

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES**

**GABRIEL RESOURCES LTD.
AND GABRIEL RESOURCES (JERSEY) LTD.**

Applicants

VS.

ROMANIA

Respondent

**ICSID CASE NO. ARB/15/31
ANNULMENT PROCEEDINGS**

REJOINDER ON ANNULMENT

3 November 2025

Before:

Professor Eduardo Zuleta Jaramillo (President)
Professor Lawrence Boo
Professor Dr. Maxi Scherer

LALIVE


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1 INTRODUCTION

- 1 Further to Procedural Order No. 1 dated 11 February 2025, Romania submits this Rejoinder on Annulment in response to the Applicants’ Reply on Annulment dated 1 September 2025 (the “**Reply**”).¹
- 2 The Applicants’ annulment request stands on **two limbs** that, upon even a *prima facie* review, **do not withstand the most basic scrutiny**.
- 3 **The first limb** is a late and baseless challenge against Prof. Zachary Douglas – and initially also against Prof. Pierre Tercier, which was not pursued either in the Memorial on Annulment of 3 April 2025 (the “**Memorial**”) or in the Reply, and must now be deemed to be withdrawn.²
- 4 The Applicants continue to misrepresent the legal standard under Articles 52 and 57 of the ICSID Convention, which requires showing a “manifest lack” of independence or impartiality, a test that the Applicants do not come close to meeting. As one *ad hoc* committee noted, “it must be cause for concern whenever a party comes forward with what is in substance a challenge to an arbitrator only after losing an arbitration”,³ which is precisely what the Applicants are doing here.
- 5 It is **extremely unusual** to seek annulment on the basis that a tribunal was not properly constituted under Article 52(1)(a) of the ICSID Convention, and even more so on the basis of an alleged lack of impartiality and independence of an arbitrator which was never raised in the underlying arbitration. Unsurprisingly, out of approximately 200 ICSID annulment

¹ Abbreviations and definitions used in the Respondent’s Counter-Memorial of 7 July 2025 (the “**Counter-Memorial**”) have the same meaning in this Rejoinder, unless otherwise stated. For the avoidance of doubt, when the Respondent references any of the pleadings in the underlying arbitration it expressly mentions “in the Arbitration” after the relevant pleading. The fact that the Respondent does not address a particular argument by the Applicants should not be understood as an acceptance.

² The Applicants note in the Introduction to their Reply on Annulment, p. 2 (para. 8) that they “did not carry forward” certain arguments “from their Application to the Memorial”, which they have also not carried forward to their Reply.

³ *Rockhopper Italia S.P.A. et al. v. Italian Republic*, Decision on Annulment, ICSID Case No. ARB/17/14, 2 June 2025, at **RAL-30**, p. 147 (para. 390).

proceedings to date,⁴ there are only two in which an award has been annulled on this basis: *Eiser v. Spain* and *Rockhopper v. Italy*. The circumstances of these two cases show that the threshold for annulment based on a lack of independence and impartiality remains extremely high, requiring very serious circumstances (such as criminal convictions) or repeated and lasting connections between the arbitrator in question and a party.

- 6 None of the circumstances **belatedly raised** by the Applicants raise any doubts about Prof. Douglas’ independence and impartiality, much less meet the standard of manifest lack of qualities that would result in an improper constitution of the Tribunal. Moreover, the Applicants’ allegations rest either on mere speculation or on events that took place long before the Award was rendered and which they could and should have known about, and which could have therefore been raised during the Arbitration. The Applicants’ baseless and opportunistic allegations to support an application to annul the Award in its entirety under Articles 52(1)(a) and (d) should therefore be rejected outright.
- 7 **The second limb** is nothing more than **an appeal in disguise**. The Applicants continue to seek annulment of parts of the Award on the basis of purportedly “multiple fundamental defects”, which they have reshuffled in the Reply in an apparent attempt to conflate the different legal standards under Articles 52(1)(b), (d) and (e). The Reply reflects a fundamental misunderstanding of the annulment process, the legal standards, and the limits of the Committee’s jurisdiction and scope of review.
- 8 It will not have escaped the Committee that the Applicants’ submissions exceed the boundaries of annulment proceedings, as dictated by the ICSID Convention. Their complaints – when they are even decipherable, which is often not the case – reflect their disagreement with the Tribunal majority’s assessment of the evidence and its conclusions in the Award. The Applicants seek to reopen and reargue their positions in the Arbitration and have this Committee assess the validity of the Tribunal majority’s factual and legal findings anew. This is impermissible.

⁴ ICSID Background Paper on Annulment 2024, at **AL-21**, p. 11, as of 31 December 2023.

- 9 Under the ICSID Convention, parties do not have a right of appeal or retrial, and annulment is “an exceptional and narrowly circumscribed remedy”.⁵ The Applicants attempt to recast and, in some cases, to tweak – and thus mischaracterize – their case from the Arbitration by, for example, portraying certain arguments or evidence as “key” or “central” where that was not the Claimants’ position in the Arbitration.⁶
- 10 The Applicants’ attempt to expand the scope of the Committee’s review should be flatly rejected. The Committee should take care to note the limits of its jurisdiction and to confine its analysis to only the grounds enshrined in the ICSID Convention, in light of their strict legal standards.
- 11 Although the Applicants’ submissions go beyond the remit of the Committee (by delving into the substance and merits of the Parties’ submissions in the Arbitration and in turn the Tribunal majority’s assessment of the evidence and its findings of fact and law), the Respondent has deemed itself compelled to engage with those arguments **for the sake of completeness only** and to ensure that it does not waive any rights.
- 12 Finally, it must be recalled that under Article 52(3) of the ICSID Convention, even where one of the annulment grounds is made out, *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.
- 13 In **Section 2** of this Rejoinder, the Respondent sets out the reasons why the Applicants’ request to annul the Award in its entirety should be rejected. The Respondent first clarifies the legal standard under Article 52(1)(a), before rebutting each of the circumstances alleged by the Applicants in

⁵ ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80). See also ICSID Convention Article 53 (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”).

⁶ See, *e.g.*, Counter-Memorial on Annulment, p. 5 *et seq.* (paras. 20, 196 and 301); see also paras. 219 and 222-224 (on the Claimants’ contractual rights), para. 254 (on the issue of the timeframe for a decision on the environmental permit application), and para. 280 (on the Claimants’ arguments relating to the second alternative claim) below.

relation to Prof. Douglas. The Respondent then addresses the Applicants' allegations under Article 52(1)(d).

- 14 In **Section 3**, the Respondent shows how the Applicants' alternative claim for partial annulment of the Award also fails. Despite the Applicants' new packaging of this alternative claim in their Reply, the Respondent has – as before – addressed the arguments under and according to each prong of the ICSID Convention, as that is the analysis the Committee must carry out. Evidently, the Tribunal did not manifestly exceed its powers, did not seriously depart from a fundamental rule of procedure, nor did it fail to state reasons in the Award. The Applicants' alternative claim under Articles 52(1)(a), (d) and (e) must thus also fail.
- 15 As set out in **Section 4**, notwithstanding the Committee's rejection of the Applicants' request to suspend the enforcement of the Award,⁷ as of date the Applicants have failed to pay the amounts owed under the Award, which continues to accrue interest. In light of the Applicants' conduct in these proceedings, their abuse of the annulment mechanism and their baseless Application, the Respondent is entitled to recover its full costs in these proceedings, together with compound commercial interest from the date of the Committee's decision and until full payment. The Respondent's prayers for relief are set out in **Section 5**.
- 16 In accordance with Sections 14.3 and 16.6 of Procedural Order No. 1, this Rejoinder is accompanied by the following documents:
- i) Exhibits **RA-77** to **RA-93**, of which four are documents from the underlying Arbitration, and thirteen are submitted in response to the Applicants' allegations in their Reply;
 - ii) Legal authorities **RAL-45** to **RAL-58**;⁸
 - iii) certain pleadings from the underlying Arbitration;⁹ and,
 - iv) a Consolidated Index of all supporting documentation.

⁷ Letter from ICSID to Parties (Termination Stay of Enforcement) dated 25 April 2025.

⁸ The Respondent refers to and provides certain legal authorities that had been submitted in the Arbitration.

⁹ This Rejoinder also refers to exhibits and expert reports from the underlying Arbitration.

2 THE APPLICANTS' REQUEST TO ANNUL THE AWARD IN ITS ENTIRETY IS BASELESS

- 17 The Applicants continue to request that the Committee annul the Award in its entirety, based on two grounds of the ICSID Convention. In the following sections, the Respondent demonstrates once again that (i) the Tribunal was properly constituted under Article 52(1)(a) (**Section 2.1**), and that (ii) there was no departure from any fundamental rule of procedure, let alone a serious departure, under Article 52(1)(d) (**Section 2.2**).

2.1 The Tribunal Was Properly Constituted

- 18 In their Reply, the Applicants continue to wrongly allege that the Tribunal was not properly constituted under Article 52(1)(a). In doing so, they present the wrong legal standard for annulment under the ICSID Convention and make unfounded allegations regarding Prof. Douglas' allegedly manifest lack of impartiality and independence.
- 19 As the Applicants' own legal authorities show,¹⁰ the argument that an ICSID award should be annulled because the tribunal was not properly constituted has rarely been invoked, let alone successfully. There have only been 17 annulment cases, out of 199, where this ground was raised¹¹ and *ad hoc* committees rejected this ground in all but 2 of those 17 cases.¹²
- 20 As the Respondent noted in the Counter-Memorial,¹³ the Applicants never sought to disqualify Prof. Douglas – or any member of the Tribunal – during the Arbitration, despite now complaining about issues that were public during the Arbitration and long before the Award was issued.¹⁴ The

¹⁰ See ICSID Background Paper on Annulment 2024, at **AL-21**.

¹¹ ICSID Background Paper on Annulment 2024, at **AL-21**, p. 83 (para. 85), referring to 16 out of 194 cases, as of 31 December 2023. According to ICSID's website, since then, five additional decisions have become public, with only one of them concerning Article 52(1)(a).

¹² ICSID Background Paper on Annulment 2024, at **AL-21**, p. 83 (para. 85). See Annex 2 of ICSID Background Paper on Annulment 2024, at **RAL-45**, showing *Eiser* as the only case where this ground has been upheld. Since then, the *Rockhopper v. Italy* committee has become the second to annul an award on this ground.

¹³ Counter-Memorial on Annulment, p. 17 (para. 59).

¹⁴ With the only exception of Prof. Douglas' acquisition of Swiss nationality, discussed below in Section 2.1.2.4.

Applicants themselves acknowledge that this case is highly unusual, as there have only been four *ad hoc* committees where allegations of lack of impartiality and independence were considered for the first time at the annulment stage, without there being a challenge in the underlying arbitration.¹⁵

- 21 Annulment should not be the appropriate recourse in these circumstances, where the ICSID Convention provides a specific procedure for the disqualification of arbitrators (during which the challenged arbitrator is given the opportunity to provide comments), and where, as ICSID's General Counsel Mr. Aron Broches noted during the negotiations of the Convention, revision of the award, rather than annulment, would be the appropriate remedy.¹⁶
- 22 As Prof. Schreuer observed regarding the *Eiser* annulment decision, questioning the independence and impartiality of an arbitrator only at the annulment stage is "arguably inefficient" because an award may be annulled "without affording the co-arbitrators either the opportunity to reject the challenge and affirm their Award, or uphold it, but salvage some part of their work by reopening deliberations with a newly appointed arbitrator."¹⁷
- 23 The Applicants' belated allegations regarding Prof. Douglas are opportunistic and should be rejected.

¹⁵ Reply on Annulment, p. 15 (para. 42), noting that only four *ad hoc* committees "have considered applications under Article 52(1)(a) based on evidence that came to light after the award", and that "it is rare" for this to happen.

¹⁶ C. Schreuer, *et al.*, *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, at **AL-62**, p. 26 (of the PDF) (para. 132), referring to discussion in *Eiser* ("The Claimant cited the negotiations to the Convention, in which Mr. Broches had rejected a suggestion from the Costa Rican delegate that would allow annulment of an award where a disqualification could have been possible had it been made before the award was rendered. Mr. Broches had replied that, if the grounds for disqualification only became known after the award was rendered, 'this would be a new fact which would enable revision of the award' (History, Vol. II, p. 872)."). This is also what the *ad hoc* committee in *Azurix v. Argentina* concluded.

¹⁷ C. Schreuer *et al.*, *Schreuer's Commentary on the ICSID Convention*, 2022, at **AL-62**, p. 27 (of the PDF) (para. 132) (Prof. Schreuer continued: "The Claimant, who was not the cause of the non-disclosure found to breach Art. 52(1)(a), was left facing a choice either to abandon its claims, or to commence fresh proceedings at considerable additional expense and delay.")

- 24 In the following sections, the Respondent will (i) rebut the Applicants’ mischaracterization of the legal standard (**Section 2.1.1**), and (ii) demonstrate that none of the circumstances raised by the Applicants concerning Prof. Douglas comes remotely close to meeting the standard for improper constitution of a tribunal (**Section 2.1.2**).
- 25 As the Respondent observed in its Counter-Memorial,¹⁸ the Applicants had dropped the annulment ground raised in their Application regarding Prof. Tercier’s alleged lack of independence and impartiality and not included it in their Memorial. In their Reply, the Applicants have again not referenced this ground nor addressed any of the Respondent’s arguments in its Counter-Memorial.¹⁹ Consequently, the Respondent understands that the Applicants have waived all arguments concerning Prof. Tercier.

2.1.1 The Applicants Mischaracterize the Standard of “Manifest Lack of Impartiality and Independence”

- 26 In the Reply, the Applicants continue to seriously misrepresent the legal standard. For example, the Applicants repeatedly rely on commentaries and decisions regarding challenges to arbitrators under other arbitration rules such as UNCITRAL²⁰ and ICC²¹ and even to domestic court decisions,²² all of which are irrelevant to proceedings under the ICSID Convention. It is widely known that the ICSID Convention sets a higher standard when it comes to disqualification of arbitrators as compared to

¹⁸ Counter-Memorial on Annulment, p. 17 (para. 58).

¹⁹ Reply on Annulment, p. 66 (fn. 296), which refers, as a third source, to the Annulment Application’s section regarding Prof. Tercier. It is unclear why, as the footnote does not support any statement regarding that annulment ground.

²⁰ Reply on Annulment, p. 20 *et seq.* (paras. 56, 92 (referring to *Grand River v. United States*, *RSE v. Latvia*, *Vito Gallo v. Canada*, all under the UNCITRAL rules), 140, and 247, fn. 471).

²¹ Reply on Annulment, p. 65 *et seq.* (paras. 133, 134 (referring to the ICC Rules (**AL-83**), ICC Secretariat’s Guide (**AL-85**), Gary Born’s *International Commercial Arbitration*, (**AL-86**)). See also reliance on the BVI Arbitration Rules (**AL-84**).

²² Reply on Annulment, p. 61 *et seq.* (paras. 123-124 (referring to a judgment of the Court of Appeal of Ontario related to an UNCITRAL case) and 210 (referring to an English High Court case)).

challenges under other arbitration rules.²³ The reason is simple: unlike other arbitration rules, the ICSID Convention requires a party to show “a *manifest lack*” of independence and impartiality.²⁴

- 27 As the *Caratube v. Kazakhstan* unchallenged arbitrators explained, following the *Blue Bank* standard on which the Applicants rely, the ICSID Convention requires “an evident or obvious” lack of qualities:

“Having considered the Parties’ respective positions and in the light of recent ICSID jurisprudence, the Unchallenged Arbitrators find that the applicable burden of proof is expressed in [*Blue Bank v. Venezuela*], as subsequently confirmed in [*Burlington Resources v. Ecuador*, *Repsol v. Argentina* and *Abaclat v. Argentina*]. ... [T]he Claimants must show that a third party would find **that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.**”²⁵

- 28 The Applicants repeatedly refer to “justifiable doubts” as to Prof. Douglas’ independence and impartiality.²⁶ However, that is the language of the UNCITRAL rules and other institutional rules, such as the LCIA. The ICSID Contracting Parties decided *not* to include “justifiable doubts” when drafting the Convention, but to instead require a “manifest lack” of independence and impartiality. The Applicants’ attempt to lower the threshold should be rejected.
- 29 While the threshold has evolved since the first annulment decision in 1985, in *Klöckner v. Cameroon I*, it is simply not appropriate to rely on non-

²³ See, e.g., *Tidewater Inc. et al. v. Venezuela*, Decision on Claimants’ Proposal to Disqualify Prof. Brigitte Stern, ICSID Case No. ARB/10/5, 23 December 2010, at **RAL-46**, p. 14 *et seq.* (paras. 41-43) (discussing the useful value of the IBA Guidelines, although ultimately “the legal standard laid down in the Convention” is the one that must be applied, and noting that the “**ICSID Convention mandates a general standard for disqualification which differs from the ‘justifiable doubts’ test formulated in the IBA Guidelines.**”) (emphasis added).

²⁴ Article 57 of the ICSID Convention.

²⁵ *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Disqualification Decision dated 20 March 2014, at **AL-43**, p. 18 *et seq.* (para. 57) (emphasis added).

²⁶ They refer to “justifiable doubts” or “justifiably doubt” 29 times in their Reply. See Reply on Annulment, p. 6 *et seq.* (for example, paras. 18-19, 24, 35, 39, 45, 74-75, 89, 92-93, 106, 109, 138, 140, 144, 148).

ICSID decisions and to misconstrue the standard by repeatedly using wording that is nowhere to be found in the ICSID Convention.²⁷

- 30 The Parties nevertheless agree on some aspects of the legal standard.
- 31 First, the Parties agree that it is an “**objective standard** based on a reasonable evaluation of the evidence by a third party.”²⁸ Indeed, as the *Blue Bank* disqualification decision explains, “the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.”²⁹ Similarly, the *Rockhopper v. Italy* annulment decision, on which the Applicants heavily rely, confirmed that it is not enough that the applicant “believes or suspects the arbitrator to lack independence or impartiality.”³⁰
- 32 Second, the Parties largely agree on the formulation of the test in *EDF v. Argentina*,³¹ as follows:
- “whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality.”³²
- 33 However, in the Reply the Applicants incorrectly paraphrase this quote, for example by deleting the word “reasonable” before “grounds”,³³ or stating that a third party “could justifiably doubt” Prof. Douglas’ impartiality and independence.³⁴

²⁷ The express terms of an international instrument are crucial and may not be ignored. See Article 31(1) of the Vienna Convention on the Law of Treaties.

²⁸ Counter-Memorial on Annulment, p. 19 (para. 63), citing *Blue Bank*; Reply on Annulment, p. 10 (para. 28), also quoting *Blue Bank*.

²⁹ *Blue Bank International & Trust v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 11 (para. 60).

³⁰ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 71 (para. 217).

³¹ Counter-Memorial on Annulment, p. 19 (para. 64); Reply on Annulment, p. 11 (para. 30).

³² Counter-Memorial on Annulment, p. 38 (para. 111).

³³ Reply on Annulment, p. 49 (para. 103) (“could have grounds”).

³⁴ Reply on Annulment, p. 8 *et seq.* (for example paras. 19, 24, 35, 89).

34 In *ConocoPhillips v. Venezuela* the unchallenged arbitrators used an even clearer formulation of the *EDF* standard:

“whether a reasonable third person, with knowledge of all the facts, would conclude, on an objective basis, that the challenged arbitrator is manifestly lacking in the ability to act impartially”.³⁵

35 The *Caratube v. Kazakhstan* disqualification decision presented a negative formulation of the same test, as follows:

“[whether] a reasonable and informed third party would find it highly likely that the [arbitrator] lacked independence and impartiality”.³⁶

36 Third, the Parties agree that the term “manifest” means “‘evident’ or ‘obvious’”, as stated in the *Blue Bank* decision.³⁷ The Applicants note that this “relates to the ease with which the alleged lack of the qualities can be perceived”, as the *Blue Bank* decision found, and that this is widely applied in almost every case.³⁸ The Respondent agrees, and this supports the Respondent’s position in this case. For example, the unchallenged arbitrators in *Total v. Argentina*, relying on *Blue Bank* and *Caratube*, among others, explained that “manifest” in this context:

“refers to the ease with which it can be detected, so that it is **clear or obvious and can be discerned with little effort and without deep analysis**.”³⁹

³⁵ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, Decision on the Proposal to Disqualify L. Yves Fortier, ICSID Case No. ARB/07/30, 26 July 2016, at **RAL-47**, p. 10 (para. 12(b)).

³⁶ *Caratube v. Kazakhstan*, Disqualification Decision dated 20 March 2014, at **AL-43**, p. 29 (para. 90).

³⁷ Reply on Annulment, p. 13 (para. 37).

³⁸ Reply on Annulment, p. 13 *et seq.* (paras. 37, 39-40).

³⁹ *Total S.A. v. Argentine Republic*, Decision on Argentine Republic's Proposal to Disqualify Ms. Cheng, ICSID Case No. ARB/04/01, 26 August 2015, at **RAL-16**, p. 22 (para. 101) (emphasis added), which the Applicants also cite in their Reply on Annulment, p. 13 (fn. 49).

- 37 The only thing that is clear or obvious in this case is that none of the circumstances raised by the Applicants with respect to Prof. Douglas meet this threshold.

2.1.1.1 The standard requires “clear and reasonable doubt” or a “real risk” of bias

- 38 As the Respondent showed in its Counter-Memorial, the *EDF v. Argentina* committee, relying on *SGS v. Pakistan*, applied a two-part test for assessing whether there is a manifest lack of impartiality and independence:⁴⁰
- First, the Applicant must **establish the facts**, circumstances serious enough to put the independence and impartiality into question.⁴¹ Mere speculation or inference is not enough.⁴²
 - Second, those facts must be of such nature as to “indicate a manifest lack of” independence and impartiality.⁴³ As the unchallenged arbitrators in *Vivendi v. Argentina* put it, “whether a **real risk** of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party.”⁴⁴

⁴⁰ *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 (para. 110); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Claimant's Proposal to Disqualify Arbitrator, ICSID Case No. ARB/01/13, 19 December 2002, at **RAL-19**, p. 5 (para. 20).

⁴¹ *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 (para. 20) (The movant must establish facts “of a kind or character as reasonably to give rise to the inference that the person challenged **clearly may not be relied upon to exercise independent judgment in the particular case.**”) (emphasis added). See also *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 (para. 110).

⁴² *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 (para. 20). See also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 22 October 2007, at **RAL-20**, p. 19 (para. 41); *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 (para. 110).

⁴³ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 (para. 110).

⁴⁴ *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentina*, Decision on the Challenge to the President of the Committee, ICSID Case No. ARB/97/3, 3 October 2001, at **RAL-48**, p. 180 (para. 25) (emphasis added).

- 39 This test has been widely followed since, including by the *Rockhopper v. Italy* committee.⁴⁵ The Applicants do not dispute this two-part test in their Reply, and otherwise heavily rely on the *EDF* decision.⁴⁶ However, they do not come anywhere close to meeting this two-part test, starting with the lack of established facts that are serious enough to question Prof. Douglas' qualities. The Applicants wrongly state that "all the grounds raised by Applicants rest on facts that are not disputed."⁴⁷ This is incorrect. As the Respondent showed in its Counter-Memorial and will further develop below, the Applicants' arguments are largely based on their speculation of facts. For example, they speculate that Prof. Douglas must have "taken steps toward acquiring Swiss citizenship *before* Respondent appointed him" because acquiring Swiss nationality is a lengthy process that takes at least 10 years.⁴⁸
- 40 In the Reply, the Applicants wrongly insist that the Respondent's standard is "proof of actual bias".⁴⁹ That is – again – incorrect. While some tribunals may have required proof of bias,⁵⁰ most tribunals and *ad hoc* committees require an "appearance of dependence or bias".⁵¹
- 41 As the Respondent explained in its Counter-Memorial,⁵² when the allegations are based on the existence of a relationship (whether it is with counsel or with a party), *ad hoc* committees have consistently held that the mere existence of a relationship is not sufficient, but rather the facts must show that the arbitrator "clearly may not be relied upon to exercise

⁴⁵ Counter-Memorial on Annulment, p. 20 *et seq.* (paras. 68-70). See *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, PCA Case No. IR-2019/1, PCA Secretary-General Recommendation dated 4 March 2019, at **AL-17**, p. 8 (para. 50); *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 72 *et seq.* (para. 218).

⁴⁶ Reply on Annulment, p. 11 (paras. 30-33).

⁴⁷ Reply on Annulment, p. 14 (para. 41).

⁴⁸ Reply on Annulment, p. 63 (para. 128) (emphasis in original).

⁴⁹ Reply on Annulment, p. 10 (para. 28).

⁵⁰ For example, in the first disqualification decision, in *Amco Asia v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Proposal to Disqualify an Arbitrator, 24 June 1982.

⁵¹ Counter-Memorial on Annulment, p. 19 (para. 65); Reply on Annulment, p. 12 (para. 34).

⁵² Counter-Memorial on Annulment, p. 20 *et seq.* (paras. 69, 124).

independent judgment **in the particular case**".⁵³ When assessing whether the relationship or connection is strong enough to meet the standard, decisions often apply four criteria: (i) proximity, (ii) intensity or frequency, (iii) dependence for benefits or advantages, and (iv) materiality.⁵⁴

- 42 Moreover, where arbitrators (or their law firm) were engaged as counsel in separate proceedings during the arbitration, disqualification decisions turn on whether there is a similarity of parties, or legal and/or factual issues, which may influence the arbitrator in question.⁵⁵ In the Reply, the Applicants take issue with this and argue that "there is no requirement to show [an overlap of] parties, facts, or legal claims",⁵⁶ however, their own legal authorities support the Respondent's position.
- 43 In *Blue Bank v. Venezuela* the disqualification application was upheld, not merely because of a connection between the arbitrator and one of the parties (his law firm was acting in another arbitration involving the same respondent, Venezuela), but because "given the **similarity of issues** likely to be discussed in *Longreef v. Venezuela* and the present case and the fact that both cases are ongoing, it is **highly probable** that Mr. Alonso **would be in a position to decide issues that are relevant** in *Longreef v. Venezuela* if he remained an arbitrator in this case."⁵⁷ In other words, there could be a conflict of interest given the arbitrator's law firm's participation in a parallel arbitration involving similar issues.

⁵³ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 (para. 110), citing *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 (para. 20) (emphasis added). See also *ConocoPhillips v. Venezuela*, Decision on Proposal to Disqualify Mr. Fortier dated 26 July 2016, at **RAL-47**, p. 10 (para. 12(c)) ("must be **capable of being related to the present case**, that is, that the particular facts must give rise to a manifest lack of independence and impartiality in this case") (emphasis added).

⁵⁴ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 12 May 2008, at **RAL-21**, p. 19 (para. 35).

⁵⁵ Counter-Memorial on Annulment, p. 25 (para. 80).

⁵⁶ Reply on Annulment, p. 40 (para. 89).

⁵⁷ *Blue Bank v. Venezuela*, Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 12 (para. 68) (emphasis added), where the disqualification proposal was accepted on the basis that the arbitrator's law firm was working on parallel proceedings against the respondent (Venezuela) and issues similar to the ones in the arbitration were "likely to be discussed".

- 44 In *Caratube v. Kazakhstan*, the similarity of factual and legal issues was also the main factor for upholding the disqualification proposal of an arbitrator appointed by the same counsel in two cases. For the unchallenged arbitrators, the similarity of the two cases was “an important consideration in the assessment of Mr. Boesch’s perceived impartiality”.⁵⁸
- 45 *Nations Energy v. Panama* followed the same approach, concluding that “the mere fact that a relationship exists ‘in and of itself is not sufficient’” to establish a manifest lack of impartiality and independence.⁵⁹ The case involved the relationship between one of the arbitrators, Dr. Alexandrov, and counsel for one of the parties, as they had worked at the same law firm for seven years. The unchallenged arbitrators concluded that, in order for there to be a manifest lack of qualities, there must be “facts that make it evident and **highly probable, not merely possible**, that [the arbitrator] cannot be relied upon to render an independent and impartial decision”.⁶⁰
- 46 In the Reply, the Applicants take issue with the *Nations Energy v. Panama* decision and call it a “relic from 14 years ago.”⁶¹ This argument is absurd. The 2011 *Nations Energy* decision is merely two years older than the *Blue Bank* decision on which the Applicants repeatedly rely. In any event, in the Respondent’s view, the *Nations Energy* standard is largely the same as the

⁵⁸ *Caratube v. Kazakhstan*, Disqualification Decision dated 20 March 2014, at **AL-43**, p. 24 (para. 75), where the disqualification proposal was accepted on the basis of the similarity between the arbitration and the separate proceedings in which the challenged arbitrator was involved, due to a “significant overlap in the underlying facts” and “the relevance of these facts for the determination of legal issues in the [...] arbitration”); para. 76 (concluding that “the similarity in cases does constitute an important consideration for the decision”) and para. 77 (where the unchallenged arbitrators went on to carefully “examine whether the facts underlying the *Ruby Roz* case” and whether they are “**similar or identical** to facts alleged in the present arbitration **and whether they are relevant for the determination of the legal issues in the present arbitration**. If so, they must then examine whether, based on a reasonable evaluation of the facts in the present case, a third party would find that Mr Boesch’s knowledge of the facts of the *Ruby Roz* case gives rise to an evident and obvious appearance of lack of impartiality.”) (emphasis added). See also Counter-Memorial on Annulment, p. 25 (fn. 120).

⁵⁹ *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama*, Decision on the Proposal to Disqualify Dr. Alexandrov, ICSID Case No. ARB/06/19, 7 September 2011 (Spanish original with unofficial partial translation), at **RAL-18**, p. 1 (para. 66) (free English translation).

⁶⁰ *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011, at **RAL-18**, p. 1 (para. 65) (emphasis added) (free English translation).

⁶¹ Reply on Annulment, p. 13 (para. 38).

one applied by *Blue Bank*, where the Chairman of the ICSID Administrative Council also looked at whether it was “highly probable” that the challenged arbitrator would not be able to decide independently in that case due to a possible conflict of interest.⁶² Moreover, *Nations Energy* relied on prior decisions such as *Suez*, which required facts that show that the lack of impartiality is “‘highly probable’, not just ‘possible’”.⁶³

- 47 The *Nations Energy v. Panama* decision is relevant and instructive as it concerns the failure to disclose a relationship between an arbitrator and one of the parties’ counsel⁶⁴ – an allegation that the Applicants make in this proceeding. These facts are far more similar than those in some of the Applicants’ cases even if they are more recent, such as *Rockhopper v. Italy*, which the Respondent discusses in the following section.
- 48 In the Respondent’s view, the Parties’ positions on the legal standard are more similar than the Applicants contend, and ultimately, regardless of the specific wording used in each of these decisions and whether that wording is identical or not, the application to the facts in each of those cases shows that the standard of “manifest” lack of qualities remains high.

⁶² *Blue Bank v. Venezuela*, Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 12 (para. 68) (noting that it was “highly probable” that the arbitrator would decide similar issues).

⁶³ *Suez et al. v. Argentina*, Decision on Second Proposal to Disqualify dated 12 May 2008, at **RAL-21**, p. 16 (para. 29) (emphasis in original).

⁶⁴ *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011, at **RAL-18**, where applicants filed a proposal to disqualify Dr. Alexandrov from the *ad hoc* committee on the basis of an undisclosed professional relationship between Dr. Alexandrov and a member of the counsel for the respondent’s team, as they had worked together at Sidley Austin for 7 years. The remaining members of the *ad hoc* committee rejected the proposal on the basis that the mere existence of such a relationship was not in itself sufficient to prove manifest lack of impartiality and independence, and that the applicants had failed to demonstrate the extent or intensity of the relationship, nor whether there was exclusivity in the dealings between these individuals, and much less that, as a consequence of said relationship, Dr. Alexandrov would have a favorable predisposition toward the respondent.) Despite being available only in Spanish, several decisions have relied on it, such as *Total v. Argentina*, Decision on Proposal to Disqualify dated 26 August 2015, at **RAL-16**, p. 26 (para. 124), *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 22 (fn. 63); *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 125 (fn. 333).

2.1.1.2 The practice of *ad hoc* committees deciding applications under Article 52(1)(a) confirms that the standard is extremely high

49 As noted above, it is extremely unusual to seek annulment on the basis that a tribunal was not properly constituted, and even more so when the lack of impartiality or independence is raised for the first time at the annulment stage. As the *Rockhopper v. Italy ad hoc* committee noted:

“this case is further unusual because in only 3 of the 16 cases have the facts said to show the arbitrator’s lack of qualification been considered for the first time in the annulment proceeding, without there having been a challenge to the arbitrator in the underlying arbitration.”⁶⁵

50 Only four *ad hoc* committees have considered applications under Article 52(1)(a) where the arbitrator whose independence and impartiality is being considered was **not** challenged during the arbitration. Two such applications have been rejected – *Suez and Vivendi v. Argentina (II)* (“*Vivendi II*”) and *EDF v. Argentina* – and two upheld – *Eiser v. Spain* and *Rockhopper v. Italy*. As explained below, the facts in these four cases demonstrate that the threshold for annulment remains extremely high.

51 In the Reply, the Applicants disagree that the standard is higher in the context of annulment proceedings than disqualification.⁶⁶ However, a party seeking annulment must prevail on two additional steps. Indeed, the *Eiser* committee, relying on *EDF*,⁶⁷ set out 3 steps that *ad hoc* committees should follow in their analysis of these unusual cases (“**3-step test**”):

- i) “was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly?
- ii) if not, has the party seeking annulment established that a third party would find an evident or obvious appearance of lack of impartiality or

⁶⁵ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 73 (para. 219). Since *Rockhopper*, there are 4 out of 17 cases.

⁶⁶ Reply on Annulment, p. 13 *et seq.* (paras. 36 and 42).

⁶⁷ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 47 *et seq.* (para. 136).

independence on the part of an arbitrator on a reasonable evaluation of the facts of the case (the *Blue Bank* standard)? and

iii) if so, could the manifestly apparent lack of impartiality or independence on the part of that arbitrator have had a material effect on the award?”⁶⁸

- 52 As the Respondent explained in the Counter-Memorial,⁶⁹ even where all these steps are met and there are grounds of annulment, under Article 52(3) of the Convention *ad hoc* committees have discretion to consider other factors that may weigh against annulment in a particular case.⁷⁰
- 53 Moreover, when assessing the second element of the 3-step test, an *ad hoc* committee’s task is harder because it does not have the benefit of receiving comments or clarifications from the arbitrator whose independence and impartiality is being assessed, comments which have been decisive in many disqualification (and even annulment) decisions.⁷¹ When annulment is used to question an arbitrator’s impartiality and independence for the first time, the facts are only based on what the parties can find through publicly available means and there is a risk that they will engage in speculation.
- 54 In their Reply, the Applicants agree that independence and impartiality cannot be assessed “generally or in the abstract” but rather “case by case”

⁶⁸ *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated 11 June 2020, at **AL-18**, p. 57 (para. 180). Also quoted in *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 84 (para. 242).

⁶⁹ Counter-Memorial on Annulment, p. 16 (para. 54).

⁷⁰ See *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision, at **AL-56**, p. 58 *et seq.* (paras. 233 and 241); *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 23 *et seq.* (paras. 72-73).

⁷¹ For example, in *Vivendi II*, Prof. Kaufmann-Kohler explained that she was not aware of the links between UBS and the claimant companies until after the award had been rendered, which was a critical consideration in dismissing the annulment. *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 58 *et seq.* (paras. 234-235). In the *EDF* annulment case, the *ad hoc* committee relied on Prof. Remon’s letter to his co-arbitrators, noting that the drafting of the award had been completed several weeks before Argentina’s announcement regarding the expropriation of Repsol. See *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 63 (para. 170).

taking into account the specific facts of each case.⁷² However, they conveniently ignore the facts in these four annulment decisions, and instead only mention the facts of a few UNCITRAL and domestic court decisions that are irrelevant. The facts in each of these four ICSID annulment decisions are critical to understanding how the legal standards have been applied in practice. They further show that the Applicants' alleged "facts" in this case do not come even remotely close to meeting the standard.

i) *Vivendi II v. Argentina*

- 55 Argentina argued that the 2007 award should be annulled because the arbitrator appointed by the claimants, Prof. Kaufmann-Kohler, lacked impartiality and independence. It argued that her position as Member of the Board of Directors of UBS, a Swiss bank that held shares with voting rights and other interests in one of the claimants, raised reasonable doubts as to her independence and impartiality.⁷³ It further argued that Prof. Kaufmann-Kohler had an "interest in UBS' performance", as she was "partially remunerated with UBS shares."⁷⁴ This was a case of conflict of interest and financial interest with respect to one of the parties.
- 56 Argentina relied on the fact that Prof. Kaufmann-Kohler's position fell within the IBA Guidelines' waivable Red List (where the arbitrator represents or advises one of the parties or an affiliate) or, at a minimum, within the Orange List (where the arbitrator is a director or member of the supervisory board in an affiliate of one of the parties, where the affiliate is not directly involved in the arbitration), and therefore there was no doubt that she should have disclosed it.⁷⁵
- 57 The *ad hoc* committee agreed that Prof. Kaufmann-Kohler should have disclosed her appointment as Director during the arbitration, noting in

⁷² Reply on Annulment, p. 9 (para. 25).

⁷³ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 10 (para. 20), also noting that at the time UBS was "the single largest shareholder in Vivendi."

⁷⁴ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 10 (para. 21).

⁷⁵ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 25 (paras. 73-75).

particular that (i) board directors are under a fiduciary duty towards the shareholders of the bank to further the interests of the bank, (ii) which was fundamentally at issue with the duty to act as an independent arbitrator in a case involving a party in which UBS had a shareholding, and (iii) accepting “a board position in a major international bank”, which has connections in “virtually any major international company”, required her to properly investigate and disclose any connections between the bank and the parties, or at a minimum disclose her UBS appointment in her ongoing arbitrations.⁷⁶

- 58 Despite these circumstances, the *ad hoc* committee concluded that the award should not be annulled because Prof. Kaufmann-Kohler “had no actual knowledge of the connection between UBS and the Claimants until after the Award was rendered”, and therefore it could have had no material effect on the award.⁷⁷ In other words, the third requirement in the 3-part test had not been met. In reaching its conclusion, the *ad hoc* committee also took into account other factors in accordance with Article 52(3), such as the finality of awards, recalling that “it would be unjust to deny” the claimants of the benefit of the award, as well as the length of the proceeding.⁷⁸

ii) **EDF v. Argentina**

- 59 Argentina argued that the 2012 award should be annulled on the basis that Prof. Kaufmann-Kohler and Prof. Jesús Remón manifestly lacked independence and impartiality.⁷⁹ Argentina advanced the same argument with respect to Prof. Kaufmann-Kohler as in *Vivendi II*,⁸⁰ however in this

⁷⁶ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 55 *et seq.* (paras. 217-218, 230).

⁷⁷ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 58 *et seq.* (paras. 234-235).

⁷⁸ *Compania de Aguas del Aconquija and Vivendi v. Argentina (II)*, Annulment Decision dated 10 August 2010, at **AL-56**, p. 59 (para. 240).

⁷⁹ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 15 (para. 45).

⁸⁰ In this case UBS had listed EDF’s parent company as one of the companies in which it recommended investment, and USB and EDF had a number of common interests in other companies. See *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 25 (para. 78).

case Argentina tried to disqualify her in the arbitration first, unsuccessfully.⁸¹ Therefore, the *ad hoc* committee's task with respect to Prof. Kaufmann-Kohler was more limited.⁸²

- 60 With respect to Prof. Remón, the allegations concerned a disclosure he made after the arbitration proceeding was closed (but before the award was issued). He explained that the law firm of which he was a partner acted for Repsol, and that “if the firm was asked by Repsol to represent it in any proceedings which it might bring against Argentina” he would abstain from any involvement until after the award had been issued.⁸³ His disclosure was prompted by Argentina's announcement in the news of its intent to expropriate Repsol, which happened several weeks after the drafting of the award had been completed.⁸⁴ Argentina was not able to propose his disqualification given that the proceeding was closed, so the issue was raised for the first time in the annulment.
- 61 The *ad hoc* committee rejected the annulment request on the basis that there was no conflict of interest, as Prof. Remón's law firm was not acting against Argentina, and the “possibility” that it might do so at some future stage was not enough.⁸⁵ The committee explained that if an arbitrator's law firm acted in separate proceedings against one of the parties, that would “frequently raise reasonable doubts about the independence and impartiality of the arbitrator”, especially if there were similar legal issues.⁸⁶ The *ad hoc* committee emphasized that, for there to be a conflict of interest,

⁸¹ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 15 (para. 46).

⁸² *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 51 (para. 145).

⁸³ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 16 (para. 47).

⁸⁴ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 27 *et seq.* (paras. 84-85, 165).

⁸⁵ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 62 (para. 168).

⁸⁶ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 62 (para. 167).

the firm would need to act for an entity “in a matter in which it was **adversarial to the party** to the arbitration.”⁸⁷ That was not the case there.

- 62 The timing of the facts was also important. Since the drafting of the award had been concluded *before* Argentina’s announced expropriation of Repsol, the committee concluded that even if Prof. Remón’s law firm had started to act for Repsol during that period, it could not have possibly influenced the award.⁸⁸ Importantly, Argentina argued that, given that Prof. Remón’s law firm did end up representing Repsol in an arbitration against Argentina after the *EDF* award, and the Notice of Arbitration referenced facts that took place before the actual expropriation announcement, his law firm must have been acting for Repsol before the drafting of the award was concluded.⁸⁹ The committee rejected this argument as “purely speculative” as there was no evidence that the law firm “was advising Repsol regarding a legal strategy *vis-à-vis* Argentina during that period.”⁹⁰ It quoted *SGS v. Pakistan*’s finding that a challenge under Article 57 of the ICSID Convention cannot be successful “as a result of inferences which themselves rest merely on other inferences”.⁹¹

iii) *Eiser v. Spain*

- 63 This is the first *ad hoc* committee ever to annul an award on the basis of an arbitrator’s manifest lack of impartiality and independence. The case concerned Dr. Stanimir Alexandrov’s past and present relationships with the claimants’ damages experts, The Brattle Group (“**Brattle**”), including the testifying expert in the arbitration, Mr. Carlos Lapuerta. The *ad hoc* committee found that there were (a) 4 cases over 15 years in which Dr. Alexandrov was appointed as arbitrator by the same party who engaged

⁸⁷ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 62 (para. 168) (emphasis added).

⁸⁸ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 63 (para. 170).

⁸⁹ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 64 (para. 171).

⁹⁰ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 64 (para. 174).

⁹¹ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 65 (para. 174).

Brattle as expert, 2 of which involved Mr. Lapuerta specifically,⁹² and (b) 8 cases over 15 years where Dr. Alexandrov served as counsel to a party who appointed Brattle as its expert, including 4 cases in which Dr. Alexandrov and Mr. Lapuerta worked together as counsel and expert for the same party, 2 of which were pending during the *Eiser* arbitration.⁹³

- 64 The *Eiser* committee highlighted the close relationship that counsel and experts develop when working together on a case:

“What is important is that damages experts work closely with counsel in the preparation of a case. In the course of an arbitration there are multiple exchanges between them. They do not and cannot possibly maintain between them the kind of professional distance which is required to be maintained between a party, its counsel and its experts in a case, on the one hand, and the member of the tribunal hearing that case, on the other.”⁹⁴

- 65 The committee noted that Dr. Alexandrov should have disclosed this relationship due to the respective roles of damages expert and counsel, and due to “the extent of the past and present interactions”.⁹⁵

iv) *Rockhopper v. Italy*

- 66 In the Reply, the Applicants heavily rely on specific portions of the *Rockhopper* annulment decision but omit any reference to the facts of that

⁹² *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 68 *et seq.* (para. 205(e)).

⁹³ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 69 *et seq.* (para. 205(f)). See also p. 76 (para. 218) (“In addition to the several past and present professional connections and interactions between them, the Committee has taken particular note of four instances where Dr. Alexandrov and Mr. Lapuerta worked for the same party, as counsel and expert respectively. In two of those cases, **Dr. Alexandrov, as counsel, was interacting with Mr. Lapuerta as expert, at the same time that he was acting in this case as an arbitrator and Mr. Lapuerta as a damages expert of one of the parties.** This was in addition to the longstanding relationship between the Brattle Group and Dr. Alexandrov’s then law firm, Sidley Austin, and included another concurrent case – *Bear Creek* – in which Dr. Alexandrov was working as counsel with [Brattle]”) (emphasis added). The Applicants’ reliance on this case in their Reply on Annulment, p. 44 (para. 93) is misplaced, as the *Eiser* context is inapposite to Prof. Douglas’ representation of Friends of the Earth UK (who did not even participate in the Arbitration).

⁹⁴ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 80 (para. 227).

⁹⁵ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 80 (para. 228).

case. However, the facts and circumstances of the *Rockhopper* case are unique. It is the very “first annulment proceeding in which an arbitrator has been contended [by a party] to lack high moral character” under Article 40 of the ICSID Convention.⁹⁶

- 67 The case concerned Dr. Charles Poncet’s criminal prosecution in Italy in the 1990’s for fabrication of documents and facilitation of false testimony during his representation of a client regarding the failure of an Italian bank.⁹⁷ Dr. Poncet had been found guilty in 1996 of two crimes (personal aiding and abetting, and false testimony) and sentenced to two years of imprisonment.⁹⁸ After nearly a decade of investigation and court proceedings in Italy, a statute of limitations ran out while Dr. Poncet’s final appeal was still pending, and therefore his criminal convictions were annulled as time barred.⁹⁹
- 68 Italy sought the annulment of the award under Article 52(1)(a), on two grounds: (i) the criminal charges against Dr. Poncet, which related to his subverting the administration of justice as a lawyer, called into question his moral character and reliability for the exercise of independent judgment – qualities required by Article 14(1) of ICSID Rules; and (ii) Dr. Poncet’s conviction in Italy and the long judicial proceedings against him gave rise to legitimate concerns that he “may feel himself to have been ill-treated by Italy” which might affect his judgment in deciding arbitration claims brought against Italy.¹⁰⁰
- 69 As the *ad hoc* committee acknowledged, the facts of that case are highly unusual. It emphasized the severity of the facts, *i.e.*, criminal convictions regarding his work as a lawyer, and concluded:

⁹⁶ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 87 (para. 248).

⁹⁷ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 96 (paras. 273 and 275).

⁹⁸ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 101 (para. 281).

⁹⁹ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 139 (para. 367).

¹⁰⁰ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 134 (para. 353).

“An objective observer, taking account of all the facts about Dr. Poncet’s criminal prosecution in Italy, could have concerns that Dr. Poncet **may be affected by biases or prejudgements regarding the Italian State and the operation of its organs** that call into question his reliability for the exercise of independent judgement as an arbitrator of Rockhopper’s claims against the Italian Republic.”¹⁰¹

- 70 In reaching this conclusion, the committee carefully analysed the Italian judgments, noting that the court of appeal rejected Dr. Poncet’s request to have his sentence reduced to the statutory minimum penalty because it found that the evidence of Dr. Poncet’s participation in the forgery of documents was “unequivocal”.¹⁰² It also noted that, at the time, Dr. Poncet had described this judgment as “revolting” and said that he would “fight until the end to prove his innocence”,¹⁰³ which in the *ad hoc* committee’s view was a recognition of the effect that “his criminal convictions could have on impressions that other people would form of him.”¹⁰⁴ Ultimately, however, Dr. Poncet decided to let the statute of limitations apply while his appeal was still pending, and therefore the Court of Cassation never ruled on his convictions.¹⁰⁵
- 71 The committee also emphasized that “Dr. Poncet’s disclosure of his criminal prosecution in the host State for **grave offenses** was to be expected at the outset of the *Rockhopper* arbitration”, as it was not “the sort of inadvertent omission that [is] ordinarily” later discovered, when arbitrators do not realize there was a relationship for example.¹⁰⁶

¹⁰¹ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 140 (para. 370) (emphasis added).

¹⁰² *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 102 *et seq.* (paras. 282 and 291).

¹⁰³ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 109 (para. 299).

¹⁰⁴ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 129 (para. 340).

¹⁰⁵ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 110 *et seq.* (paras. 301-302, 340)

¹⁰⁶ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 129 (paras. 339-340) (emphasis added).

- 72 The *ad hoc* committee concluded that the test of manifest lack of independence and impartiality had been met, both because of Dr. Poncet's disposition towards the State that had prosecuted him, which was the respondent in the case, as well as his potential biases and prejudgments in relation to the functioning of the organs of the Italian State – which he would have to decide on as an arbitrator.¹⁰⁷
- 73 Therefore, the *Rockhopper* annulment is one of a kind, and its facts are inapposite to the present case. If anything, it shows that annulment under Article 52(1)(a) is only warranted in rare cases involving severe circumstances.
- 74 It is worth noting that, at the same time as filing for annulment in *Rockhopper*, Italy sought to disqualify Dr. Poncet in a pending ICSID arbitration, *VC Holding v. Italy*, based on the same facts as in *Rockhopper*.¹⁰⁸ The tribunals in both *Rockhopper* and *VC Holding* were chaired by Mr. Klaus Reichert, and counsel for both parties was the same as well.¹⁰⁹ The disqualification proposal in *VC Holding* was rejected by the unchallenged arbitrators, who had the benefit of receiving Dr. Poncet's comments and ultimately gave weight to the fact that Dr. Poncet's convictions had been annulled in Italy.¹¹⁰ Thus, based on the exact same facts and arguments, but with the benefit of Dr. Poncet's comments, Mr. Reichert and Prof. Brigitte Stern reached the opposite outcome to the *Rockhopper ad hoc* committee.

¹⁰⁷ See also *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 130 (para. 341) (“**a State that had criminally prosecuted an individual might be expected to have concern, whether or not justified [...], about the disposition of the individual as an arbitrator of serious legal claims against it** by foreign investors. This is a further and important reason why, given the particular facts of this case, the Italian Republic might have concerns about Dr. Poncet’s **reliability for the exercise of independent judgment about the functioning of organs of the Italian State.**”) (emphasis added).

¹⁰⁸ Australia also sought to disqualify Dr. Poncet on the same grounds in *Zeph Investments v. Australia*, which was rejected.

¹⁰⁹ See *VC Holding II S.a.r.l., and others v. Italian Republic*, ICSID Case No. ARB/16/39, Decision on the Proposal for Disqualification of Arbitrator Dr. Charles Poncet dated 21 April 2023, at **AL-81**.

¹¹⁰ See *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 120 (para. 318), quoting the *VC Holding* decision.

75 The facts in these four annulment decisions are inapposite to the allegations made by the Applications in relation to Prof. Douglas. These decisions show that *ad hoc* committees require serious facts (e.g., criminal convictions showing possible bias towards the respondent State), and multiple personal and lasting connections with the parties, that clearly show an evident or obvious lack of impartiality and independence. None of the Applicants’ allegations come even remotely close to this threshold.

2.1.1.3 The Applicants conflate disclosure obligations with the standard for annulment

76 In the Reply, the Applicants misconstrue the standard for annulment or disqualification under ICSID and the scope of arbitrators’ disclosure obligations. While they heavily relied on the IBA Guidelines on Conflicts of Interest in International Arbitration (“**IBA Guidelines**”)¹¹¹ in their Memorial (including the 2024 version of the Guidelines that only came into force after the Award),¹¹² they now backtrack and argue that the Guidelines are “not binding in ICSID cases”.¹¹³ The Applicants cannot cherry-pick sections of the Guidelines convenient to their case.

77 First, the scope of disclosure obligations in ICSID cases must be clarified. It is undisputed that under ICSID Arbitration Rule 6(2) arbitrators must declare any (a) “past and present professional, business and other relationships (if any) **with the parties**”, and “any other circumstance that might cause [their] reliability for independent judgment to be questioned by a party”. It is also undisputed that there is a continuing obligation to declare these circumstances if they arise during the arbitration.

78 It is further undisputed that Prof. Douglas signed the declaration and submitted a 5-page CV which included details about his professional experience, including his position as Associate Professor at the Graduate

¹¹¹ References to “IBA Guidelines” in this submission relate to the 2014 IBA Guidelines, at **RAL-31**, which were the ones in force during the Arbitration. As the Respondent explained in its Counter-Memorial on Annulment, p. 24 (para. 77), reliance on the 2024 IBA Guidelines and the UNCITRAL Code of Conduct is misplaced as they were both adopted after the Award was rendered.

¹¹² Memorial on Annulment, p. 7 *et seq.* (paras. 21, 61 and fn. 63).

¹¹³ Reply on Annulment, p. 18 (paras. 49, 95).

Institute of International and Development Studies in Geneva.¹¹⁴ It is also undisputed that during the arbitration, in April 2019, Prof. Douglas informed the Parties of his intent to attend the 2019 annual LALIVE Lecture and dinner,¹¹⁵ to which the Claimants had “no objection”.¹¹⁶

- 79 In their Memorial, the Applicants relied on the 2024 IBA Guidelines’ explanation of arbitrators’ disclosure obligations, as follows:

“The IBA Guidelines explain that ‘[t]he purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator’s impartiality or independence.’”¹¹⁷

- 80 The Respondent agreed with this statement in its Counter-Memorial, noting that the IBA Guidelines define “justifiable doubts” by reference to whether an arbitrator might be “influenced by factors other than the merits of the case”.¹¹⁸ Despite using this language throughout their Memorial,¹¹⁹ the Applicants now take issue with it and argue that the IBA Guidelines cannot be elevated over the ICSID Arbitration Rules, and claim – without any support at all – that an arbitrator’s disclosure obligation under ICSID Rule 6(2) “is broader” than the IBA Guidelines.¹²⁰ This is not supported by the language in the ICSID Rules. The ICSID Secretariat’s Note on the 2006 Arbitration Rules explained that the language in Rule 6(2) had been added

¹¹⁴ Letter from ICSID to the Parties, enclosing statement and Prof. Douglas CV dated 20 November 2015, at **Exhibit A-62**.

¹¹⁵ Email from Tribunal Secretary to Parties dated 30 April 2019, at **A-14**.

¹¹⁶ Email from Claimants to Tribunal dated 1 May 2019, at **RA-47**.

¹¹⁷ Memorial on Annulment, p. 31 (para. 61).

¹¹⁸ Counter-Memorial on Annulment, p. 25 (para. 79) (quoting the equivalent portion in the 2014 IBA Guidelines).

¹¹⁹ See *e.g.*, Memorial on Annulment, p. 38 *et seq.* (para. 84) (“or that he could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision.”) and (para. 86) (“any reasonable third party would question whether Prof. Douglas might consciously or unconsciously be predisposed to rule in Respondent’s favor or be influenced by factors other than the merits of the case as presented by the Parties”.)

¹²⁰ Reply on Annulment, p. 16 (para. 45).

to expand the scope of disclosures “to include any circumstances likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment.”¹²¹ Nothing in this note suggests that the disclosure obligations under the 2006 Arbitration Rules were intended to be broader than the IBA Guidelines, and in fact, the Secretariat’s language is largely aligned with that of the IBA Guidelines in relation to disclosure.¹²²

- 81 It is undisputed that, while the IBA Guidelines are not binding, they provide useful guidance in relation to disclosure obligations, and have often been discussed by ICSID tribunals and *ad hoc* committees.¹²³ This is different, however, with respect to the standard for disqualification (or annulment) itself, as the ICSID Convention mandates a higher standard, as explained in Sections 2.1.1.1 and 2.1.1.2 above.
- 82 Second, none of the circumstances raised by the Applicants in this proceeding warranted disclosure by Prof. Douglas in the Arbitration, to the extent that Prof. Douglas even had sufficient awareness of the underlying issues to consider making a disclosure.
- 83 As the Respondent explained in the Counter-Memorial,¹²⁴ the IBA Guidelines categorize situations that may or may not require disclosure, into the Red, Orange, and Green lists. The Applicants cherry-pick specific language in the IBA Guidelines (including the 2024 version) on disclosure obligations,¹²⁵ but do not even try to show – because they cannot – that any of the four circumstances that they have raised in relation to Prof. Douglas could fall within the Guidelines at all.

¹²¹ ICSID, Suggested Changes to the ICSID Rules and Regulations, May 2005, at **RAL-49**, p. 12.

¹²² 2014 IBA Guidelines on Conflicts of Interest in International Arbitration dated 23 October 2014, at **RAL-31**, p. 6 (General Standard 3).

¹²³ As explained in *Tidewater Inc. et al. v. Venezuela*, Decision on Proposal to Disqualify Prof. Stern dated 23 December 2010, at **RAL-46**, p. 14 *et seq.* (paras. 42-43), while the IBA Guidelines may not be as useful in the context of identifying conflicts of interest given ICSID’s higher standard of “manifest lack” of qualities, they may still be helpful for purposes of disclosure where the standard is more aligned with that of the IBA Guidelines.

¹²⁴ Counter-Memorial on Annulment, p. 24 *et seq.* (para. 78).

¹²⁵ See Reply on Annulment, p. 19 (paras. 51-52).

- 84 For example, in their Memorial they relied on two of the Red List’s prohibitions: when an arbitrator has “a significant financial or personal interest in one of the parties”, and when an arbitrator’s “law firm or employer currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.”¹²⁶ The Applicants appear to have retracted this argument in their Reply, where they now say that whether there is a “commercial relationship” – presumably between LALIVE and Prof. Douglas in relation to the MIDS – “is not relevant”.¹²⁷
- 85 It is therefore undisputed that none of the circumstances that the Applicants rely on fall within any of the IBA Guidelines’ lists requiring disclosure. The Applicants concede this by stating that, in any event, the *Eiser* and *Rockhopper* awards were annulled “even though” they did not involve a circumstance appearing in the IBA Guidelines.¹²⁸ As the Respondent has explained in Section 2.1.1.2, the circumstances in *Eiser* and *Rockhopper* were unique and highly unusual. For example, the *Rockhopper* committee emphasized that the Green, Orange and Red lists in the IBA Guidelines “are useful in the types of situations that are likely to come up involving arbitrators”, *i.e.*, relationships with the parties or counsel, but it noted that “Dr. Poncet’s situation... did not fall into that category.”¹²⁹ Indeed, an arbitrator’s criminal convictions by one of the parties to the arbitration is a highly unusual situation. *Eiser* involved “the **long and extensive relations** between Mr. Lapuerta and/or [Brattle]”, the investors’ quantum expert in the arbitration, and one of the arbitrators.¹³⁰ The updated 2024 IBA

¹²⁶ Memorial on Annulment, p. 37 *et seq.* (para. 83).

¹²⁷ Reply on Annulment, p. 59 (para. 121).

¹²⁸ Reply on Annulment, p. 20 (para. 53).

¹²⁹ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 131 (para. 344). See also p. 142 (para. 375) (“The IBA Guidelines use lists of various circumstances that correlate with green, orange and red levels of concern about the existence of a possible conflict of interest. The lists are useful because whether actual favoritism has resulted is more difficult to know than how many times a particular law firm has appointed a particular arbitrator over a stated period.”)

¹³⁰ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 61 (para. 189) (emphasis added).

Guidelines include new provisions addressing the relationship between arbitrators and expert witnesses as a result of the *Eiser* case.¹³¹

- 86 By contrast, the Applicants rely on circumstances concerning an arbitrator's alleged connections with counsel to one of the parties or his work as counsel (or that of his barristers' chambers) while acting as arbitrator – the kinds of issues that the IBA Guidelines focus on. However, none of the specific “circumstances” raised by the Applicants are contained in the IBA Guidelines, precisely because they are a non-issue.
- 87 Third, even assuming for the sake of argument that Prof. Douglas should have disclosed any of the four circumstances raised by the Applicants, this would still fall short of the annulment standard. In the Reply, the Applicants advance a new “alternative” claim: that even if each of the four circumstances do not meet the standard of manifest lack of impartiality and independence,¹³² Prof. Douglas' alleged breaches of his disclosure obligations “together are a further alternative ground for finding that the Tribunal was not properly constituted”.¹³³ The Applicants do not point to a single legal authority to support this.
- 88 It is undisputed that the standards for disclosure and for a successful disqualification application (or annulment) are different. The IBA Guidelines provide:

“It is also essential to reaffirm that the fact of requiring disclosure – or of an arbitrator making a disclosure – does not imply the existence of doubts as to the impartiality or independence of the

¹³¹ IBA Commentary on the Revised Text of the 2024 IBA Guidelines on Conflicts of Interest in International Arbitration, at **AL-50**, p. 24 (noting that Orange List, para. 3.3.6 “is a new provision which addresses situations where an arbitrator has concurrently instructed an expert in another matter, where the arbitrator acts as counsel, and such expert also appears in the arbitration proceedings. The relationship between arbitrators and expert witnesses was not addressed in the 2014 Guidelines. This new paragraph was included in the 2024 Guidelines to address circumstances that have arisen in practice since the 2014 Guidelines.”)

¹³² Counter-Memorial on Annulment, p. 26 (paras. 81-82). See also Memorial on Annulment, p. 43 *et seq.* (paras. 101-102), where the Applicants referred to the cumulative impact of Prof. Douglas' alleged failure to disclose certain circumstances, but not framing this as an “alternative claim” in the event that their other claims fail.

¹³³ Reply on Annulment, p. 67 *et seq.* (paras. 138, 142).

arbitrator. Indeed, **the standard for disclosure differs from the standard for challenge.**¹³⁴

- 89 The Applicants' only response to this is that the IBA Guidelines are not binding.¹³⁵ However, this principle has been consistently applied in ICSID cases. For example, the *EDF* disqualification decision states as follows:

“Non-disclosure in itself cannot be a ground for disqualification, but must relate to facts that would be material to a reasonable likelihood of impartiality or lack of independence, which is not the case here.”¹³⁶

- 90 Many ICSID tribunals have followed the same approach.¹³⁷ For example, in *ConocoPhillips v. Venezuela*, the unchallenged arbitrators recalled that “nondisclosure cannot make an arbitrator partial or lacking in independence; it is only the facts and circumstances that he did not disclose that can do so.”¹³⁸
- 91 The Applicants argue that the *Rockhopper* committee found that breach of disclosure obligations in itself “can warrant annulment in certain

¹³⁴ 2014 IBA Guidelines, at **RAL-31**, p. iii (Introduction) (emphasis added). See also p. 18 (para. 5) (“Nondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so.”)

¹³⁵ Reply on Annulment, p. 18 (para. 49).

¹³⁶ *EDF International S.A. et al. v. Argentina*, Challenge Decision regarding Professor Gabrielle Kaufmann-Kohler, ICSID Case No. ARB/03/23, 25 July 2008, at **RAL-50**, p. 29 (para. 123) (emphasis added). See also p. 23 (para. 98) (“With respect to the alleged failure to disclose, we cannot accept that nondisclosure of the Board membership indicates a manifest lack of reliability in the exercise of independent judgment, the standard to be applied in this challenge. Whatever level of disclosure might be required under the ICSID Convention, a failure to inform the parties about this Board membership does not rise to that plane.”)

¹³⁷ See, e.g., *Alpha Prokejtholding v. Ukraine*, Decision on Proposal to Disqualify Dr. Turbowicz dated 19 March 2010, at **RAL-51** p. 23 (para. 64) (“there is a clear distinction between the parameters of the duty to disclose and the standards required to uphold the merits of a particular challenge.”); *Total v. Argentina*, Decision on Proposal to Disqualify dated 26 August 2015, at **RAL-16**, p. 21 (para. 98) (“[T]he IBA Guidelines relate mainly to standards applicable to the duty to disclose and not to the standards applicable to a disqualification proposal. Indeed, the IBA Guidelines themselves clarify that the fact of requiring disclosure by an arbitrator does not imply doubt about the latter’s impartiality and independence, as the standard of disclosure is different from the standard for disqualification.”)

¹³⁸ *ConocoPhillips v. Venezuela*, Decision on Proposal to Disqualify Mr. Fortier dated 26 July 2016, at **RAL-47**, p. 10 (para. 12(d)).

circumstances”.¹³⁹ However, the *Rockhopper* committee found that “the defectiveness of Dr. Poncet’s disclosure provides a basis for annulment” given the very serious nature of the undisclosed information in that case, as explained in Section 2.1.1.2 above. The *ad hoc* committee gave particular weight to Dr. Poncet’s own comments in *VC Holding v. Italy*, stating that he was “puzzled” and refusing to see how the information on his Italian convictions could have been relevant. As the *Rockhopper* committee noted:

“This case does not present the situation that most often arises when there is incomplete disclosure by an arbitrator, which is inadvertent omission and subsequent acknowledgement by the arbitrator that the omitted matter should have been disclosed. Instead, **the problem with the disclosure in this case appears to have resulted from Dr. Poncet’s decision not to include the criminal proceedings as part of his Rule 6 declaration, and he has said that he does not understand the suggestion that there should have been disclosure.**”¹⁴⁰

- 92 It was Dr. Poncet’s decision not to include serious facts concerning the respondent in that case in his declaration that the committee found unusual. Ultimately, as explained above, the *Rockhopper* award was annulled due to the actual criminal convictions in Italy, as those facts met the threshold of manifest lack of impartiality and independence in that particular case.¹⁴¹ Therefore, the award was not annulled only because of lack of disclosure of circumstances that did not otherwise meet the annulment standards. In any event, the Respondent does not dispute that there can be exceptional circumstances where the undisclosed facts are “of such gravity” or “of such magnitude”, that failure to disclose them might be sufficient to indicate a manifest lack of independence and impartiality.¹⁴² The Applicants have,

¹³⁹ Reply on Annulment, p. 18 (para. 50).

¹⁴⁰ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 125 *et seq.* (para. 334) (emphasis added).

¹⁴¹ See paras. 66-74 above.

¹⁴² See *Tidewater Inc. et al. v. Venezuela*, Decision on Proposal to Disqualify Prof. Stern dated 23 December 2010, at **RAL-46**, p. 14 (para. 40) (“non-disclosure would itself indicate manifest lack of impartiality only if the facts or circumstances surrounding such non-disclosure **are of**

however, not even tried to argue that such exceptional circumstances are present here.

- 93 Fourth, while the Respondent agrees that the duty to disclose rests primarily on the arbitrators, the parties also have a duty to investigate. This is particularly relevant where the party did not raise any issue during the arbitration but decided to raise it for the first time at the annulment stage after having lost the arbitration.
- 94 General Standard 7(c) of the IBA Guidelines imposes a duty on the parties: “In order to satisfy their duty of disclosure, **the parties are required to investigate** any relevant information that is reasonably available to them.”¹⁴³ The Applicants concede that the ICSID Arbitration Rules also impose this duty, in particular through Rule 27 which tribunals and *ad hoc* committees interpret in conjunction with Rule 9.¹⁴⁴ Rule 27 provides that:
- “A party which knows **or should have known** that a provision of [...] these Rules [...] has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.”¹⁴⁵
- 95 Rule 9 provides that a party proposing the disqualification of an arbitrator shall do so “promptly”.¹⁴⁶ *Ad hoc* committees have expressed caution about parties saving annulment grounds up their sleeve and waiting for the

such gravity (whether alone or in combination with other factors) as to call into question the ability of the arbitrator to exercise independent and impartial judgment”) (emphasis added); *Alpha Prokejt Holding GMBH v. Ukraine*, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, ICSID Case No. ARB/07/16, 19 March 2010, at **RAL-51**, p. 24 (para. 64) (“certain facts or circumstances **are of such a magnitude** that failure to disclose them either (1) would thereby in and of itself indicate a manifest lack of reliability of a person to exercise independent and impartial judgment or (2) would be sufficient in conjunction with the non-disclosed facts or circumstances to tip the balance in the direction of that result.”) (emphasis added).

¹⁴³ 2014 IBA Guidelines, at **RAL-31**, p. 16 (Explanation to General Standard 7(c)) (emphasis added).

¹⁴⁴ Reply on Annulment, p. 20 (para. 54) (“It is not disputed that a party must raise a disqualification proposal “promptly” under ICSID Arbitration Rule 9(1) or it waives that objection under Rule 27.” See, e.g., *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 146 (paras. 386-387).

¹⁴⁵ ICSID Arbitration Rule 27 (emphasis added).

¹⁴⁶ Counter-Memorial on Annulment, p. 21 *et seq.* (paras. 72-74).

outcome of the proceedings to attack the award.¹⁴⁷ As the *EDF*, *Eiser* and *Rockhopper* decisions show, *ad hoc* committees must assess as a first step to the 3-part test whether the party “should have been aware” or “ought to have reasonably been aware” “had it been vigilant” of the circumstances that it is relying on to seek annulment.¹⁴⁸

- 96 In the Reply, the Applicants argue that the Respondent has the burden of proof to establish that the Applicants waived their right to raise these issues in the annulment proceeding, as they were circumstances that arose during the Arbitration that the Applicants knew or should have known about.¹⁴⁹ This is incorrect. Only the Applicants have the burden of showing that they meet the relevant test for annulment.¹⁵⁰ It is for the Applicants to demonstrate that they did not know or could not have known of the circumstances that they have so easily located now.
- 97 The Applicants further argue that waiver would only be appropriate in rare circumstances where it is established that the party knew all the facts but withheld the objection in bad faith.¹⁵¹ This also is incorrect and contrary to the express language of the ICSID Arbitration Rules. The relevant inquiry is whether the Applicants “should have known” or “reasonably ought to have known” about those circumstances because the information was readily available.

¹⁴⁷ Counter-Memorial on Annulment, p. 22 (fn. 103). See C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**, p. 28 (of the PDF) (para. 143) (“A party that is aware of circumstances that would affect the tribunal’s proper constitution must be expected to raise this point as early as possible. It cannot be allowed to withhold this argument in order to ambush the proceedings at a moment convenient to it.”) and (para. 145) (“Otherwise a party aware of a defect in the tribunal’s composition could await the outcome of the proceedings in order to attack an unfavorable award on this ground.”).

¹⁴⁸ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 45 (para. 131) and *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 61 (para. 189). See also para. 51 above. The Applicants agree in their Reply on Annulment, p. 20 (para. 54) (“Annulment committees accordingly have considered arguments about waiver as part of their analysis.”).

¹⁴⁹ Reply on Annulment, p. 20 (para. 55).

¹⁵⁰ See Counter-Memorial on Annulment, p. 15 (para. 51).

¹⁵¹ Reply on Annulment, p. 20 (para. 55).

- 98 None of the cases on which the Applicants rely in their Reply help their position.
- 99 First, their continued reliance on *Vito Gallo v. Canada* is misplaced.¹⁵² This non-ICSID case concerned a disqualification proposal and whether it had been timely filed, *i.e.*, within the 15-day deadline under the UNCITRAL rules.¹⁵³ It is irrelevant to the present case.
- 100 Second, the Applicants rely on the *Eiser* committee’s conclusion that there was no evidence that Spain knew about Dr. Alexandrov’s cases involving Brattle.¹⁵⁴ In a reasoning spanning just three paragraphs, the *Eiser* committee surprisingly concluded that the fact that the information was publicly available (and much of it was in fact in the record of the arbitration) was not enough to prove that Spain had actual knowledge of all the facts.¹⁵⁵
- 101 The *Eiser* decision is an outlier, as no other committee has found that a party must show “proof of actual knowledge”, which is impossible to prove in a case involving facts that were not disclosed by the arbitrator. How can anyone demonstrate that the other party has actually seen information that is publicly available? Unsurprisingly, this particular finding of the *Eiser* decision has been strongly criticized, including by Prof. Schreuer in his latest Commentary on the ICSID Convention:

“**Somewhat unconvincingly**, the *ad hoc* Committee concluded that Spain could not have known or reasonably ought to have known of those prior connections. Yet, **the *ad hoc* Committee seemed in fact to apply a test of ‘actual’ knowledge**, having earlier stated that the test should include whether a party ‘reasonably ought’ to have known of facts raised in support of the application. In practice, diligent counsel in ICSID arbitrations routinely review prior awards and scrutinize arbitrators’ track records and relationships with co-

¹⁵² Reply on Annulment, p. 20 *et seq.* (para. 56).

¹⁵³ *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated 14 October 2009, at **AL-8**, p. 6 (para. 20).

¹⁵⁴ Reply on Annulment, p. 21 (para. 57).

¹⁵⁵ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 60 *et seq.* (paras. 188-190).

arbitrators, counsel, and experts, prior to their appointment, or when appointed by the other side. **A more realistic analysis would have focused only on connections between the arbitrator and the expert that were not in the public domain, and not disclosed.** Nevertheless, having made that finding, the *ad hoc* Committee concluded that Spain had not waived its right to seek annulment on grounds of Art. 52(1)(a).”¹⁵⁶

- 102 Finally, the Applicants repeatedly quote portions of the *Rockhopper* annulment decision regarding the arbitrators’ duty to disclose, but conveniently omit the relevant portions discussing whether Italy waived its right to raise Dr. Poncet’s circumstances in the annulment proceeding.¹⁵⁷ The *Rockhopper* committee emphasized that “it must be cause for concern whenever a party comes forward with what is in substance a challenge to an arbitrator only after losing an arbitration”,¹⁵⁸ as is the case here. The *ad hoc* committee expressed its “concern about the timeliness” of Italy’s objection, and analyzed in great detail whether Dr. Poncet’s circumstances would have been publicly available to Italy had it carried out an internet search.¹⁵⁹ It concluded that the record did not establish “that a simple internet search of Dr. Poncet’s name would have turned up any information indicating the existence of the criminal prosecution, or any information indicating any involvement by Dr. Poncet in connection with the failure of *Banco Ambrosiano*.”¹⁶⁰
- 103 Italy only discovered Dr. Poncet’s criminal convictions via an anonymous phone call, and the only public sources that Rockhopper submitted in the proceeding were newspaper articles from the 1990s, and one from 2009.¹⁶¹

¹⁵⁶ C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**, p. 28 (of the PDF) (para. 146) (emphasis added).

¹⁵⁷ Reply on Annulment, p. 16 *et seq.* (paras. 46-47, 50, 59-60).

¹⁵⁸ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 147 (para. 390).

¹⁵⁹ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 147 *et seq.* (paras. 391-394).

¹⁶⁰ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 148 (para. 393).

¹⁶¹ *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 148 (para. 393).

In assessing Italy's duty to investigate, the *Rockhopper* committee acknowledged the unusual circumstances of that case, concluding that requiring a party to investigate criminal records from decades ago would be too heavy a burden.¹⁶²

104 Unlike in *Rockhopper* (and *VC Holding*,¹⁶³ which was based on the same facts), three out of four of the circumstances that the Applicants have raised in this proceeding were readily available to them during the Arbitration, as is evidenced by the number of press releases, social media posts, and other documents the Applicants themselves have submitted in this proceeding.

2.1.2 None of the circumstances raised by the Applicants could possibly lead a reasonable third party to doubt Prof. Douglas' independence and impartiality

105 In their Reply, the Applicants continue to raise the same baseless arguments as to why, in their view, Prof. Douglas manifestly lacked independence and impartiality, resulting in the Tribunal not being properly constituted under Article 52(1)(a), namely:

- i) his representation of Friends of the Earth UK in English court proceedings regarding an LNG project in Mozambique;
- ii) the representation, by two of Prof. Douglas' former co-tenants at Matrix Chambers, of ClientEarth in English court proceedings;
- iii) his involvement with the MIDS academic program and LALIVE's support of that program; and,
- iv) his acquisition of Swiss nationality in 2023.

¹⁶² *Rockhopper v. Italy*, Decision on Annulment dated 2 June 2025, at **RAL-30**, p. 152 (para. 401) ("How frequently, however, should the review of court files to make sure an arbitrator has not failed to mention convictions for falsification of documentary evidence and aiding and abetting perjury be expected to be a fruitful exercise? If waiver is the consequence of a failure to review criminal court records for charges against arbitrators as a matter of course whenever a tribunal is constituted, what other steps should States also be expected to take to make sure that only arbitrators possessing high moral character and reliability for the exercise of independent judgment have been appointed in the cases against them?").

¹⁶³ *VC Holding II S.a.r.l., and others v. Italian Republic*, Decision on the Proposal for Disqualification of Arbitrator Dr. Charles Poncet dated 21 April 2023, at **AL-81**.

106 The Respondent addresses each of these arguments in turn.

2.1.2.1 Prof. Douglas' work for Friends of the Earth UK

107 In the Reply, the Applicants continue to argue that Prof. Douglas' representation of Friends of the Earth UK in late 2022 raised "justifiable doubts about [his] impartiality and independence".¹⁶⁴ Leaving aside the fact that this is not the ICSID legal standard, the Applicants' claim lacks any merit.

Friends of the Earth was non-existent in the Arbitration

108 First, the Applicants' repeated attempt to argue that Friends of the Earth had any relevance at all in the Arbitration should be rejected. This lack of relevance is evidenced by, *inter alia*, the following:

- a) There is not a single reference to Friends of the Earth in any of the pleadings in the Arbitration.¹⁶⁵
- b) With its Counter-Memorial in the Arbitration, the Respondent submitted an 8-page annex listing the NGO court and administrative challenges against the Project and more specifically, challenges brought **against State authorities** in connection with permits issued for the Project.¹⁶⁶ The Annex contains 83 petitions and identifies the NGOs acting as claimants, appellants or intervening party in those

¹⁶⁴ Reply on Annulment, p. 31 *et seq.* (paras. 75, 89). Prof. Douglas did not appear before the High Court proceedings (see *Friends of the Earth Limited et al. v. Total E&P Mozambique Area 1 Limtada et al.*, [2002] EWHC 568, Judgement, at **RA-77**), but appears as counsel in the 13 January 2023 Court of Appeal Judgment – *Friends of the Earth v. UKEF*, Court of Appeal Judgment dated 13 January 2023, at **A-55**. The Applicants reference the skeleton argument before the Court of Appeal, dated November 2022. See *Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Appellant's Supplementary Skeleton Argument dated 8 November 2022, at **A-67**.

¹⁶⁵ See Claimants' Memorial in the Arbitration dated 30 June 2017 (417 pages); Respondent's Counter-Memorial in the Arbitration (386 pages); Claimants Reply in the Arbitration dated 1 November 2018 (316 pages); Respondent's Rejoinder in the Arbitration (429 pages).

¹⁶⁶ Respondent's Counter-Memorial in the Arbitration, p. IV-1 *et seq.*, Annex IV (summarizing 83 challenges against the Project).

cases.¹⁶⁷ Despite the large number of NGOs involved over the course of many years,¹⁶⁸ Friends of the Earth did not participate in any such challenges against the Project and thus does not appear in the Annex.

c) The transcripts of the 18-day hearings also do not contain a single reference to Friends of the Earth, despite totaling over 4,800 pages.¹⁶⁹

d) A search for “Friends of the Earth” in the 325-page consolidated Index of the Record of the Arbitration does not yield a single result.¹⁷⁰

109 Friends of the Earth had no relevance whatsoever in the Arbitration, whether it be the underlying dispute that spanned many years or the arbitration proceedings themselves.

110 Second, the Applicants mischaracterize Romania’s defence in the Arbitration. They reference the Respondent’s Opening statement at the 2019 Hearing, where the Respondent argued that the Project stalled because it lacked social legitimacy.¹⁷¹ While this is correct, Friends of the Earth did not feature in the Respondent’s arguments, whether it be in its oral or written submissions. The Respondent’s position in the Arbitration was that the Project lacked not only a number of administrative and regulatory permits and approvals, including the environmental permit, but also the social license to operate.¹⁷² Indeed, there “was local opposition to this Project, effectively, from the very beginning”, which “over the years escalated to the national and even international level.”¹⁷³

111 As the Respondent further explained in its 2019 Opening statement, the social opposition started with the Roşia Montană community itself,

¹⁶⁷ There were also NGOs who supported the Project. These included, for example, *Asociatia Pro Roşia Montană*, Pro Justice Association (*Asociatia Pro Dreptatea Roşia Montană*), and the Future of Mining Trade Union (*Sindicatul Viitorului Mineritului*) – see Respondent’s Counter-Memorial in the Arbitration, p. 38 (fn. 150).

¹⁶⁸ Almost 30 NGOs and associations are referenced in Annex IV to Respondent’s Counter-Memorial in the Arbitration alone.

¹⁶⁹ 2019 Consolidated Hearing Transcript, at **RA-78** and 2020 Consolidated Hearing Transcript, at **RA-79**.

¹⁷⁰ Updated Index of Record for *Gabriel Resources v. Romania*, at **RA-80**.

¹⁷¹ Reply on Annulment, p. 25 (para. 69).

¹⁷² 2019 Consolidated Hearing Transcript, at **RA-78**, p. 339 (of the PDF), Day 2, 360:2–7. See also Award, p. 164 *et seq.* (paras. 800-804, 1310).

¹⁷³ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 348 (of the PDF), Day 2, 360:8–11.

organized through a local NGO called Alburnus Maior, as the Project would have involved destroying the village and relocating its population.¹⁷⁴ It also attracted significant opposition from local and national NGOs due to its unprecedented scale and its impact on the Roșia Montană landscape, environment, and cultural heritage.¹⁷⁵

- 112 The Respondent explained how 25 other Romanian NGOs – none of which was Friends of the Earth – got involved by signing the “Roșia Montană Declaration” in July 2002. They continued to express their opposition to the Project mainly by organizing demonstrations and, as noted above, challenging the permits and approvals issued by State authorities and did so over the course of nearly 18 years.¹⁷⁶ Thus, the Respondent’s arguments were centered around NGOs and stakeholder groups that were “able and willing to take action” against the Project “to block it” – none of which, again, included Friends of the Earth.¹⁷⁷
- 113 Moreover, the argument that RMGC had failed to secure a social license was only one of the Respondent’s many defenses in the Arbitration (related to causation), and Friends of the Earth did not figure in it. Furthermore, the Award did not even turn on the Respondent’s “social license” arguments, which the Tribunal “did not address” because “there was no breach, so that further examination of the social license issue is unnecessary.”¹⁷⁸

¹⁷⁴ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 339 *et seq.* (of the PDF), Day 2, 360:15–19; 364:1–5.

¹⁷⁵ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 339 *et seq.* (of the PDF), Day 2, 360:20–362:16.

¹⁷⁶ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 339 (of the PDF), Day 2, 360:8–365:5. Contrary to the Applicants’ argument in their Reply on Annulment, p. 37 (para. 84), the large number of NGOs involved is indeed relevant, particularly when Friends of the Earth was not among the ones actually taking legal action against the Project. Notably, Friends of the Earth was not among the NGOs which signed the “Roșia Montană Declaration”.

¹⁷⁷ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 346 (of the PDF), Day 2, 367:3–7. See also Respondent’s Counter-Memorial in the Arbitration, p. IV-1 *et seq.*, Annex IV.

¹⁷⁸ Award, p. 349 (para. 1311). In the Reply on Annulment, p. 31 (fn. 127) the Applicants include references to the Award, most of which are not relevant or do not even discuss the social license argument. They appear to have searched for the word “NGO” and included paragraphs that include this word, plus some paragraphs which do not mention “NGO” or which are unrelated to social license, for example paras. 856 or 1141.

- 114 Accordingly, no arbitrator could have ever perceived Friends of the Earth as an actor relevant to this dispute – as the Parties clearly did not. As the Respondent has explained in Section 2.1.1.1, ICSID decisions show that a “manifest lack” of qualities must be “clear or obvious and can be discerned with little effort and without deep analysis.”¹⁷⁹ Nothing about Friends of the Earth’s “role”, if any, with regard to the Project was clear or obvious.
- 115 Third, as part of their post-Award research, the Applicants have managed to dig up a handful of references to “Friends of the Earth” in only 9 exhibits that they claim were related to the Respondent’s defence in the Arbitration – 9 exhibits in out of a **total of 4,608 exhibits** in the Arbitration record.¹⁸⁰
- 116 None of these references in those documents suggests that Friends of the Earth “was one of the most relevant” NGOs opposing the Project, as the Applicants contend.¹⁸¹ The Respondent addresses each of these references in turn:
- a) The Applicants refer to two of the 27 expert reports submitted by the Respondent in the Arbitration: the Expert Opinion of Dr. Alina Pop and the Second Expert Opinion of Dr. Ian Thomson, alleging that the reports identify Friends of the Earth as a “prominent” international group “campaigning against the Project back in 2002”.¹⁸² This is false. In these two reports, Friends of the Earth is only mentioned in passing (and without analysis). Dr. Pop merely notes Friends of the Earth’s support of the Roşia Montană local community by referring to its co-signing, together with 78 other organizations, of a 2007 NGO statement

¹⁷⁹ *Total v. Argentina*, Decision on Proposal to Disqualify dated 26 August 2015, at **RAL-16**, p. 22 (para. 101), which the Applicants also cite in their Reply on Annulment, p. 13 (fn. 49).

¹⁸⁰ Reply on Annulment, p. 26 (para. 70), referring to Pop Opinion; Thomson Opinion II; Pop-15, Pop-29 (which is the same as Thomson-3); Thomson-2; Thomson-16; Thomson-17; Thomson-18; Thomson-20; Thomson-83 and C-2391. See Updated Index of Record for *Gabriel Resources v. Romania*, at **RA-80**, showing: 2,981 Claimants fact exhibits; 690 Respondent fact exhibits; 306 CRA exhibits; 30 Behre Dolbear exhibits; 138 CMA exhibits; 112 Dragos exhibits; 95 Thomson; 99 Pop exhibits; 45 Stoica exhibits; 22 McCurdy exhibits; 43 Sferdian exhibits; 47 Tofan exhibits.

¹⁸¹ Reply on Annulment, p. 26 (para. 70).

¹⁸² Reply on Annulment, p. 26 (para. 70a).

denouncing alleged bias in a film about the Project.¹⁸³ Friends of the Earth is mentioned only once in Dr. Thomson's Second Report, in a quote from an interview conducted in 2007, where the interviewee states that Stephanie Roth (a foreign activist who moved to Roșia Montană) contacted Greenpeace, World Wildlife Federation and Friends of the Earth.¹⁸⁴ Dr. Thomson notes that Greenpeace – **not** Friends of the Earth – participated in the meeting which led to the adoption of the 2002 Roșia Montană Declaration, signed this declaration, and later joined a December 2002 protest against the Project in Bucharest.¹⁸⁵ Friends of the Earth took part in **none** of these actions. These ancillary references in the two expert reports carry no analytical weight and do not support the Applicants' characterization; if anything, they show that Friends of the Earth was not "campaigning against the Project back in 2002".

- b) The Applicants refer to the First Expert Opinion of Dr. Thomson and the work of three Romanian researchers to whom he cites, to suggest that these alleged "key" sources of information portray Friends of the Earth as an active Project opponent.¹⁸⁶ This is wrong. First, those three references are merely 3 of the 46 sources cited in his First Opinion, nor does he label them as "key". Second, each of these 3 sources is a 200-300-page long doctoral thesis, and only references "Friends of the Earth" once or twice in passing.¹⁸⁷ Third, these lengthy theses do not identify any direct opposition activity by Friends of the Earth against the Project.¹⁸⁸

¹⁸³ **Pop Opinion**, p. 11 *et seq.* (paras. 35 and 47). NGO Statement, at **Exhibit Pop-15**. The NGO statement was signed by Friends of the Earth USA and Friends of the Earth Hungary, together with 78 other organizations.

¹⁸⁴ **Thomson Opinion II**, p. 24 (para. 70) (quoting from the Henisz 2007 Notes, at **C-2391**).

¹⁸⁵ **Thomson Opinion II**, p. 28 *et seq.* (paras. 71-73).

¹⁸⁶ Reply on Annulment, p. 26 (para. 70b).

¹⁸⁷ Mr. Alexandrescu's 256-page long thesis only mentions "Friends of the Earth" three times, **Thomson-016**; Ms. Parau's 303-page long thesis only mentions "Friends of Earth Hungary" once, **Thomson-017**; Ms. Velicu's 217-page long thesis only mentions "Friends of the Earth" once, **Thomson-018**.

¹⁸⁸ Mr. Alexandrescu's thesis only contains a generic reference to Friends of the Earth and notes its funding of two campaigners' trip to Washington, D.C. to meet the World Bank President, at **Thomson-016**, p. 6, 180; Velicu's thesis includes one passing reference to Friends of the Earth,

- c) The Applicants further refer to the doctoral thesis of Respondent's expert, Dr. Pop, to suggest that her thesis, which was cited by both Dr. Pop and Dr. Thomson in the Arbitration, would depict Friends of the Earth as a leading actor seeking to block the Project.¹⁸⁹ The record does not bear this out. Throughout her 245-page long thesis,¹⁹⁰ Friends of the Earth is mentioned only twice in relation to Roșia Montană, each time in a generic way when listing the actors offering support to Alburnus Maior, without analysis or attribution of specific activities.¹⁹¹ While Dr. Pop's thesis is repeatedly referenced in both experts' opinions, none of those citations pertains to Friends of the Earth.
- d) The Applicants rely on a case study by Prof. Witold Henisz of Wharton School of Business, cited several times in Dr. Thomson's First Expert Opinion.¹⁹² According to the Applicants, Prof. Henisz "observed in that case study that in 2002 Alburnus Maior 'attracted the attention and support' of international NGOs such as Mining Watch, Greenpeace,

among the international groups to which Stephanie Roth reached out as part of her networking efforts in 2002, which included "Greenpeace, Friends of the Earth, CEE Bank-Watch, Mining Watch, Earth Works, OSI, etc.", at **Thomson-018**, p. 112-113; Parau notes Friends of the Earth **Hungary** as one of 17 NGOs lobbying the Hungarian Environment Ministry, at **Thomson-017**, p. 152.

¹⁸⁹ Reply on Annulment, p. 27 (para. 70c).

¹⁹⁰ Alina Pop, Roșia Montană: Social Representations Around an Environmental Controversy in Romania, 2014, at **Thomson-002**.

¹⁹¹ The "considerable number of actors" "who gave their support for the Save Roșia Montană campaign" included "environmental and civic rights NGOs, scientific fora, clerical organizations, the Romanian Royal House, public personalities and artists", actors "from local to international levels (international environmental organizations like Greenpeace, Friends of the Earth, Mining Watch Canada, Bankwatch CEE, to name but a few", as well as "celebrities like the actress Vanessa Redgrave", at **Thomson-002**, p. 7. See also p. 41 ("[o]ver the next ten years, the persistent movement took further action against RMGC, but also against state officials, campaigning in multiple various forms: the 'Cyanide-Free Romania' Coalition (a national coalition of NGOs and some political figures calling for banning the use of cyanide in the mining industry), 'Hay-Fest' (the first environmental festival in Romania, which has been organized in Roșia Montană since 2004 and to which various artists participated voluntarily), public debates, protests, petitions sent to different national and European institutions, court actions. In other words, the grassroots movement triggered mobilization in important Romanian cities (Bucharest, Alba Iulia, Cluj-Napoca), as well as the participation of international organizations such as Greenpeace, Friends of the Earth, Mining Watch Canada, etc.").

¹⁹² Witold Henisz, Roșia Montană: Political and Social Risk Management in the Land of Dracula (A), 2009, at **Thomson-019**; and Witold Henisz, Roșia Montană: Political and Social Risk Management in the Land of Dracula (B), 2009, at **Thomson-020**.

Earthworks, and Friends of the Earth.”¹⁹³ This is inaccurate and misleading. Part A of the Henisz case study contains no reference at all to Friends of the Earth,¹⁹⁴ while part B contains only a single, passing mention, without attributing to it any activity or involvement.¹⁹⁵ This is in contrast with the detailed descriptions of the actions taken by other organizations, such as MiningWatch, Greenpeace, and Earthworks, in support of Alburnus Maior.¹⁹⁶ Indeed, the study expressly records that Alburnus Maior “attracted the attention and support” of MiningWatch (**not** Friends of the Earth). In any event, none of the references to the Henisz case study in Dr. Thomson’s opinion concerns Friends of the Earth.

- e) The Applicants refer to a single note among the 24 interviews by Prof. Henisz during his 2007 site visit to Romania, to suggest that Friends of the Earth was regarded as a principal international actor opposing the Project.¹⁹⁷ They point to Dr. Thomson’s quotations from these interview notes in his Second Expert Opinion and his 2019 Hearing presentation, including one interview recounting that Stephanie Roth contacted several NGOs in 2002, among them Friends of the Earth. The suggested inference is unfounded. Dr. Thomson did not attach any significance to Friends of the Earth in his opinion,¹⁹⁸ nor did he (or

¹⁹³ Reply on Annulment, p. 28 (para. 70d).

¹⁹⁴ Witold Henisz, *Roşia Montană: Political and Social Risk Management in the Land of Dracula* (A), 2009, at **Thomson-019**.

¹⁹⁵ Witold Henisz, *Roşia Montană: Political and Social Risk Management in the Land of Dracula* (B), 2009, at **Thomson-020**, p. 5.

¹⁹⁶ For example, the case study notes that “MiningWatch staff met with Canada’s foreign affairs minister and officials of Canada’s Export Development Bank to raise concerns about Gabriel Resources’ plans”; “Greenpeace denounced Gabriel Resources’ plans, particularly the proposed use for cyanide”; “[i]n December [2002], Greenpeace issued a report saying the proposed mine would violate E.U. regulations [...]. Later, members of the group chained themselves to a fence outside the parliament building in Bucharest to publicize their objections to the mine”; “Earthworks created a campaign called ‘No Dirty Gold,’ which railed against gold mining’s worldwide environmental impact and included Roşia Montană among its list of endangered sites”, **Thomson-020**, p. 5.

¹⁹⁷ Reply on Annulment, p. 28 (para. 70e) (referring to the Henisz Witness Statement of 2 November 2018 and Henisz 2007 Notes (resubmitted), at **C-2391**).

¹⁹⁸ Second Expert Opinion of Dr. Ian Thomson dated 6 May 2019, p. 27 *et seq.* (para. 70) (quoting from Henisz 2007 Notes (resubmitted), at **C-2391**, p. 51 (Interview 19). Extracts from the majority of the other 2007 Henisz Interviews are quoted throughout Thomson Opinion II (paras. 51-56, 59-62, 67-68, 72, 74, 82-88); none contain any reference to Friends of the Earth.

Prof. Henisz or any of the other experts opining on the social opposition to the Project) mention Friends of the Earth once at the 2019 Hearing.¹⁹⁹ Moreover, Prof. Henisz did not mention Friends of the Earth once in his witness statement.

- f) The Applicants also take issue²⁰⁰ with Respondent's experts, Dr. Thomson and Dr. Pop, both exhibiting a 17-page article co-authored by activist Stephanie Roth, describing the "Save Roșia Montană" campaign and, *inter alia*, claiming that Alburnus Maior, together with several NGOs – Friends of the Earth International, BothEnds, Urgewald and Bank Watch CEE – persuaded the World Bank's International Finance Corporation not to finance the Project in 2002.²⁰¹ The article only mentions Friends of the Earth International once, without attributing to it any particular role. At the 2019 Hearing, Dr. Pop confirmed that she used this article as one of the main sources for the chronology of "the thematic statements made by the opposition" to "the Roșia Montană Gold Corporation Project" in her doctoral thesis and Expert Opinion.²⁰² The article is quoted by Dr. Pop in relation to the "main thematic statements, tactics, styles of action and communication media" used in the "Save Roșia Montană" campaign and not in relation to any international support received by the campaign from international organizations.²⁰³
- g) The Applicants refer to a 2002 Gabriel Resources email from Bruce Marsh enclosing an analysis of Alburnus Maior,²⁰⁴ which was cited by Dr. Thomson in his Second Expert Report.²⁰⁵ While the email attachment mentions "the relationship with 'Friends of the Earth' (and

¹⁹⁹ None of Profs. Pop, Thomson, Stoica or Boutilier mention Friends of the Earth during their testimony. 2019 Consolidated Hearing Transcript, at **RA-78**.

²⁰⁰ Reply on Annulment, p. 29 (para. 70f).

²⁰¹ Roth, S.D. and Maier, J., 2016, *Silence is Golden*, Forum Umwelt und Entwicklung, November 28, 2016, at **Pop-29** and **Thomson-083**.

²⁰² 2019 Consolidated Hearing Transcript, at **RA-78**, p. 3387 (of the PDF), Day 12, 3398:18–3399:7.

²⁰³ Expert Opinion of Dr. Alina Pop dated 7 May 2019, p. 17-18 (Table 1); see also, p. 13 (para. 39), p. 27-28 (para. 64), p. 40 (para. 95).

²⁰⁴ Reply on Annulment, p. 29 (para. 70g).

²⁰⁵ Gabriel Resources Email from Bruce Marsh dated Sept. 18, 2002 enclosing Analysis of Alburnus Maior, at **Thomson-083**.

possible other organizations)” as a strength of Alburnus Maior,²⁰⁶ Dr. Thomson referred only to the email itself, in relation to RMGC contesting the number of Alburnus Maior members.²⁰⁷

- 117 It is clear from the references in those exhibits that Friends of the Earth was a non-issue. Moreover, no questions about Friends of the Earth (or any other international groups) were asked at the 2019 Hearing. No arbitrator would have noticed that Friends of the Earth existed, much less that it had any tangible role in the dispute.
- 118 In the Reply, the Applicants also attempt to rely on a document used by the Respondent during the cross-examination of the Claimants’ witness, Mr. Jonathan Henry, at the 2019 Hearing.²⁰⁸ However, this document did not point to Friends of the Earth as a relevant or visible opponent of the Project and Friends of the Earth was not referenced at any point during that cross-examination. The exhibit in question is a 2002 Wall Street Journal article titled “*Romanian Gold-Mine Loan Blocked by World Bank Chief*” reporting on the IFC’s withdrawal of potential financing due to “environmental and social concerns”.²⁰⁹ The article includes a brief comment from a Friends of the Earth International deputy director characterizing the decision as “a victory”, and observing that it reflects the pressure on the bank to stay out of big mining projects. When asked about this article at the 2019 Hearing, Mr. Henry dismissed it as press speculation, clarifying that the IFC’s decision was unrelated to NGO pressure and confirming that the only contemporaneous communication was the IFC’s own letter explaining its withdrawal on timing grounds.²¹⁰ As Mr. Henry stated in his Second Witness Statement,²¹¹ the IFC withdrew due to Gabriel Resources’ internal concerns that the IFC participation

²⁰⁶ Gabriel Resources Email from Bruce Marsh dated Sept. 18, 2002 enclosing Analysis of Alburnus Maior, at **Thomson-083**, p. 3.

²⁰⁷ Second Expert Opinion of Dr. Ian Thomson dated 6 May 2019, p. 29 (para. 75).

²⁰⁸ Reply on Annulment, p. 30 (para. 72).

²⁰⁹ “Romanian Gold-Mine Loan Blocked by World Bank Chief”, The Wall Street Journal, Oct. 11, 2002, at **R-137**.

²¹⁰ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 584 (of the PDF), Day 2, 605:4–606:14.

²¹¹ Second Witness Statement of Jonathan Henry dated 31 October 2018, at **Exhibit Henry II**, p. 2 (para. 5) (referring to a Letter from IFC to Gabriel Resources dated 17 October 2002, at **C-2146**).

could delay Project development. The record therefore confirms that Friends of the Earth was not viewed, in 2002 or in 2019, as a relevant opponent of the Project.

- 119 Finally, in the Reply the Applicants take issue with the Respondent’s observation that, in any event, Friends of the Earth’s advocacy against the Project would have targeted the Respondent too given that it was a joint venture (called RMGC) between Gabriel and the State.²¹² The Applicants argue that “[t]o the extent that Respondent here argues that Friends of the Earth’s interest in the dispute was neutral as between the Parties, its argument is disingenuous”.²¹³
- 120 However, it remains the case that the Project was also the Respondent’s Project, which the Respondent consistently sought to defend, support, and promote. As the Respondent noted throughout its submissions, and the Tribunal also recognized in the Award,²¹⁴ Romanian authorities “defend[ed] the decisions they had taken [regarding the different permits to the Project] in court, which is precisely what they did without exception for many years, and often with RMGC intervening on their side to defend those decisions.”²¹⁵ The interests of the Romanian authorities and of the Claimants were aligned.

The Applicants’ new exhibits allegedly showing Friends of the Earth’s opposition are irrelevant to this Committee

- 121 Because there is nothing in the record of the Arbitration to signal Friends of the Earth as a relevant actor, the Applicants’ case is built around **new exhibits that were not part of the Arbitration**. With their Reply they have filed 30 new exhibits in relation to Friends of the Earth alone,²¹⁶ which make a total of 57 exhibits in the annulment proceeding to support their argument that Friends of the Earth “campaigned” against the Project

²¹² Counter-Memorial on Annulment, p. 34 (paras. 104-105), Reply on Annulment, p. 38 (para. 85).

²¹³ Reply on Annulment, p. 38 (para. 85).

²¹⁴ See, e.g., Counter-Memorial on Annulment, p. 34 (para 105). See Award, p. 527 *et seq.* (paras. 1038, 1088, and 1269).

²¹⁵ 2019 Consolidated Hearing Transcript, at **RA-78**, p. 344 (of the PDF), Day 2, 365:14-18.

²¹⁶ See A-168 through A-172 and A-174 through A-199.

and the Claimants.²¹⁷ However, none of these documents were before the Tribunal, as the Claimants did not submit them in the Arbitration. No arbitrator would have been aware of the alleged activism against the Project by some of Friends of the Earth entities (such as the Hungarian or Canadian branches), who were amongst dozens of NGOs that opposed the Project over the course of many years.²¹⁸

122 The Applicants have only referenced two activities related to Friends of the Earth UK that are allegedly against the Project, both of which are wrong:²¹⁹

- a) The first reference is a 2015 post by “Tax Justice Network” describing a letter sent to the UK Prime Minister in relation to the Arbitration, and warning that ISDS cases “will balloon under the proposed [TTIP]... targeting the British and other European governments.”²²⁰ The article quotes the director of Global Justice Now, who is the first signatory of the letter, and includes 11 signatories from different NGOs, with one of them being “Friends of the Earth England, Wales and Northern Ireland”. Friends of the Earth did not report signing this letter or campaigning against the arbitration on its own website, unlike Global Justice Now or Tax Justice Network.²²¹
- b) The Applicants also argue, relying on a 2018 Facebook post by “ESC – Environmental and Social Change”, that at the UK level Friends of the Earth held a conference “about the ‘Save Roşia Montană Campaign’”.²²² This is incorrect. What the Facebook post explains is

²¹⁷ Reply on Annulment, p. 33 *et seq.* (paras. 80 and 82). With their Application for Annulment, the Applicants submitted 11 exhibits, while with their Memorial on Annulment, they submitted 16 exhibits, plus an Annex, in which they misleadingly use Friends of the Earth throughout without distinguishing which specific Friends of the Earth entity (among others, Canada and Hungary).

²¹⁸ See, *e.g.*, NGO Statement, at **Exhibit Pop-15**.

²¹⁹ Reply on Annulment, p. 36 (para. 82b).

²²⁰ Tax Justice Network Post dated Aug. 14, 2015 with full text of Letter to UK Prime Minister David Cameron and signatories, at **A-123**.

²²¹ See Global Justice Now website, “Cameron told to stop Jersey-registered shell company suing Romania in ‘corporate court’” dated 14 August 2015, at **RA-81**; Tax Justice Network Post dated Aug. 14, 2015 with full text of Letter to UK Prime Minister David Cameron and signatories, at **A-123**.

²²² Reply on Annulment, p. 36 (para. 80b).

that “Friends of the Earth **Northern Ireland**” organized a conference called “To Mine or to Mind”, and that a speaker from ESC was invited to participate in the conference.²²³ A news article from Belfast Live confirms that the conference was organized by the Northern Ireland branch, and that the purpose was to share “harrowing experiences of mining, quarrying and sand extraction” from around the world, including Romania among many others.²²⁴

- 123 It is not a secret that mining projects and other large extractive projects, such as those in the oil or gas sector, are often controversial and raise opposition by certain groups of society, particularly environmental activists. The Applicants’ contention that arbitrators should look beyond the parties in a specific arbitration, and even beyond the parties referenced in the main pleadings, to identify all actors of civil society that may have opposed a project (or even be opposed to ISDS),²²⁵ is frankly absurd. It would make an arbitrator’s conflict checks impossible to manage.

Friends of the Earth was not a non-disputing party in the Arbitration

- 124 As the Respondent explained in its Counter-Memorial, Friends of the Earth **did not participate or seek to participate as an *amicus*** in the Arbitration.²²⁶ In the Reply, the Applicants argue that Friends of the Earth “had standing to seek to intervene as a non-disputing party” under Part III, Annex C of the Canada-Romania BIT and under ICSID Arbitration Rule 37(2), so there could be “no assurance that it would not seek to do so.”²²⁷ This argument makes no sense. There is no such thing as “standing” to apply for leave to intervene as a non-disputing party.
- 125 Moreover, the assertion that Friends of the Earth would have been able to apply, and that such application would have been granted, is highly speculative. In fact, Part III of Annex C of the Canada-Romania BIT

²²³ Environmental & Social Change Post on Facebook dated 16 April 2018, at **A-153**.

²²⁴ Belfast Live, “10 point plan to save Northern Ireland from becoming ‘dirty corner of Europe’” dated 21 April 2018, at **RA-82**.

²²⁵ Reply on Annulment, p. 38 *et seq.* (para. 86).

²²⁶ Counter-Memorial on Annulment, p. 30 (para. 92).

²²⁷ Reply on Annulment, p. 39 *et seq.* (paras. 87-88).

provides that in order to apply, a non-disputing party must be “a person of a Contracting Party, or ha[ve] a significant presence in the territory of a Contracting Party”²²⁸ – Friends of the Earth would not have met this requirement, as there is no Romania chapter. Friends of the Earth would have also had to meet the additional requirements under the BIT and ICSID Arbitration Rule 37(2), *i.e.*, showing that it would assist the Tribunal in the determination of a factual or legal issue and had particular knowledge or insight that is different from the disputing parties.²²⁹ Therefore, the Applicants’ suggestion that Friends of the Earth was a potential non-disputing party, just by virtue of being an NGO, is baseless.

- 126 Arbitrators cannot be expected to guess any potential non-disputing party applicants in a specific case, particularly when they are entities that are not even mentioned by the Parties in their submissions. The Applicants’ contention that Prof. Douglas had “a duty to investigate”²³⁰ beyond the Parties, their pleadings, and the non-disputing parties who applied in the arbitration is absurd, and would make arbitrators’ conflict checks impossibly onerous.

Prof. Douglas’ representation of Friends of the Earth UK in unrelated litigation does not come close to meeting the required legal standard

- 127 First, Prof. Douglas’ representation of Friends of the Earth **Limited** (*i.e.*, the UK entity) does not create an appearance of manifest lack of impartiality and independence. As the Respondent showed in its Counter-Memorial and in Section 2.1.1.1 above, ICSID decisions involving arbitrators’ work as counsel in separate proceedings turn on whether there is a similarity of parties, or legal and/or factual issues, which may influence the arbitrator.²³¹ The only decisions where a disqualification was upheld involved situations where the arbitrator (or his law firm) represented one

²²⁸ Canada-Romania BIT dated 8 May 2009, at C-1, p. 27 (s. III, para. 1).

²²⁹ See Canada-Romania BIT dated 8 May 2009, at C-1, p. 27 *et seq.* (s. III, para. 4).

²³⁰ Reply on Annulment, p. 45 (para. 96).

²³¹ Counter-Memorial on Annulment, p. 25 (para. 80).

of the parties to the arbitration and there would likely be similarities of factual or legal issues.²³²

128 The annulment decision in *EDF v. Argentina*, described at paragraphs 59-62 above, is particularly instructive. The fact that one of the arbitrators' law firm had represented Repsol for many years, including advising in relation to its investments in Argentina, was not sufficient to establish a manifest lack of independence and impartiality. The *EDF* committee emphasized that for there to be a conflict of interest, Prof. Remón or his law firm needed to act for Repsol in a matter "in which it was **adversarial to the party to the arbitration**", in that case Argentina.²³³ Prof. Douglas' representation of Friends of the Earth does not come close to meeting this standard. As the Respondent showed in its Counter-Memorial:²³⁴

- a) Prof. Douglas represented Friends of the Earth UK, a registered private limited company. There is no overlap of parties.
- b) Prof. Douglas' representation was limited to UK court proceedings regarding an LNG project in Mozambique. There is therefore no overlap of factual issues, which concern a separate industry sector and country, Mozambique. Moreover, as the Applicants' exhibits show, the Mozambique matter involved "brutal attacks" against the local population and the dispatch of the military, and Friends of the Earth's appeal to UN human rights bodies.²³⁵ The Project did not involve any of these issues.
- c) The main legal issue was whether the UK Government's approval of the LNG project breached the UK's and Mozambique's commitments under the Paris Agreement. There was therefore no overlap of legal issues either, as compliance with Paris Agreement commitments by Romania was not at issue in the Arbitration.

²³² See paragraphs 43-44 above, referring to *Blue Bank* and *Caratube*.

²³³ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 62 (para. 168) (emphasis added).

²³⁴ Counter-Memorial on Annulment, p. 29 *et seq.* (paras. 91, 93, 95).

²³⁵ Friends of the Earth, "Gas Rush, Human Rights Abuses, Climate Devastation, Insurgent Attacks, Covid Hotspot," June 4, 2020, at **A-175**, p. 2-3.

- 129 The Applicants also argue that Friends of the Earth’s arguments in the Mozambique litigation were similar to Friends of the Earth’s position in relation to the Project.²³⁶ This is hugely misleading, not least because there was no Friends of the Earth’s “position” against the Project – the Applicants rely on a letter to Canadian parliamentarians signed by 10 NGOs, among them Friends of the Earth **Canada** (which was not on the record of the Arbitration).²³⁷ Unlike in the case of the Mozambique LNG project, Friends of the Earth did not get involved in any of the court proceedings against the Project,²³⁸ nor did the Roşia Montană campaign feature in any of Friends of the Earth’s annual reports, unlike the Mozambique and many other campaigns around the world which feature in the annual reports submitted by the Applicants describing the NGO’s activities.²³⁹
- 130 Second, the Applicants also take issue with the Respondent’s argument that Prof. Douglas represented Friends of the Earth **UK**, one of 70 other chapters, and an autonomous independent entity which did not engage in any public activism against the Project.²⁴⁰ The Applicants contend that the “obvious fallacy in Respondent’s argument... would allow an arbitrator to sit in an arbitration brought by one Friends of the Earth entity while simultaneously acting as counsel for an affiliated Friends of the Earth entity in another matter.”²⁴¹ This analogy is absurd. The whole problem with the Applicants’ argument in this proceeding is precisely that Friends

²³⁶ Reply on Annulment, p. 41 *et seq.* (para. 90).

²³⁷ Open Letter from Friends of the Earth and others to Canada’s Minister of Foreign Affairs dated 2 December 2013, at **Exhibit A-120**, p. 4.

²³⁸ Contrary to the Applicants’ assertion in the Reply on Annulment, p. 42 (para. 91), it did not pursue any litigation against the Project, unlike a large number of NGOs.

²³⁹ See Friends of the Earth International Annual Reports, at **A-194** (2010), **A-195** (2021), **A-196** (2013), **A-197** (2014). No equivalent Friends of the Earth International report covered the Roşia Montană campaign. A single reference to Roşia Montană appears in the 2002 Friends of the Earth USA Annual Report, which mentions facilitation of Romanian activists’ trip to Washington, D.C. at **A-117**, p. 9. See also all other reports, none of which reference Roşia Montană or Romania: **A-177** (2017), **A-178** (2018) (referencing Honduras, Mozambique, Bosnia-Herzegovina, Netherlands, etc. but nothing in relation to Romania); **A-179** (2019) (referencing Mozambique, Norway, France, Bosnia-Herzegovina, etc. but nothing in Romania); **A-176** (2021). The same with Friends of the Earth UK reports (**A-190**, **A-191**, **A-192**) – no reference to Romania; or with Friends of the Earth International financial statements (**A-185**).

²⁴⁰ Reply on Annulment, p. 32 (para. 78).

²⁴¹ Reply on Annulment, p. 32 *et seq.* (para. 78).

of the Earth (whichever entity within the group) was **not a party**, not even a non-disputing party, in the Arbitration. As demonstrated above, it was not even a party relevant to the underlying dispute, as evidenced by the lack of references to it during the Arbitration.

- 131 In the Reply, the Applicants argue that, even though Friends of the Earth “has local operating entities organized in jurisdictions around the world”, all entities within the structure “share a common identity, brand and mission”, and Friends of the Earth International carries out a coordination role and provides funding to some of its groups’ activities.²⁴² As mentioned in the previous paragraph, this is irrelevant given that Friends of the Earth was not a party in the Arbitration. In any event, none of the exhibits submitted by the Applicants show any actual funding provided to a relevant Friends of the Earth national group in relation to the Project. Moreover, as is made crystal clear in Friends of the Earth International’s website, it is:

“a highly **decentralised** federation, comprising **autonomous** organizations with a shared analysis of the root causes of today’s most pressing environmental and social issues”²⁴³

- 132 Friends of the Earth UK is only one of 70 autonomous organizations, and it is “a not-for-profit limited company limited by guarantee, company number 1012357”, who owns “the Friends of the Earth trademark and grant[s] local action groups a licence to campaign” under that name, and whose charitable campaigning is funded by its “sister organisation Friends of the Earth Charitable Trust, which is a registered charity, No. 281681.”²⁴⁴ None of the Applicants’ arguments detract from the fact that Friends of the Earth UK was not involved in opposing the Project in Romania.
- 133 Third, none of the legal authorities on which the Applicants rely in their Reply support their position, and in fact show that the Applicants’ arguments are incredibly weak.²⁴⁵

²⁴² Reply on Annulment, p. 33 *et seq.* (paras. 79, 80) (citing financial statements, etc.). However, nowhere in all the Friends of the Earth exhibits submitted by the Applicants does it say these are “local operating entities” – this is the Applicants’ own mischaracterization.

²⁴³ Friends of the Earth International, Organisation, at **RA-27**, p. 1 (emphasis added).

²⁴⁴ Friends of the Earth Limited, Who are we, at **RA-83**, p. 1.

²⁴⁵ Reply on Annulment, p. 42 *et seq.* (para. 92).

- a) *Grand River v. United States* involved a challenge to an arbitrator under the UNCITRAL rules (not an ICSID case). The facts of that case, which the Applicants deliberately omit,²⁴⁶ support the Respondent’s position. The challenged arbitrator served as counsel in a proceeding **against the respondent in the arbitration**, the United States. There was therefore an identity of parties, and his representation was adversarial to the United States.²⁴⁷ Moreover, the challenge decision noted that his counsel work involved the evaluation of the United States’ compliance with its international commitments under several international instruments (such as the CERD), and as an arbitrator he would need to evaluate the United States’ compliance “with its international commitments under NAFTA”.²⁴⁸ Therefore there was an overlap of parties and similarity of legal issues, which is not the case with *Friends of the Earth*.
- b) *RSE v. Latvia* also involved a challenge under the UNCITRAL rules in yet another non-ICSID case. The Applicants contend that it was enough that the arbitrator acted as counsel to investors in other ECT cases, and that it was irrelevant that her cases involved different parties and different disputed measures.²⁴⁹ This is incorrect. The fundamental issue was the “sheer number of cases” (including 13 pending ECT arbitrations, in addition to a number of past ECT cases²⁵⁰) on which Ms. Frey represented renewable energy investors against EU countries under the ECT, which created “a serious risk that overlapping questions of interpretation and application of the ECT” would arise.²⁵¹ Due to her significant ongoing counsel work under that treaty, the decision noted that she may not be able to act impartially.²⁵² Therefore, unlike in the

²⁴⁶ Reply on Annulment, p. 43 (para. 92a).

²⁴⁷ See Sections 2.1.1.1 and 2.1.1.2 above.

²⁴⁸ *Grand River Enterprises v. United States*, Letter from ICSID Secretary-General to Prof. James Anaya dated 28 November 2007, at **AL-6**, p. 1.

²⁴⁹ Reply on Annulment, p. 43 (para. 92b).

²⁵⁰ *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022, at **AL-52**, p. 8 (para. 42).

²⁵¹ *RSE v. Latvia*, Challenge Decision dated 24 June 2022, at **AL-52**, p. 9 (para. 46).

²⁵² The decision noted that her website indicated that she “primarily” represented investors in claims under the ECT, demonstrating that those cases were a very significant part of her counsel

case of Prof. Douglas’ work for Friends of the Earth UK, there was an overlap in industry sector (renewable energy), an overlap in legal issues (of interpretation of the ECT), and a significant similarity of the issues in dispute (cases concerning an EU country’s “modification of its energy regulatory framework”²⁵³).

- c) *Vito Gallo v. Canada*, another UNCITRAL case, is also irrelevant. To recall, the challenged arbitrator’s CV disclosed a “significant amount of past and present work for the Government of Mexico”, including in relation to “the interpretation or application of the provisions of NAFTA Chapter 11”.²⁵⁴ In the Reply, the Applicants try to compare a NAFTA Contracting Party’s right to intervene in NAFTA proceedings in accordance with NAFTA Article 1128, to a potential non-disputing party’s right to seek leave to intervene, which is subject to the tribunal’s approval provided that several conditions are met.²⁵⁵ This comparison is absurd. Mexico, as one of only three NAFTA Contracting Parties, had a legal right to intervene on questions of interpretation of NAFTA. Friends of the Earth did not have such a right in the Arbitration.²⁵⁶ In upholding the challenge, the decision acknowledged the specific nature of NAFTA Contracting Parties’ right to intervene:

“In the particular context of NAFTA Article 1128, this is too fine a distinction to dispel doubt. By serving on a tribunal in a NAFTA arbitration involving a NAFTA State Party, while simultaneously acting as an advisor to another NAFTA State Party which **has a legal right to participate** in the proceedings, an arbitrator

work. See **AL-52**, p. 9 (para. 45). This created a doubt as to whether her “consideration of the present case will be influenced by her duty to defend the interests of her investor claimant clients in disputes arising under the ECT.” **AL-52**, p. 9 (para. 46).

²⁵³ *RSE v. Latvia*, Challenge Decision dated 24 June 2022, at **AL-52**, p. 2 (para. 17).

²⁵⁴ *Vito Gallo v. Canada*, Challenge Decision dated 14 October 2009, at **AL-8**, p. 2 *et seq.* (paras. 4 and 30). Note that the Applicants quote the wrong part of the decision, claiming that he did “a small amount of work” – that reference only concerns the work he had done since 2009, as he explained that prior to March 2009 he had represented Mexico in respect of “the interpretation or application of the provisions of NAFTA Chapter 11 or similar provisions in Mexico’s [BITS].” **AL-8**, p. 9 (para. 30).

²⁵⁵ Reply on Annulment, p. 43 *et seq.* (para. 92c)

²⁵⁶ See para. 125 above.

inevitably risks creating justifiable doubts as to his impartiality and independence.”²⁵⁷

- 134 Finally, as the Respondent has shown, Prof. Douglas was not required to disclose his representation of Friends of the Earth UK in court litigation involving unrelated parties and issues.²⁵⁸ Indeed, despite the fact that the IBA Guidelines deal specifically with double-hatting and arbitrators’ relationships with the parties, the Applicants cannot point to a single guideline that would even remotely apply to this situation. Moreover, the Applicants’ suggestion that Prof. Douglas would have been aware of Friends of the Earth’s opposition to the Project through a reference in a syllabus from a Graduate Institute course taught by another professor, makes little sense.²⁵⁹ In the Reply, the Applicants wrongly contend that the syllabus is from a “2020-2021 MIDS course”.²⁶⁰ However, as their own exhibits show, it was a course of the Graduate Institute (not the MIDS),²⁶¹ and it was one of 18 optional courses to which MIDS students could sign up, in addition to their regular 14 MIDS courses.²⁶² Suggesting that Prof. Douglas would have reviewed the dozens of reading materials included by one of many faculty members of the Graduate Institute is truly obscure.²⁶³

²⁵⁷ *Vito Gallo v. Canada*, Challenge Decision dated 14 October 2009, at **AL-8**, p. 10 (para. 31) (emphasis added).

²⁵⁸ See Section 2.1.1.3 above. See also Counter-Memorial on Annulment, p. 32 *et seq.* (para. 98-107).

²⁵⁹ Reply on Annulment, p. 45. (para. 96). The 17-page syllabus includes a list of reading and background materials, among which there is a documentary on the Roşia Montană arbitration.

²⁶⁰ Reply on Annulment, p. 45 *et seq.* (para. 96).

²⁶¹ Geneva Graduate Institute of International and Development Studies, Prof. Joost Pauwelyn, Course Description for International Investment Law in Academic year 2020-2021, at **A-154**.

²⁶² MIDS 2020-2021 Program Brochure, at **Exhibit A-79**, p. 5 *et seq.* showing the 2 general courses and 12 intensive courses of the MIDS program.

²⁶³ Their own exhibits also show that the Professor teaching that course, Prof. Joost Pauwelyn, was not in the Program Committee, the CIDS Council, or even the Advisory Board of the MIDS program in 2020-2021, on the year when he included the documentary among the reading materials for his course. See MIDS 2020-2021 Program Brochure, at **A-79**, p. 2. This is contrary to what the Applicants claimed in their Memorial on Annulment, p. 17 (fn. 55), citing to exhibits all of which postdate this course and even the date of the Award.

2.1.2.2 Matrix Chambers' representation of ClientEarth

- 135 The Applicants maintain that the fact that Prof. Douglas' former co-tenants at Matrix Chambers represented ClientEarth before UK courts during the Arbitration raised doubts as to his independence and impartiality.²⁶⁴ In the Reply, the Applicants continue to mistakenly call ClientEarth "a Non-Disputing Party" and misrepresent the facts.
- 136 First, the Applicants take issue with the Respondent's reference to Prof. Douglas' colleagues who represented ClientEarth as his "former co-tenants."²⁶⁵ However, that is entirely accurate. The two Matrix barristers, Ms. Jessica Simor and Ms. Emma Foubister, are Prof. Douglas' former co-tenants since at least October 2022, as he joined 3 Verulam Buildings on 1 November 2022.²⁶⁶ "Co-tenants" (rather than colleagues) is how barristers in the same chambers are referred to.
- 137 In the Reply, the Applicants argue that there was a "close working relationship" between Prof. Douglas and his two former co-tenants, on the basis that Matrix Chambers' website indicates that its members "are committed to teamwork and co-operation in delivering legal services, including through sharing legal knowledge and experience."²⁶⁷ The Applicants try to mischaracterize the nature of barristers' chambers and treat them as if they were law firms. This is wrong for several reasons.
- 138 Matrix Chambers' website ("About Us – Code of Conduct") emphasizes that: "The members of Matrix are barristers **trading as sole practitioners** and are registered with the Bar Standards Board of England and Wales. They are governed by the Bar Standards Board's Handbook and Code of Conduct".²⁶⁸ Barristers' chambers are not law firms, but rather a collection of sole practitioners who share office space, staffing and other costs. By contrast, law firms are treated as a single business entity and therefore conflicts usually apply firmwide, even across unrelated practice areas. The

²⁶⁴ Reply on Annulment, p. 46 *et seq.* (paras. 97 *et seq.*).

²⁶⁵ Reply on Annulment, p. 47 (para. 101).

²⁶⁶ Global Arbitration Review, Douglas moves chambers in London dated 1 November 2022, at **RA-84**.

²⁶⁷ Reply on Annulment, p. 47 (para. 101 and 101a).

²⁶⁸ Matrix Chambers, Code of Conduct, at **RA-85** (emphasis added).

fact that two co-tenants may represent together the same client (as was the case in the UK litigation for ClientEarth) and collaborate on a specific client matter is irrelevant to Prof. Douglas' role in the Arbitration.

- 139 The Applicants rely on an excerpt from Matrix Chamber's website, indicating that its members "work[] together" and "shar[e] legal knowledge and experience".²⁶⁹ However, the Applicants omit the first part of that sentence, which states: "**Although our lawyers are individual practitioners**, they are committed to teamwork and co-operation...."²⁷⁰ Moreover, the following sentence in that excerpt highlights each members "Independence", noting that Matrix lawyers "**are independent practitioners** who promote the interests of their clients, whoever they may be."²⁷¹ The fact that members may share legal knowledge does not mean that barristers are allowed to share information that is protected by barrister-client privilege. The Applicants' suggestion that Prof. Douglas would have been informed by his former co-tenants of their client work for ClientEarth is speculative and would be contrary to the Barristers' Code of Conduct.²⁷² Moreover, the fact that one of the barristers representing ClientEarth, Ms. Simor, was also a member of the team that represented Friends of the Earth together with Prof. Douglas in an unrelated case is also irrelevant.²⁷³ The Applicants incorrectly state that while Ms. Simor and Prof. Douglas acted for Friends of the Earth in the Mozambique case, "Ms. Simor represented ClientEarth jointly with Friends of the Earth in another matter."²⁷⁴ This is wrong. Their own exhibits show that Ms. Simor only represented ClientEarth in that court case, while the two other

²⁶⁹ Reply on Annulment, p. 47 (para 101a).

²⁷⁰ Matrix Chambers - Core Values, at **A-69**, p. 1 (emphasis added).

²⁷¹ Matrix Chambers - Core Values, at **A-69**, p. 1 (emphasis added).

²⁷² Core Duty 6 of the Bar Standards Board's Handbook and Code of Conduct provides: "You must keep the affairs of each client confidential." See The Bar Standards Board Handbook, Confidentiality Guidance, at **RA-86**.

²⁷³ Reply on Annulment, p. 47 *et seq.* (para. 101b); Counter-Memorial on Annulment, p. 38 (para. 121). The two matters were also unrelated: one concerned an LNG project in Mozambique, while the other one concerned a request for declaratory relief in relation to the Government's Net Zero Strategy. See *Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin), Judgment dated 18 July 2022, at **A-72**, p. 5 *et seq.* (paras. 20, 157 *et seq.*).

²⁷⁴ Reply on Annulment, p. 47 *et seq.* (para. 101b).

claimants (one of them, Friends of the Earth), were represented by different law firms and barristers from different chambers.²⁷⁵

- 140 Moreover, as the Applicants’ own legal authorities show, ICSID tribunals have confirmed the distinct nature of barristers’ chambers. In *Hrvatska Elektroprivreda v. Slovenia*, the tribunal noted that:

“Barristers are sole practitioners. Their Chambers are not law firms. Over the years it has often been accepted that members of the same Chambers, acting as counsel, appear before other fellow members acting as arbitrators.”²⁷⁶

- 141 The case involved members of the same barristers’ chambers acting as president of the tribunal and counsel for one of the parties. The tribunal ultimately decided that it was not appropriate for members of the same chambers to act as both president and counsel, and asked that party to remove the barrister in question from its counsel team.²⁷⁷ However, the tribunal noted that this did not mean “that barristers from the same Chambers are always precluded from being involved as, respectively, counsel and arbitrator in the same case”,²⁷⁸ but it would depend on the specific case. By contrast, the same scenario involving lawyers from the same law firm would not be allowed.

- 142 Second, the IBA Guidelines confirm the different nature of barristers’ chambers. While the fact that members of the same law firm may act as arbitrator and counsel to one of the parties in an arbitration is included in the Waivable Red List, the same scenario concerning members of the same barristers’ chambers is included in the Orange List.²⁷⁹ As the Applicants

²⁷⁵ See *Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin), Judgment dated 18 July 2022, at **A-72**, p. 1.

²⁷⁶ *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Ruling regarding participation of David Mildon QC dated 6 May 2008, at **AL-7**, p. 8 (para. 17) (emphasis added).

²⁷⁷ The case concerned the respondent’s last-minute appointment of a barrister from the same chambers as the president of the tribunal. Since the appointment was made just before the hearing and the case had been running for a considerable amount of time, the tribunal ordered the respondent to remove that barrister from its counsel team.

²⁷⁸ *Hrvatska Elektroprivreda v. Slovenia*, Ruling regarding participation of David Mildon QC dated 6 May 2008, at **AL-7**, p. 12 *et seq.* (para. 31).

²⁷⁹ See 2014 IBA Guidelines, at **RAL-31**, p. 21 *et seq.* (paras. 2.3.3 and 3.3.2).

note in a footnote, the IBA Guidelines explain that “barristers’ chambers should not be equated with law firms for the purposes of conflicts, and no general standard is proffered for barristers’ chambers.”²⁸⁰ Moreover, despite relying on the IBA Guidelines, the Applicants cannot point to a guideline that even remotely applies to the scenario in this case: an arbitrator sitting in a case, and two of his co-tenants acting in unrelated UK litigation for an entity that is **not a party** to the arbitration, but which has assisted three non-disputing parties in making one submission to the tribunal. If anything, this scenario would fall within the Green List.²⁸¹

- 143 Third, the Applicants continue to argue that the timing of the representation of ClientEarth by the two Matrix barristers is not relevant, and contend that in any event, “Matrix Chambers started its work for ClientEarth in January 2022”.²⁸² This is pure speculation. The exhibit cited by the Applicants in support of that proposition is a ClientEarth press release that does **not** mention Matrix Chambers or any external counsel.²⁸³ In fact, the earliest date on which the two Matrix barristers appear as part of ClientEarth’s external counsel team (which also includes a law firm), is June 2022.²⁸⁴ The timing is important, as it means that the overlap between the two Matrix barristers’ representation of ClientEarth and Prof. Douglas’ arbitrator role in the Arbitration was minimal. As mentioned above, Prof.

²⁸⁰ 2014 IBA Guidelines, at **RAL-31**, p. 14 (Explanation to General Standard 6(a)); Reply on Annulment, p. 48 (fn. 208).

²⁸¹ See, e.g., 2014 IBA Guidelines, at **RAL-31**, p. 26 *et seq.* (para. 4.2.1 (“A firm, in association or in alliance with the arbitrator’s law firm, but that does not share significant fees or other revenues with the arbitrator’s law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.”) or para. 4.4.3 (“The arbitrator and a manager, director or member of the supervisory board, or any person having a controlling influence on one of the parties, or an affiliate of one of the parties, have worked together as joint experts, or in another professional capacity, including as arbitrators in the same case”)). These two scenarios involve a much closer relationship and would require ClientEarth to be “one of the parties” in the arbitration, which it was not.

²⁸² Reply on Annulment, p. 48 *et seq.* (para. 102), in response to Counter-Memorial on Annulment, p. 36 *et seq.* (para. 116).

²⁸³ ClientEarth Press Release dated 12 January 2022, at **A-203**.

²⁸⁴ *Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin), Judgment dated 18 July 2022, at **A-72**, p. 1.

Douglas joined 3 Verulam Buildings on 1 November 2022,²⁸⁵ and therefore must have left Matrix Chambers, at the latest, in October 2022. To recall, this is more than two years after the 2020 Hearing.²⁸⁶

- 144 Fourth, as the Respondent showed in its Counter-Memorial, ClientEarth **was not** a Non-Disputing Party (“**NDP**”), but rather, together with other NGOs assisted three NDPs (Alburnus Maior, Greenpeace CEE Romania, and ICDER) with their *amicus* submission.²⁸⁷ This was clearly set out in the Award as well as PO19.²⁸⁸ Indeed, as the Applicants’ argued in the Arbitration,²⁸⁹ ClientEarth did not comply with the BIT requirements for non-disputing parties’ participation.²⁹⁰
- 145 In the Reply, the Applicants contend that “ClientEarth maintained a substantive position as a non-disputing party”.²⁹¹ They further argue that submissions made by ClientEarth, CIEL and ECCHR in the Arbitration “repeat the same content and structure” as submissions made by them in other cases.²⁹² However, in support of this allegation they only point to a two-page letter expressing interest in exploring *amicus curiae* participation in *RWE v. The Netherlands*, which postdates the (much longer) equivalent letter submitted in the Arbitration.²⁹³ It does not matter what the Applicants speculate ClientEarth’s “substantive position” was; it does not change the fact that ClientEarth was not an NDP (much less an actual party) in the Arbitration, and would not have qualified as an NDP under the Canada-Romania BIT. The Applicants continue to ignore this point in the Reply.

²⁸⁵ Global Arbitration Review, Douglas moves chambers in London dated 1 November 2022, at **RA-84**.

²⁸⁶ 2020 Consolidated Hearing Transcript, at **RA-79**.

²⁸⁷ Counter-Memorial on Annulment, p. 37 (para. 117).

²⁸⁸ Award, p. 54 *et seq.* (paras. 316, 323); Procedural Order No. 19 dated 7 December 2018, at **A-147**, p. 3 (para. 16). The three NDPs were granted leave to file one *Amicus Curiae* submission in the Arbitration.

²⁸⁹ Procedural Order No. 19 dated 7 December 2018, at **A-147**, p. 6 (para. 35).

²⁹⁰ See paragraph 125 above.

²⁹¹ Counter-Memorial on Annulment, p. 49 *et seq.* (para 105).

²⁹² Reply on Annulment, p. 50 (para. 105b).

²⁹³ Reply on Annulment, p. 50 (fn. 219), citing **A-149** dated 19 July 2021.

- 146 Lastly, the Applicants continue to pursue the allegation that one of Prof. Douglas’ former co-tenants, Mr. Fisher, is allegedly the spouse of ClientEarth’s CEO, and that Prof. Douglas and Mr. Fisher maintained a close professional relationship as they submitted a joint expert opinion.²⁹⁴ As the Respondent explained in its Counter-Memorial, the legal opinion concerned the legal requirement of a moratorium in deep sea mining under UNCLOS, and was therefore unrelated to the Arbitration.²⁹⁵ Moreover, Mr. Fisher’s spouse was not appointed as CEO of ClientEarth until July 2022,²⁹⁶ and therefore only a couple of months before Prof. Douglas left Matrix Chambers.
- 147 In any event, the mere existence of a relationship would not be sufficient to give reasonable doubts regarding an arbitrator’s ability to exercise independent and impartial judgment, and in fact, cases based on significantly closer “relationships” have been flatly rejected.²⁹⁷ None of the circumstances raised by the Applicants come even remotely close to meeting the manifest lack of impartiality and independence test.

2.1.2.3 LALIVE’s support to a public teaching program (MIDS)

- 148 In their Reply, the Applicants continue to mischaracterize the nature and extent of LALIVE’s support of the MIDS program, contending that they could not have had knowledge of such support during the Arbitration. However, the Applicants make no effort to explain how any alleged connection between LALIVE and Prof. Douglas, through LALIVE’s support of the program, could be perceived to benefit Prof. Douglas, such that a reasonable third party would consider that there were reasonable

²⁹⁴ Reply on Annulment, p. 48 (para. 101c and fn. 207).

²⁹⁵ Counter-Memorial on Annulment, p. 38 (para. 122).

²⁹⁶ Client Earth, Laura Clarke, at **RA-87**.

²⁹⁷ Counter-Memorial on Annulment, p. 39 (para. 124); *Getma v. Guinea*, Decision on the Application to Disqualify Mr. Bernardo M. Cremades, ICSID Case No. ARB/11/29, 28 June 2012 (French original with unofficial partial translation), at **RAL-52**, where the ICSID Chairman dismissed a challenge to the Claimant-appointed arbitrator based on the fact that his brother acted as arbitrator in a parallel arbitration involving the same claimant and re the same facts. See **RAL-52**, p. 1 (para. 60) noting that “mere speculation, presumption, belief, opinion or interpretation” by the party were insufficient (free English translation).

grounds to doubt Prof. Douglas’ independence and impartiality in the Arbitration.

- 149 As set out in the Counter-Memorial and further below, LALIVE’s support of the MIDS program was neither unusual nor exclusive to LALIVE and could not possibly have impacted Prof. Douglas’ independence and impartiality in the Arbitration. Moreover, Prof. Douglas could not have been expected to disclose information regarding LALIVE’s support of the MIDS program, which in any event was or should have been available to the Applicants.

*LALIVE’s support of the MIDS Program **could not affect** the independence and impartiality of Prof. Douglas in the Arbitration*

- 150 According to the Applicants, LALIVE’s allegedly “large, multi-year financial support and partnership with MIDS”,²⁹⁸ comprised, (i) a full scholarship provided by LALIVE to one MIDS student a year covering tuition fees as expenses;²⁹⁹ (ii) a half day seminar by LALIVE during the MIDS program;³⁰⁰ and (iii) internships offered by LALIVE to “four or five” MIDS students a year.³⁰¹
- 151 As set out in the Counter-Memorial, law firm support of teaching institutions is widely accepted and not a new phenomenon.³⁰² Furthermore, the Applicants’ claim in their Reply that no other law firm provides such support to the MIDS program “at th[e] level” of LALIVE is incorrect.³⁰³
- 152 The Applicants’ own exhibits confirm that around ten MIDS students per year are offered full or partial scholarships by various institutions.³⁰⁴ At least two other law firms provide full scholarships (Levy Kaufmann-

²⁹⁸ Reply on Annulment, p. 62 (para. 126).

²⁹⁹ Reply on Annulment, p. 59 *et seq.* (paras. 120, 122).

³⁰⁰ Reply on Annulment, p. 54 *et seq.* (paras. 112, 118).

³⁰¹ Reply on Annulment, p. 55 *et seq.* (paras. 113, 119).

³⁰² Counter-Memorial on Annulment, p. 43 (para. 139); Reply on Annulment, p. 62 (para. 125).

³⁰³ Reply on Annulment, p. 58 (para. 118).

³⁰⁴ CIDS Annual Report 2020, at A-224, p. 10 *et seq.*; CIDS Annual Report 2021, at A-219, p. 11 *et seq.*

Kohler and Dechert LLP)³⁰⁵ while other law firms (*e.g.*, Three Crowns and Lambadarios) offer partial scholarships, together with other support, including sponsoring and organizing conferences during the program.³⁰⁶ Moreover, through the course of the Arbitration, LALIVE provided scholarships to a total of 5 out of over 280 MIDS students.³⁰⁷

153 Similarly, the Applicants do not deny that LALIVE’s half-day seminar is one of many seminars organized by the MIDS,³⁰⁸ including with White & Case.³⁰⁹ Nor do they deny that other law firms, including White & Case, offer internships to MIDS graduates.³¹⁰

154 In fact, the CIDS annual reports that the Applicants rely on show that many law firms support the MIDS program and its students. For example, White & Case provides support by holding a position on the MIDS advisory board,³¹¹ organizing seminars,³¹² participating as arbitrators in the academic retreats³¹³ and as faculty in the FIAA cross examination workshops³¹⁴ and in the Latin American International Arbitration Course

³⁰⁵ CIDS Annual Report 2020, at **A-224**, p. 10 *et seq.*; CIDS Annual Report 2021, at **A-219**, p. 11.

³⁰⁶ CIDS Annual Report 2022, at **A-220**, p. 28 *et seq.*

³⁰⁷ CIDS Annual Report 2020, at **A-224**, p. 5 (“The program provides full-time postgraduate legal education to around 40 students per year.”).

³⁰⁸ Counter-Memorial on Annulment, p. 42 (para. 132(ii)). See also CIDS Annual Report 2021, at **A-219**, p. 20; CIDS Annual Report 2022, at **A-220**, p. 22 *et seq.*; CIDS Annual Report 2023, at **A-225**, p. 15 *et seq.*

³⁰⁹ CIDS Annual Report 2020, at **A-224**, p. 17.

³¹⁰ Reply on Annulment, p. 55 *et seq.* (paras. 113, 119). See also Counter-Memorial on Annulment, p. 41 (para. 131). The Applicants argue that LALIVE (and LKK) “commit” to providing internships (see Reply on Annulment, p. 55 *et seq.* (paras. 113, 119). LALIVE does not, however, have a formal agreement with the MIDS with regard to internships (or otherwise).

³¹¹ As set out in the Counter-Memorial, Ms. Carolyn Lamm, partner at White & Case was on the Advisory Board of the MIDS program for several years. Counter-Memorial on Annulment, p. 39 *et seq.* (fn. 192).

³¹² See, *e.g.*, CIDS Annual Report 2020, at **A-224**, p. 17.

³¹³ See CIDS Annual Report 2021, at **A-219**, p. 18 *et seq.*; CIDS Annual Report 2022, at **A-220**, p. 23; CIDS Annual Report 2023, at **A-225**, p. 20 *et seq.*

³¹⁴ See CIDS Annual Report 2020, at **A-224**, p. 16; CIDS Annual Report 2021, at **A-219**, p. 17 *et seq.*; CIDS Annual Report 2022, at **A-220**, p. 16; CIDS Annual Report 2023, at **A-225**, p. 15. The MIDS has a partnership with the FIAA (Foundation for International Arbitration Advocacy) under which FIAA instructors offer MIDS students a two-day workshop on witness examination in international arbitration.

launched by the CIDS.³¹⁵ Partners at Lévy Kaufmann-Kohler teach regular courses in the MIDS program, in addition to the scholarship and internship offers provided by the firm.³¹⁶ Other law firms organize conferences (Lambadarios)³¹⁷ and legal writing workshops (Sidley Austin) for MIDS students.³¹⁸

- 155 Thus, despite the Applicants’ efforts to portray the contrary, LALIVE’s support of the MIDS program was and is neither unusual nor exclusive to LALIVE. Furthermore, in any event, the Applicants make no effort to explain how any reasonable third party could possibly consider that that support could somehow affect Prof. Douglas’s independence and impartiality *vis à vis* Romania in the Arbitration.³¹⁹
- 156 Furthermore, the Applicants’ continued reliance (solely) on the *Vento Motorcycles* case is misplaced.³²⁰ First, *Vento Motorcycles* is not an ICSID case and thus did not apply the same legal standards.³²¹ Second, on the facts, the case is inapposite: the court found that an undisclosed direct communication between Mexico’s lead counsel and an arbitrator, offering the arbitrator a “valuable professional opportunity[y]”³²² to join Mexico’s roster of arbitrators, provided such arbitrator with an “**incentive to please Mexico**”.³²³ Accordingly, this gave rise to a “reasonable apprehension of bias” in favor of Mexico.³²⁴ Here there was no benefit or opportunity to

³¹⁵ CIDS Annual Report 2020, at **A-224**, p. 26 *et seq.* (where Prof. Zachary Douglas was also part of the faculty).

³¹⁶ See, *e.g.*, CIDS Annual Report 2022, at **A-220**, p. 28.

³¹⁷ CIDS Annual Report 2022, at **A-220**, p. 29.

³¹⁸ See, *e.g.*, CIDS Annual Report 2020, at **A-224**, p. 20.

³¹⁹ See footnote 64 above. *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011, at **RAL-18**.

³²⁰ Reply on Annulment, p. 61 (para. 123). See also Memorial on Annulment, p. 38 (para. 84).

³²¹ See Counter-Memorial on Annulment, p. 42 (fn. 213); Reply on Annulment, p. 61 (para. 123).

³²² *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025, at **AL-57**, p. 3 (para. 13). See Counter-Memorial on Annulment, p. 42 (fn. 213). See Reply on Annulment, p. 61 (para. 123).

³²³ *Vento Motorcycles v. Mexico*, Decision dated 4 February 2025, at **AL-57**, p. 3 (para. 13) (emphasis added).

³²⁴ *Vento Motorcycles v. Mexico*, Decision dated 4 February 2025, at **AL-57**, p. 3 (para. 13).

Prof. Douglas, let alone one that would generate an incentive to please Romania.

- 157 The Applicants continue to speculate that LALIVE’s support of the MIDS “could be perceived” as conferring a benefit on Prof. Douglas specifically.³²⁵ The Applicants fail to explain, let alone demonstrate, how that support could be perceived as conferring a specific benefit on Prof. Douglas, who was one of at least 9 administrators³²⁶ and over 30 faculty members³²⁷ of the MIDS program at the relevant time.
- 158 No reasonable and informed third party could reasonably doubt that Prof. Douglas manifestly lacked independence or impartiality on this basis.³²⁸
- 159 Counsel for the Applicants also have connections with academic institutions. This is perfectly normal for leading international firms such as White & Case and LALIVE. As previously noted, White & Case supports the American University Center for International Commercial Arbitration, where Prof. Grigera Naón has served as Director of the Center for International Commercial Arbitration for many years.³²⁹ It is also one of the partners of the Sciences Po law school³³⁰ where Prof. Tercier serves as a permanent faculty member.³³¹

³²⁵ Reply on Annulment, p. 60 (para. 122). The Applicants also misquote the current MIDS website (**A-230**) to claim that the “MIDS rightly describes LALIVE’s support as ‘a valuable investment’ and ‘a significant commitment’”. This is misleading. The full quote in **A-230** addresses potential MIDS students and reads as follows: “Joining the MIDS is a valuable investment in your future, but it is also a significant commitment that requires careful consideration and planning.”

³²⁶ See for *e.g.*, MIDS 2020-2021 Program Brochure, at **A-79**, p. 2 (of the PDF) setting out the list of Program Committee and CIDS Council members. In addition, there were 22 members on the MIDS Advisory Board.

³²⁷ See, *e.g.*, MIDS, Faculty, at **RA-49**; MIDS 2020-2021 Program Brochure, at **A-79**, p. 5 *et seq.* (of the PDF).

³²⁸ Reply on Annulment, p. 59 (para. 121). See paras. 27, 32, 34, 45 above.

³²⁹ Counter-Memorial on Annulment, p. 43 (para. 139); Reply on Annulment, p. 62 (para. 126).

³³⁰ Our partners - Sciences Po Law School, at **RA-88**.

³³¹ Sciences Po Law School, Faculty, at **RA-89**, p. 5 *et seq.*

The Applicants’ claim that they were not aware and could not have been aware of LALIVE’s support of the MIDS program is not credible

- 160 It is undisputed that both Prof. Douglas’ position as one of the administrators and faculty members of the MIDS program and LALIVE’s support of the program had been public for years before the appointment of Prof. Douglas on the Tribunal.³³²
- 161 However, in their Reply, the Applicants now claim that they could not have known of the “materia[l] increase[.]” in LALIVE’s support of the MIDS program and that such support began to be “promoted publicly” and be used as a “selling point for [the] program”³³³ during the Arbitration.
- 162 The Applicants arguments are disingenuous and not credible.
- 163 As the Applicants own exhibits confirm, the MIDS program had been acknowledging (and “promoting”) LALIVE’s support before Prof. Douglas’ appointment to the Tribunal, as shown for instance in the following extract from the publicly available MIDS Annual Report from 2013-2014.³³⁴



³³² Reply on Annulment, p. 56 *et seq.* (para. 117); Counter-Memorial on Annulment, p. 39 (para. 126).

³³³ Reply on Annulment, p. 54 *et seq.* (paras. 111-116).

³³⁴ MIDS Annual Report 2013-2014, at **A-221**, p. 19 (of the PDF). See also Counter-Memorial on Annulment, p. 39 *et seq.* (fn. 192); MIDS Annual Report 2014-2015, at **A-209**, p. 19 *et seq.* (of the PDF); CIDS/MIDS Annual Report 2015-2016, at **A-210**, p. 19 *et seq.* (of the PDF). As set out in the Counter-Memorial, LALIVE’s the organization of the LALIVE Lecture together with the Graduate Institute has been publicly promoted since 2007. See Counter-Memorial on Annulment, p. 41 (para. 132(i)); LALIVE Announcement of first LALIVE Lecture dated 9 July 2007, at **RA-39**. See also para. 78 above.

- 164 However, what the Applicants characterize as the “materia[l] increase[.]” in LALIVE’s support³³⁵ – the offering of a half day seminar and an annual scholarship introduced by LALIVE in 2019 – was, by the Applicants’ admission, announced in a public and transparent manner, as evidenced by a LALIVE press release,³³⁶ updated web-pages by LALIVE and the MIDS,³³⁷ and updated brochures and annual reports published by the MIDS/CIDS.³³⁸
- 165 Moreover, as set out above,³³⁹ White & Case, have themselves been involved with the MIDS program from its beginning,³⁴⁰ and during the course of the Arbitration White & Case supported the MIDS program alongside LALIVE, including by organizing seminars,³⁴¹ participating as arbitrators in academic retreats,³⁴² and as faculty in the FIAA cross examination workshops³⁴³ and the Latin American International Arbitration Course launched by the CIDS.³⁴⁴
- 166 In light of the above, the Applicants cannot credibly claim that they “could not have been aware” of information regarding LALIVE’s support of the MIDS program during this period.³⁴⁵ Their reliance on this purported issue as a ground for annulment thus remains untimely and improper.³⁴⁶

³³⁵ Reply on Annulment, p. 54 *et seq.* (paras. 112, 114).

³³⁶ LALIVE Press Release dated 25 September 2019, at **A-211**.

³³⁷ LALIVE website, LALIVE and the MIDS, at **A-212**; Wayback Machine - MIDS website, Scholarships dated 25 July 2019, at **A-215**.

³³⁸ CIDS Annual Report 2020, at **A-224**, p. 11, 16 *et seq.*

³³⁹ See para. 154 above.

³⁴⁰ See MIDS website as of 16 September 2008, at **RA-90**. As set out in the Counter-Memorial, Ms. Carolyn Lamm, partner at White & Case was on the Advisory Board of the MIDS program for several years. Counter-Memorial on Annulment, p. 39 *et seq.* (fn. 192).

³⁴¹ See CIDS Annual Report 2020, at **A-224**, p. 17.

³⁴² See CIDS Annual Report 2021, at **A-219**, p. 18 *et seq.*; CIDS Annual Report 2022, at **A-220**, p. 23; CIDS Annual Report 2023, at **A-225**, p. 20 *et seq.*

³⁴³ See CIDS Annual Report 2020, at **A-224**, p. 16; CIDS Annual Report 2021, at **A-219**, p. 17 *et seq.*; CIDS Annual Report 2022, at **A-220**, p. 16; CIDS Annual Report 2023, at **A-225**, p. 15.

³⁴⁴ CIDS Annual Report 2020, at **A-224**, p. 26 *et seq.*

³⁴⁵ See paras. 93-94 above.

³⁴⁶ Counter-Memorial on Annulment, p. 39 *et seq.* (para. 126).

*Prof. Douglas **did not have an obligation** to specifically disclose LALIVE's support of the MIDS program*

- 167 The Applicants make no effort to explain how LALIVE's support of the MIDS program could possibly qualify as a business or professional relationship under Rule 6(2) of the ICSID Arbitration Rules, so as to require continuous disclosures by Prof. Douglas throughout the Arbitration.³⁴⁷ It evidently does not.
- 168 Nor can the Applicants show that such support falls within any of the situations described in the IBA Guidelines.³⁴⁸ It does not. In fact, as set out above, in their Reply, the Applicants seem to have retracted their unsupported argument that there was allegedly a "commercial relationship" between Prof. Douglas and LALIVE under the non-waivable red list of the IBA Guidelines.³⁴⁹
- 169 For the many reasons set out above, LALIVE's support of the MIDS could not reasonably cast doubt on Prof. Douglas' independence and impartiality in the Arbitration. There was therefore no obligation on Prof. Douglas to disclose information regarding that support during the Arbitration.³⁵⁰

2.1.2.4 Prof. Douglas' acquisition of Swiss nationality

- 170 As set out in the Counter-Memorial, Prof. Douglas' acquisition of Swiss nationality in August 2023 cannot form a valid basis to claim that the

³⁴⁷ See para. 77 above.

³⁴⁸ See para. 83 above. See also Counter-Memorial on Annulment, p. 24 *et seq.* (para. 78). The closest scenarios in the guidelines are on the Green List and not subject to disclosure. 2014 IBA Guidelines, at **RAL-31**, p. 26 (para. 4.3.3 ("The arbitrator teaches in the same faculty or school as another arbitrator or counsel to one of the parties, or serves as an officer of a professional association or social or charitable organisation with another arbitrator or counsel for one of the parties") or para. 4.3.4 ("The arbitrator was a speaker, moderator or organiser in one or more conferences, or participated in seminars or working parties of a professional, social or charitable organisation, with another arbitrator or counsel to the parties"))).

³⁴⁹ See para. 84 above; Reply on Annulment, p. 59 (para. 121); Memorial on Annulment, p. 37 *et seq.* (para. 83).

³⁵⁰ See section 2.1.1.3 above.

Tribunal was improperly constituted.³⁵¹ Nor was it a circumstance that Prof. Douglas was required or could have been expected to disclose.³⁵²

- 171 In their Reply, the Applicants concede that (i) neither the ICSID Convention nor the ICSID Rules prohibit a tribunal president and a co-arbitrator from sharing the same nationality and that (ii) Article 39 of the ICSID Convention³⁵³ imposes a nationality restriction only where a majority of the tribunal shares the nationality **of one of the disputing parties**.³⁵⁴ As none of the Tribunal members in this case shared the nationality of either disputing party, the ICSID Convention's nationality requirements were met throughout the Arbitration.
- 172 Nonetheless, the Applicants attempt to introduce a broader, unwritten standard for nationality restrictions for appointment of ICSID arbitral tribunals, and argue that even where there is no express prohibition, ICSID will not appoint a tribunal president with the same nationality as a co-arbitrator "to avoid the appearance of a lack of neutrality".³⁵⁵ Accordingly, the Applicants claim that had Prof. Douglas disclosed his application for Swiss nationality, ICSID would not have appointed Prof. Tercier, a Swiss national, as President without party agreement.³⁵⁶
- 173 In support of this claim, the Applicants rely on the ICSID Background Paper on Annulment³⁵⁷ and Prof. Schreuer's commentary on Article 52 of

³⁵¹ Counter-Memorial on Annulment, p. 44 *et seq.* (section 4.1.2.3).

³⁵² See section 2.1.1.3 above. Counter-Memorial on Annulment, p. 46 (para. 150).

³⁵³ ICSID Convention Article 39 ("The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.").

³⁵⁴ Reply on Annulment, p. 63 *et seq.* (paras. 129, 130). See Counter-Memorial on Annulment, p. 44 *et seq.* (para. 144).

³⁵⁵ Reply on Annulment, p. 64 *et seq.* (paras. 130-132).

³⁵⁶ Reply on Annulment, p. 63 *et seq.* (paras. 128, 132).

³⁵⁷ Reply on Annulment, p. 64 (para. 130) referring to ICSID Background Paper on Annulment 2024, at **AL-21**.

the ICSID Convention,³⁵⁸ as well as on “[a]rbitral practice”.³⁵⁹ This does not help the Applicants’ case.

174 First, the Applicants’ reliance on commentaries on Article 52 is misplaced. Article 52 governs the constitution of *ad hoc* annulment committees – not ICSID arbitral tribunals – and in any event does not prohibit members of an *ad hoc* committee from sharing the same nationality.³⁶⁰

175 Second, the Applicants’ references to both the ICSID Background Paper on Annulment and Prof. Schreuer’s commentary on Article 52 is misleading.

176 For instance, as in their Memorial, the Applicants quote in their Reply the ICSID Background Paper on Annulment but omit the phrase in bold below:

“[the] [nationality] restrictions serve as a crucial safeguard against potential biases and conflicts of interest, **ensuring that committee members do not possess the same nationality as the disputing parties, thereby** maintaining the integrity and impartiality of the proceedings”³⁶¹

177 Similarly, the Applicants also misleadingly quote Prof. Scheuer’s explanations of the additional nationality restrictions under Article 52, that bars *ad hoc* committee members from sharing the nationality of any member of the original tribunal, by omitting the phrase in bold below:

“The disqualification of co-nationals of arbitrators whose award is under scrutiny is based on the conception that

³⁵⁸ Reply on Annulment, p. 64 (para. 130) referring to C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**.

³⁵⁹ Reply on Annulment, p. 64 *et seq.* (para. 132).

³⁶⁰ ICSID Convention Article 52(3) (“On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute”).

³⁶¹ Reply on Annulment, p. 64 (para. 130) quoting from ICSID Background Paper on Annulment 2024, at **AL-21**, p. 15 (para. 45) (emphasis added). See also Memorial on Annulment, p. 42 (para. 97); Counter-Memorial on Annulment, p. 45 (para. 145).

annulment of an award implies a severe censure of the arbitral tribunal and that the small group of individuals from one country who qualify as arbitrators and members of *ad hoc* committees will be linked by close professional affinity so as to impair dispassionate judgment”.³⁶²

- 178 The Applicants’ attempt to cherry-pick quotes regarding Article 52 and to take them out of context to claim that the nationality restrictions for the constitution of ICSID tribunals are broader than those set out in Article 39 of the ICSID Convention,³⁶³ is highly improper.
- 179 Third, although the Applicants refer to “[a]rbitral practice,”³⁶⁴ they cite no ICSID precedents, relying instead on the “arbitral practice” set out in the Secretariat’s Guide to ICC Arbitration and commentaries regarding other “arbitral institutions”.³⁶⁵ None of these commentaries are relevant to ICSID proceedings.³⁶⁶
- 180 The Contracting Parties to the ICSID Convention deliberately limited the nationality restrictions under Article 39 to the prohibition of a majority of the tribunal from sharing the nationality **of one of the disputing parties**. No other prohibition was included, as it was not considered problematic for a majority of arbitrators to share a nationality if it was different to that of the parties.³⁶⁷

³⁶² Reply on Annulment, p. 64 (para. 130) quoting C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**, p. 82 (of the PDF) (para. 583) (emphasis added).

³⁶³ See Reply on Annulment, p. 64 (para. 131).

³⁶⁴ Reply on Annulment, p. 64 *et seq.* (para. 132).

³⁶⁵ Reply on Annulment, p. 65 *et seq.* (paras. 133, 134) referring to ICC Arbitration Rules, at **AL-83**, The Secretariat’s Guide to ICC Arbitration - 2012, Chapter 3: Commentary on the 2012 Rules, at **AL-85**, BVI International Arbitration Centre Rules, at **AL-84**, Gary Born, Challenge and Replacement of Arbitrators in International Arbitration, in INTERNATIONAL COMMERCIAL ARBITRATION § 12.03(B)(2)(2021), at **AL-86**, R. Doak Bishop *et al.*, Composition of the Arbitral Tribunal, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (2023), at **AL-87**.

³⁶⁶ See para. 26 above.

³⁶⁷ See S.W. Schill *et al.*, *Schreuer’s Commentary on the ICSID Convention*, pp. 730-739 (Cambridge, 2022), 3rd Edition, at **RAL-53**, p. 2 (para. 12) (“Neither the Convention nor the Arbitration Rules contain any rules concerning a nationality of arbitrators not related to the two parties”).

- 181 The Applicants’ argument also rests on their claim that Prof. Douglas “already had taken steps toward acquiring Swiss citizenship *before* [the] Respondent appointed him as arbitrator in this case and *before* the ICSID Secretary-General appointed Prof. Tercier as President”, since the process to acquire citizenship allegedly takes “at least 10 years”.³⁶⁸ This is mere speculation.
- 182 The exhibits relied on by the Applicants show that the 10 year period corresponds to the residency requirement to be eligible to apply for Swiss citizenship – not the length of the application process itself.³⁶⁹ Indeed, given that Prof. Douglas was based in Switzerland as of 2011,³⁷⁰ he would not have been eligible to apply for Swiss citizenship on the basis of residency at the time of Prof. Tercier’s appointment in 2018, let alone been able to take steps towards such an application.
- 183 Lastly, the Applicants now claim that, to a reasonable third person, Prof. Douglas’ acquisition of Swiss nationality in August 2023 could create an impression that “the Tribunal lacks neutrality because the Tribunal President will be more likely linked through close professional affinity to the co-arbitrator who has the same nationality”.³⁷¹ This claim is equally without merit.
- 184 The Applicants repeatedly state in their Reply that at the time of Prof. Tercier’s appointment as Tribunal President, they were aware of allegedly “close personal and professional affinity” between Prof. Douglas, Prof.

³⁶⁸ Reply on Annulment, p. 63 (para. 128) (emphasis in original). See also, p. 66 (para. 135).

³⁶⁹ Reply on Annulment, p. 63 (para. 128) referring to Switzerland State Secretary for Migration (SEM), *How do I become a Swiss citizen?* (last modified Jan. 31, 2024), at **A-53**, Switzerland State Secretariat for Migration (SEM), Ordinary naturalization dated 17 December 2020, at **A-232**.

³⁷⁰ Counter-Memorial on Annulment, p. 45 *et seq.* (para. 149); Reply on Annulment, p. 56 *et seq.* (para. 117).

³⁷¹ Reply on Annulment, p. 64 (para. 131).

Tercier and LALIVE, and had raised objections³⁷² – only to withdraw them prior to Prof. Tercier’s appointment in 2018.³⁷³

185 The Applicants still do not explain what additional “attachment”³⁷⁴ would arise due to Prof. Douglas’ acquisition of Swiss nationality in August 2023 – in addition to any known “close professional affinity”³⁷⁵ with Prof. Tercier or being based in Switzerland for over a decade – which would somehow affect his independence and impartiality *vis-à-vis* Romania in the Arbitration.

186 In sum, the Applicants’ claim regarding Prof. Douglas’ acquisition of Swiss nationality is based on speculation and mischaracterization of the legal standard. The ICSID Convention provides a clear and limited framework for nationality restrictions, which was fully respected in the constitution of the Tribunal throughout the duration of the Arbitration. There is no basis to claim that Prof. Douglas’ acquisition of Swiss nationality in August 2023 would give rise to reasonable doubts that Prof. Douglas manifestly lacked independence and impartiality in the Arbitration.

2.2 The Applicants Were Heard by an Independent and Impartial Tribunal and Have Not Established a Serious Departure from a Fundamental Rule of Procedure

187 As set out in the Counter-Memorial, the standard to establish a ground for annulment under Article 52(1)(d) is high.³⁷⁶

188 It is undisputed that under Article 52(1)(d) the Applicants bear the burden of demonstrating (a) that there has been a “departure” from a fundamental

³⁷² Reply on Annulment, p. 66 (para. 136). See also p. 63 *et seq.* (paras. 127, 137).

³⁷³ See Counter-Memorial on Annulment, p. 47 (para. 156). As set out in the Counter-Memorial, since they did not seek to disqualify Prof. Tercier in the Arbitration, they waived their right to raise these arguments at the annulment stage. Counter-Memorial on Annulment, p. 48 (para. 159).

³⁷⁴ Reply on Annulment, p. 66 *et seq.* (para. 136).

³⁷⁵ Reply on Annulment, p. 66 (para. 136). See also p. 63 *et seq.* (paras. 127, 131, 137).

³⁷⁶ Counter-Memorial on Annulment, p. 57 (para. 174).

rule of procedure; and (b) that such departure was “serious”.³⁷⁷ They continue to be unable to do so.

189 Accordingly, their claim for annulment of the Award under Article 52(1)(d) must fail.

190 In their Reply, the Applicants continue to argue that the “same reasons” that would allegedly lead a reasonable third party to reasonably doubt Prof. Douglas’ independence and impartiality “also deprived Claimants of equal treatment”, “the right to be heard”, as well as the “right to an independent and impartial tribunal”.³⁷⁸

191 However, where the Tribunal did not lack these qualities, as demonstrated in Section 2.1 above and in Section 4.1 of the Counter-Memorial, the premise for the Applicants’ claim under Article 52(1)(d) also fails.³⁷⁹ Accordingly, the Applicants do not meet the requirement that there was a departure from a fundamental rule of procedure.

192 Moreover, to the extent that the Applicants knew or ought to reasonably have known, during the Arbitration, of the circumstances giving rise to their claim regarding Prof. Douglas’ alleged lack of independence and impartiality, including LALIVE’s support of the MIDS program and Prof. Douglas’ alleged connections with Prof. Tercier, they should have raised it at the time, in accordance with ICSID Arbitration Rule 27. They did not and have now waived their right to do so.³⁸⁰

193 The Applicants have also failed to show that any alleged departure from the fundamental rules of procedure was “serious”.

³⁷⁷ Reply on Annulment, p. 69 *et seq.* (Section II(B)); Counter-Memorial on Annulment, p. 57 *et seq.* (para. 176).

³⁷⁸ Reply on Annulment, p. 69 (paras. 144, 145). As set out in the Counter-Memorial, the Applicants no longer maintain this argument with respect to Prof. Tercier in their Memorial and Reply on Annulment – see Counter-Memorial on Annulment, p. 58 (fn. 294); Annulment Application, p. 37 (para. 102) contrasted with Memorial on Annulment, p. 44 (para. 104) as well as the Reply on Annulment, p. 69 (para. 144).

³⁷⁹ See Section 2.1 above; Counter-Memorial on Annulment, p. 17 *et seq.* (section 4).

³⁸⁰ See Counter-Memorial on Annulment, p. 59 (para. 179).

- 194 It is undisputed that for a departure to be serious, the Applicants must demonstrate that it had a material impact on the Award.³⁸¹ In other words, they must show that there was “a distinct possibility that the departure may have made a difference on a critical issue of the Tribunal’s decision”³⁸² and led the Tribunal to “reach a result substantially different from what it would have awarded had such a rule been observed”.³⁸³
- 195 For example, in *Eiser v. Spain* which, involved no less than 12 instances of the arbitrator’s relationship with the claimants’ damages experts,³⁸⁴ the *ad hoc* committee evaluated the material impact of such relationship on the Award under Article 52(1)(d).³⁸⁵ The *ad hoc* committee concluded that the relationship was of “particular significance” because the tribunal adopted the expert’s model for damages “in its entirety”.³⁸⁶
- 196 Similarly, in *Fraport v. Philippines*, the *ad hoc* committee found that the admission of documents after the proceedings were closed without affording the parties an opportunity to comment on such documents, constituted a serious departure from the fundamental rule of procedure, as the tribunal had made “extensive use” of those documents in its award.³⁸⁷
- 197 In contrast, in their Reply, the Applicants simply claim that since “liability was decided by a majority that included Prof. Douglas...it is indisputable

³⁸¹ See Counter-Memorial on Annulment, p. 59 (para. 181); Annulment Application, p. 38 (para. 103).

³⁸² *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021, at **AL-58**, p. 30 (para. 137). See Counter-Memorial on Annulment, p. 60 (para. 182); Reply on Annulment, p. 71 (para. 150).

³⁸³ *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of Feb. 5, 2002, at **AL-72**, p. 16 (para. 58). See also, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment of Dec. 30, 2015, at **AL-59**, p. 24 (para. 78); *Enron Creditors Recovery Corp. and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of July 30, 2010, at **AL-66**, p. 23 (para. 71); Counter-Memorial on Annulment, p. 60 (para. 182); Reply on Annulment, p. 71 (para. 150).

³⁸⁴ See para 63 above.

³⁸⁵ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 86 (para. 247).

³⁸⁶ *Eiser v. Spain*, Annulment Decision dated 11 June 2020, at **AL-18**, p. 86 (paras. 247, 248).

³⁸⁷ See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, at **AL-76**, p. 83 *et seq.* (paras. 224, 230, 231, 235). See also, *Perenco v. Ecuador*, Decision on Annulment dated 28 May 2021, at **AL-58**, p. 28 (para. 129).

that there is a real possibility that the outcome would have been different had the Tribunal not included Prof. Douglas and instead been composed of three impartial and independent arbitrators”.³⁸⁸

- 198 However, the Applicants make no effort to explain, let alone demonstrate, how any of the alleged grounds that purportedly cast doubt on Prof. Douglas’ independence and impartiality would have had a material impact on the Award. Their claim appears to merely assume – without support – that since Prof. Grigera Naón dissented on the manner in which the Tribunal majority applied the law to the facts, there was a “distinct possibility” that the Tribunal would have reached a “substantially different” outcome in the Award, had Prof. Douglas not been on the Tribunal.³⁸⁹ In other words the Applicants allege that another tribunal (without Prof. Douglas) would have ruled against Romania.
- 199 However, it bears recalling that the Tribunal (including Prof. Douglas) ruled against the Respondent during the Arbitration on various issues. Additionally, as set out in the Counter-Memorial, the Tribunal granted the Claimants multiple opportunities to present their case, that led the Respondent on several occasions to raise due process concerns and to reserve its rights under Article 52 of the ICSID Convention.³⁹⁰
- 200 In sum, the Applicants fail to meet the requirements under Article 52(1)(d) and accordingly, their claim for annulment of the Award is without merit and must be rejected.

³⁸⁸ Reply on Annulment, p. 71 (para. 150).

³⁸⁹ See Annulment Application, p. 38 (para. 104); Memorial on Annulment, p. 46 (para. 109).

³⁹⁰ See Counter-Memorial on Annulment, p. 58 (para. 178, fn. 298).

3 THE APPLICANTS' ALTERNATIVE REQUEST TO ANNUL PART OF THE AWARD IS EQUALLY BASELESS

- 202 The Applicants continue to request, in the alternative, that the Committee annul part of the Award, based on three grounds of the ICSID Convention.
- 203 In the Reply, they have reshuffled their arguments and no longer proceed on the basis of each annulment ground – an apparent attempt both to inflate their arguments and conflate the legal standards. Yet, as shown below, their argument that there were “multiple fundamental defects mandating annulment” remains as hollow and incorrect as ever.³⁹¹ The Committee must proceed from each specific legal standard applicable to each of the annulment grounds invoked and apply it to the facts that pertain to that specific ground. To assist the Committee in this regard, the Respondent has structured this Rejoinder in the same manner as the Counter-Memorial (and as the Applicants had done in the Memorial).³⁹²
- 204 The Applicants' allegations go far beyond the scope of ICSID annulment and beyond the Committee's jurisdiction (**Section 3.1**). They furthermore fail to meet the requirements under each of the invoked annulment ground: manifest excess of power (**Section 3.2**), serious departure from fundamental rules of procedure (**Section 3.3**), and failure to state reasons (**Section 3.4**).

3.1 The Applicants' Appeal in Disguise Is Beyond the Scope of ICSID Annulment

- 205 As the Respondent explained in its Counter-Memorial, it is not in the Committee's remit to serve as a court of appeals or to re-examine the Tribunal's findings.³⁹³ Although the Applicants concede that “the annulment procedure is not an appeal,” their alternative claim does exactly that.³⁹⁴ They replead their case on the merits and request that this

³⁹¹ Reply on Annulment, p. 71 (para. 151) and p. 2 (para. 6). See also Reply on Annulment, p. 73 *et seq.* (sections III.B-F) (proceeding from each alleged “defect”, which the Applicants then attempt to connect to various annulment grounds).

³⁹² Counter-Memorial on Annulment, p. 61 *et seq.* (section 5); Memorial on Annulment, p. 47 *et seq.* (section III.).

³⁹³ Counter-Memorial on Annulment, p. 1 *et seq.* (paras. 3, 23, 53, and 311).

³⁹⁴ Reply on Annulment, p. 5 (para 14).

Committee review the extensive factual and legal findings of the Tribunal, with which the Applicants simply disagree. Their arguments are well beyond the scope of the Committee’s mandate and an abuse of the ICSID annulment mechanism.

206 The Applicants contend that the scope of review of *ad hoc* committees should not be restricted,³⁹⁵ and they rely on the *Perenco v. Ecuador* annulment decision to argue that the inquiry and analysis that *ad hoc* committees must undertake “is not merely a superficial or formal one”.³⁹⁶ However, the *Perenco v. Ecuador* committee emphasized that:³⁹⁷

- a) Annulment is “an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* [c]ommittee **is limited**”;³⁹⁸
- b) *Ad hoc* committees “are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* [c]ommittee **cannot substitute the Tribunal’s determination on the merits for its own**”;³⁹⁹ and

³⁹⁵ Reply on Annulment, p. 5 (para. 14).

³⁹⁶ Reply on Annulment, p. 5 *et seq.* (para. 15).

³⁹⁷ *Perenco Ecuador Ltd. v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment dated 28 May 2021, at **AL-80**, p. 14 (para. 64). See also ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80).

³⁹⁸ *Perenco Ecuador Ltd. v. Ecuador*, Decision on Annulment dated 28 May 2021, at **AL-80**, p. 14 (para. 64). See also ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007, at **AL-60**, p. 13 *et seq.* (paras. 24, 27); *Alapli Elektrik B.V. v. Republic of Turkey*, Decision on Annulment, ICSID Case No. ARB/08/13, 10 July 2014, at **RAL-54**, p. 9 *et seq.* (para. 32).

³⁹⁹ ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 (para. 78) (“It does not provide a mechanism to appeal alleged misapplications of law or mistakes in findings on fact. The Legal Committee confirmed by a vote that even a ‘manifestly incorrect application of the law’ is not a ground for annulment.”) and p. 53-70. See also, *e.g.*, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, at **RAL-28**, p. 52 *et seq.* (para. 239); *Tenaris S.A. and Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, at **AL-75**, p. 10 *et seq.* (paras. 43-44); *Teinver S.A. et al. v. Argentine Republic*, Decision on Argentina’s Application for Annulment, ICSID Case No. ARB/09/1, 29 May 2019, at **RAL-41**, p. 9 (para. 47).

- c) *Ad hoc* committees “should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards.”⁴⁰⁰
- 207 These principles have been consistently confirmed by *ad hoc* committees, as explained in ICSID’s Background Paper.⁴⁰¹
- 208 There is no doubt that, while “a fundamental goal of the ICSID Convention is to assure the finality of awards”,⁴⁰² annulment is an important mechanism to guarantee the fairness and integrity of ICSID arbitration.⁴⁰³ However, *ad hoc* committees do not have jurisdiction to review the substantive factual or legal conclusions of ICSID tribunals.
- 209 Each annulment ground advanced by the Applicants in their alternative claim should be reviewed with these fundamental principles in mind. While the Applicants attempt to replead their case, it would be decidedly improper for the Committee to assess the merits and engage in the substance of the Tribunal’s factual and legal findings, including in the exercise of its discretion in the evaluation of evidence. Nevertheless, since the Applicants have raised these arguments, the Respondent is once again compelled to respond to them, for the sake of completeness.
- 210 In the Reply, the Applicants do not challenge the legal standard for each annulment ground as developed by Romania in the Counter-Memorial and simply devote five paragraphs of the Reply to formulate “further observations as to the Annulment Standards”.⁴⁰⁴ The Respondent will

⁴⁰⁰ *Perenco Ecuador Ltd. v. Ecuador*, Decision on Annulment dated 28 May 2021, at **AL-80**, p. 14 (para. 64). See also ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80); *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 15 (para. 48).

⁴⁰¹ See ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80).

⁴⁰² *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, Decision on Annulment, ICSID Case No. ARB/15/20, 28 March 2022, at **RAL-55**, p. 20 (para. 92). See also Reply on Annulment, p. 5 (para. 14).

⁴⁰³ I. Shihata and A. Parra, “The Experience of the International Centre for Settlement of Investment Disputes”, *ICSID Review—Foreign Investment Law Journal* (1999), at **AL-2**, p. 341.

⁴⁰⁴ Reply on Annulment, p. 72 *et seq.* (section III.A); Counter-Memorial on Annulment, p. 62 *et seq.* (sections 5.1.1, 5.2.1, and 5.3.1).

address the Applicants' few comments in the relevant section for each annulment ground, below.

3.2 The Tribunal Majority Did Not Manifestly Exceed Its Powers

211 In the Reply, the Applicants maintain that the Award should be partially annulled under Article 52(1)(b) because the Tribunal allegedly:

- “disregarded the legal basis of Gabriel’s investment and its established rights under the applicable Romanian law by starting from the unexplained premise that the State ‘needed to revisit’ its shareholding and the level of royalties.”⁴⁰⁵
- “fail[ed] to apply the applicable law” when it “disregard[ed] the core omissions at the heart of Claimants’ case, *i.e.*, the lack of decision either for the Roșia Montană Environmental Permit or for the Bucium Applications”.⁴⁰⁶
- “impermissibly substitute[d] equitable considerations for legal analysis”.⁴⁰⁷

212 **None** of these arguments justify annulling any portion of the Award as already explained in the Counter-Memorial and in the following sections.

213 The Respondent notes at this juncture that the Applicants do not dispute in the Reply that they dropped their claim under Article 52(1)(b) in relation to the Tribunal majority’s assessment of the UNESCO designation.⁴⁰⁸

3.2.1 The Applicants do not rebut the Respondent’s explanations on the legal standard

214 As set out in the Counter-Memorial, the standard to establish that a Tribunal manifestly exceeded its powers under Article 52(1)(b) is high.⁴⁰⁹ Indeed, while this ground has been invoked in at least 90 cases in relation to an alleged failure to apply the proper law (as the Applicants claim here),

⁴⁰⁵ Reply on Annulment, p. 73 (para. 158).

⁴⁰⁶ Reply on Annulment, p. 84 *et seq.* (paras. 185, 186).

⁴⁰⁷ Reply on Annulment, p. 109 (heading III.E).

⁴⁰⁸ Counter-Memorial on Annulment, p. 81 *et seq.* (paras. 251-256).

⁴⁰⁹ Counter-Memorial on Annulment, p. 62 (para. 191).

only two awards were fully annulled and three partially annulled on that basis.⁴¹⁰

- 215 The Applicants are required to show that such an excess of powers is “self-evident rather than the product of elaborate interpretations”.⁴¹¹ Indeed, for an excess of powers to be “manifest”, it must be “obvious, clear or self-evident” and discernible “without the need for an elaborate analysis of the award.”⁴¹²
- 216 In the Reply, the Applicants continue to wrongly insist that the Committee is required to “conduct its own substantive analysis of the Tribunal’s reasoning [...] to fulfill its Article 52 mandate”.⁴¹³ However, this is beyond the Committee’s mandate. To support their position, the Applicants quote the following sentence from *EDF v. Argentina*: “[t]he reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided”.⁴¹⁴ However, in that same paragraph, the *EDF* committee also noted that it may **not “reopen[] debates on questions of fact”** and must simply “check whether it could come to [the] solution [adopted by the tribunal], however debatable.”⁴¹⁵
- 217 Indeed, *ad hoc* committees may not re-examine the facts of a case and re-evaluate the evidence that was before a tribunal, as that would act as an appellate body. As the *Adem Dogan v. Turkmenistan* committee explained:

“It is not within an *ad hoc* committee’s remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A tribunal’s discretion in such matters of appreciation and evaluation of

⁴¹⁰ ICSID Background Paper on Annulment 2024, at **AL-21**, p. 90 (para. 100).

⁴¹¹ *Wena Hotels v. Egypt*, Decision on Annulment dated 5 February 2002, at **AL-72**, p. 9 (para. 25).

⁴¹² ICSID Background Paper on Annulment 2024, at **AL-21**, p. 85 *et seq.* (para. 89).

⁴¹³ Reply on Annulment, p. 72 (para. 153).

⁴¹⁴ Reply on Annulment, p. 72 (para. 153, fn. 318).

⁴¹⁵ *EDF et al. v. Argentina*, Annulment Decision dated 5 February 2016, at **AL-12**, p. 70 *et seq.* (para. 193), quoting *Duke Energy v. Peru*, and concluding that “A debatable solution is not amenable to annulment, since the excess of powers would not then be ‘manifest’.” (emphasis added).

evidence is recognized by the ICSID system. An *ad hoc* committee cannot sit in appeal on a tribunal's assessment of the evidence."⁴¹⁶

218 Moreover, committees have consistently found that even if a tribunal "erred in the appreciation of the evidence the error would not in itself constitute a ground for annulment."⁴¹⁷

219 As the Respondent showed in the Counter-Memorial⁴¹⁸ and will develop in the following sections, the Tribunal majority applied the correct governing law in the Arbitration. The Applicants not only repeat many of the arguments they raised in the underlying Arbitration, despite them having been considered by the Tribunal majority, but they have even raised new arguments that they never made in the underlying Arbitration. As the Respondent explained in Section 3.1, it would be decidedly improper for the Committee to assess the substance of Applicants' arguments and reevaluate the evidence, as that is simply not its role. Nevertheless, since the Applicants have raised these arguments, the Respondent is once again compelled to respond to them, for the sake of completeness only.

3.2.2 The Tribunal majority correctly applied the law applicable to the Claimants' investment

220 The Applicants maintain their specious argument that the Tribunal majority exceeded its powers by disregarding the applicable law by "starting from the unexplained premise that the State 'needed to revisit' its shareholding and the level of royalties".⁴¹⁹ Their case remains as flawed as in the Memorial and stands to be dismissed for the reasons explained in the Counter-Memorial.⁴²⁰

221 As the Respondent explained in the Counter-Memorial, the Tribunal correctly stated that it was "adjudicating the present case under

⁴¹⁶ *Adem Dogan v. Turkmenistan*, Decision on Annulment, ICSID Case No. ARB/09/9, 15 January 2016, at **RAL-56**, p. 42 *et seq.* (para. 129) (emphasis added).

⁴¹⁷ *Adem Dogan v. Turkmenistan*, Decision on Annulment dated 15 January 2016, at **RAL-56**, p. 43 (para. 130). See also *Soufraki v. UAE*, Decision on Annulment dated 5 June 2007, at **AL-60**, p. 41 *et seq.* (para. 87).

⁴¹⁸ Counter-Memorial on Annulment, p. 61 *et seq.* (section 5.1).

⁴¹⁹ Reply on Annulment, p. 73 *et seq.* (para. 158 and section III.B.1).

⁴²⁰ See Counter-Memorial on Annulment, p. 72 *et seq.* (paras. 222-231).

international law”, and Romanian law may be relevant “to determine, where appropriate, the scope and extent of the rights and obligations of the Parties.”⁴²¹

- 222 There has never been any dispute in the underlying Arbitration that, as a matter of fact, Romanian law governs the two contracts under which the Claimants’ rights arose: RMGC’s Articles of Association and the Roşia Montană License.⁴²² However, in the Arbitration, the Claimants did not invoke the two contracts in relation to the License negotiations of 2011⁴²³ as they now claim, but rather did so in the context of their umbrella clause claim.⁴²⁴
- 223 The Applicants do not dispute this in their Reply, and have failed to show otherwise. Therefore, it stands to reason that the Tribunal majority did not elaborate in the Award on the issue of the application of Romanian law to the Claimants’ contractual rights in the context of the 2011 negotiations. The Committee should disregard the Applicants’ attempt to raise new arguments that it did not make in the Arbitration.⁴²⁵ Since the Applicants have raised these points again in the Reply, the Respondent is once again compelled to respond to them, for the sake of completeness only.
- 224 While the Applicants clarify that the law allegedly disregarded by the Tribunal was (i) the Mining Law, and (ii) the Company Law, they still do

⁴²¹ Counter-Memorial on Annulment, p. 66 (paras. 198 and 200) quoting Award, p. 107 (para. 566) and see also p. 65 (para. 197) (setting out the applicable law provisions in the BITs).

⁴²² Reply on Annulment, p. 74 (para. 160) (referring to Award, p. 4 *et seq.* (paras. 9-16)); Counter-Memorial on Annulment, p. 72 (para. 222).

⁴²³ Counter-Memorial on Annulment, p. 73 (paras. 224-225).

⁴²⁴ Award, p. 189 (fn. 545, paras. 898-899) (setting out the Claimants’ argument that the obligation to observe undertakings under the UK-Romania BIT extended to commitments made through these instruments, regardless of whether or not they were formed directly between the State and the investor). See Counter-Memorial on Annulment, p. 73 (paras. 224-225).

⁴²⁵ See *Adem Dogan v. Turkmenistan*, Decision on Annulment dated 15 January 2016, at **RAL-56**, p. 40 (para. 121) (“the Committee examined the pleadings of the Parties and the transcript of the proceedings before the Tribunal. It appears that the Respondent [the applicant in the annulment proceedings] did not argue that either Şöhrat-Anna or Samşyt, the proprietary entities in which the Claimant claimed to have an interest, were not juridical persons. The legal personality of Şöhrat-Ana and Samşyt was, therefore, **never an issue in the arbitration proceedings**. The Tribunal, therefore, rightly did not consider this argument and **nothing would turn on the Committee proceeding to examine it in any further detail.**”) (emphasis added).

not explain how exactly “the majority failed to apply those provisions of Romanian law”.⁴²⁶ The Claimants’ claims in the Arbitration were not based on the compliance or non-compliance of these specific provisions.⁴²⁷

- 225 In any event, as an *ad hoc* committee recalled, “omitting to apply individual provisions of [domestic] law [...] would not be a ground for annulment of the Award.”⁴²⁸ The Applicants’ references to the “stabilization” function of the Mining Law or the “good faith” obligation arising under the Company Law⁴²⁹ are beside the point.
- 226 Moreover, the Applicants purport to portray a sense of definiteness of the terms of the license and articles of association which is not correct under Romanian law. The Applicants recognize that Romanian law allows parties to negotiate contractual terms, including amendments to existing agreements, and in the case of mining contracts to amend the level of royalties, **by mutual agreement**.⁴³⁰ That is precisely what RMGC and Romania did in 2009 through Addendum No. 7 to the Roșia Montană License,⁴³¹ and in 2011 when the Claimants were engaged in renegotiating the contractual terms, including the royalties.⁴³² Such negotiations also

⁴²⁶ Reply on Annulment, p. 76 *et seq.* (para. 167) purporting to respond to Counter-Memorial on Annulment, p. 73 (para. 226) (where the Respondent noted that the Applicants had not identified the relevant provisions).

⁴²⁷ See Counter-Memorial on Annulment, p. 73 (paras. 224-225).

⁴²⁸ *Adem Dogan v. Turkmenistan*, Decision on Annulment dated 15 January 2016, at **RAL-56**, p. 49 *et seq.* (para. 150).

⁴²⁹ Reply on Annulment, p. 76 *et seq.* (para. 167). The Applicants’ reference to Prof. Bîrsan’s legal opinion is unnecessary given the irrelevance of the point raised, see also para. 269 below.

⁴³⁰ Reply on Annulment, p. 76 (para. 167) (“the law applicable to the Roșia Montană License [...] made the royalty a civil law (contractual) obligation **that could only be modified by mutual agreement of the parties**”) (emphasis added).

⁴³¹ Reply on Annulment, p. 75 *et seq.* (fn. 333 and para. 167).

⁴³² Counter-Memorial on Annulment, p. 74 (para. 228) referring notably to Award, p. 26 *et seq.* (paras 119-149) (where the Tribunal starts its description of the “2011 renegotiation of the financial terms of the Project” by describing the 19.31% and 80.69% of the RMGC shares held by the State and Gabriel, respectively, and the 4% “royalty on the gross revenue from eventual production” pursuant to “the Roșia Montană License, **as amended**”) (emphasis added)); see also Award, p. 27 (para. 127) [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
(emphasis added).

took place in 2013.⁴³³ As the Respondent noted in the Counter-Memorial, the Tribunal majority concluded that the record of the Arbitration showed that the Claimants were engaged in the negotiations and did not object at the time, that the parties’ understood such negotiations to be consistent with the applicable legal framework, as well as the contractual instruments.⁴³⁴

- 227 Since the parties were not able to reach an agreement during the negotiations in 2011, the previously agreed level of royalties continued to apply. The Respondent thus explained in the Counter-Memorial that “the contractual framework [...] remained operative and served as the legal basis upon which the Project continued”.⁴³⁵ The Applicants disagree with this conclusion and state, without any support, that the Tribunal majority’s decision was based “on its assessment that permitting procedures continued with several elements remaining to be decided by the Government, which in the majority’s view included the economics”.⁴³⁶ The Applicants’ unsupported characterization of the Award makes little sense, and seems to conflate the permitting process with the Applicants’ allegations concerning the law applicable to the Investment.⁴³⁷
- 228 Because the negotiations failed and the previously agreed royalties and framework remained in place, the Tribunal majority did not fail to recognize the “force and effect” of the percentage shareholding and the royalties payable to the State, as the Applicants contend.⁴³⁸
- 229 The Applicants purport to demonstrate their point by referring to the “consistent line of public statements from the government side that pertained to the economic terms of the Project and the need to revisit them in light of the situation”.⁴³⁹ These public statements are irrelevant to their applicable law argument, but simply provide the factual context in which

⁴³³ See para. 303 below.

⁴³⁴ Counter-Memorial on Annulment, p. 74 (para. 228) referring to Award, p. 39 *et seq.* (paras. 119-149).

⁴³⁵ Counter-Memorial on Annulment, p. 74 (paras. 229-230).

⁴³⁶ Reply on Annulment, p. 76 (para. 166).

⁴³⁷ Reply on Annulment, p. 76 (para. 166).

⁴³⁸ Reply on Annulment, p. 77 (para. 167).

⁴³⁹ Reply on Annulment, p. 74 (para. 161).

the negotiations took place. Indeed, the 2008 economic crisis had hit Romania hard, prompting the State to explore all its revenue generating options, including in relation to the Project considering that “gold prices were significantly higher than before and were expected to rise even further.”⁴⁴⁰

- 230 In addition, the Applicants wrongly emphasize that the Tribunal majority “did not refer to Romanian law” or to the contracts underlying the Claimants’ investment when it concluded that economic issues were “open”, “pending”, or “needing to be revisited” in 2011.⁴⁴¹ They thereby disregard the context in which the public statements were made in 2011. The Tribunal majority noted that there were statements by “Ministers or State officials” made “in the wider discussion of the implementation of the Project, not just or specifically on the issue of permitting”.⁴⁴² References to “open” or “pending” issues are thus not to be taken as legal qualifications but against this factual narrative, which the Applicants willfully ignore.
- 231 The Applicants jump from this alleged failure to apply Romanian law (*quod non*) to the conclusion that “the majority had no basis to apply, and thus could not have applied, the BIT standards to assess the effects of the State’s treatment on Gabriel’s investment, including on those contract rights.”⁴⁴³ This is such a stretch – all the more given the total lack of support provided by the Applicants.
- 232 Given that the Applicants do not invoke any other alleged failure to apply Romanian law in connection with RMGC and the Claimants’ contractual rights,⁴⁴⁴ there is no reason for the Committee to accept annulling any portions of the Award.

⁴⁴⁰ Award, p. 202 (para. 947); see Counter-Memorial on Annulment, p. 106 (para. 332) (noting that by 2011 the “State was looking for revenue sources to deal with the devastating consequences in Romania of the economic crisis of 2008.”).

⁴⁴¹ Reply on Annulment, p. 75 *et seq.* (paras. 162 and 167).

⁴⁴² Award, p. 208 (para. 950). See also Counter-Memorial on Annulment, p. 105 (para. 330).

⁴⁴³ Reply on Annulment, p. 77 (para. 168).

⁴⁴⁴ See also Reply on Annulment, p. 4 (para. 13b.) (framing the “issue that should lead to annulment” as being “that the majority’s conclusion was predicated upon its disregard of the

3.2.3 The Tribunal majority correctly applied the law regarding the Roşia Montană environmental permitting procedure

233 Before addressing the arguments relating to the Tribunal majority’s application of the law regarding the EIA Process (in **Section 3.2.3.2**), the Respondent must dispel the Applicants’ misleading statements that Romania failed to issue decisions and abandoned the permitting processes without explanation (**Section 3.2.3.1**).

3.2.3.1 The Applicants make misleading statements relating to the permitting procedure

234 In their Reply, the Applicants make a series of misleading statements that they present as a “central aspect of Claimants’ case”, namely that (i) “the Government abandoned the legal framework” by “fail[ing] to take any decision” and that (ii) the “administrative procedures simply stopped without any decision”, and the Tribunal majority failed to consider or address these issues.⁴⁴⁵ These arguments have no basis.

235 First, the Applicants argue (and repeat, also in connection to other annulment grounds) that when assessing Romania’s compliance with the BITs, the Tribunal should have found Romania liable for not issuing a decision on the Roşia Montană Environmental Permit and the Bucium Applications.⁴⁴⁶ However, this is a matter of substantive disagreement that falls outside the scope of review of the Committee.⁴⁴⁷

236 In assessing Romania’s actions and omissions under the BITs, the Tribunal majority correctly recalled the **scope of its mandate**:

“it is **not required to substitute itself for Respondent** or the State or State entities **in deciding whether a decision made was wrong**

law applicable to Gabriel’s investment, according to which Gabriel’s established rights in the Project economics were not open to be renegotiated.”).

⁴⁴⁵ See notably Reply on Annulment, p. 82 *et seq.* (paras. 182-185).

⁴⁴⁶ Reply on Annulment, p. 84 *et seq.* (paras. 185, 188-189, 196-198 and 208) (regarding an alleged excess of powers), para. 209 (regarding an alleged due process violation) and paras. 227 and 230 (regarding an alleged failure to state reasons). The Applicants elsewhere inconsistently allege that “[t]o assess liability, the majority did not need to decide whether the permitting requirements were met”. Reply on Annulment, p. 99 (para. 227).

⁴⁴⁷ See para. 205 above; Counter-Memorial on Annulment, p. 65 *et seq.* (fn. 325 and para. 201).

in law or fact. Instead, it must consider whether the State acted in accordance with international law with respect to a decision, or act, or omission. This is not only because States are sovereigns with the primary responsibility to regulate, but also because **the mandate of this Tribunal, and any investor-State tribunal, is different in scope to that of a State’s regulatory agency or court.**”⁴⁴⁸

237 This finding is consistent with the position regularly taken by ICSID tribunals when it comes to the conduct of domestic authorities in regulatory matters.⁴⁴⁹

238 Second, the Applicants repeatedly allege that the environmental permitting procedure was “abandoned [by the State]” or “simply stopped” “without explanations” and that no decision was taken on the Bucium Applications.⁴⁵⁰ However, the Tribunal majority examined the factors that explain the absence of a decision, including the complexity of the Project and of the EIA Process, the involvement of many stakeholders including numerous State authorities, and social opposition.⁴⁵¹ It concluded that these factors did not amount to arbitrary or otherwise wrongful conduct by the Respondent under the BITs and international law.⁴⁵² Moreover, in the

⁴⁴⁸ Award, p. 181 (para. 857 second bullet) (emphasis added).

⁴⁴⁹ See, e.g., *Antonio del Valle Ruiz and Others v. Spain*, Final Award, PCA Case No. 2019-17, 13 March 2023, at **RAL-57**, p. 139 (para. 520) and p. 164 (para. 584) (finding that “international law requires tribunals to afford an appropriate level of deference to the manner in which a State exercises the discretion” and “should not second-guess the correctness of [the national authority’s decision]”). See also *S.D. Myers v. Canada*, Partial Award, 13 November 2000, at **RLA-051**, p. 65 *et seq.* (para. 263); *Saluka Investments B.V. (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006, at **CLA-97**, p. 45 (para. 305) (emphasizing the “high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders”).

⁴⁵⁰ Reply on Annulment, p. 3 *et seq.* (para. 13a.), p. 88 (para. 195) (regarding an alleged excess of powers), p. 92 (para. 209) (regarding an alleged due process violation), and p. 99 (para. 227) (regarding an alleged failure to state reasons).

⁴⁵¹ Award, p. 201 *et seq.* (paras. 943-945, 985, 999, 1016, 1036-1039, and 1080) (for Roșia Montană) and p. 308 (para. 1163) (for Bucium).

⁴⁵² Award, p. 239 *et seq.* (paras. 981-982, 998, 1013-1015, 1034, 1040, 1083-1084, and 1090), p. 332 (para. 1243) (for Roșia Montană) and p. 307 (paras. 1162 and 1164) (for Bucium).

Arbitration, the Respondent showed that the permitting process was abandoned by the Claimants (not the Respondent).⁴⁵³

239 As the Tribunal majority also recorded in the Award, the permitting process for the Project did not stop in 2013. For example, the validity of an urbanism certificate was extended for 24 months in March 2015, dam safety approvals were issued in October 2017, and the Roşia Montană License was renewed in June 2019 “by joint agreement of the NAMR [the State authority for mining] and RMGC.”⁴⁵⁴ The Tribunal majority also referred to Gabriel Canada’s public disclosures of late 2013 and 2014 which described the permitting process as ongoing.⁴⁵⁵

240 It is thus wrong to claim – as the Applicants do – that the Tribunal majority “fail[ed] to address these undisputed facts”.⁴⁵⁶ These facts were disputed and the Tribunal majority did assess the circumstances leading to the absence of decision regarding RMGC’s application for an environmental permit. The Applicants’ attempt to “appeal” these findings before the Committee should be rejected.

3.2.3.2 The Applicants have not demonstrated any failure to apply the law regarding the Roşia Montană permitting process

241 The Applicants maintain that the Tribunal majority “manifestly exceeded its power by failing to apply the applicable law” to the “Roşia Montană Environmental Permitting Procedure”.⁴⁵⁷

242 However, the Applicants continue to rely on a distorted reading of the Tribunal majority’s statement that its assessment did not turn on the

⁴⁵³ Award, p. 164 *et seq.* (paras. 800 and 803) (noting the Respondent’s position that RMGC did not meet the permitting requirements in 2011 and subsequently); 2019 Consolidated Hearing Transcript, at **RA-78**, p. 378 *et seq.* (of the PDF) Day 1, 399-444, notably 399:14-19 (Respondent noting “RMGC never met the requirements for the Environmental Permit.”), 430:1-2 (“RMGC needed but did not have in place valid urban plans.”), 444:6-7 (“In 2011 and 2013 RMGC also did not comply with the Water Framework Directive.”); Respondent’s Rejoinder in the Arbitration, p. 69 *et seq.* (section 3.3.2) and p. 172 *et seq.* (sections 3.6.1.1-3.6.1.7).

⁴⁵⁴ Award, p. 329 *et seq.* (para. 1239).

⁴⁵⁵ Award, p. 331 *et seq.* (paras. 1240-1242).

⁴⁵⁶ Reply on Annulment, p. 92 (para. 209).

⁴⁵⁷ Reply on Annulment, p. 84 *et seq.* (para. 185, section III.C.1a).

question “whether the prerequisites for obtaining the Environmental Permit were met at different points in time”.⁴⁵⁸ In the Applicants’ view, that statement is evidence that “the majority disregarded the entire legal framework applicable to the environmental permitting process for the Roşia Montană Project”.⁴⁵⁹ As already explained, this is incorrect.⁴⁶⁰

- 243 The Applicants quote but do not take into account in their analysis the rest of the Tribunal majority’s statement, namely that what it “must focus on [is] whether the **process** met the minimum standards under international law” and the relevant treaty provisions.⁴⁶¹ For this reason alone, the Applicants’ case fails. The Tribunal did consider the process as well as the framework under Romanian law as part of its analysis under the FET standard, as also explained in the Counter-Memorial.⁴⁶²
- 244 In sum, the argument that the Award does “not consider the law that governed the environmental permitting procedure” is plainly wrong,⁴⁶³ and, as demonstrated below, the Applicants fail to demonstrate an excess of powers by the Tribunal, let alone a manifest excess of powers in this regard.⁴⁶⁴ Furthermore, the Applicants’ case goes beyond the scope of what the Committee’s mandate provides. For the sake of completeness, the Respondent will nevertheless address in the following sections the Applicants’ arguments in turn; first the Applicants’ arguments on the

⁴⁵⁸ Reply on Annulment, p. 85 (paras. 187) referring to Award, p. 201 *et seq.* (para. 965, see also para. 944) (“The decisive factor for assessing the international liability of Respondent is not the outcome, *i.e.*, **whether or not the Permit should have been granted or whether the Project should have gone ahead**, but rather the process itself.”) (emphasis added); Counter-Memorial on Annulment, p. 66 (para. 200) (already noting the Applicants’ reference to this statement of the Tribunal majority).

⁴⁵⁹ Reply on Annulment, p. 85 (paras. 186-189) referring to Award, p. 201 *et seq.* (paras. 944, 965, and 783).

⁴⁶⁰ Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 232-250).

⁴⁶¹ Award, p. 201 *et seq.* (para. 965) (emphasis added); Reply on Annulment, p. 85 (para. 187).

⁴⁶² Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 234-239 and 241); Award, p. 107 (paras. 565-566) (“Romanian law may also be considered generally to determine, where appropriate, the scope and extent of the rights and obligations of the Parties alleged to give rise to the [...] claims on the merits”).

⁴⁶³ Reply on Annulment, p. 86 *et seq.* (paras. 188 and 193-197).

⁴⁶⁴ Furthermore, as noted in paras. 217-218 above, even if the Tribunal majority had erred in the application of the law (*quod non*), a mere error in the application of law could not justify annulment.

application of Romanian law, then their complaints that the Tribunal majority relied on political considerations and allegedly failed to address the lack of any decision on the environmental permit application.

The Tribunal majority's application of the law

- 245 The Applicants' contention that the Tribunal majority "only described/recited" the EIA Process but failed to "apply the law"⁴⁶⁵ misrepresents the structure and reasoning of the Award, which goes far beyond describing the regulatory framework.
- 246 The Tribunal majority engaged in a substantive legal assessment of whether Romania's actions and omissions in connection with the EIA Process for the Project breached its obligations under the FET standard of the BITs.⁴⁶⁶ As summarized in the Counter-Memorial,⁴⁶⁷ the Tribunal majority assessed, step by step, whether the Romanian authorities' actions and omissions – in relation to *e.g.* the suspension of the TAC process between 2007 and 2013, the handling of the urbanism certificates and of the archaeological discharge certificates – involved "egregious delay or negligence" or a lack of transparency or due process,⁴⁶⁸ which the Tribunal had identified as forming part of the applicable legal standard under the BITs.⁴⁶⁹
- 247 After methodologically setting out the Romanian legal framework relating to the EIA Process and how it was carried out for the Project, the Tribunal

⁴⁶⁵ Reply on Annulment, p. 87 (para. 193) purporting to respond to Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 234-235 and 238-239).

⁴⁶⁶ Award, p. 212 *et seq.* (paras. 961-972 and paras. 19 *et seq.*) and p. 239 (para. 981) (finding that "based on the record before it, the Tribunal cannot conclude that [...] matters were resolved at that time, and that Romania should have issued the Environmental Permit but did not. Nor can it point to any impropriety, intentional or otherwise, on the part of the State during this and the subsequent meetings."). See also Award, p. 175 *et seq.* (paras. 833–862) (where the majority set out the legal test under FET, drawing on investment jurisprudence and identifying arbitrariness, lack of transparency, and denial of due process as the relevant criteria).

⁴⁶⁷ See Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 235-237).

⁴⁶⁸ Award, p. 7 *et seq.* (paras. 18-118, 783-784, 961-1094, and 1227-1244).

⁴⁶⁹ See notably Award, p. 181 *et seq.* (paras. 856-858 and 944-980) (setting out the Tribunal majority's extensive reasoning on arbitrariness, transparency, and due process).

majority found that this process had been conducted professionally.⁴⁷⁰ Irrespective of the Applicants' comments on this terminology,⁴⁷¹ it is obvious that the Tribunal majority applied the law to the facts and did not merely recite the law or describe the procedure as the Applicants claim.

- 248 The Applicants misrepresent how the Tribunal majority analyzed the issue of the absence of a decision on the environmental permit application, by “only” framing it as the question “whether the debates in the TAC meetings conducted during the EIA Process were reasonable.”⁴⁷² The Tribunal majority went well beyond assessing the debates in the TAC meetings.
- 249 It follows that there was no need for the Tribunal to assess whether the requirements for each permit or approval were met at any given time.⁴⁷³ Under the guise of complaining that the Tribunal majority failed to apply Romanian law as part of its FET assessment, the Applicants conflate a legality review under domestic law and a determination on an international treaty breach. Put simply, the Applicants wrongly seek to recast the Tribunal majority's (correct) refusal to act as a domestic appellate body, as a failure to apply the applicable law – the Committee cannot let this succeed.⁴⁷⁴
- 250 Similarly, the Applicants' assertion that the Award “describes other permits addressed in the EIA Process” which “does not correct for [sic] the majority's failure to apply the applicable law” misses the point.⁴⁷⁵ The Tribunal's references to ancillary permits and authorizations were integral

⁴⁷⁰ Award, p. 239 (paras. 978-979) (affirming that the process “was conducted professionally and in a manner that took into account the scale, complexity, gravity, and sensitivity of the Project and without evidence of egregious delay or negligence such that the derailment of the process would be inevitable, whether intentional or not.”).

⁴⁷¹ Reply on Annulment, p. 88 (para. 196) (alleging that the authorities' professional conduct “does not respond to the majority's failure to consider the Romanian law provisions) purporting to respond to Counter-Memorial on Annulment, p. 78 (para. 241).

⁴⁷² Reply on Annulment, p. 4 (para. 13a.).

⁴⁷³ Reply on Annulment, p. 88 (para. 194) purporting to respond to Counter-Memorial on Annulment, p. 76 (para. 237).

⁴⁷⁴ See section 3.1 and paras. 235-237 above.

⁴⁷⁵ Reply on Annulment, p. 88 (para. 194) purporting to respond to Counter-Memorial on Annulment, p. 76 (para. 237).

to its application of the FET standard as they served to demonstrate the complexity and technical interdependence of the EIA requirements at play.

- 251 The Applicants also wrongly assert that “while Respondent argued that the requirements for issuing the Environmental Permit were not met, the majority did not rule on that issue.”⁴⁷⁶ However, the Tribunal majority found that Romania had no obligation, under the applicable law, to issue the permit following the TAC meetings of November 2011 and the subsequent meetings in 2013-2015.⁴⁷⁷
- 252 As noted above, the Applicants state in the Reply that the environmental permitting procedure “simply stopped” or was “abandoned [by State authorities]”.⁴⁷⁸ This is wrong as a matter of fact and does not reflect the findings in the Award. The Tribunal majority considered the EIA Process (including the circumstances surrounding the Respondent’s non-issuance of a decision regarding the environmental permit application) and considered whether there had been a breach of the FET standard (through arbitrariness, bad faith, or lack of due process, etc.). It found that the Respondent’s acts and omissions with regard to the EIA Process, including the absence of a decision, did not amount to a breach of the BITS.⁴⁷⁹
- 253 Similarly, the Applicants’ convoluted explanations regarding the scope of the Tribunal majority’s findings on the absence of decision on the environmental permit application in 2011 or subsequently,⁴⁸⁰ illustrate once more their selective reading of the Award. Contrary to the Applicants’ allegations, the Tribunal majority’s reasoning encompassed the entire

⁴⁷⁶ Reply on Annulment, p. 88 (para. 194) and p. 4 (para. 13a.) purporting to respond to Counter-Memorial on Annulment, p. 6 *et seq.* (paras. 25-29).

⁴⁷⁷ See, e.g., Award, p. 239 *et seq.* (paras. 980-982), see also fn. 484 below.

⁴⁷⁸ Reply on Annulment, p. 88 (para. 195) purporting to respond to Counter-Memorial on Annulment, p. 77 (para. 238); see para. 238 above.

⁴⁷⁹ See para. 238 above.

⁴⁸⁰ Reply on Annulment, p. 88 (para. 197) purporting to challenge the Respondent’s reference to unresolved issues in November 2011 and subsequently in Counter-Memorial on Annulment, p. 78 (para. 242).

relevant period (2011-2015) and its analysis of the EIA Process did not stop in 2011.⁴⁸¹

- 254 The main new argument raised in the Reply pertains to the alleged requirement that the “legal framework [...] required issuance – within a given timeframe – of a decision”.⁴⁸² In support, the Applicants refer to the Legal Opinion of Prof. Mihai. However, this was a disputed question of law and fact in the Arbitration, and the record was rife with documentary and expert evidence that the Applicants’ position was wrong under Romanian law and as a matter of fact.⁴⁸³ It is not this Committee’s role to reevaluate that evidence, as partially presented by the Applicants. Ultimately the Tribunal majority found that not all matters had been resolved, not all questions posed and concerns raised by State authorities’ in the context of the EIA Process had been addressed, such that Romania could not issue a decision on the application on the environmental permit.⁴⁸⁴ Moreover, and in any event, the issue of compliance with an

⁴⁸¹ See para. 239 above; see also, *e.g.*, Award, p. 240 (para. 982) (referring to the lack of “impropriety, intentional or otherwise, on the part of the State during this [meeting of November 2011] and the subsequent meetings”) and p. 332 (para. 1243) (“the Tribunal cannot accept Claimants’ theory that what followed the rejection of the Draft Law [*i.e.*, in 2013] was not a genuine or *bona fide* regulatory process, at least with respect to the further meetings that took place at the TAC”).

⁴⁸² Reply on Annulment, p. 85 *et seq.* (paras. 186 and 188-189).

⁴⁸³ *E.g.*, Dragoş Legal Opinion dated 22 February 2018, p. 66 *et seq.* (paras. 366-372) (where Romania’s legal expert noted that “the environmental laws provide for **no specific deadline** within which the request for an EP should be solved, it results that the **general 30-day term** in Art. 2 letter h) of Law 554/2004 is applicable. The deadline **starts to run as of a complete request** submitted by the petitioner. Hence, should RMGC have considered that its request for the issuance of the EP was grounded and that the request should have been allowed, it had the possibility to file a claim against the lack of response from the Ministry of Environment, after 30 days as of that date (**when it considered all of the conditions met**).”) (emphasis added).

⁴⁸⁴ The Tribunal majority noted that RMGC still had to meet certain steps. *E.g.*, Award, p. 239 (para. 981) (“based on the record before it, the Tribunal cannot conclude that the 29 November 2011 meeting was the last TAC meeting, that matters were resolved at that time, and that Romania should have issued the Environmental Permit but did not.”), p. 237 (para. 977 fifth bullet) (“That things were still pending is evidenced by a report communicated [...] on 6 March 2013 referring specifically to, among other things, the ongoing work of the TAC, **specific steps to be undertaken by RMGC** as well as the ongoing status of the disputed points [...]”) (emphasis added), p. 239 (para. 979) (“In the TAC meeting of 14 June 2014, it was said that they were not opposed to mining projects, but there were concerns, and **those concerns, whether valid or not, needed to be addressed** given the public’s interest in the Project.”)

alleged timeframe for the issuance of a decision (which was disputed in the Arbitration) would not justify annulling any portion of the Award.⁴⁸⁵

- 255 Finally, the Applicants wrongly argue that the Tribunal majority’s assessment of Romania’s conduct of the EIA Process “was neither a ‘plausible’ nor ‘tenable’ application of law [but] an express disregard of the applicable law” because of the manner in which “the majority framed the issue” allegedly to “avoid consideration of the Romanian law that governed the EIA Process”.⁴⁸⁶ It is clear that the Applicants simply disagree with the substance of the Tribunal majority’s findings.

The Applicants still wrongly allege that the Tribunal majority based its decision on “politics”

- 256 The Applicants maintain their argument that the Tribunal majority “concluded without any legal basis that the permitting decision could be based on politics” even though “political factors were not part of the EIA Process in the applicable Romanian law”.⁴⁸⁷ According to the Applicants, by allegedly framing the permitting decision as “political,” the Tribunal majority omitted to consider the applicable legal framework. This argument is absurd.⁴⁸⁸
- 257 First, the Tribunal majority did not conclude that the “permitting decision could be based on politics”. Nowhere does the Award contain any such conclusion or even make such a suggestion.

(emphasis added); p. 346 *et seq.* (para. 1301 third bullet) (“Likewise, there is **no evidence that Claimants took steps to apply and secure the required missing ADCs**. As such, the Tribunal cannot point to anything to support the allegation that Claimants would not be able to obtain the declassification of the Roşia Montană area from the LHM.”).

⁴⁸⁵ See paras. 217-218 above.

⁴⁸⁶ Reply on Annulment, p. 89 (para. 198) purporting to respond to Counter-Memorial on Annulment, p. 79 (para. 243).

⁴⁸⁷ Reply on Annulment, p. 85 *et seq.* (paras. 186 and 190-192); see also Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 232 and 239).

⁴⁸⁸ Counter-Memorial on Annulment, p. 77 *et seq.* (para. 239).

- 258 To the contrary, the Award details the legal framework governing the EIA Process, as the Respondent recalled in the Counter-Memorial.⁴⁸⁹ The Applicants do not deny this, but nevertheless still refer to the alleged lack of “any reference in its liability assessment to the extensive evidence [...] regarding the Romanian legal and administrative framework governing the EIA Process”.⁴⁹⁰ This statement is highly misleading given the extensive references to the legal framework governing the EIA Process.
- 259 Second, the Claimants argued in the Arbitration that the Respondent’s non-issuance of an environmental permit was due to political reasons.⁴⁹¹ The Tribunal majority rejected that argument, finding that there had been no political interference in the EIA Process.⁴⁹²
- 260 Third, the Tribunal majority noted the political **context** surrounding the Project – a fact that was undisputed considering the large-scale and unprecedented nature of this project.⁴⁹³
- 261 However, contrary to the Applicants’ contentions, the Tribunal majority’s reference to this political context obviously does not mean that the Tribunal majority was not applying the law.⁴⁹⁴

⁴⁸⁹ Counter-Memorial on Annulment, p. 75 (paras. 234-237) (referring notably to Award, p. 7 *et seq.* (paras. 18-118, 961-1094, and 1227-1244). These referenced paragraphs are not only found in the summary of the facts at the start of the Award but also in “Section IV. Liability”).

⁴⁹⁰ Reply on Annulment, p. 86 *et seq.* (para. 190).

⁴⁹¹ Counter-Memorial on Annulment, p. 77 *et seq.* (para. 239); see, *e.g.*, Award, p. 155 (para. 767) (“whether **the allegedly politicized treatment of RMGC’s application for permitting** of the Roşia Montană Project was a measure that resulted in breaches of the UK-Romania and Canada-Romania BITs.”) (emphasis added).

⁴⁹² See, *e.g.*, Award, p. 158 *et seq.* (paras. 783-784 and 1196).

⁴⁹³ See, *e.g.*, Award, p. 158 *et seq.* (paras. 783-784) (where the Tribunal majority noted that “the EIA Process [...] was intrinsically linked to **politics**” amongst a dozen other “potential impacts”, and that the “EIA was therefore a complex process [...] as it touch[ed] not only on environmental, social and cultural issues, but also on legal, economic and political ones.”); see also Award, p. 316 (para. 1196) (“Politics were at play here, as this was a complex project with national and transboundary implications, touching on environmental, social, legal, and economic issues, as discussed above.”). The Applicants misleadingly portray these paragraphs in the Award as “conclu[sions]”. Reply on Annulment, p. 87 (para. 190) referring to Award, p. 158 *et seq.* (paras. 783-784).

⁴⁹⁴ See Counter-Memorial on Annulment, p. 77 *et seq.* (para. 239); see also, *e.g.*, Award, p. 316 (para. 1196) (“There is no dispute that this Project was **influenced by “politics”** [...] However,

The Tribunal majority did not fail to apply any “rule that a failure to act may breach the BITs”

- 262 The Applicants argue that “the majority disregarded the applicable rule of international law that the BIT standards may be breached by a failure to act (omission).”⁴⁹⁵ As the Applicants acknowledge, the Tribunal majority stated several times that omissions could constitute a breach.⁴⁹⁶ The Applicants, however, nevertheless refer to an alleged failure to apply the “rule of international law that the BIT standards may be breached by a failure to act (omission)”, interchangeably referring to the alleged “lack of decision” as being a “failure to act” or an “omission”.⁴⁹⁷
- 263 However, the Applicants’ statement that the Tribunal majority never considered the reasons why no decision on the environmental permit application was issued⁴⁹⁸ is patently incorrect as explained in paragraphs 237-239 above.⁴⁹⁹

- 264 In sum, what the Applicants describe as a purported “failure to apply Romanian law” in connection with the EIA Process corresponds to the Tribunal majority’s application of the FET standard under both BITs to the facts of the case as established within the Romanian legal context.⁵⁰⁰ The Tribunal assessed whether Romania’s alleged conduct – including allegations of delay, political interference, and wrongful suspension of the EIA Process – was arbitrary, discriminatory, or contrary to due process.⁵⁰¹

this **does not mean** that the process was “politically” influenced in the manner alleged by Claimants, *i.e.*, **in violation of fundamental notions of justice** and in violation of **due process** and Claimants’ rights.”) (emphasis added).

⁴⁹⁵ Reply on Annulment, p. 85 *et seq.* (paras. 186 and 204-208) purporting to respond to Counter-Memorial on Annulment, p. 75 *et seq.* (paras. 259-261).

⁴⁹⁶ Reply on Annulment, p. 91 (para. 204).

⁴⁹⁷ Reply on Annulment, p. 85 *et seq.* (paras. 186, 204 and 206).

⁴⁹⁸ Reply on Annulment, p. 92 (para. 208) purporting to respond to Counter-Memorial on Annulment, p. 83 (para. 261).

⁴⁹⁹ See also Counter-Memorial on Annulment, p. 82 (paras. 259-260).

⁵⁰⁰ See Award, p. 201 (para. 945) (recalling that “it is adjudicating the present case under international law; as such, its mandate is not to review the merits of a State’s decision by reference to the applicable domestic law and the facts.”).

⁵⁰¹ See fn. 469 above.

It concluded that was not the case. Far from disregarding the applicable law, the Tribunal majority applied the BIT standards to the facts of the case and the claims before it, all against the backdrop of the Romanian legal framework. Whether the Applicants agree or disagree with the outcome of this analysis is a matter of substantive disagreement, which does not justify annulling any portion of the Award.

3.2.4 The Tribunal majority correctly applied the law regarding the Bucium Applications

- 265 The Applicants maintain their argument that the Tribunal majority “manifestly exceeded its power by failing to apply the applicable law” to “assess the impact of the State’s failure to act on [the] Bucium Applications as required to assess liability based on the BIT standards.”⁵⁰² These arguments do not withstand scrutiny.⁵⁰³
- 266 In support of their claim, the Applicants repeat three times in the Reply that the Tribunal majority assessed the Bucium claims without “cit[ing] or refer[ring] to any aspect of the applicable Romanian legal regime governing the applications,”⁵⁰⁴ including in the “fact section of the Award”.⁵⁰⁵ Yet, they still do not identify which provisions of Romanian law the Tribunal majority allegedly disregarded.⁵⁰⁶ In any event, and as noted above, an omission to apply individual provisions of Romanian law would not suffice to annul any portion of the Award.⁵⁰⁷
- 267 The Applicants also maintain that, because the Tribunal majority did not refer to the applicable Romanian legal regime, “there also was no basis”

⁵⁰² Reply on Annulment, p. 89 *et seq.* (section III.C.1b).

⁵⁰³ Counter-Memorial on Annulment, p. 79 *et seq.* (paras. 245-250).

⁵⁰⁴ Reply on Annulment, p. 90 (para. 200) (“do not cite or refer to any aspect of the applicable Romanian legal regime”), p. 90 (para. 201) (“did not mention the applicable law”) and p. 91 (para. 202) (“includes no reference to the applicable law”).

⁵⁰⁵ Reply on Annulment, p. 90 (para. 201) (noting that the fact section of the award did not “include any assessment of liability and did not mention the applicable law.”) purporting to respond to Counter-Memorial on Annulment, p. 79 (para. 246) (which challenged the Applicants’ attempt to minimize the Tribunal majority handling of the Bucium claims in “three short paragraphs and a conclusion”).

⁵⁰⁶ Counter-Memorial on Annulment, p. 79 (para. 247).

⁵⁰⁷ See para. 225 above.

for the Tribunal to assess “how the State’s treatment [...] complied with the BIT standards”.⁵⁰⁸ At the same time, they no longer portray the assessment of the Romanian legal framework as “a necessary element to any ruling on the merits of Claimants’ investment treaty claims”,⁵⁰⁹ nor do they dispute the Respondent’s observations regarding the manner in which *ad hoc* committees have considered domestic law when assessing claims of FET breaches.⁵¹⁰

268 The Applicants make only two further points in the Reply.

269 First, they refer to the legal opinions of Prof. Bîrsan describing the “legal regime governing NAMR’s obligation to render a decision” and issue licenses “within a timeframe set by law” in specific circumstances.⁵¹¹ Putting aside the lack of credibility demonstrated by Prof. Bîrsan at the 2019 Hearing,⁵¹² it is not clear why the Applicants rely on Prof. Bîrsan in the present proceedings. If they are suggesting that the Tribunal failed to follow Prof. Bîrsan’s conclusions, that is a matter of substantive disagreement for which there is no room in these proceedings. In any event, the Applicants disregard the Tribunal majority’s reference (albeit indirect) to Prof. Bîrsan’s evidence (through references to specific paragraphs of the Claimants’ submissions which themselves rely on his legal opinions).⁵¹³

⁵⁰⁸ Reply on Annulment, p. 90 (para. 200) referring to Memorial on Annulment, p. 60 *et seq.* (paras. 146-148).

⁵⁰⁹ Memorial on Annulment, p. 71 (para. 175); see Counter-Memorial on Annulment, p. 66 *et seq.* (para. 202).

⁵¹⁰ Counter-Memorial on Annulment, p. 67 *et seq.* (paras. 203-206); see also para. 231 above.

⁵¹¹ Reply on Annulment, p. 89 *et seq.* (para. 199).

⁵¹² 2019 Consolidated Hearing Transcript, at **RA-78**, p. 2187 (of the PDF), 2205:19-22 (“I did not write the presentation myself.”), 2209:15–2210:9 (“I didn’t read in detail all the documents”, “about drafting the opinions, the two of them, of course that I closely cooperated with the counsels for the Claimants.”, “I haven’t drafted myself anything but just looked over the things that we discussed and we agreed to be drafted.”), which contradicted the statement made by Prof. Bîrsan in his direct examination. 2019 Consolidated Hearing Transcript, at **RA-78**, p. 2159 (of the PDF), 2177:14-17 (“WITNESS: I drafted, as you have said, President and Honorable Arbitral Tribunal, two Opinions regarding the litigation before this Tribunal.”).

⁵¹³ See, e.g., Award, p. 7 [Section A.II.2.b – Overview of the facts – The Bucium Exploration License] (fn. 37-38, 41 referring to Claimants’ Memorial in the Arbitration, paras. 117-119 and 290, which refer to Bîrsan LO, paras. 11-17, 95-104, 326-327, 334-336 and Section V.A.3 and V.B.3); Award, p. 161 [Section B.IV.3.b.i – Liability – The principal claim – Claimants] (fn.

- 270 Second, the Applicants challenge the Respondent’s observation in its Counter-Memorial that the Tribunal majority “implicitly considered compliance with Romanian law”,⁵¹⁴ but they provide no explanation. The Applicants merely point to the alleged lack of “indication in the majority’s decision that the applicable law was the basis for its decision.”⁵¹⁵ That statement is not correct.
- 271 To the contrary, as already noted in the Counter-Memorial and as can be seen from the Award,⁵¹⁶ the Tribunal majority considered the claims presented by the Parties, including the Bucium Exploration License and subsequent Applications within the framework of Romanian law.⁵¹⁷ It assessed whether the authorities handled the Applications in accordance with the BIT standards, including with regard to allegations of delay, abuse

423 referring to C-PO 27, Questions (a) and (f), which in turn refer to Bîrsan LO2, paras. 216-218 and Section IV); Award, p. 162 [Section B.IV.3.b.i – Liability – The principal claim – Claimants] (fn. 425 referring to C-PHB, para. 237, which in turn refers to Bîrsan LO2, Section IV); Award, p. 193 [Section B.IV.3.c.ii – Liability – The principal claim – The Tribunal’s analysis – The Law] (fn. 558 referring to Memorial in the Arbitration, paras. 626-629, which in turn refer to Bîrsan LO, para. 359 and Section V.B.2); Award, p. 306 [Section B.IV.3.c.iv.4 – Liability – The principal claim – The Tribunal’s analysis – The assessment – The Bucium Exploration License and applications] (fn. 816 referring to Memorial in the Arbitration, para. 290, which in turn refers to Bîrsan LO, Section V.B.3); Award, p. 315 [Section B.IV.4.c – Liability – The first alternative claim – The Tribunal’s analysis] (fn. 839 referring to Claimants’ Reply in the Arbitration, Section VI, which in turn refers to Bîrsan LO, Section V and Bîrsan LO2, Section IV.B); Award, p. 319 [Section B.IV.5.b.i – Liability – The second alternative claim – Claimants] (fn. 851 referring to Memorial in the Arbitration, Section IX.B.3, which in turn refers to Bîrsan LO, para. 401 and Sections V.A.1, V.B.1, V.B.2, V.B.3, V.C).

⁵¹⁴ Counter-Memorial on Annulment, p. 80 (para. 249).

⁵¹⁵ Reply on Annulment, p. 90 *et seq.* (para. 202) purporting to respond to Counter-Memorial on Annulment, p. 80 (para. 249).

⁵¹⁶ Counter-Memorial on Annulment, p. 79 *et seq.* (paras. 248-249 and fn. 401).

⁵¹⁷ Award, p. 6 *et seq.* (paras. 17 and 195-198) (describing the Bucium Exploration License, a concession contract undisputedly **governed by Romanian law**, [REDACTED]

[REDACTED] p. 135 (para. 684) (“The “dispute” before this Tribunal involves allegations that Romania breached its treaty obligations when it acted in a manner that prevented the implementation of the Roşia Montană Project and prevented RMGC from exercising its right to develop the Project in an arbitrary manner, without due process and without compensation. As a result of this alleged prevention, **the dispute includes the denial of RMGC’s rights with respect to the Bucium Projects [...]**”) (emphasis added).

of power, misconduct or wrongdoings on the part of the authorities,⁵¹⁸
which it found to have been the case, as noted in the Counter-Memorial.⁵¹⁹

- 272 In any event, and as noted above, whether NAMR *should* have issued a
decision on the Bucium Applications (as the Applicants argue when stating
that the Tribunal majority “disregarded the legal requirement to issue a
decision on the Bucium Applications”)⁵²⁰ fell outside the scope of the
Tribunal’s mandate, which could not sit as a court of appeal on this issue.⁵²¹
- 273 Finally, the Applicants wrongly argue that the Tribunal majority’s
“decision, manifestly lacking in any reference to any applicable legal
principle” was not “a ‘plausible’ nor ‘tenable’ decision based on the
applicable law”.⁵²² It is clear – once again – that the Applicants simply
disagree with the substance of the Tribunal majority’s findings.

3.2.5 The Award was not a decision *ex aequo et bono*

- 274 The Applicants maintain their position that the Award is based “on
subjective notions of equity contrary to the Tribunal’s obligation to apply
the law”, because the Tribunal majority allegedly (i) premised its

⁵¹⁸ Award, p. 201 (para. 943) (setting out how the “Tribunal will consider whether Romania’s acts or omissions [...] in connection with the Buicum (*sic*) Exploration License and applications [...] fulfil the following criteria: – first, are related and connected by an underlying pattern or purpose to terminate the Roşia Montană Project, such that together they must be considered a composite act; and – second, whether those acts or omissions, if found to be a composite act, violate any of the elements of the provisions of the two BITs, as set forth above.”) (underlined in original), and p. 306 (para. 1149) (“whether Respondent beached its obligations under the two BITs”); see also Counter-Memorial on Annulment, p. 110 *et seq.* (para. 349) (setting out the steps of the Tribunal majority’s analysis, which entailed applying the applicable law).

⁵¹⁹ Award, p. 307 (para. 1162) (finding “no evidence of an abuse of power in the way Respondent handled the permitting process and the Project”), p. 308 *et seq.* (para. 1163) (referring to evidence dated 2010, 2011, 2014, and noting that “there was no evidence of any delay or misconduct on the part of NAMR in relation to the Bucium Applications”), and p. 309 (para. 1164) (concluding “the Tribunal does not find that Romania mishandled the Bucium Applications in breach of international standards”).

⁵²⁰ Reply on Annulment, p. 89 *et seq.* (heading b), see also p. 82 (para. 182) (noting that the “Government abandoned the legal framework that governed the administrative permitting procedures [...] for Bucium as most notably shown through [...] its failure to take any decision on the Bucium Applications.”).

⁵²¹ See paras. 236-238 above.

⁵²² Reply on Annulment, p. 91 (para. 203) purporting to respond to Counter-Memorial on Annulment, p. 80 (para. 250).

conclusion on a lack of intention to harm Gabriel’s investment or to benefit the State, and (ii) “failed to consider the cumulative effects of Romania’s acts and omissions”.⁵²³

- 275 Two preliminary comments are warranted. First, the Applicants do not deny in the Reply the “high threshold” to find that a decision is *ex aequo et bono*;⁵²⁴ however, they claim that the numerous defects that they invoke regarding the application of the law, the manner in which claims and evidence were addressed, and the issues raised in this section “together cross that threshold.”⁵²⁵ The Applicants thus admit that **on their own**, the arguments addressed in this section **do not suffice to meet the threshold**. Should the Committee dismiss the Applicants’ other claims, it would not need to make any finding on the issue. For the sake of completeness, the Respondent will nevertheless address the Applicants’ arguments.
- 276 Second, in the Reply, the Applicants refer once to the “majority’s liability decision [being] based on subjective notions of equity” but provide no further explanation.⁵²⁶
- 277 **As to whether the Tribunal majority found a “lack of intention to harm Gabriel’s investment or to benefit the State”**, the Applicants do not deny that they had conflated the notions of “intent to harm” (not required to find a BIT breach) and “pattern or purpose” (relevant to establish a wrongful composite act), other than to cryptically state that

⁵²³ Reply on Annulment, p. 109 *et seq.* (para. 252, section III.E.1 and 2) (referring to the Tribunal majority having “substitute[d] equitable considerations for legal analysis” and “decided *ex aequo et bono*”).

⁵²⁴ Counter-Memorial on Annulment, p. 70 (paras. 212-213 and references cited therein).

⁵²⁵ Reply on Annulment, p. 110 (para. 256) purporting to respond to Counter-Memorial on Annulment, p. 70 (para. 212).

⁵²⁶ Reply on Annulment, p. 109 (para. 252). The Applicants do not dispute that, when read in their context, the paragraphs on which they relied to assert that the Tribunal majority applied “its own subjective notions of equity” show that the Tribunal majority did evaluate the facts and applied the applicable law. The Respondent thus understands that the Applicants no longer pursue their arguments relating to the Tribunal’s “subjective notion of equity”. Memorial on Annulment, p. 75 *et seq.* (para. 186); Counter-Memorial on Annulment, p. 70 (paras. 213-215).

“even if a ‘purpose’ refers to intention, a ‘pattern’ does not.”⁵²⁷ This statement makes little sense and is incorrect.⁵²⁸

278 The Applicants argue that the first and second alternative claims were not based on a theory of composite act, “yet the majority based its decision on those claims on the alleged lack of intention to harm the investment”.⁵²⁹ This is simply not true.

279 As regards the first alternative claim, the Tribunal majority confirmed three times as regards “The law” that the first alternative claim “does not rely on the composite act theory; it merely references the same treaty provisions as in the principal claim.”⁵³⁰ The Tribunal majority then assessed the facts, noting that they are “the same facts relied upon by Claimants in their principal claim” and a few others, such that the Tribunal majority “reiterate[d] its findings on the three main themes relied upon by Claimants in their principal claim” and listed its findings on the further issues raised.⁵³¹ There is no indication in that summary, nor in its ensuing conclusion (finding no breach of the BITs),⁵³² that the Tribunal majority was relying on an “alleged lack of intention to harm the investment”, or “premised” its decision thereon.

280 As regards the second alternative claim, the Applicants disregard their argument in the Arbitration that certain events were allegedly “motivated by an intention not to implement the Project” and amounted to a breach of the BITs, including notably the FET standard (which includes an analysis whether conduct was arbitrary, discriminatory, or an abuse of powers).⁵³³

⁵²⁷ Reply on Annulment, p. 109 (para. 254) purporting to respond to Counter-Memorial on Annulment, p. 84 (para. 265).

⁵²⁸ See, e.g., Award, p. 173 (para. 827 relying on *Rompetrol v. Romania*) (“the Tribunal finds the following definitions / approaches of investor-State tribunals (relied also by Claimants) appropriate: [...] There must be ‘*some link of underlying pattern or purpose between them*’.”) (emphasis added and in original).

⁵²⁹ Reply on Annulment, p. 110 (para. 255).

⁵³⁰ Award, p. 313 *et seq.* (paras. 1181 second bullet, 1182 and 1187) (underlined in original).

⁵³¹ Award, p. 314 *et seq.* (paras. 1188 and 1191-1198).

⁵³² Award, p. 317 (paras. 1199-1200).

⁵³³ Award, p. 320 (paras. 1213 and 1217-1218).

The Tribunal majority thus properly referred to and considered those arguments and claims.⁵³⁴

- 281 **On the issue whether the Tribunal majority failed to consider the “cumulative effects of Romania’s acts and omissions”,** as the Respondent previously explained, the Tribunal majority explained how it approached its assessment of the composite act as part of the principal claim.⁵³⁵ In their Reply, the Applicants merely state that following the Respondent’s position “would not dispose of the issue”.⁵³⁶ The Respondent maintains that the Applicants are taking a statement from the Award out of context and improperly seeking to present it as a failure to apply the law.⁵³⁷
- 282 As regards the Applicants’ complaint that the Tribunal majority allegedly “failed to apply the law regarding cumulative effect” in relation to the first alternative claim,⁵³⁸ the Respondent repeats the quote from Prof. Schreuer’s commentary that “as long as the tribunal identifies the applicable law correctly and strives to apply it, it is impossible to conclude that the tribunal has disregarded the law for the sake of equity.”⁵³⁹
- 283 At the very minimum, this is what the Tribunal majority did – the Applicants acknowledge that the Tribunal majority explained what its

⁵³⁴ Award, p. 323 (para. 1225).

⁵³⁵ Counter-Memorial on Annulment, p. 83 *et seq.* (paras. 262-263).

⁵³⁶ Reply on Annulment, p. 111 (para. 258) purporting to respond to Counter-Memorial on Annulment, p. 83 *et seq.* (paras. 263-264).

⁵³⁷ Counter-Memorial on Annulment, p. 83 *et seq.* (paras. 262-263) referring to Award, p. 309 (para. 1166).

⁵³⁸ Reply on Annulment, p. 111 (para. 259).

⁵³⁹ Counter-Memorial on Annulment, p. 70 (para. 212) quoting C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**, p. 46 (p. 1303 of the original) (para. 297).

analysis had to cover.⁵⁴⁰ The Tribunal majority then proceeded to apply the law to the facts of the case.⁵⁴¹

284 For the reasons set out above and in the Counter-Memorial, the Applicants' arguments have no merit and in any event do not meet the high threshold to demonstrate that the Tribunal majority manifestly exceeded its powers. As a result, no portion of the Award stands to be annulled pursuant to Article 52(1)(b).

3.3 There Was No Serious Departure from Fundamental Rules of Procedure as the Tribunal Majority Properly Considered the Claims, Evidence and Testimony Presented by the Parties

285 In the Reply, the Applicants contend that the Award should be partially annulled on the basis of Article 52(1)(d), because the Tribunal allegedly:

- "failed to engage with key evidence relied upon by Gabriel", depriving Claimants of due process, the right to be heard and equal treatment,⁵⁴²
- "seriously departed from a fundamental rule of procedure as it denied Claimants due process by failing to address the claims presented";⁵⁴³
- "flagrantly denied Claimants due process and seriously departed from fundamental rules of procedure in the way it approached Mr. Ponta's evidence in the case".⁵⁴⁴

286 **None** of these arguments justify annulling any portion of the Award as already explained in the Counter-Memorial and in the following sections.

⁵⁴⁰ Reply on Annulment, p. 111 (para. 259) referring to Award, p. 314 (para. 1187) ("The Tribunal reiterates that the first alternative claim is not based on the composite act theory, but is an independent claim, meaning that each act or omission of Respondent, whether individually or collectively, must be examined to determine whether there was a breach of an international treaty obligation on 9 September 2013. How the "collective" aspect is addressed here is whether there was a "creeping" violation, *i.e.*, a violation that involves a series of acts or omissions over time that requires the Tribunal to also examine the last act to find a breach.").

⁵⁴¹ Award, p. 314 *et seq.* (paras. 1188-1198).

⁵⁴² Reply on Annulment, p. 4 (para. 13b.) and p. 73 (para. 158).

⁵⁴³ Reply on Annulment, p. 84 *et seq.* (para. 185).

⁵⁴⁴ Reply on Annulment, p. 101 (para. 233).

3.3.1 The Applicants do not dispute the Respondent's explanations on the legal standard

- 287 As set out in the Counter-Memorial, to succeed on this ground the Applicants must show that (i) the procedural rule at issue is **fundamental**, (ii) the Tribunal departed from it, and (iii) the departure is **serious**.⁵⁴⁵
- 288 Regarding the first prong, the Applicants continue to wrongly argue that the Tribunal violated their right to be heard and the principle of equal treatment of the parties.⁵⁴⁶ There is no dispute that these are fundamental rules of procedure. These principles ensure that parties are given the opportunity to present their arguments and evidence to the tribunal.⁵⁴⁷ In the present case, there can be no dispute that the Tribunal afforded the Claimants every opportunity to present their case, and that they did not raise any objections in that regard in the Arbitration.⁵⁴⁸
- 289 On the second prong, it is undisputed that the right to be heard or equal treatment does **not** extend to “every piece of evidence presented” by the Parties.⁵⁴⁹ The Applicants nevertheless claim that the Tribunal failed to “duly consider[r]” certain “key evidence that [they] relied upon”.⁵⁵⁰ Yet they provide no legal support to explain what a tribunal is required to do to “duly consider”, “address” or “engage [...] with” the evidence provided by the parties.⁵⁵¹ As to their reference to “key evidence”, the Applicants’

⁵⁴⁵ Counter-Memorial on Annulment, p. 57 *et seq.* (Section 4.2). See also paras. 274 *et seq.*

⁵⁴⁶ Reply on Annulment, p. 73 (para. 158); Counter-Memorial on Annulment, p. 87 (para. 275).

⁵⁴⁷ See, e.g., Counter-Memorial on Annulment, p. 88 (para. 278) (quoting *Tulip v Turkey*: “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.**”) (emphasis added).

⁵⁴⁸ Counter-Memorial on Annulment, p. 2 (para. 8) and p. 12 (para. 41) (referring to Award, p. 104 (para. 557) (noting that the Parties “had no objection to the way the proceedings have been conducted).

⁵⁴⁹ Reply on Annulment, p. 79 (para. 171).

⁵⁵⁰ Reply on Annulment, p. 72 *et seq.* (paras. 154, see also para. 171).

⁵⁵¹ Reply on Annulment, p. 78 (para. 169).

legal authority in support of this statement relates to a different annulment ground: failure to state reasons.⁵⁵²

- 290 As noted by the *Tulip v. Turkey ad hoc* committee, “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”.⁵⁵³ Moreover, where it can be reasonably inferred that certain evidence was considered, then there is no ground for annulment.⁵⁵⁴ The Applicants do not deny that *a fortiori* the express mention of arguments or evidence in an award demonstrates that they were taken into consideration by the tribunal.⁵⁵⁵
- 291 Furthermore, it is undisputed that *ad hoc* committees have recognized that tribunals have wide discretion in relation to the relevance and evaluation of evidence,⁵⁵⁶ and the exercise of such discretion cannot be a basis for a

⁵⁵² The Applicants claim that the tribunal is “duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case”. However, this finding of the *ad hoc* committee is set out in a section of the decision, which relates to a different annulment ground: failure to state reasons. Reply on Annulment, p. 102 (para. 236); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 29 *et seq.* (section 1.2, see also paras. 130-131 and 136-138). The Applicants also refer to “a failure to address an essential aspect of the claim”. However, in that case, the English High Court held that the tribunal had not “at all” dealt with an issue that was “crucial to the result”. The tribunal had considered that a counterfactual analysis was relevant for its decision regarding the respondent’s quantum claim (*i.e.*, an outcome determinative issue) but had omitted the claimant’s counterfactual case. Reply on Annulment, p. 92 (para. 210); *Republic of Kazakhstan v. World Wide Minerals Ltd et al.*, Case No. CL-2024000236, 2025 EWHC 452, at **AL-74**, p. 8 *et seq.* (paras. 26, 36-38, 73-75, 128, and 146).

⁵⁵³ Counter-Memorial on Annulment, p. 88 (para. 278) quoting *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 25 (para. 82).

⁵⁵⁴ Counter-Memorial on Annulment, p. 90 (para. 282) relying on *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina’s Application for Annulment, at **AL-16**, p. 84 *et seq.* (para. 300).

⁵⁵⁵ Counter-Memorial on Annulment, p. 94 (para. 300).

⁵⁵⁶ *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 26 (para. 84) quoting *Wena Hotels v. Egypt*, Decision on Annulment dated 5 February 2002, at **AL-72**, p. 17 (para. 65) (“[I]rrespective whether the matter is one of substance or procedure, it is in the Tribunal’s discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party. Arbitration Rule 34(1) recalls that the Tribunal is the judge of the probative value of the evidence produced”); see also *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, Decision on Annulment, ICSID Case No.

finding that there has been a serious violation of a fundamental rule of procedure, including unequal treatment.⁵⁵⁷

- 292 On the third prong, and as noted in the Counter-Memorial, for there to be a *serious* departure from a fundamental rule of procedure, the applicant must prove that a tribunal did not consider evidence that would have been outcome determinative.⁵⁵⁸
- 293 As the Applicants themselves acknowledge, they have the burden to demonstrate “that [such departure] had the potential to impact the award”.⁵⁵⁹ *Ad hoc* committees have consistently held that the departure must be shown to have the potential of causing the tribunal to “reach a result substantially different from what it would have awarded had such a rule been observed”.⁵⁶⁰
- 294 As shown in the Counter-Memorial and the following sections, there was no due process violation and the Applicants’ case under this annulment ground has no merit; they do not come even remotely close to meeting this standard.

ARB/12/40 and 12/14, 18 March 2019, at **RAL-58**, p. 55 (para. 188) (“Questions relating to the evaluation of evidence are subject to the primacy of the arbitrators’ judgement and are not reviewable by *ad hoc* committees under Article 52 of the ICSID Convention.”); ICSID Background Paper on Annulment 2024, at **AL-21**, p. 50.

⁵⁵⁷ *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 26 (para. 85); *Impregilo S.p.A. v. Argentine Republic*, Decision on Annulment, ICSID Case No. ARB/07/17, 24 January 2014, at **RAL-39**, p. 49 (para. 176). See Counter-Memorial on Annulment, p. 89 (para. 279).

⁵⁵⁸ *Malicorp Limited v. Arab Republic of Egypt*, Decision on the Application for Annulment, ICSID Case No. ARB/08/18, 3 July 2013, at **RAL-40**, p. 42 (para. 128). See Counter-Memorial on Annulment, p. 90 (para. 282).

⁵⁵⁹ Reply on Annulment, p. 72 (para. 154) referring to *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65** and Memorial on Annulment, p. 77 (para. 193).

⁵⁶⁰ *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 23 (para. 75); *Enron v. Argentina*, Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 23 (para. 71); Counter-Memorial on Annulment, p. 89 (para. 281).

3.3.2 There was no due process violation in connection with the “Claimants’ testimonial and email evidence that the government linked permitting decisions to its economic demands”

- 295 The Applicants maintain that the Tribunal majority allegedly disregarded “important testimonial and contemporaneous email evidence” which “depriv[ed] Claimants of the right to be heard and to equal treatment”.⁵⁶¹ This is false.
- 296 It is not clear what specific “testimonial and contemporaneous email evidence” is at issue. In the Memorial, the Applicants referred generically to “the principal testimonial and contemporaneous email evidence” (merely referring “*E.g.*” to a few paragraphs of a witness statement).⁵⁶² The Respondent showed that the Award did consider the Claimants’ documentary and witness evidence.⁵⁶³ In the Reply, the Applicants (i) make the same allegation that the Tribunal majority “ignored” and “did not engage at all with the principal testimonial and contemporaneous email evidence”, but now refer to slides from their opening statements at the 2019 Hearing,⁵⁶⁴ and (ii) challenge the Respondent’s observation that the Tribunal majority “did address Claimants’ evidence”.⁵⁶⁵ These points are wrong.
- 297 First, the Applicants acknowledge that the Tribunal majority addressed the Claimants’ arguments on the alleged link (or lack thereof) between the economic negotiations concerning the Roşia Montană License and the environmental permitting process, but argue that this was done “in a discrete section of the Award”.⁵⁶⁶ This is beside the point, most sections can be considered “discrete” in a 361-page Award.
- 298 Importantly, the Applicants do not deny that this section covered more than ten pages of the Award and described in detail the facts relating to the

⁵⁶¹ Reply on Annulment, p. 73 *et seq.* (para. 158 and section III.B.2).

⁵⁶² Memorial on Annulment, p. 83 (fn. 279).

⁵⁶³ See Counter-Memorial on Annulment, p. 94 (para. 298).

⁵⁶⁴ Reply on Annulment, p. 78 (fn. 348).

⁵⁶⁵ Reply on Annulment, p. 78 (para. 170).

⁵⁶⁶ Reply on Annulment, p. 78 (para. 169).

economic negotiations in 2011 and in 2013.⁵⁶⁷ The Tribunal majority went beyond discussing “only a series of public statements made by Government officials from August 2011 through December 2011” as the Applicants misleadingly repeat in the Reply.⁵⁶⁸

299 Second, the Applicants do not deny that the Tribunal majority referenced the Claimants’ “witness testimony and more than two dozen exhibits”, but complain that this was done in “a string-cite” at footnote 597 of the Award, without any description of the evidence, no discussion of its relevance or credibility, and that it was incomplete.⁵⁶⁹ This complaint is absurd, in particular when one reads the footnote together with the related paragraph of the Award.⁵⁷⁰

300 Furthermore, this “string-cite” refers to specific paragraphs of the Claimants’ witness testimony and to specific pages of exhibits, which are listed with a description, providing information on the nature (*e.g.*, “Government Memorandum”, “Government Mandate”, “[REDACTED]”, “Letter”, “Note on the status of renegotiation in regard to the economic clauses of the Agreement signed with Gabriel Resources/RMGC under the Roşia Montană mining project”, “[REDACTED]”

⁵⁶⁷ Counter-Memorial on Annulment, p. 94 (para. 298).

⁵⁶⁸ Reply on Annulment, p. 78 (para. 169); see, *e.g.*, Award, p. 209 (para. 953) (corroborating the content of a statement with an “official internal memorandum from the Minister of the Economy to the Prime Minister”), p. 209 (para. 954) (referring to the context where the price of gold had increased), p. 210 (para. 958) (noting the lack of evidence of “actual steps [...] taken to interfere unlawfully with the permitting process [...] to frustrate or delay the permitting processes unlawfully”), p. 210 (para. 958 first bullet) (referring to the TAC meeting of November 2011), p. 210 *et seq.* (para. 958 second bullet) (referring to “the Parties’ exchange of communications and in person discussions on the issue” in 2011 and start of 2012).

⁵⁶⁹ Reply on Annulment, p. 78 (paras. 169-170).

⁵⁷⁰ Award, p. 210 (p. 958 second bullet and fn. 597). This footnote 597 is inserted in support of the statement that “**In the Parties’ exchange of communications and in person discussions** on the issue starting from 21 September 2011 and extending to 26 January 2012 with Gabriel’s final proposal acceding to the State’s offer but ending there on the eve of Prime Minister Boc’s resignation (see paras 119-149 above),[**footnote 597**] the Tribunal sees no suggestion of any improper linking of the issuance of the permit with the renegotiation of the terms of the License let alone any inappropriate coercion from Respondent’s side. **These communications do not suggest that the Government was planning to use its regulatory powers to achieve its objectives in the negotiation; instead, they are evidence of a pure negotiating process.** In particular, one need only look at Gabriel’s detailed offer to the Government about improving the economic terms for the State sent on 10 June 2013 where there is no suggestion in this letter that it is made under duress or coercion or that Gabriel reserves its rights.” (emphasis added)

[REDACTED]
[REDACTED] authors and recipients
(including State officials, the Respondent's and the Claimants' witnesses),
dates, and content of the exhibits (" [REDACTED]
[REDACTED]
[REDACTED]").⁵⁷¹

- 301 All of the exhibits cited in this footnote 597 of the Award are also mentioned on the slides of the 2019 Hearing to which the Applicants now cite.⁵⁷² There can thus be no dispute that the Tribunal majority did consider the "evidence on this key issue".⁵⁷³
- 302 Third, the Applicants complain that the Tribunal majority "failed to address the evidence" that showed that the alleged improper linking of negotiations and permitting "extended through 2013".⁵⁷⁴ This is incorrect: as indicated in the Counter-Memorial, the Tribunal majority considered evidence post-dating 2011 in this regard.⁵⁷⁵
- 303 The Applicants argue that the two footnotes to which the Respondent pointed in support are "not relevant" because they relate to another aspect of the decision, namely the Draft Law.⁵⁷⁶ However, one of the aspects of the discussions in relation to the Draft Law was another "renegotiation" of the contract between Gabriel Resources, RMGC, and the Government – as the Applicants feign to ignore but the Award records in detail.⁵⁷⁷ Moreover,

⁵⁷¹ Award, p. 211 (fn. 597).

⁵⁷² See para. 296 above.

⁵⁷³ See Reply on Annulment, p. 78 (para. 169).

⁵⁷⁴ Reply on Annulment, p. 79 (paras. 172-173) purporting to respond to Counter-Memorial on Annulment, p. 94 (para. 298).

⁵⁷⁵ Counter-Memorial on Annulment, p. 94 (paras. 297-298 and references mentioned therein).

⁵⁷⁶ Reply on Annulment, p. 79 (paras. 172-173) referring to Counter-Memorial on Annulment, p. 94 (para. 298, fn. 469).

⁵⁷⁷ E.g., Award, p. 272 (para. 1100, point 3b), p. 277 (para. 1107) ("On 27 May 2013, [REDACTED]
[REDACTED]
[REDACTED] p.
277 (para. 1108) (quoting a TAC meeting transcript stating that "we will also make a financial-economic negotiation of this Project, not only from the point of view of the royalty and of the State's share in this company Roşia Montană Gold Corporation, but also from the point of view of other economic-financial aspects that are of particular relevance for the Romanian State. All

the Tribunal majority's analysis is grounded on the Claimants' own evidence.⁵⁷⁸ In any event, none of these allegations could possibly amount to a due process violation.

- 304 Therefore, the Tribunal majority did not fail to consider important documentary and witness evidence and there was accordingly no departure from a fundamental rule of procedure, let alone a serious departure. The Applicants in any event continue to fail to show that any such departure (*quod non*), had the potential of causing the Tribunal majority to "reach a result substantially different" from the result it reached.⁵⁷⁹

3.3.3 There was no due process violation regarding "the lack of any decision on the environmental permit or on the Bucium applications"

- 305 The Applicants maintain that the Tribunal majority "failed to address an essential aspect of the claims presented" because it allegedly did "not address in any way the lack of any decision in [the] administrative procedure[s]" relating to Roşia Montană and to Bucium in relation to their principal and alternative claims.⁵⁸⁰ However, read as a whole, the Award

of these will part of the law that will be submitted to the Parliament for approval."), p. 278 (para. 1109) ("On 5 June 2013, [REDACTED]
[REDACTED]
[REDACTED]"), p. 278 (para. 1111) ("On 11 June 2013, [REDACTED]
[REDACTED]
[REDACTED]"), and p. 279 (para. 1113) ("On 14 June 2013, [REDACTED]
[REDACTED]
[REDACTED]

⁵⁷⁸ E.g., Award, p. 302 (para. 1136 and evidence cited in fn. 806) ("[REDACTED]
[REDACTED]
[REDACTED]"), and p. 303 (para. 1138 ("Gabriel did advocate in favor of a general law, but since the renegotiated economic conditions would be part of the Draft Law, this was obviously not possible. Against this background, it cannot be said that Claimants did not support the Draft Law; they were actively involved in drafting proposals to be included in the Draft Law, and the Draft Law itself reflects Claimants' proposals on a number of issues.")).

⁵⁷⁹ See para. 194 above; Counter-Memorial on Annulment, p. 89 (para. 281).

⁵⁸⁰ Reply on Annulment, p. 92 *et seq.* (paras. 209 and 225, section III.C.2).

covers all of the points that the Applicants claim were ignored; this claim therefore still has no merit.⁵⁸¹

306 In the Counter-Memorial, the Respondent noted as a preliminary point regarding the Tribunal majority's alleged failure to "address the claims presented [by Applicants]", that the claims were "unclear" and "constantly evolving", which the Applicants dispute in the Reply.⁵⁸² It speaks volumes that their attempt to clarify spans some three pages.

307 They note that "the dissenting arbitrator had no difficulty understanding the claims presented" and that the claims were "consistently based [...] on the same facts throughout the arbitration",⁵⁸³ which is beside the point. The Applicants confirm in the Reply that, following questions from the Tribunal after the 2019 Hearing, they clarified their position in the Arbitration on the "timing of the State's breaches" and structured their case as a "principal claim", "first alternative claim" and "second alternative claim".⁵⁸⁴

308 Most importantly, the Applicants do not deny that the Tribunal afforded them "more than ample opportunity to present their case".⁵⁸⁵

309 In the following sections, the Respondent will show that the Tribunal majority did not fail to address the absence of a decision on the environmental permit application or on the Bucium Applications and there was no due process violation, contrary to the Applicants' baseless assertions.

No due process violation in connection with the principal claim

310 The Applicants argue that the Tribunal majority "focused its liability decision on what it considered to be the process" and failed to consider the

⁵⁸¹ See Counter-Memorial on Annulment, p. 90 *et seq.* (paras. 284-295).

⁵⁸² Reply on Annulment, p. 93 *et seq.* (paras. 211-214 and 220) purporting to respond to Counter-Memorial on Annulment, p. 11 *et seq.* (paras. 40 and 271).

⁵⁸³ Reply on Annulment, p. 93 (paras. 211-212).

⁵⁸⁴ Reply on Annulment, p. 93 *et seq.* (paras. 213-214) (referring to numerous post-hearing submissions, including several submissions produced in response to Tribunal questions).

⁵⁸⁵ Reply on Annulment, p. 93 (para. 211) ("to the extent that the Tribunal had questions, it posed them to the Parties."); Counter-Memorial on Annulment, p. 12 (para. 41).

“significance” of the absence of any decision on the environmental permit application.⁵⁸⁶ This is inaccurate as explained in paragraphs 242-243 above.

- 311 The Applicants’ further two arguments on the principal claim can also be dismissed for the following reasons.
- 312 First, the Applicants mischaracterize the Tribunal majority’s recap of its “mandate [not being] to review the merits of a State’s decision”, of which they note “there was none”, as evidence that the majority did not consider the significance and lawfulness of such absence of decision.⁵⁸⁷ However, and as noted in Section 3.2.3.1 above, in that paragraph the Tribunal majority correctly explained that its role was to adjudicate the case “*under international law*”; as such, its mandate is not to review the merits of a State’s decision by reference to the applicable domestic law”.⁵⁸⁸ This finding is uncontroversial.⁵⁸⁹ The Applicants accept in the Reply that the BIT standards constituted the relevant measure, not Romanian law as they argue in relation to the excess of powers claim.⁵⁹⁰
- 313 Yet, the Applicants acknowledge that the Parties had opposing theories in the Arbitration and disputed “**why** those administrative procedures were never completed”. They contrast this with the undisputed “**fact** that these [...] procedures were not completed”.⁵⁹¹ This distinction is splitting hairs; the Applicants do not explain how the Tribunal majority would have considered the Parties’ disputed positions on the reasons without considering the absence of any decision. In any event, the Tribunal majority did consider the latter as explained in section 3.2.3.1 above.⁵⁹²

⁵⁸⁶ Reply on Annulment, p. 95 *et seq.* (paras. 215).

⁵⁸⁷ Reply on Annulment, p. 95 *et seq.* (para. 216).

⁵⁸⁸ Award, p. 201 (para. 945).

⁵⁸⁹ See paras. 236-237 above.

⁵⁹⁰ Reply on Annulment, p. 96 (para. 217); see paras. 249 and 264 above.

⁵⁹¹ Reply on Annulment, p. 96 (para. 217) (emphasis added).

⁵⁹² See also paras. 251 and 263 above; Award, p. 239 (paras. 980-981). The Applicants here also misleadingly narrow the scope of the Tribunal’s analysis when they summarize the Tribunal majority’s analysis on liability as being “focused [...] on what it considered to be the process, which it characterized as the reasonableness of the debates that occurred **during TAC meetings**

- 314 Second, in relation to the Tribunal majority's conclusion that there was no obligation for the State to issue the environmental permit, the Applicants acknowledge the Tribunal majority's findings that there remained unresolved matters in November 2011 and that nothing in the subsequent TAC meetings had been improper.⁵⁹³
- 315 They nevertheless argue that the Tribunal majority did not conclude "whether the Government should have taken a decision [...] after November 2011" and did not "address the significance of the lack of any decision or explanation after the last TAC meeting held in 2015."⁵⁹⁴ However, as already explained, the Tribunal majority did consider matters that were not resolved by 2013 or even later.⁵⁹⁵

No due process violation in connection with the Tribunal majority's assessment of post-2013 events as part of the principal and first alternative claim

- 316 The Applicants recall in the Reply that the principal and first alternative claims arose out of the alleged "definitive and permanent rejection of the Projects in 2013" following its "political rejection".⁵⁹⁶ While the Applicants do not dispute that events that took place after 2013 were outside the scope of their claim and were not "part of the alleged 'breach'," ⁵⁹⁷ they complain that the Tribunal nevertheless did not address them. In the Reply, they misleadingly state that the Tribunal majority noted that "several" post-2013 events did not fall within the scope of the first alternative claim, and refer to paragraphs of the Award dealing with issues unrelated to the decision on the environmental permit application (namely, the recapitalization of RMGC and tax and audit investigations).⁵⁹⁸ Yet, the

that were held." As explained above, the Award covers more than an assessment of the TAC meetings. Reply on Annulment, p. 95 *et seq.* (paras. 215-216), see paras. 246-248 above.

⁵⁹³ Reply on Annulment, p. 96 (para. 218).

⁵⁹⁴ Reply on Annulment, p. 96 (para. 218).

⁵⁹⁵ See para. 253 above referring to Award, p. 240 *et seq.* (paras. 982 and 1243).

⁵⁹⁶ Reply on Annulment, p. 96 *et seq.* (para. 219).

⁵⁹⁷ See Counter-Memorial on Annulment, p. 93 (paras. 293-294) (recalling that the Claimants had clarified that "the post-2013 events were not 'part of the alleged breach'").

⁵⁹⁸ Reply on Annulment, p. 96 *et seq.* (para. 219, fn. 425) referring to Award, p. 315 *et seq.* (paras. 1193-1194).

Applicants continue to ignore the more relevant finding that, in any event, there was “no evidence ‘of a connection’ between the post-2013 events and the rejection of the Draft Law”.⁵⁹⁹

- 317 In sum, the Applicants wrongly conclude that the Tribunal majority “simply never addressed” the Claimants’ arguments that the post-2013 events “were relevant to show that Romania had rejected and abandoned the Projects”.⁶⁰⁰ They simply disagree with the decision.

No due process violation in connection with the second alternative claim

- 318 The Applicants claim that the Tribunal majority did not consider the alleged failure of State authorities “to complete the EP process for Roșia Montană”.⁶⁰¹ They make the same fallacious arguments as the ones addressed in paragraphs 237-239 and 262-263 above when they point to the Tribunal majority’s alleged failure to “address the claim”, including the claim that the procedure “stopped without explanation”,⁶⁰² which is wrong.
- 319 In addition, the Applicants challenge the Respondent’s explanation that the absence of decision can be explained by the fact that “issues remained unsolved” in 2011, 2013, and subsequently.⁶⁰³ While they acknowledge “one example” discussed at a TAC meeting of 2014, they allege it is insufficient to conclude that the Tribunal “address[ed] the claim” – in their view, the Tribunal majority failed to address the reasons **why** any such unsolved issues were not dealt with subsequently.⁶⁰⁴ The Applicants are impermissibly seeking a (re)assessment of the evidence presented in the Arbitration, which is outside the Committee’s mandate. Moreover, and in any event, they misrepresent the Tribunal majority’s findings regarding outstanding issues, including those at the time of the 2014 TAC meeting,

⁵⁹⁹ Award, p. 317 (para. 1198); Counter-Memorial on Annulment, p. 93 (para. 294).

⁶⁰⁰ Reply on Annulment, p. 97 (para. 219); see para. 238 above.

⁶⁰¹ Reply on Annulment, p. 97 (paras. 220-221).

⁶⁰² Reply on Annulment, p. 97 *et seq.* (paras. 220-221 and 223).

⁶⁰³ Reply on Annulment, p. 97 *et seq.* (para. 221) purporting to respond to Counter-Memorial on Annulment, p. 91 (para. 287).

⁶⁰⁴ Reply on Annulment, p. 97 *et seq.* (para. 221) referring to Award, p. 328 (para. 1235).

which explain the absence of any decision on the environmental permit application.⁶⁰⁵

320 The Applicants also disregard the Claimants’ public disclosures of 2014 which listed outstanding issues and the Tribunal majority’s detailed list of examples showing that “the Project continued to progress in various respects after September 2013”.⁶⁰⁶

321 In sum, although the Applicants repeatedly invoke a “failure to address” a “central basis for liability”, this position stands at odds with the Award’s express reasoning. By persisting in their narrative that the permitting process “stopped without explanation”, the Applicants overlook the Tribunal majority’s determination that unresolved issues remained pending before the competent authorities.⁶⁰⁷ The Applicants do not attempt to engage with this finding, as this touches on the Tribunal’s assessment of evidence which falls outside the scope of these annulment proceedings. However, the Applicants’ repetition of these baseless assertions masks their disagreement with the Tribunal majority’s factual and legal evaluations and demonstrates further that their challenge does not seek to address any genuine omission on the part of the Tribunal majority.⁶⁰⁸

⁶⁰⁵ Award, p. 328 (paras. 1234-1235) (“at the first TAC meeting in **2014** [...], it was made clear that the Draft Law could not interfere with the independent TAC process, which **had been on hold but was now continuing**. The TAC President emphasized that **there continued to be disagreement** among experts on environmental issues.”) (emphasis added).

⁶⁰⁶ Award, p. 328 *et seq.* (para. 1237) (“On 02 April 2014, a TAC meeting was held to **discuss the issues noted following the hearings and field trips** in the Report on the Draft Law [...]. During that meeting, a briefing was delivered on behalf the Ministry of Culture regarding the **process for the Archaeological Discharge Certificate no. 9/2011**. The [...] TAC met again on 24 July 2014, in a meeting which addressed the **opportunity to perform an independent study on the permeability of the bottom of the TMF** situated on Corna Valley, taking into account the recommendations included in the report on the Draft Law [...] the TAC member authorities were asked for points of view and suggestions regarding the requirements which should be included in such a study [...]), and p. 329 *et seq.* (para. 1239) (listing events in 2014-2019).

⁶⁰⁷ See para. 250 and fn. 484 above.

⁶⁰⁸ See Award, p. 240 *et seq.* (paras. 1305-1307).

No due process violation in connection with the Bucium Applications

- 322 The Applicants maintain that the Tribunal majority failed to consider the lack of decision on the Bucium Applications, as part of the second alternative claim.⁶⁰⁹ While the Respondent referred in the Counter-Memorial to the Tribunal majority’s conclusion that the applications had not been mishandled, or subject to delay or misconduct, the Applicants argue that those were conclusions under the principal claim.⁶¹⁰ However, the Applicants disregard the Tribunal majority’s express reference – when dealing with the second alternative claim (as well as the first alternative claim) – to its findings under the principal claim.⁶¹¹
- 323 The Applicants suggest that the Tribunal majority did not adequately consider post-2013 events in the context of the second alternative claim in relation to Bucium.⁶¹² In support, they note that this claim focused on the issue whether conduct post-dating 2013 breached the BITs, whereas in their view the Tribunal majority “improperly considered only conduct leading up to September 9, 2013” as part of the principal claim.⁶¹³ Both points are incorrect. The Tribunal majority referred to post-2013 events when summarizing the facts, on which it relied when assessing the principal, first and second alternative claims in relation to Bucium.⁶¹⁴ In addition, and to recall, the Claimants argued in the Arbitration that for the

⁶⁰⁹ Reply on Annulment, p. 97 *et seq.* (paras. 220 and 222).

⁶¹⁰ Counter-Memorial on Annulment, p. 91 *et seq.* (paras. 288-289); Reply on Annulment, p. 98 (para. 222).

⁶¹¹ Award, p. 307 *et seq.* (paras. 1161-1169) (as part of the principal claim), and p. 315 *et seq.* (paras. 1192 and 1215) (indicating “see para. 1163” and “see paras. 1160 and 1161 *et seq.*” respectively).

⁶¹² Reply on Annulment, p. 98 (paras. 222-223).

⁶¹³ Reply on Annulment, p. 98 (para. 222).

⁶¹⁴ Award, p. 306 (para. 1150) (referring to para. 198) (noting that the “Bucium applications are still pending”), p. 307 (paras. 1157-1160) (referring to exchanges between RMGC and NAMR in 2014-2016), p. 308 (para. 1163 penultimate paragraph) (referring to a communication in 2014), and p. 309 (fn. 830) (referring to a NAMR decision, a TAC meeting, and the Parliamentary Special Commission Report, all dated 2013).

principal and first alternative claims, “events after 2013 are not considered part of the alleged ‘breach’”.⁶¹⁵

- 324 The Applicants also reiterate their complaint that the Tribunal majority allegedly “failed to address Claimants’ claim that the lack of any decision [...] on the Bucium Applications breached the BITs.”⁶¹⁶ They now appear to formulate this argument only in connection with the second alternative claim.⁶¹⁷ As noted immediately above, the fact that the applications were still pending (*i.e.*, that no decision had been issued) was one of the post-2013 facts considered by the Tribunal majority.⁶¹⁸ The Tribunal majority nevertheless recorded the Claimants’ argument that the Tribunal “may” rely “as well” on the “failure since March 2015 to take any action” on the Bucium Applications.⁶¹⁹ And in its analysis of the second alternative claim, the Tribunal majority referred to its findings under the first alternative claim,⁶²⁰ including that:

“there is no evidence of a connection between what is alleged to have occurred with the Bucium Licence [...] and the decision of the Parliament to reject the Draft Law, as well [as] the ‘statements’ made by politicians about the fate of [the] Draft Law or the Project on 9 September 2013.”⁶²¹

- 325 The Tribunal majority found that “the culminative effect of these disparate acts does not rise to the level of a breach of the FET standard or other obligation under the [...] BITs” and stated that it “cannot conclude that there has been a breach of any of the provisions of the [BITs].”⁶²² Against this backdrop, the Applicants’ allegation that the Tribunal majority “failed

⁶¹⁵ Award, p. 200 (para. 941) and p. 312 *et seq.* (para. 1181 third bullet); see also para. 316 above.

⁶¹⁶ Reply on Annulment, p. 98 (para. 223).

⁶¹⁷ Reply on Annulment, p. 98 (paras. 222-223).

⁶¹⁸ See fn. 614.

⁶¹⁹ Award, p. 319 *et seq.* (paras. 1207 and 1213).

⁶²⁰ Award, p. 321 (para. 1215).

⁶²¹ Award, p. 317 (para. 1198) (underlined in original).

⁶²² Award, p. 317 (paras. 1198-1200).

to consider the post-2013 events [...] together with all the prior conduct, rather than in isolation”⁶²³ rings hollow.

326 In sum, the Applicants are recasting their criticisms regarding the outcome of the Award in the guise of a “fail[ure] to address this essential aspect of the claims presented”.⁶²⁴ By claiming that the Tribunal majority left the matter “silent”, instead of assessing whether the “circumstance was lawful” that no decision was issued for Roşia Montană and Bucium,⁶²⁵ the Applicants are arguing in substance that the Tribunal *should have* determined whether the Romanian authorities acted lawfully under domestic administrative and environmental law – *i.e.*, whether they *should have* issued a decision accepting or denying the environmental permit and the Bucium Applications. As noted above, that question – what the authorities *ought* to have decided under Romanian law – is precisely the kind of merits review that the Tribunal majority correctly declined to undertake.⁶²⁶ The Applicants’ attempt to appeal these findings must be rejected.

327 It follows that there was no departure from a fundamental rule of procedure, let alone a serious departure, in connection with the Tribunal majority’s assessment of the Roşia Montană and Bucium permitting processes.

3.3.4 There was no due process violation regarding Mr. Ponta’s evidence and the Tribunal did not deny the Applicants’ right to cross-examine him

328 The Applicants maintain that the Tribunal majority “seriously departed from fundamental rules of procedure in the way it approached Mr. Ponta’s evidence”, namely by (i) “fail[ing] to engage with or even mention Prime Minister Ponta’s video-recorded admission of liability on national television in September 2013” (Exhibit C-437 in the Arbitration) and

⁶²³ Reply on Annulment, p. 98 (para. 223).

⁶²⁴ Reply on Annulment, p. 99 (para. 225).

⁶²⁵ Reply on Annulment, p. 95 *et seq.* (para. 216).

⁶²⁶ See paras. 235 and 249 above.

(ii) admitting into the record “a lengthy witness statement”.⁶²⁷ As previously explained and further explained below, these arguments are void of any merit.⁶²⁸

3.3.4.1 The Tribunal majority considered the statements made by Mr. Ponta on national television (Exhibit C-437)

- 329 The Applicants continue to wrongly claim that the Tribunal majority “failed to engage with” a statement made by Mr. Ponta during a televised interview (Exhibit C-437) and continue to mischaracterize and give undue weight to one sentence in that interview.⁶²⁹
- 330 However, as explained in the Counter-Memorial and in the following paragraphs, the Tribunal majority considered this and many other public statements of Mr. Ponta and others, before saying that it “[could not] conclude that there ha[d] been a breach of any of the provisions of the [BITs].”⁶³⁰
- 331 First, the Applicants acknowledge in the Reply that the Tribunal majority “referred to and quoted” this 23-page exhibit in the Award.⁶³¹ It relied on this exhibit to illustrate how politicians publicly explained the reasons for involving Parliament with the Project in 2013.⁶³²

⁶²⁷ Reply on Annulment, p. 101 *et seq.* (para. 233, section III.D).

⁶²⁸ Counter-Memorial on Annulment, p. 94 *et seq.* (paras. 299-308).

⁶²⁹ Reply on Annulment, p. 103 *et seq.* (paras. 237-243). The Respondent does not agree with the Applicants’ characterization of this press statement/interview as a “video-recorded admission of liability on national television in September 2013”. This evidence was in any event addressed by both Parties in the Arbitration and in turn by the Tribunal majority. See para. 339 below.

⁶³⁰ Award, p. 305 (paras. 1146-1148) (for the principal claim) and p. 316 (paras. 1196 and 1200) (for the first alternative claim).

⁶³¹ While the Applicants referred in the Memorial to two quotes from this exhibit, in the Reply they only allege that one of them was allegedly disregarded by the Tribunal majority. The other quote indeed figures *verbatim* in the Award as the Respondent pointed out. Memorial, p. 49 (paras. 115f. and 213); Reply on Annulment, p. 103 (para. 237); Counter-Memorial on Annulment, p. 5 *et seq.* (paras. 22 and 299).

⁶³² *E.g.*, Award, p. 302 (para. 1135). This paragraph in the “analysis” section follows over 30 pages of “facts”, referring to and quoting dozens of public statements made at the time of the drafting of the Draft Law and then its submission to Parliament.

- 332 Second, although the Applicants reproach the Tribunal majority for not specifically referring to a particular passage from this interview (in which Mr. Ponta used the term “nationalization”), the Tribunal majority need not have done so.⁶³³
- 333 Third, the Applicants disregard how the Award quotes *verbatim* other statements Mr. Ponta made during other interviews and which are similar to this particular passage.⁶³⁴ However, the Applicants do not mention those, nor do they explain why the passage they singled out would have led the Tribunal majority to adopt a different position (*i.e.*, why it would be outcome determinative).
- 334 The Tribunal majority indeed analyzed Mr. Ponta’s many statements in Exhibit C-437 and similar exhibits and found:

“as to Prime Minister Ponta’s conflicting statements on the Project, it is recalled that **Prime Minister Ponta made various statements** on the vote against the Draft Law and **on the implications of a negative vote**. The question is whether Prime Minister Ponta wrongfully tainted the parliamentary process or the permitting procedure more generally. Based on the above, as well as the fact that the process resumed following the rejection of the Draft Law, **there is no evidence of such tainting**. In fact, while there were many comments to the effect that the rejection of the Draft Law

⁶³³ Reply on Annulment, p. 103 (paras. 237-238) purporting to respond to Counter-Memorial on Annulment, p. 94 (para. 299 and fn. 472).

⁶³⁴ *E.g.*, Award, p. 284 (para. 1119) (quoting Exhibit C-460) (“On 5 September 2013, Prime Minister Ponta stated the following: *I was obligated, under the law, and I am trying to explain this to those who want to hear me, that under the current law I had to give approval and the Roșia Montană Project had to start. They have met all the conditions required by the law. Precisely because I considered that I should not do this, I sent the law to Parliament to submit it to a real debate. That’s the situation and this is why, had I done absolutely nothing, I would have then had to pay I don’t know how many billions in compensation to the company in question. I don’t want to pay from your money, from the taxpayer’s money, compensation for contracts concluded starting with 1998. I want the decision to be made by the Parliament.*”) (underlined and italics in original) and p. 289 (para. 1123) (quoting Exhibit C-872 and mentioning other statements made on television) (“**The most critical thing for me was that this vote be given by Parliament, as there will obviously be lawsuits, and I do not want that the Government or the ministers, we, be held accountable for contracts and commitments undertaken by Mr. Băsescu and the previous governments.**”) (emphasis in original).

would mean the rejection of the Project, there were many other statements to the contrary as well.”⁶³⁵

335 The Tribunal majority assessed the weight to give to these statements:

“In any case, **the Tribunal cannot infer too much from these statements.** There are two reasons for this: First, although Victor Ponta as Prime Minister had submitted the approval of the Project to the Parliament, he was also a Member of Parliament and a political party and was entitled to express his opinion in that capacity when voting in Parliament. Second, the rejection of the Draft Law meant that the Project would not reflect the renegotiated environmental, economic, cultural and other conditions; instead, the Project and the permitting process would continue on the basis of the original conditions reflected in the Roșia Montană License, which were obviously less favourable to the Government.”⁶³⁶

336 The Applicants also ignore the following passage:

“The Tribunal reiterates its considerations above (see paras 1134 *et seq.*): [...] there is no evidence that the entire process leading to the rejection of the Draft Law was tainted by an abuse of power or conspiracy to undermine Claimants’ investments. **Politicians say what they want to say in interviews with the media; what is more important is how the State in its various manifestations actually treated the Project.**”⁶³⁷

337 The Tribunal majority thus decided not to infer too much from Mr. Ponta’s statements and deemed it more important to focus on the State’s treatment of the Project.

⁶³⁵ Award, p. 305 (para. 1146) (emphasis added). This paragraph of the Award does not reference any specific exhibit but is found in the “analysis” section immediately following the “fact” section in which Exhibit C-437 and other similar interviews are quoted.

⁶³⁶ Award, p. 305 (para. 1147) (underlined in original, emphasis added).

⁶³⁷ Award, p. 316 (para. 1196 second bullet) (referring to paras. 1134 *et seq.* where Exhibit C-437 is cited) (emphasis added). The Applicants refer to the first bullet of this paragraph in a different context (when discussing the influence of “politics”). See Reply on Annulment, p. 87 (fn. 381).

- 338 In any event though, as the Applicants acknowledge in the Reply,⁶³⁸ it is not for the Committee to reassess the relevance of the evidence that was assessed by the Tribunal.
- 339 Fourth, the Applicants’ attempts to purportedly clarify “the meaning of Mr. Ponta’s statements” are wholly improper and have no place in annulment proceedings.⁶³⁹ The Parties made submissions in the Arbitration regarding this exhibit and related evidence.⁶⁴⁰ The Claimants’ right to be heard was respected. As shown above, the Tribunal majority considered that evidence.
- 340 In any event, for the sake of completeness, on substance, the Respondent notes that:
- i) The Applicants do not meaningfully contest the Respondent’s observation that Exhibit C-437 “does not comprise any recognition that a nationalization had occurred.”⁶⁴¹
 - ii) A plain reading of the relevant excerpt shows that Mr. Ponta was describing the possible consequences if the Project were rejected.⁶⁴² The Project was, however, not rejected.⁶⁴³
- 341 Finally, even if the Tribunal majority had not expressly referred to Exhibit C-437 (*quod non*), as previously noted, an applicant bears the burden of

⁶³⁸ Reply on Annulment, p. 103 (para. 239).

⁶³⁹ Reply on Annulment, p. 103 *et seq.* (paras. 239 and 241-243) purporting to respond to Counter-Memorial on Annulment, p. 4 (para. 22). They also wrongly challenge the Respondent’s description in the Counter-Memorial of a specific quote from Mr. Ponta’s interview. However, the excerpt makes clear that Mr. Ponta referred to the European Commissioner’s statement in his interview. The accuracy of the latter’s statement is irrelevant, where the Respondent does not argue that Mr. Ponta rightly or wrongly referred to, or relied on it.

⁶⁴⁰ See, e.g., Claimants’ Memorial in the Arbitration dated 30 June 2017, p. 211 *et seq.* (paras. 488-491 and 833); Respondent’s Counter-Memorial in the Arbitration, p. 131 *et seq.* (paras. 346-347); Respondent’s Rejoinder in the Arbitration, p. 163 (paras. 511-512); Claimants’ Responses to Questions Presented by the Tribunal in PO27 dated 11 May 2020, p. 2 *et seq.* (paras. 5, 50 and 191); Claimants’ First Post-Hearing Brief dated 18 February 2021, p. 108 *et seq.* (para. 258); and fn. 642 below.

⁶⁴¹ Counter-Memorial on Annulment, p. 6 (para. 22); Reply on Annulment, p. 105 (para. 242).

⁶⁴² See, e.g., Respondent’s Second Post-Hearing Brief in the Arbitration dated 23 April 2021, p. 66 (para. 146 third bullet); Reply on Annulment, p. 105 (para. 242).

⁶⁴³ See para. 239 above.

proving that the tribunal failed to consider evidence that was “outcome-determinative”, not just any “evidence presented by a party”.⁶⁴⁴ Moreover, even if a specific exhibit was not “discuss[ed] in detail” in an award, there is no reason for annulment where it can be “reasonably inferred” from the award that the tribunal had considered the evidence.⁶⁴⁵ Here, the Tribunal majority not only expressly referred to Exhibit C-437, but also engaged with specific statements made by Mr. Ponta which are similar to the one to which the Applicants refer.

3.3.4.2 The Tribunal did not deny the Applicants’ right “to confront material adverse testimony in cross-examination”

- 342 The Applicants continue to characterize as a “serious due process violation” the Tribunal’s alleged failure to exclude from the record Mr. Ponta’s witness statement while the Claimants “were denied the opportunity to cross-examine him.”⁶⁴⁶
- 343 The Applicants, however, do not dispute the following key points:
- i) It was within the Tribunal’s power to decide whether Mr. Ponta’s statement was admissible.⁶⁴⁷
 - ii) The admission of Mr. Ponta’s witness statement (in circumstances where he could not appear at the Hearing) was done “in accordance with the procedural rules”, specifically POs Nos. 1 and 23 and ICSID Rule 34(1).⁶⁴⁸
 - iii) **The Tribunal majority did not rely on Mr. Ponta’s statement in the Award** (nor the dissenting arbitrator in the dissent).⁶⁴⁹

⁶⁴⁴ See para. 293 above.

⁶⁴⁵ See para. 290 above; Counter-Memorial on Annulment, p. 90 (para. 282).

⁶⁴⁶ Reply on Annulment, p. 106 (para. 244). They furthermore now seek to lend great importance to his witness statement. Reply on Annulment, p. 109 (para. 251).

⁶⁴⁷ Reply on Annulment, p. 108 (para. 249); Award, p. 59 (para. 349).

⁶⁴⁸ Reply on Annulment, p. 106 *et seq.* (para. 246) (describing the procedure leading to the Tribunal’s admission of the witness statement); Counter-Memorial on Annulment, p. 95 *et seq.* (para. 302) (on the procedure) and p. 96 (paras. 302v. and 304) (on the admissibility of the statement).

⁶⁴⁹ Counter-Memorial on Annulment, p. 96 (paras. 305 and 308).

- iv) The Applicants had the opportunity to submit rebuttal evidence to respond to Mr. Ponta's evidence – but chose not to do so.⁶⁵⁰
- v) There is a difference between the admissibility of evidence and the assessment of its probative value.⁶⁵¹

344 In the Reply, the Applicants argue that it is “commonly accepted that it is a basic due process violation to accept testimony into the record” when it cannot be tested at the hearing.⁶⁵² However, none of the sources they cite support that argument:

- i) The Applicants' reliance on the IBA Rules on the Taking of Evidence in International Arbitration (“**IBA Rules**”) is misplaced.⁶⁵³ The IBA Rules do not provide that a tribunal shall not admit testimony into the record in such circumstances, but rather, that a tribunal “**shall disregard** any witness statement” if the witness fails to appear at the hearing without a valid reason – which is precisely what the Tribunal majority did.⁶⁵⁴
- ii) The ICSID awards on which the Applicants rely also do not support their position.⁶⁵⁵ Those tribunals recalled that under Arbitration Rule 34(1), ICSID tribunals have “the power to decide on the admissibility of any evidence adduced and on its probative value whenever deemed appropriate by the Tribunal”.⁶⁵⁶ In *Metalpar v. Argentina*, the tribunal concluded that it could not “base its decision on the facts and conclusions that [the claimants'] witnesses and experts would have allegedly proved”, as the claimants decided “for reasons

⁶⁵⁰ Counter-Memorial on Annulment, p. 97 (para. 307). The Applicants also do not deny that the Claimants were allowed to raise on cross-examination with their own witnesses rebuttal points to respond to the statement of Mr. Ponta.

⁶⁵¹ Counter-Memorial on Annulment, p. 97 (para. 308).

⁶⁵² Reply on Annulment, p. 107 (para. 247).

⁶⁵³ Reply on Annulment, p. 107 (fn. 471); Procedural Order No. 1 dated 26 August 2016, at **RA-91**, p. 10 (para. 15.11 “The parties and the Tribunal **are not bound**, but shall be guided as appropriate by Articles 3 and 9 of the IBA Rules”).

⁶⁵⁴ Reply on Annulment, p. 107 (fn. 471) quoting IBA Rules on the Taking of Evidence in International Arbitration, at **AL-88**, p. 20 (of the PDF) (p. 11 of the original) (Article 4(7)).

⁶⁵⁵ Reply on Annulment, p. 107 (fn. 471).

⁶⁵⁶ See *Metalpar S.A. and Buen Aire S.A. v. Argentina*, ICSID Case No. ARB/03/5, Award dated 6 June 2008, at **AL-92**, p. 13 (para. 51).

unknown to the Tribunal” not to present any of the witnesses and experts.⁶⁵⁷ In *Gemplus v. Mexico*, the tribunal noted that it had “placed no reliance upon” a witness statement in its award.⁶⁵⁸ Finally, in *LG&E v. Argentina*, the claimants submitted new witness evidence with their post-hearing submissions, despite the tribunal’s decision that no new evidence would be admitted. The tribunal therefore concluded that it could not consider the new evidence submitted “after the cut-off date”.⁶⁵⁹ None of these tribunals, however, decided (i) **not to admit** such witness evidence on the record, or (ii) to strike statements after a witness failed to appear at the hearing. Instead, in exercising their powers under the ICSID Arbitration Rules, these tribunals decided not to rely on those witness statements in their awards, which is precisely what the Tribunal majority did here.

iii) The publications on which the Applicants rely support the Respondent’s position. As one of their new legal authorities explains:

“The approach most often used in modern practice was summarised by one well-experienced international tribunal as follows: “if a witness whose statement has been submitted by a party and whose examination at the Hearing has been requested by the other Party, does not appear at the Hearing, **his statement will not be taken into account by the Tribunal**. A Party may apply with reasons for the exception from that rule.”⁶⁶⁰

⁶⁵⁷ *Metalpar S.A. and Buen Aire S.A. v. Argentina*, Award dated 6 June 2008, at **AL-92**, p. 38 (para. 153).

⁶⁵⁸ *Gemplus S.A., et al. v. Mexico*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4 dated 16 June 2010, at **AL-94**, p. 21 *et seq.* (para. 1-27).

⁶⁵⁹ *LG&E Energy Corp., et al. v. Argentina*, Award, ICSID Case No. ARB/02/1 dated 25 July 2007, at **AL-95**, p. 26 *et seq.* (paras. 94-95 and 68).

⁶⁶⁰ N. O’Malley, *Rules of Evidence in International Arbitration*, 2012, at **AL-90**, p. 126 (para. 4.50) (emphasis added) (quoting from *Chevron v. Ecuador*). The Applicants misleadingly quote five words from a sentence that refers only to expert evidence and does not mention witness evidence anywhere (which is instead addressed in a different chapter). The other sources on which the Applicants rely discuss only commercial arbitration. See M. Rubino-Sammartano, *Breach of Due Process, International Arbitration Law and Practice* (3rd ed. 2014), at **AL-89** (discussing commercial arbitration and the importance of the applicable law and institutional rules as there can be wide differences when it comes to witness testimony and a tribunal’s approach to examination at the hearing); M. S. Kurkela and S. Turnunen, *Due Process in International Commercial Arbitration* (2d ed. 2010), at **AL-91**.

- 345 In the Reply, the Applicants continue to rely on the *Pey Casado* annulment decision for their proposition that mere “admission of witness evidence” without cross-examination violates due process.⁶⁶¹ As the Applicants admit, *Pey Casado* did not even involve a witness, but rather the claimant himself who did not submit any witness statement in the proceeding but made certain oral statements at the hearing without being subject to cross-examination.⁶⁶²
- 346 Unlike in the present case, in *Pey Casado* the tribunal did cite those statements in its award, and therefore the applicants argued that the tribunal’s reliance on oral statements that had not been tested at the hearing violated due process. The *ad hoc* committee found that, while the tribunal had relied on the claimant’s oral statement, it also relied on other evidence to support most of its findings on jurisdiction.⁶⁶³ Ultimately the *Pey Casado ad hoc* committee did not find any “serious” departure from a fundamental rule of procedure, because even though the tribunal included a few references to that oral evidence in the award, these were “**not outcome determinative**”.⁶⁶⁴
- 347 Finally, the Applicants provide three examples to show that the “Tribunal itself recognized the importance of cross-examination of witnesses”.⁶⁶⁵
- i) In Procedural Order No. 23, the Tribunal indicated that only a witness statement (not a declaration) of Mr. Ponta would be accepted to the record. The Applicants emphasize the Tribunal’s comment in this Procedural Order that the exclusion of a “declaration” was in line with its previous refusal of testimony from non-disputing parties because they would not be cross-examined.⁶⁶⁶ However, non-disputing parties do not benefit from the same rights as the parties and the rules on

⁶⁶¹ Reply on Annulment, p. 108 (paras. 249-250).

⁶⁶² Reply on Annulment, p. 108 (para. 250).

⁶⁶³ *Victor Pey Casado v. Chile (I)*, Decision on the Application for Annulment of the Republic of Chile, ICSID Case No. ARB/98/2, at **AL-11**, p. 148 (paras. 301-308).

⁶⁶⁴ *Victor Pey Casado v. Chile (I)*, Decision on Annulment dated 18 December 2012, at **AL-11**, p. 152 (para. 313).

⁶⁶⁵ Reply on Annulment, p. 107 *et seq.* (para. 248).

⁶⁶⁶ Reply on Annulment, p. 108 (para. 248) referring to Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 9 *et seq.* (paras. 44-45).

witness evidence do not apply to them; as a result, they cannot appear at the hearing and thus cannot be cross-examined.⁶⁶⁷

- ii) The Applicants note that “over the Claimants’ objection, the Tribunal allowed the Respondent to produce additional documents after the Rejoinder”⁶⁶⁸ which would be “necessary for the meaningful examination” of witnesses. However, **both** Parties were given – and made use of – the opportunity to submit rebuttal evidence.⁶⁶⁹
- iii) The Applicants point to the Respondent’s request to extend the duration of the 2019 Hearing to ensure sufficient time for the proper examination of the witnesses and experts; this was to **both** Parties’ benefit in light of the numerous witnesses and experts to be examined.

- 348 For the reasons set out above and in the Counter-Memorial, the Applicants’ arguments have no merit. None of the alleged failures to address claims or evidence amounts to a departure of a fundamental rule of procedure, let alone a serious departure, which would warrant any annulment pursuant to Article 52(1)(d).

3.4 The Tribunal Majority Adequately Stated the Reasons for the Award

- 349 In the Reply, the Applicants wrongly maintain that the Award should be partially annulled on the basis of Article 52(1)(e) because the Tribunal allegedly failed to state reasons as follows:
 - “why it disregarded Claimants’ contract rights under Romanian law” and “why it did not consider Claimants’ evidence persuasive”,⁶⁷⁰

⁶⁶⁷ See Procedural Order No. 19 dated 7 December 2018, at **A-147**, p. 8 (para. 42) (“the [non-disputing parties’] request to participate in the Hearing is excluded by the BIT and Section 24.5 of PO 1”); Procedural Order No. 1 dated 26 August 2016, at **RA-91**, p. 16 (para. 24.5).

⁶⁶⁸ Reply on Annulment, p. 108 (para. 248).

⁶⁶⁹ See Counter-Memorial on Annulment, p. 97 (para. 307 (ii)).

⁶⁷⁰ Reply on Annulment, p. 73 *et seq.* (para. 158).

- “for disregarding the lack of any decision on the Roșia Montană Environmental Permit or on the Bucium Applications”;⁶⁷¹ and
- “impermissibly substitute[d] equitable considerations for legal analysis”.⁶⁷²

350 **None** of these arguments justify annulling any portion of the Award as already explained in the Counter-Memorial and in the following sections.

3.4.1 The Applicants do not rebut the Respondent’s explanations on the legal standard

351 It is undisputed that this annulment ground has been described as a “minimum requirement”,⁶⁷³ which is satisfied as long as the reasons “enable[] one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or law.”⁶⁷⁴ Provided the reasons can be followed, the **quality** of those reasons is irrelevant; even incorrect or unpersuasive reasons do not warrant annulment.⁶⁷⁵ Only “contradictory”, “unintelligible” or “frivolous” reasons can warrant annulment.⁶⁷⁶

352 *Ad hoc* committees have warned that “more than with the other grounds for annulment, a review of an award’s reasoning **creates the danger of**

⁶⁷¹ Reply on Annulment, p. 99 (heading III.C.3).

⁶⁷² Reply on Annulment, p. 109 (heading III.E).

⁶⁷³ Counter-Memorial on Annulment, p. 98 (para. 311) referring to *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on the Application for Partial Annulment of the Arbitral Award dated 6 January 1988, at **AL-1**, p. 105 (para. 5.09).

⁶⁷⁴ Counter-Memorial on Annulment, p. 98 *et seq.* (paras. 311-312); *MINE v. Guinea*, Decision on Partial Annulment dated 6 January 1988, at **AL-1**, p. 105 (para. 5.09), *Hydro Energy I S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Application for Annulment of Mar. 20, 2023, at **AL-68**, p. 148 (para. 400); *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 100 (para. 317).

⁶⁷⁵ See Counter-Memorial on Annulment, p. 100 (paras. 316 *et seq.*); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, at **AL-78**, p. 118 (para. 64).

⁶⁷⁶ See Counter-Memorial on Annulment, p. 99 *et seq.* (paras. 315, 316, 318, and 319); *Alapli Elektrik B.V. v. Republic of Turkey*, Decision on Annulment dated 10 July 2014, at **RAL-54**, p. 57 (para. 202). See also *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 101 (para. 321).

crossing the line of an appeal”.⁶⁷⁷ As the Applicants’ legal authority *MINE v. Guinea* confirmed, “[t]he adequacy of the reasoning is not an appropriate standard of review” under Article 52(1)(e), as it would draw the Committee “into an examination of the substance of the tribunal’s decision” which is excluded by Article 53 of the Convention.⁶⁷⁸

- 353 The Applicants rely on the *TECO v. Guatemala* annulment decision to claim that “annulment may be warranted on this ground where reasons given are ‘insufficient from a logical point of view to justify the tribunal’s conclusion.’”⁶⁷⁹ However, they fail to note the *ad hoc* committee’s further observation that:

“Insufficiency of reasons is not a ground for annulment where a tribunal did not explain why it rejected arguments, evidence or authorities that were not relevant or necessary for its analysis. Similarly, **insufficiency of reasons does not warrant annulment if the tribunal did not address every argument, piece of evidence or authority in the record.**”⁶⁸⁰

- 354 The *ad hoc* committee in *Teinver v. Argentina* agreed with this principle, and noted that it is “not the role of a Committee to step into the shoes of an arbitrator and engage into speculation as to the relevance that a piece of

⁶⁷⁷ *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 99 *et seq.* (para. 316).

⁶⁷⁸ *MINE v. Guinea*, Decision on Partial Annulment dated 6 January 1988, at **AL-1**, p. 105 (paras. 5.08-09); *Fraport Airport v. the Philippines*, Decision on the Application for Annulment, ICSID Case No. ARB/03/25, 23 December 2010, at **CLA-28**, p. 108 (para. 277) (“adequacy of the reasoning is not an appropriate standard of review.”).

⁶⁷⁹ Reply on Annulment, p. 73 (para. 155) referring to *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 73 *et seq.* (paras. 249-250).

⁶⁸⁰ *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 73 (para. 249) (emphasis added); *Teinver v. Argentina*, Decision on Annulment dated 29 May 2019, at **RAL-41**, p. 65 (para. 210) (“a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome. Likewise, a tribunal has no duty to address in its award all the evidence that is in the record, and failure to do so does not entail annulment unless the evidence that such tribunal failed to address was manifestly so important as to change the outcome of the arbitration.”).

evidence that a tribunal did not address would have had on the award.”⁶⁸¹
This is precisely what the Applicants are attempting to do.

355 The Applicants’ only response is to refer to what they characterize as the Tribunal majority’s “boilerplate statement” that it is not necessary to repeat every single argument and piece of evidence.⁶⁸² However, this statement was only stating the obvious and can hardly be controversial. Furthermore, the Applicants do not dispute that the Tribunal confirmed in this same statement that it addressed “the decisive factors necessary to rule on the Parties’ claims.”⁶⁸³

3.4.2 The Tribunal majority did not fail to state reasons in “assessing the link between project permitting and renegotiations”

356 The Applicants maintain that the Tribunal majority failed to state reasons “in assessing the link between Project permitting and renegotiations,” as regards (i) the Tribunal majority’s “conclusion that project economics was an open issue” and (ii) “why it did not consider [their] evidence persuasive.”⁶⁸⁴ However, they cannot escape the fact that the Tribunal majority did set out the reasons for these conclusions (notably in paragraphs 946-960 of the Award) as further explained below.⁶⁸⁵

357 As a preliminary point, the Respondent notes that the Applicants do not refer in Section III.B.3 of the Reply to the specific “testimonial and email evidence” which they allege the Tribunal majority disregarded.⁶⁸⁶ The Respondent understands that the Applicants are referring to the evidence that is discussed in Section 3.3.2 above under a different annulment

⁶⁸¹ *Teinver v. Argentina*, Decision on Annulment dated 29 May 2019, at **RAL-41**, p. 65 (para. 210).

⁶⁸² Reply on Annulment, p. 73 (para. 156) referring to Counter-Memorial on Annulment, p. 103 (para. 324).

⁶⁸³ Counter-Memorial on Annulment, p. 103 (fn. 519) quoting Award, p. 106 (para. 561).

⁶⁸⁴ Reply on Annulment, p. 80 (heading III.B.3, paras. 158 and 174) referring notably to Award, p. 208 (paras. 948-949 and fn. 597).

⁶⁸⁵ Counter-Memorial on Annulment, p. 104 *et seq.* (para. 326).

⁶⁸⁶ Reply on Annulment, p. 80 *et seq.* (paras. 174 and 181).

ground. For the reasons explained there and below, no such evidence was disregarded.

- 358 The Applicants acknowledge that the Tribunal majority provided reasons on the alleged “open issue” of the Project economics, but wrongly argue that they are not “understandable”.⁶⁸⁷ The Tribunal majority’s reasons “logically explain” the decision (to use the standard accepted by the Applicants)⁶⁸⁸ as the Respondent explained in the Counter-Memorial.⁶⁸⁹ Yet, the Applicants continue to rely on a selective reading of sentences of the Award taken out of context, as further shown below.⁶⁹⁰
- 359 The Applicants allege that the Respondent only “offers speculation as to what the majority might have meant when it concluded the Project economics were open and needed to be revisited”.⁶⁹¹ The Respondent did not speculate but rather referred to the Award itself.⁶⁹² The Applicants similarly challenge the Respondent’s observation that the Tribunal majority was “recording the view of some of the ministers”, without explaining why “that is not what the Award says”; that is precisely what the Award says.⁶⁹³ Moreover, the Tribunal majority did not “conclude” nor “base” any decision on the sole point that economic issues were being discussed, as the Applicants suggest while ignoring the full context and other observations forming part of the Tribunal majority’s analysis.⁶⁹⁴

⁶⁸⁷ Reply on Annulment, p. 80 (para. 174).

⁶⁸⁸ See Reply on Annulment, p. 73 (para. 155); see also Section 3.4.1 above.

⁶⁸⁹ Counter-Memorial on Annulment, p. 104 *et seq.* (para. 326).

⁶⁹⁰ See Counter-Memorial on Annulment, p. 105 *et seq.* (paras. 328-333).

⁶⁹¹ Reply on Annulment, p. 80 (para. 175) purporting to respond to Counter-Memorial on Annulment, p. 105 *et seq.* (paras. 328-336).

⁶⁹² Counter-Memorial on Annulment, p. 105 (paras. 328-333) referring to Award, p. 202 *et seq.* (paras. 947, 951, and 953-955).

⁶⁹³ Reply on Annulment, p. 80 (para. 175); Counter-Memorial on Annulment, p. 105 *et seq.* (para. 330); Award, p. 209 *et seq.* (para. 955) (“the most that can be demonstrated by reference to these statements is that **some Ministers (the Minister of Culture and Minister of Environment in particular) considered** that the outstanding issues relating to the Project (principally the environmental issues and the economic issues) needed to be addressed at a Governmental level before further progress could be made.”) (emphasis added).

⁶⁹⁴ Reply on Annulment, p. 80 *et seq.* (paras. 175-176) referring to Award, p. 208 (paras. 949 and 959, and omitting, *e.g.*, paras. 950-958); Counter-Memorial on Annulment, p. 105 *et seq.* (paras. 329-330).

- 360 The Applicants' complaints that the Tribunal majority did not consider their evidence persuasive are also misplaced, bearing in mind that:⁶⁹⁵
- i) The Applicants do not dispute that the Tribunal had "discretion to assess the weight and relevance to afford the evidence and related arguments".⁶⁹⁶
 - ii) The Applicants accept that they cannot challenge the Tribunal majority's assessment of the evidence.⁶⁹⁷
 - iii) The Tribunal majority considered the relevant evidence, including the "multiple witness statements and [...] more than two dozen exhibits".⁶⁹⁸
 - iv) The Tribunal majority reviewed the extensive record (as also discussed in Section 3.3.2 above) and found that it did not support the Claimants' theory of an improper link between permitting and renegotiations.⁶⁹⁹
 - v) The *TECO v. Guatemala* case is inapposite given that it involved, as the Applicants recognize, a situation of "complete absence" of discussion of one of the expert reports.⁷⁰⁰
- 361 The Applicants complain that the Tribunal majority did not "explain" why the evidence was "insufficient, unpersuasive, or unsatisfactory".⁷⁰¹ However, they do not dispute that the Tribunal majority set out in the Award its review of the evidence, taking into account the context and

⁶⁹⁵ Reply on Annulment, p. 80 (heading III.B.3, paras. 158 and 174) referring notably to Award, p. 208 (paras. 948-949 and fn. 597).

⁶⁹⁶ Counter-Memorial on Annulment, p. 105 (para. 327).

⁶⁹⁷ Reply on Annulment, p. 81 (para. 177) referring to Counter-Memorial on Annulment, p. 106 (para. 331).

⁶⁹⁸ See paras. 299-301 above.

⁶⁹⁹ Counter-Memorial on Annulment, p. 106 *et seq.* (para. 335) referring notably to Award, p. 211 (para. 959). See also *Teinver v. Argentina*, Decision on Annulment dated 29 May 2019, at **RAL-41**, p. 76 *et seq.* (para. 249) (holding that "A failure by the Tribunal to comment on certain portions of an expert report produced by a party, which the Tribunal may have found to be irrelevant, is therefore not such as to entail the annulment of the Award"); *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 42 (para. 160).

⁷⁰⁰ Reply on Annulment, p. 81 (para. 180) ("it [made a finding of] non-existence"); Counter-Memorial on Annulment, p. 99 *et seq.* (para. 315) referring to *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 35 *et seq.* (paras. 128-131).

⁷⁰¹ Reply on Annulment, p. 81 *et seq.* (para. 181).

timing of events, and the conclusions drawn on that basis, as explained in the Counter-Memorial.⁷⁰² Their statement that the Tribunal majority gave conclusions rather than reasons is unfounded.⁷⁰³

- 362 In a footnote, the Applicants contend that the Tribunal majority “bothered to mention” only one exhibit⁷⁰⁴ – this is false. A simple reading of paragraph 958 of the Award shows that the Tribunal majority explained assessed the evidence, citing dozens of exhibits and witness evidence, and cross-referenced paragraphs 119-149 of the Award where it detailed the 2011 License negotiations.
- 363 The Applicants’ disagreement with the Tribunal majority’s assessment of the evidence is beyond the scope of this proceeding. In assessing whether the Tribunal majority failed to state reasons in the Award, it is not the Committee’s role to review the underlying evidence and to consider whether it would have stated reasons differently.
- 364 For the sake of completeness only, the Respondent briefly addresses the Applicants’ allegation that Exhibit C-1286 “says the opposite of what the Majority contends”.⁷⁰⁵
- 365 The Applicants reiterate an argument already made in the Arbitration and which the Respondent opposed, namely that the letter shows duress or coercion by State authorities.⁷⁰⁶ The Applicants, however, gloss over elements reflecting an absence of duress or coercion by State authorities (also noted by the Respondent in the Arbitration), namely (i) Gabriel’s

⁷⁰² Counter-Memorial on Annulment, p. 104 *et seq.* (paras. 325-336) notably p. 104 (para. 326) (referring among other to the “detailed chronologies of the facts relating to the License negotiations in 2011” and the “events of 2012-2013 when the parties were further negotiating”) and p. 105 (para. 327) (referring to the context in which the public statements were made, their content and timing).

⁷⁰³ Reply on Annulment, p. 82 (para. 181).

⁷⁰⁴ Reply on Annulment, p. 82 (fn. 370) referring to Award, p. 210 (para. 958).

⁷⁰⁵ Reply on Annulment, p. 82 (fn. 370) quoting Award, p. 211 (para. 958 second bullet) (where the Tribunal majority notes that “there is no suggestion in this letter that it is made under duress or coercion or that Gabriel reserves its rights.”).

⁷⁰⁶ Reply on Annulment, p. 82 (fn. 370) referring to Exhibits C-1286 and C-781; see, *e.g.*, Claimants Reply in the Arbitration dated 1 November 2018, p. 97 *et seq.* (paras. 185-187); Respondent’s Rejoinder in the Arbitration, p. 140 *et seq.* (paras. 456-457 and 503-504).

positive and optimistic position expressed throughout this letter;⁷⁰⁷ (ii) the fact that Gabriel reserved their rights “to withdraw the Offer in writing at any time without prior notice.”⁷⁰⁸ The Tribunal majority correctly held that “there is no suggestion in this letter that it is made under duress or coercion”; rather this letter is “evidence of a pure negotiating process”.⁷⁰⁹

366 It follows that, contrary to the Applicants’ assertion, this exhibit fully supports the statement made in the Award, *i.e.*, the Tribunal majority stated the reasons supporting its conclusion.

367 In sum, the Applicants are expressing their substantive disagreement with the Tribunal majority’s assessment of the evidence, which they impermissibly seek to disguise as a failure to state reasons.

3.4.3 The Tribunal majority did not fail to state reasons regarding “the lack of any decision on the Roşia Montană environmental permit or on the Bucium applications”

368 The Applicants wrongly maintain that the Tribunal majority failed to “address the lack of any decision” on (i) the Roşia Montană environmental permit application and (ii) the Bucium Applications.⁷¹⁰ They *a fortiori* cannot establish “a complete absence of reasoning on a central aspect of the claims presented” which would warrant annulment, as explained in the Counter-Memorial.⁷¹¹

⁷⁰⁷ Letter from RMGC to Department for Infrastructure Projects, at C-1286, p. 3 (“Since its election, the Romanian Government has taken on the review of the Project in a professional and constructive manner in the context of creating real opportunities for the re-launch of the mining sector in Romania”); [REDACTED] June 11, 2013 [REDACTED] at C-781, p. 1 (“[REDACTED]”). The Applicants accept that Exhibit C-1286 was sent under cover of Exhibit C-781. Reply on Annulment, p. 82 (fn. 370).

⁷⁰⁸ Letter from RMGC to Department for Infrastructure Projects, at C-1286, p. 16 (last paragraph).

⁷⁰⁹ Award, p. 211 (para. 958 second bullet).

⁷¹⁰ Reply on Annulment, p. 99 *et seq.* (section III.C.3).

⁷¹¹ Reply on Annulment, p. 99 (para. 226); see Counter-Memorial on Annulment, p. 107 (paras. 337-351).

- 369 **In relation to the Roşia Montană environmental permit**, the Applicants repeat, without explanation, that the Tribunal majority allegedly did not address the absence of a decision on the application and the question whether that amounted to a breach of the BITs.⁷¹² These points can be dismissed for the reasons set out in Sections 3.2.3.1 and 3.3.3 above.⁷¹³
- 370 In the Memorial, the Applicants had pointed to one of the Tribunal majority’s findings in the Award section entitled “Causation consideration”, which states in full that
- “the nature of the Project, with its social, public, political and other elements, made the case a difficult and not a simple one, and therefore brought in the interests of many stakeholders. This ultimately explains how things turned out, for better or for worse.”⁷¹⁴
- 371 The Applicants do not dispute that the Tribunal majority’s explanations in the “Causation” section are not part of the decision on liability and accept that this statement was “made in dicta”.⁷¹⁵ Their comment in the Reply that this statement nevertheless “demonstrates the lack of understandable reasoning” is unexplained and unfounded.
- 372 **In relation to the Bucium Applications**, the Applicants accept in the Reply that the Tribunal majority addressed the claim “in the context of its decision on Claimants’ principal claim” and found that there was no “composite act in breach of the BITs”, including in relation to the State’s handling of the Bucium Applications up until 2013.⁷¹⁶ The Applicants thus

⁷¹² Reply on Annulment, p. 99 (para. 227); see Counter-Memorial on Annulment, p. 107 (para. 338) (referring to these two same arguments raised in the Memorial).

⁷¹³ See also paras. 252-253 (explaining that the permitting procedure did not “simply stop”) and para. 246 (describing the Tribunal majority’s substantive legal assessment whether the actions and omissions of the State constituted a breach of FET) above.

⁷¹⁴ Memorial on Annulment, p. 91 (para. 236) referring to Award, p. 349 (para. 1312); Reply on Annulment, p. 100 (para. 229) (only quoting “explains how things turned out, for better or [for] worse”).

⁷¹⁵ Reply on Annulment, p. 100 (para. 229); Counter-Memorial on Annulment, p. 109 (paras. 343-344).

⁷¹⁶ Reply on Annulment, p. 100 (para. 230).

do not dispute that there was no failure to state reasons in connection with the principal claim.⁷¹⁷

373 Furthermore, the Applicants do not explain why the Tribunal majority’s findings regarding the principal claim “did not apply” to the first alternative claim.⁷¹⁸ They disregard the Tribunal majority’s explanation that the principal and first alternative claims are “identical” save for the latter not being based on the composite act theory.⁷¹⁹ The Tribunal majority not only referred to the “analysis of the evidence that is part of Claimants’ principal claim” but **separately** also “examine[d] whether Romania has **in any way** mishandled the Bucium Applications.”⁷²⁰ Further, the Tribunal majority’s analysis also covered its assessment of “possible discrimination” (of which it found none) and the (lack of) link to the rejection of the Draft Law.⁷²¹

374 As to the second alternative claim, the Applicants misrepresent the findings of the Tribunal majority, notably as regards the relevant timeframe of the events assessed.⁷²² As already explained above,⁷²³ the reasons set out by the Tribunal majority in relation to the principal and first alternative

⁷¹⁷ Their comment that this does “not dispose of the issue on annulment” is understood as referring to the alternative claims. Reply on Annulment, p. 100 (para. 230).

⁷¹⁸ Reply on Annulment, p. 100 (para. 231).

⁷¹⁹ Award, p. 312 (para. 1178) (noting that the first alternative claim “is based on exactly the same facts and the same alleged breaches of the two BITs.” The Tribunal majority also noted a difference in relation to the date of breach “beginning on 9 September 2013 (‘as of 9 September 2013’), which implies that a later date of breach could also be chosen.”).

⁷²⁰ Award, p. 315 (para. 1192 referring to para. 1163) and p. 308 *et seq.* (paras. 1163-1164) (emphasis added) (noting (i) “the Bucium Applications, including the process of the homologation of the relevant areas, were pending” as of 2011 with Mr. Tănase acknowledging that “there was still work to be done”; (ii) Gabriel Canada included in its Annual Information Forms (2012-2014) that “no formal decision is expected” on the Bucium Applications “until further progress has been made on permitting the Project at Roşia Montană”; (iii) “the first time RMGC pursued the topic” of the Bucium Applications “was in 2014”; and (iv) there is “no evidence of any wrongdoing by NAMR”).

⁷²¹ Award, p. 317 (paras. 1197-1198) (finding (i) “no evidential foundation for concluding that this Project was treated less favourably than other projects”, (ii) “no evidence of a connection” between the conduct related to the Bucium Applications and the decision to reject the Draft Law and the public statements of politicians, and that (iii) the effects of the individual acts “do not rise to the level of a breach” under the BITs).

⁷²² Reply on Annulment, p. 101 (para. 232).

⁷²³ See paras. 323-325 above.

claims on the Bucium Applications also apply to the second alternative claim; indeed, the Tribunal majority's conclusion that Romania did not mishandle the Bucium Applications is not limited to the timeframe up to "September 9, 2013". In reaching this conclusion, the Tribunal majority took into account post-2013 events, including exhibits and witness testimony produced by the Claimants.⁷²⁴

375 Accordingly, the Tribunal majority stated the reasons for its decisions relating to the Bucium Applications as part of the principal, first and second alternative claims.

3.4.4 The Tribunal majority did not fail to state reasons regarding the UNESCO designation

376 The Applicants maintain that the Tribunal majority failed to state reasons for its conclusion relating to the UNESCO inscription.⁷²⁵

377 While the Applicants had argued in the Memorial that the Tribunal majority's reasons were "unpersuasive or insufficient", they do not dispute in the Reply the Tribunal majority's "clear and structured engagement" with the Claimants' pleadings and evidence in the Arbitration and the "methodological approach" the Tribunal majority adopted.⁷²⁶

378 The Applicants accept that the "majority addressed the claim", but allege that the "reasons" provided were not "pertinent" or "relevant to the claim" presented, which they claim is a "defect on annulment".⁷²⁷ In support, the Applicants rely on the *Soufraki v. UAE* decision's interpretation of the terms "Insufficient or inadequate reasons".⁷²⁸ As that decision recalled, these terms have also been interpreted as requiring "a reasonable connection between the bases invoked by a tribunal and the conclusions

⁷²⁴ Award, p. 307 *et seq.* (paras. 1157-1164 and evidence cited in the footnotes).

⁷²⁵ Reply on Annulment, p. 112 *et seq.* (section III.F).

⁷²⁶ Counter-Memorial on Annulment, p. 112 (paras. 353-358); Memorial on Annulment, p. 97 (para. 250).

⁷²⁷ Reply on Annulment, p. 112 (paras. 263-264).

⁷²⁸ Reply on Annulment, p. 112 (fn. 499) referring to *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007, at **AL-60**, p. 57 (para. 123).

reached by it”.⁷²⁹ The *Soufraki ad hoc* committee also warned that “wrong or unconvincing reasons” are not sufficient.⁷³⁰

- 379 Here, the Applicants disagree with the outcome of the Tribunal majority’s decision on the UNESCO claim and impermissibly seek to push the Committee to “cross the line of an appeal” (to take the terms of the *Cube v. Spain ad hoc* committee⁷³¹).
- 380 The Applicants state this in the abstract, without attempting to demonstrate why or how, other than referring back to the Memorial. The Applicants’ position thus remains based – as explained in the Counter-Memorial – on a selective reading of the Award, isolating passages from their context while disregarding the Tribunal majority’s reasoning as a whole.⁷³² In any event, that is a matter of substantive (dis)agreement which does not concern the Committee.
- 381 The Respondent therefore maintains that the Tribunal majority did not fail to state reasons “for its conclusion regarding the impact of the UNESCO inscription on the ability to implement the Roşia Montană Project.”⁷³³
- 382 Although the Applicants argue that the Award contains “additional fatal defects, including on the effects of the UNESCO description,⁷³⁴ they do not explain what other “defects” they are invoking. In any event, there are none.”⁷³⁵

⁷²⁹ *Soufraki v. UAE*, Decision on Annulment dated 5 June 2007, at **AL-60**, p. 56 *et seq.* (para. 123) (quoting *AMCO I* and stating “In Wena, the committee required that the reasons given by a tribunal must constitute a chain linking the facts and the law of the case to the conclusion.”).

⁷³⁰ *Soufraki v. UAE*, Decision on Annulment dated 5 June 2007, at **AL-60**, p. 57 (para. 123).

⁷³¹ See para. 352 above.

⁷³² Counter-Memorial on Annulment, p. 111 *et seq.* (paras. 352-353).

⁷³³ Counter-Memorial on Annulment, p. 114 (para. 359).

⁷³⁴ Reply on Annulment, p. 112 (heading F), see also p. 112 (para. 262) (alleging that the Award is “fatally defective **in other respects**, including because the majority failed to state reasons for its conclusion on whether the UNESCO inscription [...]”) (emphasis added).

⁷³⁵ See paragraph 213 above (noting that the Applicants have dropped their claim of a manifest excess of powers in relation to the UNESCO issue).

3.4.5 The Tribunal majority did not fail to state reasons “for its conclusions that the State’s conduct did not breach the BIT standards”

- 383 The Applicants continue to argue that the Tribunal majority allegedly “failed to apply the applicable BIT standards” to the claims and “thus” also “failed to state reasons for its conclusions”.⁷³⁶ They provide no further explanation other than to assert that “[i]n this case, the majority failed to support the conclusions reached with sufficiently pertinent reasons.”⁷³⁷
- 384 This is evidently not the case. Furthermore, the Applicants do not dispute the Respondent’s explanations in the Counter-Memorial regarding the applicable law and, more specifically, the relevant BIT standards.⁷³⁸ Moreover, and in any event, the Tribunal majority correctly applied the law, as shown in Section 3.2.5 above.

3.4.6 The Tribunal majority did not fail to state reasons in relation to Mr. Ponta’s evidence

- 385 The Applicants also maintain (now only in two short paragraphs) that the Tribunal majority “did not explain whether or why Prime Minister Ponta’s videotaped admission [Exhibit C-437] was unpersuasive or insufficient”, nor did it indicate how it assessed the evidentiary value of Mr. Ponta’s witness statement. In their view, this is a failure to state reasons that warrants annulment.⁷³⁹ This is incorrect, as already explained, and the Applicants raise no additional arguments in the Reply. To recall:
- i) The Applicants do not deny that the Tribunal majority considered this exhibit (C-437).⁷⁴⁰ They nevertheless mischaracterize and give undue

⁷³⁶ Reply on Annulment, p. 111 (para. 260).

⁷³⁷ Reply on Annulment, p. 111 *et seq.* (para. 261). On the interpretation of “sufficient reasons” in the context of the applicable legal standard, see paras. 353-354 above.

⁷³⁸ Counter-Memorial on Annulment, p. 65 *et seq.* (section 5.1.2, specifically paras. 207-210); see Reply on Annulment, p. 75 (para. 163) (referring to a few other paragraphs of that section of the Counter-Memorial).

⁷³⁹ Reply on Annulment, p. 102 (paras. 234 and 243). This was previously addressed in a self-standing section of the Memorial. Memorial on Annulment, p. 53 (para. 130) and p. 99 (section III. D.7).

⁷⁴⁰ Counter-Memorial on Annulment, p. 116 (para. 367).

weight to this particular passage of Mr. Ponta’s televised interview (which in any event does not comprise an “admission”) for the reasons set out in Section 3.3.4.1 above. They also disregard the Tribunal majority’s review of similar public statements, its explanations regarding the weight it attributed to such public statements, and its conclusion that what is “more important is how the State [...] actually treated the Project.”⁷⁴¹

- ii) It is undisputed that the Tribunal majority did not rely on Mr. Ponta’s witness statement in the Award.⁷⁴²

- 386 For the reasons set out above and in the Counter-Memorial, the arguments invoked by the Applicants in relation to an alleged failure to state reasons have no merit. No portion of the Award stands to be annulled pursuant to Article 52(1)(e).

4 THE APPLICANTS SHOULD BE ORDERED TO COVER THE COSTS OF THESE ANNULMENT PROCEEDINGS

- 387 To date, the Applicants have refused to pay the amounts owed under the Award, namely approximately USD 10 million.⁷⁴³ Nevertheless, the Applicants continue to raise funds to finance their baseless annulment claims,⁷⁴⁴ while the Respondent is out of pocket the (high) costs of these proceedings. This is not right.
- 388 It is undisputed that Article 61(2) of the ICSID Convention applies *mutatis mutandis* to annulment proceedings and grants *ad hoc* committees discretion over the allocation of costs between the parties.⁷⁴⁵

⁷⁴¹ See paras. 329-337 above (with quotes to the Award, notably para. 1196 second bullet).

⁷⁴² See Section 3.3.4.2 above.

⁷⁴³ Award, p. 360 (para. 1358); Comments on the Stay Request, p. 10 (para. 37).

⁷⁴⁴ See Gabriel Press Release Private Placement Initial Closing dated 12 September 2025, at **RA-92**; Gabriel Press Release Private Placement Initial Closing dated 6 March 2025, at **RA-93**.

⁷⁴⁵ Counter-Memorial on Annulment, p. 118 (para. 370); Reply on Annulment, p. 113 (para. 267).

- 389 In the Reply, the Applicants do not dispute that, where annulment is refused, *ad hoc* committees have increasingly held that applicants remain responsible for the costs of the proceedings (*i.e.*, costs follow the event).⁷⁴⁶ Nor do they dispute that this is particularly the case where an annulment application is found to be “fundamentally lacking in merit”.⁷⁴⁷
- 390 The Applicants also do not deny that *ad hoc* committees can consider the parties’ conduct of the proceedings when allocating costs.⁷⁴⁸ As set out in the Counter-Memorial, the Applicants’ conduct in these proceedings have generated increased costs and delay at every juncture.⁷⁴⁹ They sought an order to stay enforcement of the Award, leading to ten submissions from the Parties and three decisions from the Committee,⁷⁵⁰ and then refused to comply with the conditions under which the Committee agreed to stay enforcement.⁷⁵¹ While arguing that their financial situation required the stay of the Award, they expended further costs by raising a spurious challenge against Prof. Dr. Maxi Scherer, prompting four submissions from the Parties, before withdrawing the challenge.⁷⁵² Their voluminous submissions in connection with their annulment application also generated

⁷⁴⁶ See ICSID Background Paper on Annulment 2024, at **AL-21**, p. 31 *et seq.* (para. 72); *Tulip Real Estate v. Turkey*, Decision on Annulment dated 30 December 2015, at **AL-59**, p. 73 (para. 230). See also, *e.g.*, *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 155 (para. 504); *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025, at **AL-51**, p. 353 (para. 956); Counter-Memorial on Annulment, p. 118 *et seq.* (para. 371). As set out in the Counter-Memorial, some *ad hoc* committees have also ruled that the losing party should bear the legal fees and expenses of the successful party. See Counter-Memorial on Annulment, p. 118 (fn. 600); *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia*, Decision on Annulment, ICSID Case No. ARB/18/28, 5 November 2024, at **RAL-35**, p. 82 *et seq.* (paras. 266 and 269); *ConocoPhillips v. Venezuela*, Annulment Decision dated 22 January 2025, at **AL-51**, p. 353 (para. 956); *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 155 (para. 504).

⁷⁴⁷ See C. Schreuer *et al.*, Schreuer’s Commentary on the ICSID Convention, 2022, at **AL-62**, p. 23 (p. 1256 *et seq.* of the original) (para. 111) (referring notably to the annulment decision in *CDC v Seychelles*); Counter-Memorial on Annulment, p. 119 (paras. 372-373).

⁷⁴⁸ Counter-Memorial on Annulment, p. 119 (para. 374).

⁷⁴⁹ Counter-Memorial on Annulment, p. 119 (para. 374).

⁷⁵⁰ Decision on Stay of Enforcement dated 21 January 2025, p. 4 *et seq.* (of the PDF) (section II); Second Decision on Stay of Enforcement dated 7 March 2025, p. 4 *et seq.* (paras. 4, 5); Letter from ICSID to Parties (Termination Stay of Enforcement) dated 25 April 2025, p. 2.

⁷⁵¹ Letter from ICSID to Parties (Termination Stay of Enforcement) dated 25 April 2025.

⁷⁵² Letter from Applicants dated 6 December 2024.

increased costs for the Respondent, which had to respond to arguments that are patently without merit and exceed the scope of the Committee's remit (but which the Respondent has had no choice but to address). The Committee should consider this conduct when exercising its discretion under Article 61(2).

- 391 The Respondent maintains its claim for (i) a compound commercial interest rate from the date of the Committee's decision and until full payment,⁷⁵³ or in the alternative, (ii) a "simple interest at a risk-free rate as represented by the rate of interest on a three-month US Treasury bill" – the interest rate applied by the Tribunal in the Award.⁷⁵⁴
- 392 Contrary to the Applicants' arguments, the Respondent's request for simple interest during the Arbitration has no bearing on its request for compound interest in the current annulment proceedings.⁷⁵⁵ The Respondent's position reflects the extraordinary nature of annulment proceedings, the Applicants' continued refusal to pay the Award and the accruing interest (and the absence of indication that they have any intention of paying these amounts in the future), the total absence of merit of the Application, the Applicants' conduct of these proceedings and the ensuing (high) costs of these proceedings. In any event, *ad hoc* committees have granted compound interest and, in the present case, the Applicants also request compound interest.⁷⁵⁶
- 393 Thus, in light of the Applicants' baseless attempt to annul the Award, the Applicants should bear the full cost of these proceedings and be ordered to reimburse the Respondent's legal fees and costs incurred to defend against this application, including compound interest at the appropriate rate.

⁷⁵³ Counter-Memorial on Annulment, p. 119 (para. 375); *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 154 (para. 500).

⁷⁵⁴ Award, p. 360 (para. 1358(2)(c)); Counter-Memorial on Annulment, p. 119 (para. 375).

⁷⁵⁵ Reply on Annulment, p. 114 (para. 270).

⁷⁵⁶ *Cube Infrastructure Fund SICAV et al. v. Kingdom of Spain*, Decision on Annulment dated 28 March 2022, at **RAL-55**, p. 154 (para. 500). See Reply on Annulment, p. 114 (para. 269) (referring to the Applicants' pleading in the Arbitration where they requested "12-month London Interbank Offered Rate (LIBOR) plus 4%, subject to annual compounding").

5 PRAYERS FOR RELIEF

394 Based on the above, Romania respectfully asks the Committee to:

- a) Reject the Applicants' request to annul the Award,
- b) Order the Applicants to bear jointly and severally all of the costs arising from these annulment proceedings, including all of the costs and fees of the Committee, ICSID, and the Respondent, including attorneys' fees and expenses and all other expenses incurred in participating in the annulment proceedings, including internal costs, together with interest until full payment.

Respectfully submitted,

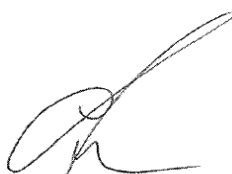
3 November 2025

For and on behalf of Romania,

Counsel for the Respondent



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Corina Tănase
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LIST OF RESPONDENT'S FACT EXHIBITS

RA-1	Resolution No. 3442 of the Trade Registry Office attached to the Alba County Court dated 1 April 2024
RA-2	Excerpt from website of Alba County Court re Case 1706/107/2024 dated 8 October 2024
RA-3	Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024
RA-4	Article 723 of the Romanian Code of Civil Procedure
RA-5	Dr. Leaua's LinkedIn post dated 8 June 2023
RA-6	Prof. Dr. Scherer's LinkedIn post dated 30 August 2024
RA-7	Ms. Athanasiou's comment on Prof. Dr. Scherer's LinkedIn post dated 31 August 2024
RA-8	LinkedIn Comments of Ms. Athanasiou and Ms. Bassiri dated 2 September 2024
RA-9	Gabriel Canada MD&A, Third Quarter 2024
RA-10	Junior Mining Network, Gabriel Resources: US\$1.5 Million Loan dated 29 November 2024
RA-11	Romanian Code of Fiscal Procedure (extracts)
RA-12	Romanian Company Law No 31/1990 (extracts)
RA-13	Romanian Code of Civil Procedure (extracts)
RA-14	RMGC Financial Indicators 2021
RA-15	RMGC Financial Indicators 2022
RA-16	RMGC Financial Indicators 2023
RA-17	Romanian Insolvency Law No. 85/2014 (extracts)
RA-18	Romanian Company Law No 31/1990 (extracts)

RA-19	Letter from Respondent to ICSID dated 5 March 2018
RA-20	Email from Respondent to ICSID dated 16 March 2018
RA-21	Letter from Respondent to ICSID dated 19 March 2018
RA-22	Letter from Respondent to ICSID dated 29 March 2018
RA-23	Procedural Order No. 27 dated 10 March 2020
RA-24	Letter from Respondent to Tribunal dated 20 April 2022
RA-25	Letter from ICSID to Parties (enclosing statement and Prof. Grigera Naón's CV) dated 3 December 2015
RA-26	GOV.UK, Friends of the Earth Limited Overview
RA-27	Friends of the Earth International, Organisation
RA-28	Friends of the Earth International, What we do
RA-29	Friends of the Earth, About us
RA-30	Seabed Mining Moratorium Is Legally Required by U.N. Treaty, Legal Experts Find, The Pew Charitable Trusts dated 26 September 2023
RA-31	MIDS Program Brochure 2012-2013
RA-32	MIDS website as of 16 September 2015
RA-33	MIDS Program Brochure 2015-2016
RA-34	MIDS Program Brochure 2018-2019
RA-35	LinkedIn Announcement of Prof. Douglas's appointment as MIDS Program Director dated 27 September 2024
RA-36	MIDS, Partners
RA-37	LALIVE, Professor Pierre Lalive
RA-38	MIDS, Scholarships

RA-39	LALIVE Announcement of first LALIVE Lecture dated 9 July 2007
RA-40	Queen Mary University of London, Research (excerpts from various years)
RA-41	American University Washington DC, Advisory Board dated 26 June 2025
RA-42	American University Washington DC, 2021 Lecture dated 2 November 2021
RA-43	American University Washington DC, Faculty
RA-44	Mentorship Program of the American University, Washington, DC
RA-45	Advisory Council of the American University, Washington, DC
RA-46	American University Washington DC, Faculty Profile: Horacio Naón dated 26 June 2025
RA-47	Email from Claimants to Tribunal dated 1 May 2019
RA-48	Letter from Respondent to ICSID dated 8 November 2015
RA-49	MIDS, Faculty
RA-50	Swiss Arbitration Association, Overview
RA-51	Swiss Arbitration Association, ASA Special Series
RA-52	ICCA, ICCA Geneva 2011 - 50th Anniversary Conference
RA-53	Flyer for Stories from the Hearing Room: Experience from Arbitral Practice
RA-54	University of Fribourg, IBL Teaching Staff
RA-55	CIDS, Celebration of the 80th birthday of Professor Pierre Tercier

RA-56	UN Trade and Development, <i>Wang and others v. Ukraine</i> (2020)
RA-57	D. Charlotin, “Pierre Tercier is tapped to chair under-the-radar UNCITRAL BIT arbitration brought by Chinese claimants”, <i>IA Reporter</i> , 22 Feb. 2022
RA-58	Letter from Respondent to Tribunal dated 26 September 2019
RA-59	Letter from Respondent to Tribunal dated 19 November 2019
RA-60	Letter from Respondent to Tribunal dated 16 October 2019
RA-61	Letter from Respondent to Tribunal dated 24 April 2020
RA-62	Letter from Respondent to Tribunal dated 29 April 2020
RA-63	Letter from Respondent to Tribunal dated 1 October 2020
RA-64	Letter from Respondent to Tribunal dated 4 October 2020
RA-65	Letter from Respondent to Tribunal dated 30 October 2020
RA-66	Letter from Respondent to Tribunal dated 26 August 2021
RA-67	Letter from Respondent to Tribunal dated 14 September 2021
RA-68	Procedural Order No. 30 dated 28 April 2020
RA-69	Procedural Order No. 34 dated 22 October 2020
RA-70	Procedural Order No. 35 dated 30 September 2021
RA-71	Letter from Tribunal to Parties dated 12 April 2022
RA-72	Letter from Tribunal to Parties dated 24 September 2019
RA-73	Letter from Claimants to Tribunal dated 19 July 2019
RA-74	Letter from Respondent to Tribunal dated 9 August 2019
RA-75	Letter from Claimants to Tribunal dated 11 October 2019

RA-76	Procedural Order No. 24 dated 22 October 2019
RA-77	<i>Friends of the Earth Limited et al. v. Total E&P Mozambique Area 1 Limtada et al.</i> , [2002] EWHC 568, Judgement
RA-78	2019 Consolidated Hearing Transcript
RA-79	2020 Consolidated Hearing Transcript
RA-80	Updated Index of Record for <i>Gabriel Resources v. Romania</i>
RA-81	Global Justice Now website, "Cameron told to stop Jersey-registered shell company suing Romania in 'corporate court'" dated 14 August 2015
RA-82	Belfast Live, "10 point plan to save Northern Ireland from becoming 'dirty corner of Europe'" dated 21 April 2018
RA-83	Friends of the Earth Limited, Who are we
RA-84	Global Arbitration Review, Douglas moves chambers in London dated 1 November 2022
RA-85	Matrix Chambers, Code of Conduct
RA-86	The Bar Standards Board Handbook, Confidentiality Guidance
RA-87	Client Earth, Laura Clarke
RA-88	Our partners - Sciences Po Law School
RA-89	Sciences Po Law School, Faculty
RA-90	MIDS website as of 16 September 2008
RA-91	Procedural Order No. 1 dated 26 August 2016
RA-92	Gabriel Press Release Private Placement Initial Closing dated 12 September 2025

RA-93 Gabriel Press Release Private Placement Initial Closing dated 6 March 2025

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