INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

RASIA FZE AND JOSEPH K. BORKOWSKI

V.

REPUBLIC OF ARMENIA

(ICSID CASE NO. ARB/18/28)

I hereby certify that the attached document is a true copy of the *ad hoc* Committee Decision on annulment dated November 5, 2024.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., November 5, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

RASIA FZE AND JOSEPH K. BORKOWSKI

Applicants on Annulment

and

REPUBLIC OF ARMENIA

Respondent on Annulment

ICSID Case No. ARB/18/28
Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
Ms. Loretta Malintoppi, President of the *ad hoc* Committee
Ms. Adedoyin Oyinkan Rhodes-Vivour, Member of the *ad hoc* Committee
Professor Hi-Taek Shin, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee
Mr. Yuichiro Omori

Date of dispatch to the Parties: November 5, 2024

REPRESENTATION OF THE PARTIES

Representing Rasia FZE and Joseph K. Borkowski:

Mr. Mark McNeill
Dr. Odysseas G. Repousis
Mr. Charles Rice
Quinn Emanuel Urquhart & Sullivan, LLP
51 Madison Avenue, 22nd Floor
New York, NY 10010
United States of America

and

Mr. Varoujan Avedikian
TK Partners
26, Erebuni Plaza Business Center, 1 Vazgen Sargsyan St, Yerevan 0010
Republic of Armenia

Representing the Republic of Armenia:

Mr. Yeghishe Kirakosyan
Representative of the Republic of Armenia on International Legal Matters

and

Mr. Liparit Drmeyan
Ms. Kristine Khanazadyan
Ms. Mariam Tarverdyan
Ms. Parandzem Mikayelyan
Ms. Maria Hovhannisyan
Office of the Representative of the Republic of Armenia on International Legal Matters
Republic Square, Government House 10010, Yerevan
Republic of Armenia

and

Mr. Edward Baldwin
Alliance Law Partners LLP
1510 Wisconsin Ave NW, Suite #203
Washington, DC 20007
United States of America

and

Prof. Frédéric Gilles Sourgens
Washburn University
1700 SW College Avenue
Topeka, Kansas 66621
United States of America

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TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

Application	Application for annulment filed on May 19, 2023
Arbitration	Arbitration proceeding between Rasia FZE and Joseph K. Borkowski and the Republic of Armenia (ICSID Case No. ARB/18/28)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Award	The award rendered on January 20, 2023 in the arbitration proceeding between Rasia FZE and Joseph K. Borkowski and the Republic of Armenia (ICSID Case No. ARB/18/28) by the Tribunal
BIT or USA-Armenia BIT	The Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, signed on September 23, 1992 and entered into force on March 29, 1996
A-[#]	Applicants' Exhibit
Memorial	Applicants' memorial on annulment dated August 24, 2023
Reply	Applicants' reply on annulment dated December 19, 2023
Applicants' Opening Statement	Applicants' slides used during their opening presentation at the Hearing, as corrected on July 2, 2024
Applicants' Rebuttal Statement	Applicants' slides used during their rebuttal presentation at the Hearing
AL-[#]	Applicants' Legal Authority
Committee	Annulment committee composed of Ms. Loretta Malintoppi, Professor Hi-Taek Shin and Ms. Adedoyin Oyinkan Rhodes-Vivour.

Hearing	Hearing on annulment held on July 2 and 3, 2024
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
RA-[#]	Respondent's Exhibit
Counter-Memorial	Respondent's counter-memorial on annulment dated October 16, 2023
Rejoinder	Respondent's rejoinder on annulment dated February 22, 2024
Respondent's Opening Statement	Respondent's slides used during its opening presentation at the Hearing
Respondent's Rebuttal Statement	Respondent's slides used during its rebuttal presentation at the Hearing
RLA-[#]	Respondent's Legal Authority
Transcript Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal composed of Ms. Jean E. Kalicki, Mr. John Beechey and Mr. J. Christopher Thomas that rendered the Award

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an application for annulment of the award rendered on January 20, 2023 (the "**Award**") in the arbitration proceeding between Rasia FZE and Joseph K. Borkowski and the Republic of Armenia (ICSID Case No. ARB/18/28) (the "**Arbitration**") by an arbitral tribunal composed of Ms. Jean E. Kalicki, Mr. John Beechey and Mr. J. Christopher Thomas (the "**Tribunal**").

2. The applicants on annulment are Rasia FZE ("**Rasia**"), a company incorporated in the United Arab Emirates, and Mr. Joseph K. Borkowski ("**Mr. Borkowski**"), a natural person having the nationality of the United States of America (together, the "**Applicants**" or the "**Claimants**"). The Respondent on annulment is the Republic of Armenia ("**Armenia**" or the "**Respondent**"). The Applicants and the Respondent are collectively referred to as the "Parties", and their representatives and addresses are listed above on page (i).

3. The Award decided on a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of (a) the 2012 Southern Armenia Railway Concession Agreement (the "**Railway Agreement**") and the 2012 Southern Armenia High Speed Road Concession Agreement (the "**Road Agreement**"), both dated July 28, 2012, which Rasia and the Respondent entered into in relation to two related projects in southern Armenia (together, the "**Concession Agreements**"), (b) the Treaty Between the United States of America and the Republic of Armenia Concerning the Reciprocal Encouragement and Protection of Investment, which entered into force on March 29, 1996 (the "**USA-Armenia BIT**" or the "**BIT**") as well as (c) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the "**ICSID Convention**").

4. The dispute in the original Arbitration related to the Respondent's series of actions and inactions in relation to these two projects in southern Armenia, designed to improve infrastructures in Armenia, that allegedly violated provisions in the Concession Agreements (*vis-à-vis* Rasia) and the USA-Armenia BIT (*vis-à-vis* Mr. Borkowski). The Claimants' claims included alleged violations with regard to fair and equitable treatment, arbitrary treatment, and expropriation. They also advanced umbrella clause claims.

5. In the Award, the Tribunal dismissed all of the Claimants' claims and ordered that the Claimants pay the Respondent USD 2,783,250.09, comprising USD 427,149.84 for the expended portion of the Respondent's advances to ICSID and USD 2,356,100.25 towards the Respondent's legal fees and expenses. The Award's operative part reads as follows:[1]

> *(1) Armenia's objection* ratione materiae*, on the basis of the non-existence of an investment, is denied;*
>
> *(2) Rasia's claims for breach of the Concession Agreements are denied as time-barred under the statute of limitations applicable to those agreements;*
>
> *(3) Mr. Borkowski's claim for breach of Article II(2)(c) of the BIT (the umbrella clause) is denied as similarly time-barred and also because Armenia did not enter into any obligations with Mr. Borkowski, and he has no standing to assert a claim under Article II(2)(c) with regard to obligations entered into with Rasia;*
>
> *(4) Mr. Borkowski's claims for breach of Articles II(2)(a), II(2)(b) and III of the BIT (fair and equitable treatment, arbitrary measures and expropriation) are denied on the merits;*
>
> *(5) Accordingly, the Claimants' claims for damages on account of alleged breaches of the Concession Agreements and the BIT are denied;*
>
> *(6) Orders that the Claimants pay the Respondent US$2,783,250.09, comprising US$427,149.84 for the expended portion of the Respondent's advances to ICSID and US$2,356,100.25 towards the Respondent's legal fees and expenses; and*
>
> *(7) Denies all other relief sought by both Parties.*

6. The Claimants applied for annulment of the Award on the basis of Article 52(1) of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers (Article 52(1)(b)); (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) failure to state reasons (Article 52(1)(e)).

[1] Award, ¶ 725, A-0001-ENG.

II. PROCEDURAL HISTORY

7. On May 19, 2023, ICSID received an application for annulment of the Award dated May 19, 2023 from the Applicants (the "**Application**"), together with Factual Exhibits A-1 through A-35, Legal Authorities AL-1 through AL-37 as well as an expert report on Armenian law by Adelaida Baghdasaryan dated May 19, 2023 and its supporting exhibits AB-1 to AB-20 (the "**Baghdasaryan Report**"). The Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**") for the stay of enforcement of the Award until the Application was decided (the "**Stay Application**").

8. On June 2, 2023, pursuant to Arbitration Rule 50(2), the Secretary-General of ICSID registered the Application. On the same date, in accordance with Arbitration Rule 54(2), the Secretary-General informed the Parties that the enforcement of the Award had been provisionally stayed.

9. On June 15, 2023, the Parties were informed of the Secretary-General's intention to propose to the Chairman of ICSID's Administrative Council (the "**Chairman**") the appointment to the *ad hoc* Committee of Ms. Loretta Malintoppi, a national of the Italian Republic, as President, Prof. Hi-Taek Shin, a national of the Republic of Korea and Ms. Adedoyin Oyinkan Rhodes-Vivour, a national of the Federal Republic of Nigeria as Committee Members. The Parties were invited to submit any observations related to this proposal by June 23, 2023.

10. On June 26, 2023, having confirmed that the Parties had not submitted any observations regarding the proposed appointment, the Secretary-General informed the Parties that the Chairman would proceed to appoint Ms. Loretta Malintoppi, Prof. Hi-Taek Shin and Ms. Adedoyin Oyinkan Rhodes-Vivour.

11. On July 4, 2023, the Centre informed the Parties that the *ad hoc* Committee was constituted in accordance with Arbitration Rules 6 and 53. Its Members are Ms. Loretta Malintoppi (President), a national of the Italian Republic, appointed to the Panel by the Chairman, Prof. Hi-Taek Shin (Member), a national of the Republic of Korea, appointed to the Panel

by the Republic of Korea, and Ms. Adedoyin Oyinkan Rhodes-Vivour (Member), a national of the Federal Republic of Nigeria, appointed to the Panel by the Federal Republic of Nigeria (the "**Committee**"). The Members of the Committee were appointed by the Chairman. On the same date, the Parties were further notified that Mr. Yuichiro Omori, Legal Counsel, ICSID, would serve as Secretary of the Committee.

12. On July 11, 2023, the Committee wrote to the Parties regarding the First Session of the annulment proceeding and provided a draft version of Procedural Order No. 1 for their comments. In that letter, the Committee invited the Applicants to confirm whether they maintain their Stay Application, and further invited the Applicants to submit a written request to introduce the Baghdasaryan Report into the record by July 18, 2023, and the Respondent to submit its observations on the Applicants' such request by July 25, 2023. The Committee's latter invitation was made "*[i]n view of paragraph 15.4 of the draft Procedural Order No. 1 [sent to the Parties on July 11, 2023]*" which in turn required, for new evidence to be admitted in this proceeding, that special circumstances exist based on a reasoned written request followed by observations from the other party.

13. On July 18, 2023, as directed, the Applicants confirmed their availability for the First Session. The Applicants also informed the Committee that they maintained their Stay Application and that they would confer with the Respondent regarding the timetable. The Applicants further formally requested that the Baghdasaryan Report be admitted into the record of this proceeding (the "**Baghdasaryan Report Request**"), without providing its reasons. On the same date, the Respondent confirmed its availability for the First Session.

14. On July 25, 2023, the Respondent objected to the admission of the Baghdasaryan Report "*as a general matter*" and noted that it could not object with specific arguments as the Applicants had not provided arguments or reasons as to why it should be admitted.

15. On July 26, 2023, the Committee invited the Applicants to submit written reasons for the Baghdasaryan Report Request by August 1, 2023, and the Respondent to submit its written observations by August 8, 2023. The Parties were also invited to further address this matter orally during the First Session.

16. On August 1, 2023, the Applicants submitted written reasons for their Baghdasaryan Report Request.

17. On August 3, 2023, the Parties sent to the Committee their comments on the draft Procedural Order No. 1, which contained their respective timetables on the Stay Application. The Parties further proposed that this matter be addressed at the First Session.

18. On August 6, 2023, the Applicants sent a letter to the Committee in support of their Stay Application.

19. On August 7, 2023, the Committee invited the Respondent, if it so wished, to provide its comments on the Applicants' letter of August 6, 2023 or to address the elements raised in the said letter orally during the First Session.

20. On August 8, 2023, the Respondent provided its response to the Applicants' letter of August 6, 2023 regarding the Stay Application. On the same date, the Respondent also filed with the Committee its written observations on the Applicants' August 1, 2023 letter concerning the Baghdasaryan Report Request.

21. On August 9, 2023, in accordance with Arbitration Rules 53 and 13(1), the Committee held its First Session with the Parties by videoconference. During the session, the Parties presented oral arguments on the matter of the Baghdasaryan Report Request and the Stay Application.

22. Following the First Session, on August 23, 2023, the Committee issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues ("**PO1**"). PO1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural language would be English, and that the place of proceeding would be Washington D.C., United States of America. PO1 also sets out a procedural calendar for the proceeding, and prescribes in its paragraphs 15.3 and 15.4 as follows:

> *15.3. Given the nature of an annulment proceeding, the Committee expects that the parties will refer primarily to the evidentiary record from the*

arbitration proceeding and it does not expect to receive new evidence (exhibits, witness statements or expert reports).

15.4. Therefore, without prejudice to each party's right to submit new legal authorities, no new evidence shall be admitted in this proceeding, unless the Committee determines that exceptional circumstances exist based on a reasoned written request followed by observations from the other party. For the avoidance of doubt, the Committee confirms that the rules under this paragraph apply to the Applicants' request to introduce the Baghdasaryan Report in this annulment proceeding, on which the Committee will render its ruling in due course.

23. On August 24, 2023, the Applicants filed their Application for Annulment and Memorial dated August 23, 2023 (the "**Memorial**"), with factual exhibits A-0001 to A-0035,[2] legal authorities AL-0001 to AL-0037 and the Baghdasaryan Report.[3]

24. On the same date, the Respondent submitted its Opposition to the Stay of Enforcement dated August 24, 2023 (the "**Stay Opposition**"), along with a factual exhibit RA-0001 and legal authorities RALA-0001 to RALA-0010.

25. On August 29, 2023, the Committee issued Procedural Order No. 2 dismissing the Applicants' Baghdasaryan Report Request given that exceptional circumstances as required under PO1 were not found ("**PO2**").

26. On September 8, 2023, the Applicants filed their Reply on Continuation of the Stay of Enforcement dated September 7, 2023 (the "**Stay Reply**"), and their cumulative index.

27. On September 12, 2023, the Committee invited the Applicants to formally submit the legal authority cited in the Stay Reply and, if they so wished, the legal authorities cited in the Applicants' letter of August 6, 2023, in accordance with the requirements prescribed in PO1. The Applicants were also invited to submit an updated cumulative index including these legal authorities.

[2] Factual exhibit A-0026-ENG was uploaded onto Box by the Applicants on September 11, 2023.

[3] The Applicants noted that "[t]his bundle contains the Baghdasaryan Report and its accompanying exhibits, subject to the Committee's ultimate ruling on its inclusion".

28. On September 13, 2023, the Applicants submitted their updated cumulative index which included the following items: (i) factual exhibits A-0001 to A-0035 and legal authorities AL-0001 to AL-0037, filed with the Memorial; (ii) A-0036 and A-0037, filed with the Stay Reply; and (iii) AL-0038 to AL-0040, filed in response to the Committee's invitation of September 12, 2023.

29. On September 21, 2023, the Respondent submitted its Rejoinder on the Stay of Enforcement (the "**Stay Rejoinder**") and its cumulative index, along with factual exhibits RA-0002 to RA-0005 and legal authorities RALA-0011 to RALA-0012.

30. On September 29, 2023, the Applicants submitted a letter regarding their Stay Application, together with their cumulative index and a factual exhibit A-0038. On the same date, the Committee invited the Respondent to provide its comments on the Applicants' such letter by October 3, 2023.

31. On October 3, 2023, as directed, the Respondent submitted its comments on the Applicants' letter of September 29, 2023 regarding the Stay Application.

32. On October 4, 2023, without receiving the Committee's invitation to do so, the Applicants sent an email to the Committee in response to the Respondent's October 3, 2023 letter.

33. On October 5, 2023, the Committee informed the Parties that it did not consider that the Parties' further submissions on the Stay Application were required to render its decision. The Committee also reminded the Parties to comply with the prescriptions of PO1, including its Annex B on procedural timetable.

34. On October 16, 2023, the Committee issued its Decision on Stay of Enforcement of the Award dated October 16, 2023 (the "**Stay Decision**"), in which it decided and directed in paragraph 99 that:

> *a. The provisional stay of enforcement is extended until the date of the Committee's decision on the Application for Annulment, so long as the Applicants, within forty-five days of the date of this Decision, furnish to the Committee an unconditional and irrevocable bank guarantee or security bond for the full amount due under para. 725(6) of the Award*

(USD 2,783,250.09) (the "instrument") inclusive of all applicable interests accrued to the date of issuance of the instrument.

b. The instrument must be issued by a first-tier reputable credit institution and must be immediately payable to or cashable by the Respondent upon the presentation of a decision rejecting the Applicants' annulment application, withdrawal of the Application for Annulment, or discontinuance of this annulment proceeding. Furthermore, the instrument shall provide that, in the event that the Committee upholds the Award, the amount payable to the Applicants shall equal the amount under para. 725(6) of the Award, plus interest accrued as of the date of the instrument as applicable. A copy of the executed instrument shall be provided to the Committee and to the Respondent.

c. Within seven days of receipt of the executed instrument, the Respondent shall provide to the Committee (with a copy to the Applicants) any comments on whether the instrument meets the conditions specified by the Committee in this Decision. If the Committee wishes to receive additional comments from either Party, it shall request so.

d. The stay of enforcement shall be lifted sixty days after the date of this decision if the Applicant has not [sic] furnished the instrument as described above by that date.

35. On October 17, 2023, the Respondent filed its Counter-Memorial on Annulment (the "**Counter-Memorial**"), together with factual exhibits RA-0006 through RA-0012 and legal authorities RALA-0013 through RALA-0021.

36. On November 30, 2023, the Applicants submitted a letter and an electronic copy of a document entitled "*Demand Guarantee*" issued by Lazarus Capital Partners ("**Lazarus**"), signed both by its Managing Director and Director (the "**Demand Guarantee**"), together with an account statement evidencing the funds. The Demand Guarantee had an expiration date of December 25, 2024, and provided in its relevant part as follows:

3. Immediately upon the ICISD Annulment Committee's decision becoming final, and provided the Applicants' application to annul the Award is unsuccessful in full, we irrevocably undertake to pay the Beneficiary upon receipt of a written demand, the sum of two million seven hundred eighty three thousand two hundred fifty and 9/100 U.S. Dollars ($2,783,250.09) or such lesser amount as may be requiring, following the Annulment Committee's decision. The maximum amount of this

Guarantee is two million seven hundred eighty three thousand two hundred fifty and 9/100 U.S. Dollars ($2,783,250.09).

37. On December 1, 2023, the Committee invited the Respondent to comment, in accordance with paragraph 99.c of the Stay Decision, on whether the documents filed by the Applicants met the required conditions, by December 7, 2023.

38. On December 7, 2023, the Respondent provided its comments on the Applicants' Demand Guarantee, challenging its adequacy on multiple grounds.

39. On December 8, 2023, the Committee invited the Applicants to submit their comments on the Respondent's observations by December 15, 2023.

40. Later that same day, the Applicants provided their comments on the Respondent's observations of December 7, 2023, reiterating that the Demand Guarantee satisfied the requirements as set out in the Stay Decision. The Applicants stated that they were "*in advanced discussions with Aon plc, a global professional services and management consulting firm, for the placement of a security bond with Intact Financial Corporation, a global property and casualty insurance company*", and added that they were at the Committee's disposal should the option of a security bond be preferable.

41. On December 12, 2023, the Committee invited the Respondent to provide, by December 18, 2023, its observations on the Applicants' statement that they would be prepared to place a security bond with Intact Financial Corporation under the terms described in their letter of December 8, 2023.

42. On December 18, 2023, as directed, the Respondent provided its observations on the above-mentioned matter regarding the security bond. The Respondent did not oppose the Applicants' statement but requested that "*any security bond include the Committee's directive language, rather than stating (as the Applicants had done) that the annulment decision must be 'final,' or including an artificial termination date of the bond*".

43. On the same date, the Parties informed the Committee that they had agreed to a one-day extension of the deadline for the Applicants to file their reply on annulment and the

corresponding changes to the procedural timetable. On December 19, 2023, the Committee agreed to the proposed extension.

44. On December 19, 2023, the Applicants filed their Reply on Annulment (the "**Reply**"), along with factual exhibits A-0039 to A-0045.

45. On December 22, 2023, the Committee issued its Revised Decision on Stay of Enforcement of the Award (the "**Revised Stay Decision**"), in which it decided that:

> *27. […] the Demand Guarantee does not meet the requirements of the Stay Decision.*
>
> *[…]*
>
> *31. […]*
>
> *a. The Applicants shall produce an unconditional and irrevocable security bond for the full amount due under para. 725(6) of the Award (USD 2,783,250.09) inclusive of all applicable interests accrued to the date of issuance of the instrument ("Instrument") within forty-five days from the date of this Decision. The Instrument shall not contain an expiration date.*
>
> *b. The Instrument must be issued by Intact Financial Corporation, or another first-tier reputable credit institution of similar standing, and must be immediately payable to or cashable by the Respondent upon the issuance of a decision rejecting the Applicants' annulment, withdrawal of the Application for Annulment, or discontinuance of this annulment proceeding. Furthermore, the Instrument shall provide that, in the event that the Committee upholds the Award, the amount payable to the Applicants shall equal the amount under para. 725(6) of the Award, plus interest accrued as of the date of the Instrument. A copy of the executed instrument shall be provided to the Committee and to the Respondent and in full satisfaction of the Award.*
>
> *c. The stay of enforcement shall be lifted sixty days after the date of this Decision if the Applicant has not furnished the Instrument as described above by that date.*
>
> *d. The Committee reserves its right to revisit at any time its decision or order, at the request of either Party or by own its motion, to vary or amend its decision or order.*

e. The Committee reserves its decision on costs for a subsequent stage of the proceeding.

46. On January 19, 2024, the Applicants filed a letter and an electronic copy of a document labelled "*Security Bond*" (Bond No. 800140501) dated January 18, 2024 issued by Atlantic Specialty Insurance Company, a surety underwriting company of Intact Financial Corporation, signed by its Attorney-in-Fact Sara Owens (the "**Security Bond**"), together with a power of attorney and its accounting statement as of 31 December 2022. The Security Bond did not bear the Applicants' signature.

47. In the said letter, the Applicants stated that they required assistance in terminating the Demand Guarantee as the Revised Stay Decision was insufficient to cancel it and therefore requested that the Committee issue an order directing that the Demand Guarantee be terminated.

48. On January 24, 2024, at the request of the Committee, the Applicants resubmitted the Security Bond bearing their signature.

49. On January 25, 2024, the Committee issued its New Decision on Stay of Enforcement and Termination of Demand Guarantee issued by Lazarus Capital Partners (the "**New Stay Decision**"). Its dispositive part reads as follows:

a. The Security Bond satisfies the requirements set forth in the Revised Stay Decision.

b. The Demand Guarantee shall be terminated.

c. The stay of enforcement of the Award is maintained pending the Committee's decision on the Applicants' application for annulment.

d. The Committee reserves its right to revisit at any time its decision or order, at the request of either Party or by own its motion, to vary or amend its decision or order.

e. The Committee reserves its decision on costs for a subsequent stage of the proceeding.

50. On February 22, 2024, the Respondent filed its Rejoinder on Annulment (the "**Rejoinder**"), along with factual exhibits RA-0013 through RA-0018 and legal authorities RALA-0022 through RALA-0029.[4]

51. On March 28, 2024, the Committee provided to the Parties with a draft version of Procedural Order No. 3 on the organization of the hearing ("**Draft PO3**"), inviting them to consult and revert to the Committee by May 6, 2024 with any agreements and/or disagreements that they might have on Draft PO3.

52. On April 29, 2024, the Committee received an application from Counsel for Mr. Edmond Khudyan ("**Mr. Khudyan**") to make a submission as a non-disputing party dated April 29, 2024 (the "**NDP Application**"). On the same date, on behalf of the Committee, the Committee Secretary transmitted the NDP Application to the Parties and invited them to provide any observations on the NDP Application by May 9, 2024.

53. On May 6, 2024, as directed, the Parties filed their comments on Draft PO3.

54. On May 9, 2024, the Respondent filed its observations on the NDP Application. On May 10, 2024, at the Committee's request for clarification, the Applicants submitted their observations on the NDP Application.

55. On May 14, 2024, the Committee sent to the Parties a revised version of Draft PO3.

56. On May 20, 2024, a pre-hearing organizational meeting was held by video conference.

57. On May 23, 2024, the Committee issued Procedural Order No. 3 concerning the organization of the hearing ("**PO3**").

58. On the same date, the Committee issued Procedural Order No. 4 containing the Committee's decision on the NDP Application ("**PO4"**).

[4] These documents, including the factual exhibits and legal authorities, were uploaded onto Box by the Respondent on March 27, 2024.

59. On May 28, 2024, the Committee invited the Parties to indicate whether they consented to the transmission of PO4 to Mr. Khudyan, by May 30, 2024.

60. On May 30, 2024, the Respondent objected to the transmission of PO4 to Mr. Khudyan. The Applicants did not respond to the Committee's invitation of May 28, 2024.

61. On June 12, 2024, the Committee proposed that the Committee provide Mr. Khudyan with the relevant legal reasoning of PO4 on the condition that Mr. Khudyan would provide a confidentiality undertaking, and invited the Parties to comment on the Committee's such proposal by June 19, 2024. On the same date, the Applicants informed the Committee that it had no objection to the Committee's proposal. On June 19, 2024, the Respondent informed the Committee that it did not object to the Committee's proposal.

62. On July 1, 2024, the Applicants requested that the Committee allow the addition of a new exhibit into the hearing bundle as exhibit A-0046-ENG.

63. A hearing on annulment was held in Washington D.C., the USA on July 2 and 3, 2024 (the "**Hearing**"). The following persons were present at the Hearing:

Committee:		
Ms. Loretta Malintoppi	President	In-person
Professor Hi-Taek Shin	Member of the Committee	In-person
Ms. Adedoyin Oyinkan Rhodes-Vivour	Member of the Committee	In-person
ICSID Secretariat:		
Mr. Yuichiro Omori	Secretary of the Committee	In-person
Ms. Jaidat Ali Djae	Paralegal	In-person
For the Applicants:		
Mr. Mark McNeill	Quinn Emanuel Urquhart & Sullivan, LLP	In-person
Mr. Odysseas Repousis	Quinn Emanuel Urquhart & Sullivan, LLP	In-person
Mr. Charles Rice	Quinn Emanuel Urquhart & Sullivan, LLP	In-person
Mr. Varoujan Avedikian	TK Partners	In-person
Mr. Joseph Borkowski	Applicant	Remote
For the Respondent:		
Mr. Teddy Baldwin	Alliance Law Partners, LLP	In-person
Prof. Dr. Frederic Sourgens	Washburn University	In-person

Dr. Liparit Drmeyan	Respondent's Counsel / Representative	In-person
Ms. Kristine Khanazadyan	Respondent's Counsel / Representative	In-person
Ms. Parandzem Mikayelyan	Respondent's Counsel / Representative	In-person
Ms. Mariam Tarverdyan	Respondent's Counsel / Representative	Remote
Ms. Maria Hovhannisyan	Respondent's Counsel / Representative	Remote

Court Reporter:

Ms. Rose Tamburri	Court-Reporter	In-person

64. During the 1st day of the Hearing, the Parties orally presented their respective positions on the Applicants' request to introduce a new exhibit into the record of this annulment proceeding. The Committee rejected the Applicants' such request orally during the Hearing.

65. On July 15, 2024, the Committee informed the Parties that it had received sufficient submissions and evidence from the Parties, and therefore it did not find it necessary to receive a post-hearing brief from the Parties or to ask post-hearing questions to the Parties.

66. Following the signing of the confidentiality undertaking by Mr. Khudyan and his counsel, on August 21, 2024, the Committee transmitted relevant portions of the legal reasoning of PO4 to Mr. Khudyan.

67. On August 12 and 13, 2024, at the invitation of the Committee, the Parties filed their respective submissions on costs.

68. The proceeding was closed on August 29, 2024.

69. On the same date, the Respondent submitted its comments on the Applicants' submission on costs.

70. On September 6, 2024, at the invitation of the Committee, the Applicants submitted their response to the Respondent's August 29, 2024 submission.

71. On September 13, 2024, the Committee informed the Parties that it did not require further information from the Parties with regard to their costs submissions.

III. THE PARTIES' REQUESTS FOR RELIEF

(1) The Applicants' Requests for Relief

72. The Applicants seek the following reliefs in their Application[5] and Memorial:[6]

> *(i) STAY enforcement of the Award;*
>
> *(ii) ANNUL the Award in full; and*
>
> *(iii) ORDER Armenia to bear all costs of these annulment proceedings, including the cost of the Applicants' legal representation, as well as all costs of the Applicants in the Arbitration proceedings, with interest.*

73. In their Reply, the Applicants seek the following reliefs:[7]

> *(i) ANNUL the Award in full; and*
>
> *(ii) ORDER Armenia to bear all costs of these annulment proceedings, including the cost of the Applicants' legal representation, as well as all costs of the Applicants in the Arbitration proceedings, with interest.*

(2) The Respondent's Requests for Relief

74. The Respondent requests, in its Counter-Memorial, that the Committee render a decision:[8]

> *193. Rejecting in its entirety Applicants' Application for Annulment of the Award rendered 20 January 2023.*
>
> *194. Ordering Applicants to pay the Republic's costs in these annulment proceedings in an amount to be specified, including all attorneys' fees and expenses in connection with these proceedings, and all fees and expenses of the* ad hoc *Committee and the ICSID Secretariat, together with interest thereon;*
>
> *195. Ordering any other relief that the* ad hoc *Committee deems appropriate.*

[5] Application, ¶ 145.

[6] Memorial, ¶ 145.

[7] Reply, ¶ 130.

[8] Counter-Memorial, ¶¶ 192-195.

75. In its Rejoinder, the Respondent requests that the Committee render a decision:[9]

> *2. Rejecting in its entirety Applicants' Application for Annulment of the Award rendered on 20 January 2023.*
>
> *3. Ordering Applicants to pay the Republic's costs in these annulment proceedings in an amount to be specified, including all attorneys' fees and expenses in connection with these proceedings, and all fees and expenses of the* ad *hoc Committee and the ICSID Secretariat, together with interest thereon; and*
>
> *4. Ordering any other relief that the* ad hoc *Committee deems appropriate.*

IV. GROUNDS FOR ANNULMENT

76. The Applicants seek annulment of the Award on the following grounds as set out in Articles 52(1)(b), (d) and (e) of the ICSID Convention:[10]

a. The Tribunal has manifestly exceeded its powers;

b. The Tribunal has made a serious departure from a fundamental rule of procedure; and

c. The Tribunal failed to state reasons on which the Award is based.

77. The Committee will first deal in Part A with the Applicants' request for annulment under Article 52(1)(b) of the ICSID Convention for a manifest excess of powers, followed by the Applicants' request under Article 52(1)(d) for a serious departure from a fundamental rule of procedure in Part B, and finally the Applicants' request under Article 52(1)(e) for the Award's failure to state reasons in Part C.

[9] Rejoinder, ¶¶ 1-4 of p.86.

[10] Application, ¶¶ 2-3.

A. GROUND 1: MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B))

(1) Applicable Legal Standard of Review for Manifest Excess of Powers (Article 52(1)(b))

a. The Applicants' Position

78. The Applicants submit that an excess of power occurs where a tribunal deviates from the parties' agreement to arbitrate, and in particular if a tribunal (i) wrongly asserts its jurisdiction over a dispute, (ii) fails to exercise its jurisdiction properly, or (iii) applies the wrong rules of law in disregard of the parties' choice of rules to apply to their dispute.[11]

79. The Applicants assert that the term "*manifest*" has been interpreted as "*obvious*" or "*serious*", or "*if it can be discerned with little effort and without deeper analysis*". In the context of a tribunal's application of the correct law, it is the Applicants' position that an excess of power is manifest if a tribunal (i) makes an incorrect determination as to whether an issue is subject to national or international law, and its erroneous choice in that regard is outcome-determinative; (ii) has identified the correct rules of law, but has so grossly misinterpreted and misapplied them as to be tantamount to the application of the wrong rules of law; or (iii) failed to consider whether the conduct complained of constituted a breach of the underlying investment treaty or other instruments governing the dispute.[12] At the Hearing, the Applicants further contended that the Parties appear to agree that applying a "different test" constitutes an annullable error.[13]

b. The Respondent's Position

80. Concerning the requirement of an "*excess of power*", the Respondent argues that the jurisprudence submitted by the Applicants in support of their arguments is inapposite. In

[11] Application, ¶ 66; Memorial, ¶ 66; Reply, ¶ 33.

[12] Application, ¶¶ 67-68; Memorial, ¶¶ 67-68; Reply, ¶ 33.

[13] Transcript Day 2, pp. 247-249, however, the Applicants accept that the Respondent specifically required "ill intent" for it to be annullable. *See also* Applicants' slides used during their rebuttal presentation at the Hearing ("**Applicants' Rebuttal Statement**"), p. 22, arguing that "[t]he Parties appear to agree that providing a 'different test' is an annullable offence".

the Respondent's view, the Tribunal exercised the jurisdiction it had when it dismissed the Applicants' claims on the basis of the limitations period.[14]

81. While the Respondent accepts the Applicants' contention that "*appl[ying] the wrong rule of law in disregard of the parties' choice of rules to apply to their dispute*" would result in the excess of a tribunal's power, it maintains that the standard requires proof of the failure to apply the applicable law, as opposed to an imperfect interpretation or application of the applicable law.[15] The Respondent agrees with the finding of the annulment committee in *Soufraki v. UAE*, submitted by the Applicants, that a "*distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment*".[16] The Respondent does not disagree with the Applicants' position that an error must make "*a difference to the result*" for an award to be annullable.[17]

82. The Respondent further relies on the *ad hoc* committee's finding in *Alapli v. Turkey* that *"…it is not the role of an annulment committee to verify whether the tribunal's interpretation of the law or assessment of the facts was correct*" and therefore "*[a]s long as the tribunal correctly identified the applicable law, and strove to apply it to the facts that it established, there is no room for annulment*".[18] It further draws the Committee's attention to the ruling of the *Tulip v. Turkey* committee that "[a]d hoc *committees cannot review an award's findings for errors of fact or law*".[19] The Respondent highlights that weighing of factual evidence and the drawing of evidentiary conclusions is a matter within

[14] Counter-Memorial, ¶ 99.

[15] Counter-Memorial, ¶ 100, referring to Application, ¶ 66 and Memorial, ¶ 66.

[16] Counter-Memorial, ¶¶ 100, 104-105; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 (Annulment Proceeding), Decision of the *Ad Hoc* Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007) ("***Soufraki v. UAE***"), ¶ 85, AL-0003-ENG.

[17] *See* Counter-Memorial, ¶ 102; Rejoinder, ¶ 81.

[18] Counter-Memorial, ¶¶ 152-157; Rejoinder, ¶ 111, referring to *Alapli Elektrik BV v. Republic of Turkey*, ICSID Case No. ARB/08/13 (Annulment Proceeding), Decision on Annulment (July 10, 2014) ("***Alapli v. Turkey***"), ¶ 234, RAL-0019-ENG.

[19] Counter-Memorial, ¶¶ 152-157, referring to *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey,* ICSID Case No. ARB/11/28 (Annulment Proceeding), Decision on Annulment (December 30, 2015) ("***Tulip v. Turkey***"), ¶ 44, AL-0005-ENG.

the Tribunal's competence and therefore cannot be a valid annulment ground for an excess of power.[20]

83. With regard to the requirement of "*manifest*", the Respondent acknowledges that one way to interpret manifestness is for it to mean obviousness, as the Applicants argue. However, the Respondent disagrees with the *ad hoc* committees' findings in *Sempra v. Argentina* and *Enron v. Argentina*, both introduced by the Applicants, as "*[t]hese two decisions more than most have led to an erosion of trust by participants in the ICSID system in the ICSID annulment mechanism*".[21]

c. The Committee's Analysis

84. The Committee notes that the Parties agree that "*appl[ying] the wrong rule of law in disregard of the parties' choice of rules to apply to their dispute*"[22] would result in the excess of a tribunal's power and that they both rely on the *Soufraki* annulment decision holding that "*a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment*".[23]

85. As to the requirement of "*manifestness*" under Article 52(1)(b), the Applicants argue that the word "*manifest*" has been interpreted as being roughly synonymous with "*obvious*" or "*serious*".[24] For its part, the Respondent does not appear to disagree with this rather uncontroversial definition but argues that the Applicants do not submit any argument on how the Tribunal's conduct shows that it "*manifestly*" exceeded its powers.[25]

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[20] Rejoinder, ¶ 111. *See also* Rejoinder, ¶ 141.

[21] Counter-Memorial, ¶¶ 159-160.

[22] Memorial, ¶ 66; Counter-Memorial, ¶ 100.

[23] Application, ¶¶ 68, 89; Memorial, ¶¶ 68, 89; Reply, ¶ 33; Applicants' slides used during their opening presentation at the Hearing, as corrected on the same date ("**Applicants' Opening Statement**"), p. 5; Counter-Memorial, ¶¶ 100, 104-105; *Soufraki v. UAE*, ¶ 85, AL-0003-ENG. *See also* Transcript Day 1, 46:7-48:4.

[24] Memorial, ¶ 67, referring to Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law (2d ed. 2012), p. 304, AL-0018-ENG and *Soufraki v. UAE*, ¶ 41, AL-0003-ENG ("[t]*o exceed the scope of one's powers means to do something beyond the reach of such powers as defined by three parameters, the jurisdictional requirements, the applicable law and the issues raised by the Parties*").

[25] Counter-Memorial, ¶ 98.

86. The Committee finds that an excess of powers is "*manifest*" when it can be easily discerned "*with little effort and without deeper analysis*"[26] or when it is "*self-evident rather than the product of elaborate interpretations one way or the other*".[27]

87. Failure to apply the proper law can constitute a manifest excess of powers under Article 52(1)(b). Some committees have stressed in that regard that a fine line exists between a failure to apply the proper law and its erroneous application. Thus, the issue may prove to be rather complex in actual practice and committees differ as to whether an egregious error in the application of the proper law may amount to a failure to apply the proper law. In this regard, the Committee shares the view of the *ad hoc* committee in *Soufraki v. UAE* which in particular held as follows:

> *ICSID ad hoc committees have commonly been quite clear in their statements – if not always in the effective implementation of these statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment.* […]
>
> *Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ("bon père de famille") could accept needs to be distinguished from simple error – even a serious error – in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, e.g., an extraordinary writ of certiorari.* […]
>
> *It seems hardly necessary to add that failure to apply the proper law must also be distinguished from failure to apply the proper law to the true or correct facts. Errors in a tribunal's findings of facts, generated by, for instance, acceptance of evidence of no or insufficient probative value, do not provide a ground for annulment, save where such errors constitute or result in "a serious departure from a fundamental rule of procedure" under Article 52(1)(d) of the ICSID Convention*[.][28]

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[26] Christopher Schreuer, et al., The ICSID Convention, A Commentary (2nd ed.), 2009 ("***Schreuer 2nd Commentary***"), ¶ 135, AL-0017-ENG.

[27] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (Annulment Proceeding), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000 (February 5, 2002) ("***Wena Hotels v. Egypt***"), ¶ 25, AL-0028-ENG.

[28] *Soufraki v. UAE*, ¶¶ 85-87, AL-0003-ENG (footnotes omitted).

88. The Committee thus considers that failure to apply the applicable law is a ground for annulment, but the incorrect application or interpretation of that law, or an *error in judicando*, by a tribunal does not constitute a manifest excess of powers.

89. In applying this legal standard in Section (2)c below, the Committee will first determine whether the Tribunal committed an excess of powers because if failed to apply the proper law and, if so, it will ascertain whether the excess of powers was also "*manifest*".

(2) Application of the Legal Standard for Manifest Excess of Powers (Article 52(1)(b))

a. The Applicants' Position

(a) Argument 1: The Tribunal erred by importing a procedural prescription period from Armenian law into the ICSID Arbitration

90. The Applicants submit that the Tribunal wrongly applied provisions of the Armenian Civil Code concerning the limitations period, which is strictly procedural under Armenian law, despite the fact that the Parties only consented to apply the "*substantive Legislation*" of Armenia in the Concession Agreements.[29]

91. For the Applicants, issues pertaining to statutes of limitations in ICSID arbitration are jurisdictional defenses which are governed by international law only. In the Applicants' view, since the Parties deliberately agreed to apply only the "*substantive*" legislation of Armenia in the Concession Agreements and carved out procedural rules from their choice of law clause, provisions concerning limitations period in the Armenian Civil Code were inapplicable and did not reinter the arbitration by virtue of Article 42(1) of the ICSID Convention.[30] The Applicants draw the Committee's attention to, *inter alia*, Article 168 of the Civil Procedure Code entitled "*[m]otion on applying a statute of limitations and its examination at a preliminary court session*" and conclude that provisions on limitations periods are procedural in nature under Armenian law.[31] Consequently, the Applicants

[29] Application, ¶¶ 80-82; Memorial, ¶¶ 80-82; Reply, ¶ 45.

[30] Application, ¶¶ 9, 83-86; Memorial, ¶¶ 9, 83-86; Reply, ¶¶ 46-51. *See also* Application, ¶ 75(ii); Memorial, ¶ 75(ii).

[31] Reply, ¶¶ 61-62. *See also* Reply, ¶¶ 50-51 in which the Applicants refer to the dispute resolution clause of the USA-Armenia BIT.

claim that the Tribunal exceeded its powers by both (i) applying the wrong rules of law; and (ii) failing to exercise its jurisdiction.[32]

92. The Applicants reject the points raised by the Respondent in the Counter-Memorial, as follows: (i) prescription defense is considered as jurisdictional in ICSID arbitrations, and not an admissibility defense because, *inter alia*, the ICSID Convention does not contain different rules for jurisdiction and admissibility, such a distinction would effectively render ICSID awards immutable, and that the limitations period defence was not addressed as an admissibility issue in the Award, as evidenced from its structure;[33] (ii) in any event, the distinction between jurisdiction and merits is irrelevant to the Committee's determination of whether an excess of power by the Tribunal existed in this case;[34] (iii) the Tribunal's conclusion that claims were "*extinguished*" is inconsistent with an admissibility ruling and amounts to re-writing the Concession Agreements by robbing the Applicants' of an opportunity for redress in ICC arbitration; and (iv) the Parties were free to agree to apply any part of the Armenian Civil Code to their dispute, which they did in the Concession Agreements, and therefore the limitations period under the Armenia Civil Code was inapplicable in this case. There is no rule that the Armenian Civil Code must either be applied in full or not at all, as the Respondent falsely contends.[35]

(b) Argument 2: The Tribunal grossly misinterpreted and misapplied the Armenian prescription period

93. The Applicants submit that even assuming that the Armenian limitations period could somehow be imported into ICSID arbitration, the Tribunal grossly erred by misinterpreting and misapplying it in this case.[36]

[32] Application, ¶¶ 87-88; Memorial, ¶¶ 87-88; Reply, ¶¶ 51-52.

[33] Applicants made this argument in the discussion devoted to the legal standard for manifest excess of powers in their written submissions. *See also* Transcript Day 1, 113:10-114:17.

[34] Transcript Day 1, pp. 111-114.

[35] Reply, ¶¶ 53-57; Applicants Opening Statement, pp. 40-41. *See also* Reply ¶ 34, in which the Applicants asserted the issue (i) also under the "III. LEGAL STANDARD FOR ANNULMENT" section.

[36] Application, ¶ 89; Memorial, ¶ 89; Reply, ¶ 58.

94. First, the Applicants contend that, while pursuant to Armenian law Armenian statutes must be interpreted in accordance with the literal meaning of the words contained therein,[37] the Tribunal misinterpreted and misapplied this provision by adding an additional requirement that there must be an acknowledgment of a "*wrongdoing*", which can be found nowhere in the Armenian Civil Code and against the text of the provision.[38] Based on this misapplication of the law and despite the existence of ample contemporaneous evidence showing the Respondent's explicit and repeated acknowledgement of its existing obligations under the Concession Agreements, the Tribunal erroneously held that the limitations period was not interrupted and dismissed the Applicants' claims.[39]

95. The Applicants stress that there is no support in the text of the Armenian Civil Code for the Tribunal's interpretation and aver that the provision has never been interpreted as such by Armenian courts.[40] It is the Applicants' position that the correct interpretation is that the word "*debt*" simply means "*obligation*", and therefore any acknowledgement by the Respondent that the Concession Agreements were still in force, and that the Respondent had an existing obligation under those contracts, would interrupt the running of the limitations period.[41] For the Applicants, requiring an admission of "*wrongdoing*" would render the provision meaningless as it is exceedingly rare in practice that a party to a contractual dispute voluntarily admits its wrongdoing.[42] Such incorrect reading is also inconsistent, in the Applicants' view, with the other part of the provision which admits interruption of the limitations period when a defendant takes any "*actions evidencing*" its acknowledgement of an obligation, which may include for example partial performance of a contract.[43] Requiring the Applicants to sue the Respondent for the limitations period to

[37] Transcript Day 1, 30:7-19. *See also* Applicants' Opening Statement, p. 8, referring to Article 8 of the Armenian Civil Code, A-0043-ENG, and Article 86 of the Law on Legal Acts of Armenia, A-0045-ENG.

[38] Transcript Day 1, 42: 6-21, 74:11-79:6.

[39] Application, ¶¶ 10-11, 90-96, 99; Memorial, ¶¶ 10-11, 90-96, 99; Reply, ¶¶ 62-72. *See also* Application, ¶ 75(iii); Memorial, ¶ 75(iii).

[40] Application, ¶¶ 97, 101; Memorial, ¶¶ 97, 101; Reply ¶¶ 71-72.

[41] Application, ¶ 98; Memorial, ¶ 98; Reply ¶ 73. *See also* Applicants' Opening Statement, pp. 11-12, referring to Articles 345 and 355 of the Armenian Civil Code, A-0043-ENG.

[42] Reply, ¶¶ 74-75.

[43] Reply, ¶ 76.

be interrupted is also anomalous and unsupported.[44] The Applicants also contend that the Respondent has accepted that the word "*wrongdoing*" was problematic.[45]

96. The Applicants add that, in any event, the evidence before the Tribunal shows that the Respondent indeed acknowledged its wrongdoing in February 2016.[46] In particular, the Applicants contend that during the Arbitration, they had pointed to approximately 30 official written letter exchanges between the Parties from November 2015 to September 2017 and to two associated settlement meetings in 2016 and 2017, in which the Respondent allegedly acknowledged its existing obligations under the Concession Agreements.[47] The Applicants refer to paragraphs 458-461 of the Award where, according to the Applicants, the Tribunal wrongly concluded that the following correspondence did not amount to the Respondent's acknowledgement of the debt: (i) the Respondent's February 15, 2016 letter; (ii) the Respondent's statements allegedly made during the meeting on March 18, 2016; (iii) the Respondent's email of April 5, 2016; and (iv) the Respondent's statements arguably made during the meeting on July 3, 2017.[48]

97. In this regard, during the Hearing, the Applicants also argued, referring to paragraphs 464 and 466 of the Award, that the Tribunal erred in interpreting the Armenian Civil Code by dismissing the above mentioned four communications on the basis of "*three new legal requirements that appear nowhere in the text of the statute, nor were ever raised by, or discussed with, the Parties*" and concluded that these documents were missing any "*acknowledgement of wrongdoing*", any "*call for the Parties to revive the Projects*"[49] or any "*affirmative evidence of reliance on the part of the obligee*".[50]

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[44] Reply, ¶ 77.

[45] Transcript Day 2, 234:22-25. *See also* Applicants' Rebuttal Statement, p. 20.

[46] Application, ¶¶ 102-104; Memorial, ¶¶ 102-104; Reply, ¶¶ 78-80.

[47] Application, ¶ 92; Memorial, ¶ 92; Reply, ¶ 65, referring to their first post-hearing submission in the Arbitration ("***Claimants' First Arbitration Post-Hearing Brief***"), ¶¶ 306-310, A-0029-ENG.

[48] *See* Reply, ¶¶ 69-70; *See also* Transcript Day 1, 57:11-68:21; Applicants' Opening Statement, pp. 13-24, in which the Applicants refer to these four events as evidence of Armenia "acknowledg[ing] its outstanding contractual obligations in at least four communications".

[49] Transcript Day 1, 72:1-12, 79:1-86:2, 90:22-91:4. *See also* Applicants' Opening Statement, pp. 2, 25-29; Applicants' Rebuttal Statement, p. 19.

[50] Transcript Day 1, 72:9-13, 86:2-18. *See also* Applicants' Opening Statement, pp. 25, 30-31.

98. Second, the Applicants contend that the Tribunal wrongly applied the limitations period of three years, whereas the correct limitations period applicable in this case was 10 years.[51]

99. According to the Applicants, Article 333(1) of the Armenian Civil Code, which should have been applied by the Tribunal, provides that the limitations period shall be 10 years in cases where the injury is alleged to have resulted from corrupt actions in the course of the entry into, and performance of, transactions in the manner prescribed by the Civil Code.[52]

100. The Applicants argue that, although their claims in the Arbitration were fundamentally based on corrupt actions by the Respondent's government officials, the Tribunal failed to consider the impact that these allegations might have had on the limitations period. While admitting that the Applicants did not bring this provision to the Tribunal's attention during the Arbitration, the Applicants criticize the Respondent for not raising this point before the Tribunal despite Armenia's strong policy against corruption, and further state that this provision cannot be waived by any Party due to this strong public policy. Accordingly, the Applicants assert that, even if the Armenian limitations period could be imported into the Arbitration, the limitations period in this case would not lapse until 2025.[53]

101. The Applicants further take issue with the Tribunal's Procedural Order No. 4 for deciding not to compel the testimony of the Respondent's ex-Minister allegedly involved in the corrupt actions, Mr. Beglaryan, in contrast to its Procedural Order No. 7 compelling a member of the Claimants' consortium, Mr. Weixin, to testify at the Arbitration hearing. For the Applicants, this amounted to unequal treatment of the Parties.[54]

102. Third, the Applicants aver that the Tribunal erred in finding that the limitations period in this case started running on March 18, 2015,[55] because it should not have commenced until a later date.[56]

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[51] Application, ¶¶ 52, 105; Memorial, ¶¶ 52, 105; Reply, ¶ 81.

[52] Application, ¶¶ 105-106; Memorial, ¶¶ 105-106; Reply, ¶ 82.

[53] Application, ¶¶ 12, 108-109; Memorial, ¶¶ 12, 108-109; Reply, ¶¶ 60, 84-85.

[54] Application, ¶¶ 110-112; Memorial, ¶¶ 110-112; Reply, ¶¶ 84, 86-88.

[55] Application, ¶ 113; Memorial, ¶ 113. *See also* Application, ¶ 52; Memorial, ¶ 52.

[56] Application, ¶¶ 113, 118; Memorial, ¶¶ 113, 118.

103. The Applicants criticise the Tribunal for ignoring facts occurred after March 18, 2015, which allegedly show that the Applicants' investments were destroyed by the Respondent's series of actions between November 2012 and May 2019 collectively.[57] In any event, the Applicants state that it was only on July 27, 2017 that the Respondent unilaterally terminated the Concession Agreements by issuing a formal notice to Rasia and up until then the Parties continued to negotiate, including to settle their dispute.[58]

104. Fourth, the Applicants submit that the Tribunal also erred in concluding that the limitations period could be interrupted only by submitting a claim to ICSID arbitration, whereas Article 340(1) of the Armenian Civil Code in fact permits the interruption more broadly.[59]

105. In the Applicants' view, "*actions evidencing the acknowledgment of the debt by the person obliged*", as required under Article 340(1) of the Armenian Civil Code, encompass actions triggering the established dispute resolution mechanisms, such as engaging in a formal process to settle their dispute. In particular, the Applicants contend that the following actions amounted to such "*actions evidencing the acknowledgment of the debt by the person obliged*": (i) on December 16, 2015, Rasia served on the Ministry of Transport and Communications of Armenia a formal notice of a dispute under the Road Agreement; (ii) on June 25, 2016, Mr. Borkowski delivered to the Ministry of Transport and Communication and the Prime Minister of Armenia a notification of claim which allegedly commenced the mandatory six-month period of settlement negotiations under the USA-Armenia BIT; and (iii) on April 9, 2017, Rasia served on the Armenian Ministry of Transport and Communication a formal notification of claim under the Road Agreement.[60] According to the Applicants, while the Tribunal acknowledged that the Parties had initiated the dispute resolution process, based on the wrong interpretation as described above, it dismissed the Applicants' claims.[61]

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[57] Application, ¶¶ 114-116; Memorial, ¶¶ 114-116. *See also* Application, ¶ 137; Memorial, ¶ 137; Reply, ¶¶ 89-92.

[58] Application, ¶¶ 117-118; Memorial, ¶¶ 117-118; Reply, ¶¶ 93-94; Transcript Day 1, 117: 3-25. *See also* Applicants' Opening Statement, p. 42, indicating that this date is a more appropriate date.

[59] Application, ¶¶ 120, 124-125; Memorial, ¶¶ 120, 124-125; Reply, ¶ 96.

[60] Application, ¶¶ 121-123, 125; Memorial, ¶¶ 121-123, 125; Reply, ¶¶ 97-99, 102.

[61] Application, ¶ 124; Memorial, ¶ 124; Reply, ¶¶ 100-101.

106. The Applicants reiterate that, had the Tribunal inquired with the Parties about the interpretation of Article 340 of the Armenian Civil Code, its decision would have been better informed, if not entirely different. They further insist that the Tribunal penalized the Applicants for the Respondent's failure to sufficiently plead its time-bar defence, which warrants annulment of the Award.[62]

107. Fifth, the Applicants take issue with the Tribunal's finding that their claims were permanently extinguished under Armenian law.[63]

108. The Applicants assert that, under Armenian law, untimely claims cannot be substantively extinguished, but rather the conclusion is that the creditor is simply no longer entitled to a remedy without prejudice to the merits of the claim.[64]

109. For the Applicants, this erroneous finding by the Tribunal is highly prejudicial to the Applicants as it would forbid them from submitting the same claims in ICC arbitration, despite their right to do so under the Concession Agreements. Particularly, the Applicants contend that the Concession Agreements allow the Applicants to bring the case to ICC arbitration if the Tribunal "*denies or declines jurisdiction*" or is "*otherwise unavailable*", which is the scenario in this case. However, by determining without either Party ever raising such an argument that the Applicants' claims were permanently extinguished under Armenian law, the Tribunal manifestly exceeded its power by purporting to decide for the ICC tribunal that the Applicants' claims no longer exist and attempting to rewrite the dispute settlement mechanism in the Concession Agreements, rather than simply determining not to admit those claims as untimely.[65] It is the Applicants' position that this error is compounded by the Tribunal providing only "*general views*" on the merits of their

[62] Application, ¶ 126; Memorial, ¶ 126. *See also* Application, ¶ 55; Memorial, ¶ 55; Reply, ¶ 103.

[63] Application, ¶ 127; Memorial, ¶ 127.

[64] Application, ¶ 127; Memorial, ¶ 127; Reply, ¶¶ 62, 104-105.

[65] Application, ¶¶ 13, 127-128; Memorial, ¶¶ 13, 127-128; Reply, ¶ 108. *See also* Application, ¶ 75(iv); Memorial, ¶ 75(iv).

contract-based claims, despite having held that it lacked jurisdiction over those claims, which were highly selective and superficial.[66]

110. Sixth, focusing on the Respondent's arguments in the Counter-Memorial, the Applicants submit that: (i) they do not agree with the Tribunal's interpretation of Article 340(1) of the Armenian Civil Code; (ii) they do not agree with the manner and method in which the Tribunal interpreted Article 340(1) of the Armenian Civil Code; (iii) the Respondent merely attempts to paper over the Tribunal's insertion of the word "*wrongdoing*" into the Armenian limitations period; (iv) the Respondent seeks to dodge discussions of corruption in this case; (v) the Respondent selectively focuses on limited facts of a series of events which all should be taken into account holistically; (vi) the Respondent endeavors to dismiss the Tribunal's failure to suspend the limitations period as "*procedurally impermissible and substantively flawed*"; (vii) the Respondent fails to refute that Mr. Borkowski's claims under the USA-Armenia BIT were impermissibly extinguished; (viii) the Respondent wrongly asserts that the Applicants are seeking an impermissible reweighing of the evidence; and (ix) given the intertwined nature of the Applicants' claims, the Award should be annulled in full.[67]

b. The Respondent's Position

(a) Argument 1: The Tribunal erred by importing a procedural prescription period from Armenian law into the ICSID Arbitration

111. The Respondent first takes issue with the Applicants' alleged mischaracterization of the Award by claiming that the Tribunal treated the limitations defence as a jurisdictional issue, whereas the Award made it clear that it was an issue of admissibility.[68] The Respondent adds that contrary to the Applicants' position in this annulment proceeding, they did not plead the limitations defence as a jurisdictional issue during the Arbitration,[69] but rather

[66] Application, ¶ 129; Memorial, ¶ 129; Reply, ¶¶ 118-124, 126. *See also* Application, ¶¶ 56, 75(vi); Memorial, ¶¶ 56, 75(vi).

[67] Reply, ¶¶ 109-117, 128-129. *See also* Application, ¶ 59; Memorial, ¶ 59.

[68] Counter-Memorial, ¶¶ 72-75; Rejoinder, ¶¶ 2, 4, 55. *See also* Counter-Memorial, ¶¶ 8, 25 and Rejoinder, ¶¶ 7-25 for other alleged mischaracterizations by the Applicants.

[69] Counter-Memorial, ¶¶ 76-77; Rejoinder, ¶ 76.

considered the limitations defence as an issue pertaining to the merits.[70] The Respondent also states that the Parties agreed during the Arbitration that the limitations period was properly applicable to Rasia's contract claims.[71] The Applicants have not referred to any evidence supporting their new position in this annulment proceeding.[72] The Respondent thus states that the Applicants' argument in this regard is procedurally barred.[73]

112. Citing an article by Prof. Jan Paulsson, the Respondent contends that an ICSID tribunal's admissibility findings are not subject to annulment by an *ad hoc* committee for excess of power. Relying on the award in *Enron v. Argentina*, Prof. Paulsson's article states that "*a successful admissibility objection would normally result in rejecting a claim for reasons of the merits*" and explains that the relevant question in this regard "*is the objecting party taking aim at the tribunal or at the claim*".[74]

113. For the Respondent, the issues on the limitations period concern the Applicants' claims and not the Tribunal, because an ICC tribunal, even if the Applicants brought their case before it, would reach the same conclusion as the Tribunal in the present case. This is because the ICC tribunal (i) would have to apply Articles 337-340 of the Armenian Civil Code by virtue of the choice of law provision under the Concession Agreements, and (ii) when applying the *lex arbitri* (the law applicable to arbitration), which is German law in this case that considers limitations period as substantive law, would analyse the substantive law chosen by the Parties (i.e. Armenian Civil Code) to determine whether the Applicants' claims are time-barred. The Respondent thus concludes that, "*[n]o matter how the tribunal looks at the issue…the result is the same: Applicants lose because their claims are time-barred under the Armenian Civil Code*".[75]

[70] Transcript Day 1, 184:21-24. *See also* Respondent's slides used during its opening presentation at the Hearing ("**Respondent's Opening Statement**"), p. 101.

[71] Transcript Day 1, p. 185:19-25. *See also* Respondent's Opening Statement, pp.104-106.

[72] Rejoinder, ¶ 72.

[73] Counter-Memorial, ¶ 78.

[74] Counter-Memorial, ¶ 79. *See also* Rejoinder, ¶ 73.

[75] Counter-Memorial, ¶¶ 80-86. *See also* Rejoinder, ¶ 68.

114. Second, the Respondent submits that the limitations period under Armenian law is substantive law, and not procedural law as claimed by the Applicants.

115. The Respondent rejects the Applicants' position that "*the prescription period in the Armenian Civil code is strictly procedural*". For the Respondent, this assertion is internally inconsistent and untenable as relevant provisions of the Concession Agreements only allow the Armenian Civil Code "*as a whole*" to be treated as "*substantive Legislation*", but do not permit specific provisions within the Civil Code to be considered as procedural law.[76]

116. Furthermore, the Respondent stresses that, as a matter of Armenian law, provisions concerning limitations period are substantive law and not procedural law. The Respondent underscores that it was the Armenian legislator's deliberate decision to include those provisions in the Armenian Civil Code, which is substantive legislation of Armenia, but not in its Civil Procedure Code. For the Respondent, this is further corroborated by the fact that those provisions are part of "*Division 5*" of the Armenian Civil Code entitled "*Transactions. Representations. Time Periods. Limitations of Actions*" which begins and deals with substantive issues. This is further clarified, in the Respondent's view, by Article 13(1) of the Armenian Civil Code which provides that both courts and arbitral tribunals should apply the Armenian Civil Code so as to protect the civil rights it codified.[77] While the Respondent concedes that there is a reference to limitations period in Article 168 of the Armenian Civil Procedure Code, it insists that this provision does not alter the above conclusions as "*this provision only addresses the motion to apply the statute of limitations and its examination at a preliminary court session and does not address the applicability or substantive issues surrounding the limitations period*".[78] Furthermore, as Article 168 was not part of the Arbitration record, the Respondent avers that it is procedurally

[76] Counter-Memorial, ¶¶ 87-95. *See also* Rejoinder, ¶¶ 59-65.

[77] Counter-Memorial, ¶¶ 96-97; Rejoinder, ¶¶ 58, 66.

[78] Rejoinder, ¶¶ 66, 95-96. *See also* Rejoinder, ¶¶ 67-69 regarding dispute resolution clause of the USA-Armenia BIT, and ¶ 95 in which the Respondent notes that Article 168 introduced by the Applicants in the Reply was adopted in April 2018.

impermissible for the Applicants to rely on it in this annulment proceeding.[79] Accordingly, there is no excess of power for failure to apply the applicable law in the present case.[80]

117. Third, the Respondent contends that assuming *arguendo* that the Tribunal made an error, such an error "*would not in fact be outcome determinative given that the Tribunal made rulings in the alternative that Rasia is not owed any damages for breach as it could not make out causation*". Therefore, the Respondent contends that any such a possible error by the Tribunal would not have made "*a difference to the result*".[81]

(b) Argument 2: The Tribunal grossly misinterpreted and misapplied the Armenian prescription period

118. First, the Respondent submits that the Applicants in fact conceded in their pleadings that the Tribunal correctly interpreted Article 340(1) of the Armenian Civil Code[82] and that the Tribunal used the right method of interpretation.[83] For the Respondent, the Applicants therefore should not be heard to argue that the Tribunal committed an annullable error by failing to apply the applicable law in the first place.[84]

119. Second, the Respondent disagrees with the Applicants' position that the Tribunal misinterpreted and misapplied the Armenian limitations period because such arguments are, in the Respondent's view, predicated on the Applicants' mischaracterization of the Award.[85]

120. Specifically, and in the context of the Applicants' claim that the Tribunal substituted the word "*debt*" with "*wrongdoing*", the Respondent refers to, *inter alia*, paragraphs 459-464 and 466 of the Award and states that "*the Tribunal never so substituted any words in the Civil Code as is clear on the face of the Award*". According to the Respondent, the Tribunal noted that the acknowledgement of a breach or other wrongdoing was "*sufficient*" to toll

[79] Rejoinder, ¶ 97.
[80] *See* Counter-Memorial, ¶ 101. *See also* Rejoinder, ¶ 61.
[81] Counter-Memorial, ¶ 102; Rejoinder, ¶ 81.
[82] Counter-Memorial, ¶¶ 103-105; Rejoinder, ¶¶ 82-86. *See also* Counter-Memorial, ¶¶ 4-7.
[83] Counter-Memorial, ¶¶ 106-109; Rejoinder, ¶¶ 91-93.
[84] *See* Counter-Memorial, ¶¶ 101, 109.
[85] *See* Counter-Memorial, ¶¶ 8, 110. *See also* Rejoinder, ¶¶ 105-110.

the statute of limitations in application, but it did not hold that such an acknowledgement of breach or wrongdoing was "*necessary*" for limitations period to be interrupted. The Respondent thus insists that the Tribunal assessed whether there was an acknowledgement of an obligation "*which is either intended to, or would have the natural effect of, encouraging a counterparty to refrain from initiating legal action*", rather than mechanically requiring the existence of an acknowledgement by a party of a "*wrongdoing*".[86] The Respondent adds that the word "*wrongdoing*" only appears three times in the Award, none of which concern the Tribunal's interpretation of Article 340(1) of the Armenian Civil Code.[87]

121. Furthermore, the Respondent states that the acknowledgement must concern the obligation at issue in the potential lawsuit. For example, not every breach of a contract in a long-term project, and the breaching party's confirmation that the contract is still alive, could lead to interruption of limitations period. Thus, for the Respondent, a statute of limitations is not interrupted when in a long-term contract one party (i) merely "*acknowledges*" to the other that the contract is still in force/not terminated; or (ii) simply lodges a concern with a counter-party.[88] According to the Respondent, the Tribunal did assess evidence as put forward by the Applicants and noted that "*if taken in isolation*" some of the Respondent's statements in 2016 could be viewed as acknowledgments, but dismissed their claims as "*[t]he insurmountable problem for the Claimants is that it is abundantly clear they did not rely on the Respondent's statements in any way*".[89]

122. Third, the Respondent rejects the Applicants' assertion that the Tribunal should have applied the 10-year limitations period in this case, *inter alia*, for the following reasons: (i) as the Applicants concede, they never raised this issue during the Arbitration; (ii) the issue of corruption was not germane to the Award; (iii) the Tribunal made no finding of a solicited bribe in its Award; (iv) the Applicants failed to submit evidence in support of their position in this respect; (v) the error, if admitted, at most only rises to the level of an error

[86] Counter-Memorial, ¶¶ 110-122. *See also* Rejoinder, ¶¶ 31, 98-101.
[87] Rejoinder, ¶¶ 87-89.
[88] Rejoinder, ¶¶ 102-104.
[89] Counter-Memorial, ¶¶ 123-128.

in judicando, and does not constitute a failure to apply the applicable law; (vi) the requirements under the applicable provisions are not met in this case; and (vii) Procedural Orders No. 4 and No. 7 were rendered reasonably and thus they do not amount to unequal treatment of the Parties.[90]

123. Fourth, with regard to the Applicants' contention that the Tribunal erred in determining that the limitations period commenced on March 18, 2015, the Respondent submits, in essence, that the Applicants (i) fail to show how the alleged mistake amounts to a "*manifest excess of power*" by the Tribunal; (ii) do not submit any argument or interpretation of the statute as to why such date is not relevant; and (iii) stated in the Arbitration that March 18, 2015 was "*the date on which the Claimants were substantially and irreversibly deprived of their investments*" and thus any possible subsequent breaches by the Respondent are irrelevant.[91]

124. Fifth, addressing the Applicants' complaint that the Tribunal misjudged by interpreting that the limitations period could only be interrupted by submitting a claim to ICSID arbitration, the Respondent argues that the Applicants' position is impermissible and substantively flawed because the Applicants (i) merely state that the Tribunal "*grossly erred in interpreting and applying the limitations period*", whereas errors in interpretation and application are not grounds for annulment; (ii) had already advanced the same argument before the Tribunal which was dismissed; (iii) provide no legal authority to substantiate their position and therefore their argument remains as a mere difference of opinion; and (iv) misrepresent when they say that the Tribunal ignored the Applicants' notifications under the USA-Armenia BIT and the Road Concession allegedly evidencing the Parties' settlement negotiations.[92] Referring to the Japan-Armenia BIT as an example, the Respondent further states that neither the commencement of amicable resolution nor the filing of a notice of intent satisfies or interrupts the limitations period in this case.[93]

[90] Counter-Memorial, ¶¶ 129-136; Rejoinder, ¶¶ 10-12, 112-119.
[91] Counter-Memorial, ¶¶ 137-140, 166-170. *See also* Rejoinder, ¶¶ 120-126.
[92] Counter-Memorial, ¶¶ 141-148. *See also* Rejoinder, ¶¶ 127, 131.
[93] Rejoinder, ¶¶ 128-133.

125. Sixth, the Respondent takes issue with the Applicants' alleged misrepresentation of the Award that Rasia's claims were extinguished.

126. The Respondent points out that paragraph 471 of the Award, which the Applicants rely upon in support of their argument on this issue, in fact does not concern Rasia's claims, but rather it concerns Mr. Borkowski's umbrella clause claim. The Respondent asserts that the language of the paragraph, "*does not opine on whether the time bar extinguishes claims under Armenian law*", but rather it "*simply provides further illustrations for its reasoning that an unassertable contract right cannot be vindicated through an umbrella clause claim*".[94]

127. Concerning the Applicants' contention that an alleged extinguishment of their claims is an excess of powers because it supposedly encroaches on the powers of the ICC tribunal, the Respondent claims that the Applicants conflate jurisdictional with admissibility rulings.[95]

128. Seventh, the Respondent avers that the Applicants exclusively focus on the requirement of an "*excess of power*" in their submissions but plead nothing on the requirement that such an excess of power must be "*manifest*".[96]

129. Eighth, the Respondent adds that the Applicants' arguments under these annulment grounds only pertain to Rasia's claims, but not Mr. Borkowski's BIT claims or the Tribunal's determination on causation and damages. Therefore, even if successful, it can only result in a partial annulment of the Award.[97]

130. Ninth, the Respondent advances that any new arguments raised by the Applicants in this annulment proceeding with regard to Armenian law should be dismissed as they do not form part of the underlying Arbitration record. It also reiterates and provides the following observations in response to the Applicants' such alleged new arguments: (i) the statute of limitations is substantive law of Armenia because, *inter alia*, it is provided in the Armenian

[94] Counter-Memorial, ¶¶ 149-151. *See also* Counter-Memorial, ¶¶ 10-11; Rejoinder, ¶¶ 137, 139.

[95] Rejoinder, ¶ 136.

[96] Counter-Memorial, ¶ 98.

[97] Counter-Memorial, ¶¶ 182-183, 185. *See also* Rejoinder, ¶¶ 3, 147-152.

Civil Code; (ii) the expiration of the limitations period does not affect the right to bring the claim, but if the opposing party makes a request in conformity with Article 335 of the Armenian Civil Code, the court can apply the statute of limitations and render a judgment dismissing the claim/recognizing it as inadmissible if the prescribed time limit has lapsed, which is what happened in this case; (iii) the limitations period is a matter of admissibility and merits, rather than a procedural or jurisdictional matter, pursuant to Article 335(1) of the Armenian Civil Code as well as scholars and jurisprudence in Armenia;[98] and (iv) the Applicants' attempt to overturn the Tribunal's evidential findings, without providing any evidence to the contrary, should not be accepted.[99]

c. The Committee's Analysis

131. The Committee notes at the outset that it is not its mission to verify whether the Tribunal applied the law correctly. The Committee subscribes to the view expressed by the *Amco Asia* committee that an annulment committee's task consists in "*determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention*".[100]

132. Given the Committee's belief in the limited role of annulment committees in the ICSID system, which clearly distinguishes them from appellate bodies, it will refrain from engaging in a new examination of the legal and factual issues at stake in the Arbitration.

133. With this preface in mind, the Committee will turn to the analysis of the two arguments advanced by the Applicants under this ground of annulment.

[98] Counter-Memorial, ¶¶ 186-191.

[99] Rejoinder, ¶¶ 141-142.

[100] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Annulment Proceeding), *Ad Hoc* Committee Decision on the Application for Annulment (May 16, 1986), ¶ 23, AL-0022-ENG.

(a) Argument 1: The Tribunal erred by importing a procedural prescription period from Armenian law into the ICSID Arbitration

134. The Applicants submit that the Tribunal erred in applying the statute of limitations under the Armenian Civil Code because this was a strictly procedural question under Armenian law and the Parties to the Concession Agreements only agreed to apply Armenia's "'*substantive legislation', indicating that they intended to carve out* procedural *rules from their choice of law*".[101] Moreover, for the Applicants, "*prescription is a jurisdictional defense and the Tribunal's jurisdiction is governed by international law only*".[102] Their conclusion is that the Tribunal applied the wrong rules of law and failed to exercise its jurisdiction thus committing a manifest excess of powers.[103]

135. In reviewing this first argument, the Committee notes that in the Arbitration the Claimants/Applicants did not advance the arguments they make in these proceedings, i.e. they did not argue in the Arbitration that the words "*substantive Legislation*" do not include procedural law or that the statute of limitations is a strictly procedural matter under Armenian law. Moreover, the Claimants/Applicants did not plead in the Arbitration the question of the statute of limitations as pertaining to jurisdiction, but, rather, in the sections of their written submissions dealing with the merits.[104]

136. More specifically, in the Arbitration, the Claimants/Applicants argued that the statute of limitations was interrupted by certain actions of the Claimants/Applicants but they did not dispute that the applicable limitations period for their contract claims under Armenian law is three years, that their alleged "*valuation date*" is March 18, 2015, and that the Arbitration was commenced on July 19, 2018, more than three years later.[105] In addition, the Claimants/Applicants submitted that, with regard to Mr. Borkowski's claims under the umbrella clause of the Treaty, the consequences of Armenia's Concession breaches are governed by customary international law, and not Armenian law, because, by breaching

[101] Reply, ¶ 49, emphasis in the original.

[102] Reply, ¶ 47.

[103] Reply, ¶ 51.

[104] Arbitration Reply, Section VII D 1, RA-0007-ENG; Claimants' First Arbitration Post-Hearing Brief, ¶ 307, RA-0029-ENG.

[105] Arbitration Reply, ¶¶ 601-605, RA-0007-ENG.

the Concessions, Armenia also violated its public international law obligation under the Treaty to comply with obligations it entered into under the Concessions.[106]

137. As to the meaning that must be attributed to the words "*substantive Legislation*" in the Concession Agreements, there appears to have been no discussion in the Arbitration whether or not this terminology includes procedural law, and there is none in the Award. Instead, the Tribunal's analysis of the Respondent's statute of limitations defense with regard to Rasia's claims for breach of the Concessions Agreements begins by stating that "*the Parties agree [that these claims] are governed by Armenian law*".[107] The Tribunal added: "*the Parties also agree that the applicable provisions of the Armenian Civil Code are*" Articles 332, 337 and 340 and proceeded to conduct an interpretation of these provisions of the Code of Civil Law.[108] The fact that the Parties agreed on the application of these provisions of the Armenian Civil Code was confirmed at the Hearing by the Respondent and is not disputed by the Applicants.[109]

138. Within this context, the Tribunal correctly analysed the question in the light of the provisions of Armenian law which the Parties agreed were applicable, i.e. Articles 332, 337 and 340, and interpreted those provisions "*based on the apparent ordinary meaning of the terms used*".[110]

139. Article XVIII (67) of the Concession Agreements does indeed refer to "*the substantive Legislation of the Republic of Armenia*" as the governing law of the contracts.[111] The term "*Legislation*" is defined in Article I, Section 1, of the Agreements as "*any and all enactments, statutes, codes, laws, international treaties, regulations, decrees, decisions, administrative interpretations, ordinances, by-laws, directives, guidelines, rules, or*

[106] Arbitration Reply, ¶ 606, RA-0007-ENG.
[107] Award, ¶ 445, A-0001-ENG.
[108] Award, ¶¶ 445-446, A-0001-ENG.
[109] Transcript Day 2, pp. 298-300.
[110] Award, ¶¶ 445-446, A-0001-ENG.
[111] Railway Agreement, A-0002-ENG; Road Agreement, A-0003-ENG.

policies of any State Authority", in other words as encompassing the entirety of Armenia's laws.[112]

140. The Committee cannot share the Applicants' artificial distinction between provisions of Armenian law applying to the merits of the dispute and provisions applying to jurisdiction. The Committee fails to see any basis for the Applicants' contention that the Parties' designation of "*substantive*" legislation in the governing law provisions of the Concession Agreements indicates that they "*intended to carve out* procedural *rules from their choice of law*".[113] In the Committee's opinion, no such carve out is apparent from a plain reading of the governing law clause of the Concession Agreements and the Tribunal correctly applied the Civil Code of Armenia as part and parcel of "*the substantive Legislation of the Republic of Armenia*", i.e. the laws of Armenia seen as a whole. This was the correct approach both in light of the Parties' agreement that Armenian law governed the Concession Agreements and the language of Article XVIII (67) recalled above. The Tribunal applied the applicable law and therefore a manifest excess of powers cannot be found. By the same token, since the Tribunal did not apply the wrong law, the Committee finds that the Tribunal did not exceed its powers by failing to exercise its jurisdiction and the Applicants' argument in this regard is accordingly also dismissed.

141. The Respondent contends that annulment would be improper in this case because the Tribunal treated the limitations issue as an issue of admissibility rather than jurisdiction,[114] and that the Tribunal's ruling "*also could be characterized as a merits determination*".[115] The Respondent in particular argues that a merits determination is not subject to review by an *ad hoc* committee as a manifest excess of power except if the tribunal failed to apply the proper law.[116] The Applicants, for their part, contend that the distinction between

[112] Railway Agreement, A-0002-ENG; Road Agreement, A-0003-ENG.
[113] Reply, ¶ 49.
[114] Counter-Memorial, ¶ 73.
[115] Counter-Memorial, ¶ 74.
[116] Counter-Memorial, ¶ 81.

jurisdiction and merits is irrelevant to the Committee's determination of whether an excess of power by the Tribunal existed in this case.[117]

142. The Committee notes that the Tribunal did not qualify its analysis as belonging to either the realm of jurisdiction or admissibility. Even though the question of whether the claims under the Concession Agreements and the umbrella clause claims are time-barred falls under the general heading of "*Jurisdiction and Admissibility*" of the Award, the review and analysis of this question is separate from the preceding section entitled "*Are the Claims Admissible?*", thus suggesting that the question is not one of admissibility. The Committee is inclined to agree with the Respondent that the Tribunal's ruling is "*a ruling on the basis of the law 'applicable to these Agreements*'" without further qualification.[118] Put it another way, as noted by the Respondent's counsel at the Hearing, "*[t]he claim is time-barred as a matter of the applicable law*".[119]

143. In any event, the Committee agrees with the Applicants that the nature of the Tribunal's ruling in this regard is ultimately irrelevant for purposes of this ground of annulment. What matters in the Committee's opinion is that the Tribunal applied the proper law to this issue, both because it was the governing law of the Concessions Agreements and because it had been so argued in the cases put forward by the Parties, which thus established the proper legal framework within which the Tribunal's decision fell. In this regard, it is important to stress that the Applicants' argument that provisions concerning limitations periods are inapplicable in this case because they are procedural in nature in the light also of Article 168 of the Armenian Civil Procedure Code was not before the Tribunal and can therefore not be entertained by this Committee. As held by the *ad hoc* committee in *Klöckner I*, the ICSID annulment process cannot "*be used by one party to complete or develop an*

[117] Transcript Day 1, pp. 111-114.
[118] Counter-Memorial, ¶ 74.
[119] Transcript Day 1, 183: 9-10.

argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments".[120]

144. With regard to the Applicants' allegation that, in holding that their claims were "*extinguished*", the Tribunal "*re-wrote the Parties' Concessions and robbed the Claimants of any opportunity for redress*" in a possible future ICC arbitration,[121] the Committee considers that the Applicants seem to read too much into the Award. The word "*extinguishment*" appears once in the Award, at paragraph 471, and it is used in the context of the discussion of Mr. Borkowski's umbrella clause claims. The statement in question reads as follows: "*[u]mbrella clauses may provide a path to an international dispute resolution forum, constituted under treaty, but they do not transform the nature of the underlying contractual rights and obligations; those underlying rights and obligations are still capable of extinguishment in accordance with the laws under which they initially were established*". Thus, the Tribunal did not declare the claims "*extinguished*" under Armenian law, it simply noticed – in the particular context of claims asserted under an umbrella clause – that these claims are capable of extinguishment because their contractual nature is not transformed by virtue of the umbrella clause. The Committee therefore is at a loss understanding how in the circumstances the Applicants could have been "*robbed of an opportunity for redress*" by the Tribunal. The Committee notes that the Applicants advance similar allegations that their claims were "*extinguished*" also with regard to its second argument under this ground of annulment, i.e. that the Tribunal misinterpreted and misapplied the Armenian prescription period. Given that the Committee has addressed these allegations in this section, and that the same reasoning applies also to the Applicants' second argument, they will not be addressed again in the Section that follows to avoid unnecessary repetition.

145. Having established that there was no excess of powers on the part of the Tribunal as both the Applicants' arguments that the Tribunal (i) applied the wrong rules of law and (ii) failed

[120] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 (Annulment Proceeding), Decision on the Application for Annulment Submitted by Klöckner (May 3, 1985) ("***Klöckner v. Cameroon***"*)*, ¶ 83, AL-0012-ENG.

[121] Reply, ¶ 54.

to exercise its jurisdiction have been dismissed, the question of the "*manifestness*" of the excess of power is moot and needs not to be examined.

(b) Argument 2: The Tribunal grossly misinterpreted and misapplied the Armenian prescription period

146. The Applicants also contend that the Tribunal committed an excess of power because it misinterpreted and misapplied the Armenian statute of limitation period. They argue in particular that the Tribunal did not interpret the statute on the basis of the literal meaning of its words but instead assigned "*its own idiosyncratic definitions to key phrases*".[122]

147. The Committee considers that, to the extent that the Applicants argue that the Tribunal provided the wrong interpretation of Article 340(1) of the Armenian Civil Code, this is not a matter that may be subject to annulment. The appreciation and assessment of the evidence and the interpretation of the law are clearly matters that fell within the Tribunal competence and cannot be re-visited by this Committee, lest it acts like a court of appeal, which is not its role. In this regard, the Committee endorses the following position expressed by the committee in *Alapli v. Turkey*:

> *"[P]ursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility of any evidence adduced and of its probative value. Not only is such an analysis not warranted by the language of Article 53(1) of the ICSID Convention, but also the tribunal, having first-hand knowledge of the evidence before it, is best situated to interpret it. What is more, a tribunal has considerable discretion in its evaluation of the evidence."*[123]

148. At the Hearing, the Applicants, while acknowledging that the date picked by the Tribunal as the start of the limitation period (March 18, 2015) was "*an important date*", argued that "*a more appropriate date*" for the start of the prescription period is July 27, 2017, when Armenia indicated that Rasia "*[wa]s free to file a claim against the government [with] ICSID*".[124] For the Applicants, the Tribunal's "*decision reflects hindsight bias*" and the fact

[122] Reply, ¶ 111.

[123] *Alapli v. Turkey*, ¶ 234, RLA-0019-ENG.

[124] Transcript Day 1, 114:24-115:4, 117:3-15.

that the Tribunal chose an arbitrary date to start the limitation period was "*a very serious sign of unfairness and bias*".[125]

149. The Committee considers that the Applicants' argument has no merit as there is no basis to assert that the Tribunal's decision reflected bias. The alternative date now put forward by the Applicants in these proceedings had not been advanced by the Claimants/Applicants as the appropriate date for the commencement of the limitations period before the Tribunal. As recalled in the Award, the Respondent contended in the Arbitration that the limitations period began to run on March 18, 2015, which is the date by which Armenia had repudiated the Concession Agreements, and the date Claimants/Applicants selected as the "*valuation date*" for their damages claim.[126] While in the Arbitration the Claimants/Applicants submitted that Armenia's allegedly wrongful acts did not stop before July 19, 2015[127] and continued as late as 2017,[128] they did not expressly contend that any specific date should be used as the starting date of the limitations period nor did they propose an alternative to the Respondent's date of March 18, 2015.

150. The Tribunal's analysis in the Award of when the three-year statute of limitations began running logically starts from the language of Article 337(1) which provides that that time-period begins to run "*when [Rasia] learn[ed] or should have learned of the violation of [its] right*".[129] In applying this provision to the facts of the case, the Tribunal observed that the Claimants' argued that "*their investments 'were destroyed by Armenia through a series of acts beginnings in November 2012' and that '[t]here is no single event which constituted the total loss of the Claimants' investments*"". The Tribunal then considered that the accrual date for purposes of the statute of limitations analysis was the valuation date selected by the Claimants/Applicants, i.e. March 18, 2015, which was described by

[125] Transcript Day 1, 116:25-117:2, 118:4-14; Applicants' Opening Statement, pp. 41-42.
[126] Award, ¶ 433, A-0001-ENG.
[127] Arbitration Reply, ¶ 607, A-0024_ENG. *See also* Memorial, ¶¶ 113-119.
[128] Arbitration Reply, ¶ 607, A-0024-ENG.
[129] Award, ¶ 447, A-0001-ENG.

the Claimants/Applicants as "*the date by which Armenia* had made clear its intention *to eliminate the Railway Project as well as the Road Project*".[130]

151. Thus, on the basis of the arguments and evidence before it, the Tribunal's conclusion was that "*the Claimants' pleading that Armenia took additional steps in breach of the Concessions after Claimants already had been 'irreversibly deprived of their investments' in March 2015 did not alter the accrual date for purposes of the statute of limitations analysis*".[131] It follows that the date chosen by the Tribunal was not an arbitrary date, but one that was selected after consideration of the relevant provision of Armenian law applied in the light of the arguments made by the Parties in the case. While the Claimants/Applicants disagree with the Tribunal's choice of date, which also happens to be the date that was chosen by the Respondent in the Arbitration, the Committee can detect nothing inappropriate, let alone arbitrary, in the way the Tribunal decided this question. In any event, even assuming, *quod non*, that the Tribunal had alternative dates before it, whether or not the Tribunal chose the most appropriate date is not for this Committee to decide.

152. The Applicants also allege that their claims in the Arbitration were based on the corrupt actions of the Armenian Ministry of Transport, Mr. Beglaryan, and this should have had an impact on the limitations period by virtue of Article 333(1) of the Civil Code which provides that, when an injury is alleged to have resulted from corrupt actions, there is a 10-year limitations period starting from the time of the corrupt actions.[132] For the Applicants, the Tribunal erred by ignoring these corruption allegations and did not treat the Parties equally because it denied the Claimants/Applicants' request to compel Mr. Beglaryan's testimony and instead accepted the Respondent's request to compel the testimony of Mr. Weixin from CCCC, a member of the Claimants/Applicants' consortium.[133]

[130] Award, ¶ 448, A-0001-ENG, emphasis in the original.
[131] Award, ¶ 449, A-0001-ENG.
[132] Application, ¶ 105.; Reply, ¶ 85.
[133] Reply, ¶ 86.

153. The Committee has the following observations to make in this regard. First, to the extent that the issue of corruption was pleaded in the Arbitration, the Tribunal did deal with it and rejected it as follows: "*Given the demanding standard for proving corruption and illegality, as well as Mr. Borkowski's observed penchant for exaggerating evidence to try to advance his case […], the Tribunal declines to accept the alleged bribery request as proven, based solely on Mr. Borkowski's uncorroborated testimony that it occurred*."[134] It is not the function of the Committee to revisit the Tribunal's appreciation of the probative value of the evidence and substitute its views to those of the Tribunal.

154. Second, as to the longer limitations period under Article 333(1) of the Armenian Civil Code, this point was never before the Tribunal as none of the Parties raised it in the Arbitration. The Applicants argue that the Respondent should have brought it to the Tribunal's attention, but, arguably, this was a potential defense that should have been raised by the Claimants/Applicants against the Respondent's argument that the claims were barred by a three-year statute of limitations. Yet, the Claimants/Applicants failed to make that argument then and they are barred from making that argument now. A ground for annulment cannot be upheld on the basis of arguments that were not advanced in the original arbitration.

155. Third, the Committee finds no unequal treatment of the Parties in the fact that a request to hear witness testimony by the Claimants/Applicants was denied by the Tribunal. Once more, this is the kind of appreciation of the evidence that fell within the Tribunal's discretion and the Committee cannot re-visit it. Moreover, in the circumstances of this case, the Tribunal noted in the Award that it "*was unable to hear testimony from Minister Beglaryan, who is no longer under the Respondent's direction and control*".[135] Thus, it appears that, in its discretion and in the light of the evidence before it, the Tribunal made the decision not to call Mr. Beglaryan as a witness. It is true that the Tribunal requested the Claimants/Applicants to file a witness statement by Mr. Weixin and to make him available for cross-examination.[136] However, the Award shows that this was done in order to test the

[134] Award, ¶ 496, A-0001-ENG.
[135] Award, ¶ 649, A-0001-ENG.
[136] Award, ¶¶ 66, 69-70, A-0001-ENG.

authenticity of certain documents introduced by the Claimants/Applicants and therefore, not only this was a very different situation from Mr. Beglaryan's, but the witness statement had been requested by the Tribunal in order to allow the Claimants/Applicants to introduce certain documentary evidence and thus this was to their benefit, rather than their detriment.[137] In the circumstances, no unequal treatment of the Parties can be found.

156. The Applicants further allege that the Tribunal grossly misinterpreted and misapplied Armenian law by: (i) adding a new requirement of "*wrongdoing*" which does not exist under Armenian law, and (ii) concluding that the statute of limitations could only be interrupted by submitting a claim to ICSID arbitration whereas Article 340(1) of the Armenian Civil Code permits the interruption more broadly.

157. With regard to the Applicants' allegation that the Tribunal replaced the word "*debt*" with the word "*wrongdoing*" in interpreting Article 340(1) of the Armenian Civil Code, the Committee considers that the Applicants misrepresent the Tribunal's analysis and finds it useful to recap how the matter was treated in the Award. It should be noted that, with regard to this point, similar arguments are also made in support of the ground of annulment for a serious departure from a fundamental rule of procedure which will be considered under Section B(2)c below.

158. To put the question in context, the Tribunal examined the Respondent's argument that the Claimants' claims under the Concession Agreements were barred under Armenian law in Section D of the Award entitled "*Are the Claims Under the Concessions and the Umbrella Clause Barred?*".[138]

159. As discussed above, the Respondent argued that the limitations period began to run on March 18, 2015, which is the date by which Claimants contended Armenia had repudiated the Concession Agreements, and the date Claimants selected as the "*valuation date*" for their damages claim. Accordingly, the Respondent argued, the limitations period expired on March 18, 2018. Given that the Claimants commenced the Arbitration on July 19, 2018,

[137] Transcript Day 2, 288:10-25; 288:22-289:4.
[138] Award, pp. 142 *et seq*., A-0001-ENG.

more than three years after the date of March 18, 2015, any claim under the Concession Agreements was time-barred.[139]

160. As recalled by the Tribunal at the start of its analysis in the Award, the Respondent's statute of limitations defense sought to defeat Rasia's claims for breach of the Concession Agreements and Mr. Borkowski's umbrella clause claim under the BIT. Given that the defense was not asserted with regard to Mr. Borkowski's other claims under the BIT, those claims would have proceeded regardless of the Tribunal's findings on the statute of limitations and the umbrella clause claims.[140]

161. The Tribunal began by dealing with the contractual claims and recalled the applicable provisions of the Armenian Civil Code, Articles 332, 337 and 340.[141] This latter provision reads as follows:

> ***Article 340. Interruption of the running of the term for the statute of limitations***
>
> *1. Running of the statute of limitations shall be interrupted by the filing of a claim in the prescribed manner, as well as by performing actions evidencing the acknowledgement of the debt by the person obliged.*
>
> *2. Running of the term for the statute of limitations shall restart after the interruption. The time which has elapsed before the interruption shall not be calculated within the new term.*

162. The Tribunal examined first the question of the starting date of the three-year statute of limitations and then proceeded to consider whether the running of the three-year period was "*interrupted*" pursuant to Article 340(1). The Tribunal first observed that the Parties had not submitted any legal authorities to assist in the interpretation of this provision, which is an undisputed fact, and moved to consider "*the likely purpose of this provision along with its literal text"*.[142] The Tribunal then went on to state that in this case the terms of Article 340(1) should be interpreted more broadly than the literal meaning of the words

[139] Award, ¶ 433, A-0001-ENG.

[140] Award, ¶ 444, A-0001-ENG.

[141] Award, ¶ 445, A-0001-ENG.

[142] Award, ¶ 456, A-0001-ENG. *See* Transcript Day 1, 51:10-25, 104:18-24, 105:6-106:2.

"*acknowledgement of a debt"* and should "*include an acknowledgment of an outstanding contractual obligation to another, which is either intended to, or would have the natural effect of, encouraging a counterparty to refrain from initiating legal action"*.[143]

163. The Applicants take no issue with the Tribunal's interpretation of Article 340(1) and find it essentially correct and corresponding to what they consider to be the literal or ordinary meaning of the statute.[144] However, in the Applicants' view, the Tribunal departed from this interpretation later on in the Award and committed critical errors by *"effectively inventing new legal rules"* which were outcome determinative in this case[145] when it examined whether the limitations period was interrupted by any actions taken by Armenia "*evidencing the acknowledgement of the debt*". It is thus necessary to review the entirety of the Tribunal's analysis to determine whether the Applicants' understanding is correct.

164. Having provided its interpretation of Article 340(1) in paragraph 457 of the Award, the Tribunal went on to recall that, according to the Claimants/Applicants, the statute of limitations had been interrupted by statements made by the Respondent on three occasions after March 18, 2015 (on February 15, 2016, March 18, 2016, and July 3, 2017).[146] It should be noted in this regard that, during the Hearing in these proceedings, the Applicants stated that there were four such occasions and also mentioned an email dated April 5, 2016, a document which they attempted to introduce into the evidence on the eve of the Hearing and whose production was not allowed by the Committee.[147] While this document was not examined by the Tribunal together with the three others mentioned above, the Award refers to it at paragraph 461 as one of the instances in early 2016 which, in the Tribunal's opinion, "*could be viewed as encouraging the Claimants to engage in practical discussions to revive at least the Railway Project, rather than declaring an end to the Parties' dealings*".[148] Thus, it appears that the Tribunal did consider this document and viewed it as a separate

[143] Award, ¶ 457, A-0001-ENG.

[144] Transcript Day 1, 42:6-19.

[145] Transcript Day 1, 43:8-9.

[146] Award, ¶ 458, A-0001-ENG.

[147] Applicants' Opening Statement, p. 13. *See also* Transcript Day 1, 7:24-26:3.

[148] Award, ¶ 461, A-0001-ENG. The relevant passage reads as follows: "*on 5 April 2016, the Respondent asked Rasia to provide a 'sample time-line on the completion of the next steps and the obligations of the [Railway Concession]'*". Reference is made in fn 673 to Exhibit C-176, Email from Mr. G. Grigoryan to Mr. J. Borkowski, 5 April 2016.

occasion which might have interrupted the statute of limitations but did not, according to the Tribunal's conclusion. Whatever the reasons for considering this document separately from the other occasions, the fact remains that the Tribunal did take it into account in its analysis.

165. At the Hearing, the Applicants reviewed again this documentary evidence and argued that it showed that Armenia repeatedly acknowledged its existing contractual obligations and ensured that it would cooperate to revive the railway projects.[149] In the Applicants' opinion, "*these are precisely the sort of communications that (…) would have the natural effect of encouraging a counterparty from initiating legal action*".[150] and would therefore satisfy the Tribunal's literal interpretation of Article 340(1) at paragraph 457 of the Award. Instead, the Applicants argue, there was a "*complete disconnect*" between the Tribunal's interpretation and the rule that it applied in the Award in analysing the various documents.[151] For the Applicants, the Tribunal was not applying Article 340(1) and rejected the evidence on the basis of the new requirements of "*acknowledgement of wrongdoing*" or "*a call for the parties to revive the projects*" that appear nowhere in the statute.[152]

166. The Committee disagrees. In the Committee's opinion, when the reasoning of the Tribunal is examined as a whole in its proper context, it is clear that the Tribunal had no intention of substituting the words of the statute or creating new legal requirements. The Tribunal was simply reviewing and assessing the documentary evidence submitted by the Claimants/Applicants to decide whether it was capable of interrupting the limitations period set forth in Article 430(1). In particular, the Tribunal noted that several points emerged from an examination of the occasions that were said to have interrupted the statute of limitations. The relevant paragraphs of the Award (459-461) read as follows:

> *459. First, none of the Respondent's statements on these occasions can be said to include any acknowledgment of wrongdoing on Armenia's part; to the contrary, they consistently defend Armenia's conduct, deny*

[149] Transcript Day 1, pp. 57-69.

[150] Transcript Day 1, 70:14-18.

[151] Transcript Day 1, 73:23-74:4.

[152] Transcript Day 1, pp. 77-82.

> *any breach on its part, and contend that Rasia was the party responsible for the failure of either Project to proceed.*
>
> *460. Second, and notwithstanding the Respondent's complaints about Rasia's performance, the Respondent consistently maintained on these occasions that the Concessions had not been terminated, but they remained in effect.*
>
> *461. Third, if taken in isolation, several of the Respondent's statements in early 2016 could be viewed as encouraging the Claimants to engage in practical discussions to revive at least the Railway Project, rather than declaring an end to the Parties' dealings.*

167. So, it was in the context of reviewing the post-March 18, 2015 documents mentioned above that the Tribunal observed for the first time at paragraph 459 of the Award, that "*none of the Respondent's statements on these occasions can be said to include* any acknowledgment of wrongdoing *on Armenia's part".* [153] However, the Tribunal's reasoning does not end here as this paragraph goes on to say that Armenia's statements on the occasions examined "*consistently defend Armenia's conduct, deny any breach on its part, and contend that Rasia was the party responsible for the failure of either Project to proceed*". Moreover, the Tribunal concluded that "*the Respondent consistently maintained on these occasions that the Concessions had not been terminated, but they remained in effect*" and that many statements by Armenia "*could be viewed as encouraging the Claimants to engage in practical discussions to revive at least the Railway Project, rather than declaring an end to the Parties' dealings".* Significantly, the Tribunal also stated that "*statements acknowledging both Parties' ongoing contractual obligations to one another and professing a willingness to move forward could be seen as fulfilling the implicit broader purposes of the 'interruption' provision, namely, to stop a limitations period from running while one party continues to encourage and promise mutual performance rather than a resort to litigation*". However, the Tribunal continued, "*[t]he insurmountable problem for the Claimants is that it is abundantly clear they did not rely on the Respondent's statements in any way*". These conclusions are formulated in a clear and logical way and show that what mattered to the Tribunal in assessing this evidence was that – while Armenia did not admit that it had a debt vis-à-vis the Claimants/Applicants

[153] Award, ¶ 459, A-0001-ENG, emphasis added.

and maintained that the Concessions had not been terminated – the Claimants/Applicants pushed forward with litigation.[154]

168. At paragraph 466 of the Award, the Tribunal repeated for the second and last time the word "*wrongdoing*" in considering a statement made by the Armenian Minister of Justice at a July 3, 2017 meeting which was said by the Claimants/Applicants to have interrupted the statute of limitations, and found that the statement fell "*far short of satisfying the requirements for interrupting the limitations period, when it was not accompanied either by any acknowledgment of the Respondent's wrongdoing or by any call for the Parties to revive the Projects*".[155] The Applicants understand this paragraph as introducing two new legal requirements that did not exist in the statute. However, in the Committee's view, the Tribunal was simply elaborating from its initial interpretation of Article 340(1) and providing two examples rather than inventing new statutory requirements. The words "*acknowledgement of the Respondent's wrongdoing*" in particular appears to have been used as an alternative to the term "*acknowledgement of the debt*" used in Article 340(1). This is further confirmed by the fact that, if one were to substitute the word *wrongdoing* with the word *debt* in the paragraphs of the Award where the former is mentioned, the logical sequence of the Tribunal's analysis and the outcome reached would be exactly the same.

169. The Committee also does not accept the Applicants' argument that the Tribunal exceeded its powers because it grossly misinterpreted and misapplied Article 340(1) the Armenian Civil Code by concluding that the statute of limitations was interrupted only by submitting the ICSID claim. In the Committee's opinion, the Tribunal did apply the law that should have been applied to the question. While the Applicants take issue with the manner in which the Tribunal interpreted and applied this provision, and argued that the Tribunal misconstrued it, the Tribunal's analysis was not so gross or egregious to amount to a failure to apply the proper law.

[154] Award, ¶¶ 463-465, A-0001-ENG, emphasis added.

[155] Award, ¶ 466, A-0001-ENG, emphasis added.

170. In the light of the above, the Committee finds that the Tribunal applied the law that it was bound to apply to the dispute as it was argued by the Parties in the Arbitration and it did so thoroughly and logically. As will be seen at paragraphs 209-234 below, the Tribunal also committed no violation of due process. It follows that the Tribunal committed no excess of powers.

171. Given the Committee's conclusions, there is no need to examine whether any excess of powers was "*manifest*". The question raised by the Respondent that only partial annulment is permissible in this case is also moot given that the Committee has rejected this ground of annulment.

B. GROUND 2: SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D))

(1) Applicable Legal Standard of Review for Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d))

a. The Applicants' Position

172. The Applicants submit that this ground for annulment, which is designed to safeguard the fundamental integrity of the arbitral process, is triggered if the following two requirements are met: (i) the rule concerned is fundamental; and (ii) the departure from the rule is serious.[156]

173. Regarding the first requirement on the "*fundamentality*" of the rule, the Applicants assert that this concerns mandatory rules of natural justice and principles of judicial fairness, and it is not limited to violations of specific provisions of the ICSID Convention or the Arbitration Rules. The Applicants list examples of fundamental rules of procedure identified by *ad hoc* committees, including: (i) the right to be heard; (ii) equal treatment of the parties; (iii) the principle of party autonomy; and (iv) the treatment of evidence and

[156] Application, ¶ 61; Memorial, ¶ 61. *See also* Reply, ¶ 30.

burden of proof.[157] The Applicants explain that the right to be heard encompasses both matters of fact and law.[158]

174. The Applicants contend that the right to be heard is a fundamental rule of procedure and that "*each party must have the opportunity to address every formal motion before the tribunal and every legal issue raised by the case*".[159] The Applicants also rely on the *ad hoc* committee's decision in *Victor Pey Casado et al. v. Chile* in which the committee held that "*there is a departure from the right to be heard […] when a party is not given a full, fair, or comparatively equal opportunity to state its case, present its defense, or produce evidence regarding every claim and issue at every stage of the arbitral proceeding*".[160] Citing the *TECO* annulment committee's decision, the Applicants go on to state that, while they recognize that a tribunal is not strictly limited to the arguments presented by the parties, a matter must be adequately pled, must remain "*within the legal framework established by the parties*" and the tribunal must not "*surprise*" the parties "*with an issue that neither party has invoked, argued or reasonably could have anticipated during the proceedings*". In the Applicants' view, if a tribunal determines that it lacks sufficient input from the parties on an issue that may prove determinative of the outcome of the case, it must, above all else, address its questions to the parties, even if this results in delay to the issuance of its award as due process takes priority over expediency.[161]

175. Concerning the second requirement on the "*seriousness*" of the departure from the rule, the Applicants agree that the departure must be more than minimal and be substantial such "*as to deprive a party of the benefit or protection which the rule was intended to provide*".[162]

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[157] Application, ¶ 62; Memorial, ¶ 62; Reply, ¶ 27(i).

[158] Reply, ¶ 32.

[159] Application, ¶ 63; Memorial, ¶ 63. The Applicants state that this is from the *ad hoc* committee's decision in *Maritime International Nominees Establishment v. Republic of Guinea,* ICSID Case No. ARB/84/4 (December 22, 1989) ("***MINE v. Guinea***"). However, in their footnote 77, the Applicants refer to *Tulip v. Turkey*, ¶ 80, AL-0005-ENG, to substantiate this proposition.

[160] Application, ¶ 63; Memorial, ¶ 63, referring to *Victor Pey Casado and President Allende Foundation v. Republic of Chile,* ICSID Case No. ARB/98/2 (Annulment Proceeding), Decision on the Application for Annulment of the Republic of Chile (December 18, 2012), ¶ 184, AL-0010-ENG.

[161] Application, ¶¶ 63-64; Memorial, ¶¶ 63-64; Reply, ¶¶ 28, 31, referring to *TECO Guatemala Holdings LLC v. Republic of Guatemala,* ICSID Case No. ARB/10/23 (Annulment Proceeding), Decision on Annulment (April 5, 2016) ("***TECO v. Guatemala***"), ¶ 184, AL-0015-ENG.

[162] Application, ¶ 65, relying on *MINE* v *Guinea*, ¶ 5.05, AL-0006-ENG/AL-0023-ENG.

Relying on the annulment committee's decision in *Wena Hotels Ltd v. Egypt*, the Applicants claim that "*a serious violation is one that, had it not been made, could have resulted in the issuance of award with a significantly different result*".[163]

b. The Respondent's Position

176. The Respondent takes the position that both of the following requirements must be met: (i) a tribunal's non-compliance must pertain to a fundamental rule of procedure, and (ii) such non-compliance must be serious.[164]

177. The Respondent rejects the articulation of the legal standard advanced by the Applicants. Specifically, it disagrees with the Applicants' contention that "*if a tribunal determines that it lacks sufficient input from the parties on an issue that may prove determinative of the outcome of the case, it must, above all else, address its questions to the parties, even if it results in delay to the issuance of the award*" since, in the Respondent's view, such an overbroad conclusion is not supported by any of the legal authorities submitted by the Applicants (referring to *MINE v. Guinea*; *Tulip v. Turkey*; *Casado v. Chile*; *TECO v. Guatemala*; *Fraport v. Philippines*).[165] The Respondent refers to paragraph 82 of *Tulip v. Turkey*, in which the *ad hoc* committee noted that "*[t]he right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them*".[166]

178. The Respondent further argues that the decisions of the *TECO* and *Casado* annulment committees in any event do not support the Applicants' position in this case because the Applicants concede that they had pled on the limitations period issues during the Arbitration (even if *arguendo* they were made "*out of an abundance of caution*"), and thus the Tribunal's decision was "*within the legal framework established by the parties*".[167]

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[163] Application, ¶ 65; Memorial, ¶ 65; Reply, ¶ 27(ii). The Applicants cite Schreuer 2nd Commentary, ¶ 287, AL-0017-ENG (citing *Wena Hotels v. Egypt*, ¶ 52, AL-0028-ENG).

[164] Transcript Day 1, 174: 3-11. *See also* Respondent's Opening Statement, pp. 71, 86; Respondent's slides used during its rebuttal presentation at the Hearing ("**Respondent's Rebuttal Statement**"), pp. 3-4.

[165] Counter-Memorial, ¶ 68. *See also* Rejoinder, ¶ 52.

[166] Transcript Day 1, 166:6-12. *See also* Respondent's Opening Statement, p. 72.

[167] Rejoinder, ¶ 53.

179. The Respondent accepts that the right to be heard is applicable to both questions of fact and law.[168] It, however, objects to the Applicants' pleaded legal standard on the right to be heard because it arguably would deprive tribunals of any discretion in their independent appreciation of the applicable law during deliberations, and would further open almost every award in which a tribunal did not adopt the legal pleadings of one of the parties wholesale to annulment challenge.[169]

c. The Committee's Analysis

180. The Parties essentially agree on the two-prong test that must be applied by an annulment applicant to satisfy this ground for annulment, namely: i) the rule of procedure from which the tribunal allegedly departed must be fundamental (i.e. it must concern mandatory rules of natural justice and principles of judicial fairness) and ii) it must be shown that the departure from this rule is serious (i.e. it must be shown that it is more than "minimal").[170] The Parties however differ on the interpretation of these requirements and the case law on which the Applicants rely.

181. In particular, the Applicants argue that a tribunal should not "*surprise*" the parties by raising an issue that was not invoked, or could not have been reasonably anticipated, during the proceedings, especially when that issue is outcome-determinative.[171]

182. For its part, the Respondent contends that the Applicants give this annulment standard an "*extreme meaning*" which is not supported by the case law on which they rely. The Respondent further argues that if the Applicants' interpretation were to be accepted, this could be damaging to investment arbitration as "*it would open almost every Award in which*

[168] Rejoinder, ¶ 54.

[169] Counter-Memorial, ¶ 69. *See also* Rejoinder, ¶ 51.

[170] Application, ¶¶ 61-62 and 65; Rejoinder, ¶ 39; Transcript Day 1, 174:3-11. *See also* Respondent's Opening Statement, pp. 71, 86; Respondent's Rebuttal Statement, pp. 3-4.

[171] Application, ¶ 64; Reply, ¶ 28, relying on *TECO v. Guatemala*, ¶ 184, AL-0015-ENG, and *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Annulment Proceeding), Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (December 23, 2010) ("***Fraport v. Philippines***"), ¶¶ 129, 178-179, 218-219, 224 and 247, AL-0016-ENG.

a Tribunal did not adopt the legal pleadings of one of the parties wholesale to annulment challenge".[172]

183. The Committee finds that it is uncontroversial that the two-prong test of a "*serious*" and "*fundamental*" departure from a rule of procedure must be met for this ground of annulment to be satisfied. This has been confirmed by the decisions of a number of annulment committees. As held for instance by the *Wena* annulment committee:

> "*The said provision [Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other."*[173]

184. It is trite law that the parties to a case must be heard and treated equally and fairly, including – as stated by the *Wena* committee – to be allowed to state their respective positions and defenses with the support of the relevant evidence on all issues that are raised by the other party or by the tribunal. The case law has also examined more particularly the right to be heard as a fundamental procedural principle in the context of this ground of annulment. In some cases, parties have argued that their right to be heard was violated because the relevant tribunal based its decision on arguments that were not advanced by the parties to the proceedings, or were not otherwise discussed during the proceedings, thus surprising the parties with an outcome that was not anticipated. The Committee considers that some of the decisions by annulment committees in this regard are sound and should guide its analysis in this case.

185. All these cases, including those on which the Applicants rely, have held, in one form or another, that a party must have the opportunity to present its case and the supporting evidence before the tribunal.[174] At the same time, committees have found that tribunals

[172] Counter-Memorial, ¶ 69. *See also* Rejoinder, ¶ 54.

[173] *Wena Hotels v. Egypt*, ¶ 52, AL-0028-ENG.

[174] *See* e.g. *Tulip v. Turkey,* ¶ 80, AL-0005-ENG.

were not precluded from formulating their own arguments even when these were not raised by the parties. Put it another way, while the parties must be afforded every opportunity to present their cases, advance their defenses and adduce the appropriate evidence, the fact that a tribunal does not refer to each and every argument put forward by the parties, does not ask specific questions, or even comes up with its own interpretation of the legal issues before it, does not necessarily amount to a violation of the right to be heard, as long as the tribunal remains within the bounds of the legal issues and authorities advanced by the parties. The committee's decision in *Klockner I* is pertinent in this regard. Having noted that a tribunal must remain "*within the 'legal framework' established by*" the parties, the committee added:

> *"Within the dispute's "legal framework", arbitrators must be free to rely on arguments which strike them as the best ones, even if those arguments were not developed by the parties (although they could have been). Even if it is generally desirable for arbitrators to avoid basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a "serious departure from a fundamental rule of procedure". Any other solution would expose arbitrators to having to do the work of the parties' counsel for them and would risk slowing down or even paralysing the arbitral solutions to disputes."*[175]

186. Thus, insofar as a tribunal stays within the "*legal framework*" of the case, i.e. as long as it does not stray significantly from the legal issues and the parties' submissions as pleaded in the case, it is not precluded from using its own legal reasoning or from reaching different conclusions than those argued by the parties without seeking the parties' views in advance.[176] As noted by the *Klockner I* committee, "*whether to reopen the proceeding before reaching a decision and allow the parties to put forward their views on the arbitrators' 'new' thesis is rather a question of expedience".*[177]

187. Another important part of the Award is where the Tribunal states that "*the record is equally clear that the Claimants did not view any of the Respondent's statements in early 2016 as a basis for forbearance in pursuing legal claims. Rather, the Claimants' response was*

[175] *Klöckner v. Cameroon*, ¶ 91, AL-0012-ENG.

[176] Schreuer 2nd Commentary, ¶ 317, AL-0017-ENG.

[177] *Klöckner v. Cameroon*, ¶ 91, AL-0012-ENG.

consistent with a plan to push forward with litigation".[178] Thus, in the Tribunal's view, the Claimants' conduct showed that they did not consider the Respondent's statements at the time as a basis to refrain from pursuing its legal actions. This was the Tribunal's interpretation of the documentary evidence submitted by the Parties in the light of their arguments and as such formed part of the Tribunal's adjudicatory function; in performing this function the Tribunal did not commit a breach of due process. The Applicants clearly do not share the Tribunal's view but the Committee cannot see any basis for a departure from a fundamental rule of procedure, let alone a serious departure, in the circumstances of this case.

188. As to the element of surprise that a new approach adopted by a tribunal may have on the parties, this Committee shares the following view expressed by the committee in *Vivendi v. Argentina*:

> *"It may be true that the particular approach adopted by the Tribunal in attempting to reconcile the various conflicting elements of the case before it came as a surprise to the parties, or at least to some of them. But even if true, this would by no means be unprecedented in judicial decision-making, either international or domestic, and it has nothing to do with the ground for annulment contemplated by Article 52(1)(d) of the ICSID Convention."*

189. In conclusion, the Committee finds that a tribunal does not violate a party's right to be heard and does not commit a serious departure from a fundamental rule of procedure under Article 52(1)(d) of the ICSID Convention if it adopts a different approach to the analysis of the case than those presented by the parties or bases its decision on arguments that were not developed and discussed by the parties, as long as it remains within the legal framework established by the parties. The Committee will address the application of this standard to the present case in the following section.

[178] Award, ¶ 465, A-0001-ENG.

(2) Application of the Legal Standard for Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d))

a. The Applicants' Position

190. The Applicants submit that the Tribunal's decision to interpret the Armenian Civil Code "*on its own*" rather than to address questions to the Parties deprived them of their rights to be heard, particularly the rights of the Applicants whose claims were wrongfully dismissed on that basis, and consequently constituted a serious departure from a fundamental rule of procedure.[179] For the Applicants, had the Parties been afforded an opportunity to brief the Tribunal on its unique interpretation of the Armenian Civil Code, the Tribunal likely would not have dismissed the Applicants' claims.[180]

191. The Applicants further contend that the Tribunal wrongly interpreted the tolling provision to require the admission of a "*wrongdoing*", an interpretation that was never argued by the Parties and is not supported by the plain language of the statute, any judicial precedent or other Armenian law authorities.[181]

192. The Applicants take issue with the Tribunal's alleged inaction to inquire with the Parties during the Arbitration about the interpretation of the Armenian Civil Code, which was dispositive to the Tribunal's conclusion in the Award. The Applicants point out that, while the Parties had Armenian counsel retained for this case, the Tribunal, despite having no expertise on Armenian law, did not give the Parties any chance to opine on its interpretation during the course of the Arbitration, including during the two-week merits hearing and nearly two years of deliberation. Instead, the Tribunal decided to interpret the statute on its own by stating that "*[n]one of the Parties has presented an expert on Armenian law to interpret these Civil Code provisions*", which was untrue. Moreover, the Applicants underscore that the Tribunal directed the Parties to address entirely different issues in their post-hearing briefs, which led the Applicants to believe that the limitations period is

[179] Application, ¶¶ 76, 79; Memorial, ¶¶ 76, 79.

[180] Reply, ¶ 38.

[181] Application, ¶ 10, referring to ¶¶ 459 and 466 of the Award, A-0001-ENG.

unimportant, or at least that the Tribunal did not need any further assistance from the Parties in its interpretation.[182]

193. The Applicants add that even during the written phase of the Arbitration leading up to the hearings, the Armenian limitations period was referenced only in a handful of paragraphs by the Parties in a "*throwaway*" manner. The Applicants aver that, on these occasions, they made clear that any such defense, if seriously pressed by the Respondent, would require further briefing, particularly on the questions of interruption. Therefore, while the Applicants do not seem to dispute that they addressed the limitations issue during the Arbitration, including their position in their first post-hearing brief that the Armenian limitations period was inapplicable because the Respondent's breaches of the Concession Agreements and the admissibility of their claims are governed by customary international law, they insist that this was done "*only out of an abundance of caution*" and argue that "*Armenia cannot seriously contend that this passing treatment was sufficient to allow the Tribunal to correctly apply the statutory limitation period and (to the Claimants' great surprise) dismiss the claims on the basis of that provision*".[183]

194. The Applicants further contend that given that the limitations period is an affirmative defence advanced by the Respondent in this case, the Tribunal should have dismissed the Respondent's such defence when it concluded that the Parties' pleadings were insufficient, rather than deciding to interpret it on its own and dismiss the Applicants' claims.[184]

195. Also, it is the Applicants' position, as presented during the Hearing, that Armenian law requires that a court faced with such a limitation objection must conduct a rigorous investigation into all issues in a dedicated preliminary stage. As Armenia did not raise it during the bifurcated phase, such defence should be considered as waived under Article 168 of the Armenian Civil Procedure Code.[185]

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[182] Application, ¶¶ 7-8, 46-48, 53-54, 77-78; Memorial, ¶¶ 7-8, 46-48, 53-54, 77-78; Reply, ¶¶ 16-24, 39-41. *See also* Application, ¶ 75(i); Memorial, ¶ 75(i); Transcript Day 1, 41:10-23; Applicants' Rebuttal Statement, pp. 8-15.

[183] Reply, ¶¶ 11-15, 18.

[184] Application, ¶ 79; Memorial, ¶ 79. *See also* Application, ¶ 55; Memorial, ¶ 55.

[185] Transcript Day 1, 107:9-111:20. *See also* Applicants' Opening Statement, pp. 35-37.

196. Additionally, the Applicants state that the Tribunal also seriously departed from a fundamental rule of procedure when it provided its "*general views*" on the merits of the Applicants' contract-based claims, despite having held that it lacked jurisdiction over those claims.[186]

197. With respect to the Respondent's contentions in the Counter-Memorial, the Applicants object as follows: (i) the Applicants did not consent to the Tribunal's interpretation of the Armenian Civil Code; (ii) the Applicants did not take a "*strategic choice*" not to plead on the limitations period during the Arbitration, but it was rather a natural reaction to the Tribunal's evident lack of interest on this issue; (iii) the Applicants have consistently argued that both the Tribunal's interpretation and application of Article 340(1) of the Armenian Civil Code were wrong; and (iv) given the intertwined nature of the Applicants' claims, the Award must be annulled in full.[187]

b. The Respondent's Position

198. The Respondent objects to the Applicants' claim that they were deprived of their rights to be heard during the Arbitration.[188]

199. First, the Respondent insists that the Applicants in fact admit that the Tribunal correctly interpreted the relevant provisions of Armenian law.[189] According to the Respondent, the Tribunal did not interpret the word "*debt*" in Article 340 of the Armenian Civil Code to mean "*wrongdoing*" as the Applicants aver. The Respondent explains that, while the Tribunal used the word "*wrongdoing*" in the Award, it was not used in the context of interpreting Article 340 of the Code, but rather it was noted as one element when applying such Article to the facts at issue. For the Respondent, this is clear from the Award, including from the following passages: (i) "*an 'acknowledgment of [a] debt' by an obligor to an obligee may reasonably lead the obligee to consider a dispute resolve at least at the level of principle, without the need to initiate a legal proceeding*"; (ii) "*the Tribunal*

[186] Application, ¶ 129; Memorial, ¶ 129; Reply, ¶ 118. *See also* Application, ¶¶ 56, 75(vi); Memorial, ¶¶ 56, 75(vi).
[187] Reply, ¶ 42-44, 128-129. *See also* Application, ¶ 59; Memorial, ¶ 59.
[188] Counter-Memorial, ¶ 39.
[189] Counter-Memorial, ¶¶ 40-47. *See also* Rejoinder, ¶¶ 32, 39, 48-50.

interprets the phrase in Article 340(1) more broadly, to include an acknowledgment of an outstanding contractual obligation to another, which is either intended to, or would have the natural effect of, encouraging a counterparty to refrain from initiating legal action"; and (iii) "*[w]hile not an 'acknowledgment of a debt' in the narrowest reading of Article 340(1) of the Armenian Civil Code, statements acknowledging both Parties' ongoing contractual obligations to one another and professing a willingness to move forward could be seen as fulfilling the implicit broader purposes of the 'interruption' provision, namely, to stop a limitations period from running while one party continues to encourage and promise mutual performance rather than a resort to litigation*".[190]

200. Second, the Respondent submits that the Applicants did explain their positions on the interpretation of the Armenian Civil Code during the Arbitration.

201. Referring to multiple paragraphs of the Award, the Respondent explains that during the Arbitration, (i) in the counter-memorial, the Respondent "*contend[ed] that the Claimants' claims under the Concession [Agreements] are time-barred under Armenian Law (the governing law of the Concession Agreements)*" and submitted a translation of Article 340 of the Armenian Civil Code; (ii) in the reply, the Claimants argued substantively that the limitations period under Article 340 of the Armenian Civil Code may be interrupted, by referring only to the text of said Article; (iii) in the rejoinder and two post-hearing briefs, the Respondent made further submissions on the limitations period; and (iv) in its first post-hearing brief, the Claimants advanced their position on the interpretation of Article 340(1) of the Armenian Civil Code and further argued, for the first time, that the Respondent had acknowledged its debt and "introduce[d] the idea that the limitations period might be procedural in nature and not applicable".[191]

202. The Respondent draws the Committee's attention to the fact that the Applicants did not advance their arguments on the limitations period during the hearing and in their second

[190] Counter-Memorial, ¶¶ 42-47, referring to the Award, ¶¶ 456-459, 463-464, A-0001-ENG; Rejoinder, ¶¶ 33-38.

[191] Counter-Memorial, ¶¶ 48-54; Rejoinder, ¶¶ 13-14, 16-20, 23, 25, 28-31, 41; Transcript Day 1, 149:12-141:16; Respondent's Opening Statement, pp. 73-77. *See also* Counter-Memorial, ¶ 3.

post-hearing brief,[192] despite the fact that the Respondent had made the following statement during the hearing:

> *"…statute of limitations, as we said at the outset, is three years here, and here is the Armenian law. And they filed more than three years after what they say is the valuation date*."[193]

203. The Respondent further underscores that, contrary to the Applicants' contention, the Tribunal did not limit the Parties' arguments in the second post-hearing briefs. The Respondent refers to, *inter alia*, the following message conveyed by the President of the Tribunal to the Parties:[194]

> *"I should preface by saying that one should not read anything into either the content of these questions nor the absence of questions on other parties of your briefs. These are not intended to be the most important issues, or perhaps even important issues at all. These were just notes I took and I am going to work through them in a somewhat random order, and read nothing into them, but there they are.*
>
> *[…]*
>
> *[P]lease don't read anything into these questions. There are other topics that no doubt would interest us and that you will wish to comment on anyway."*

204. For the Respondent, the Applicants never took the limitations period seriously during the Arbitration, in contrast to the Respondent and the Tribunal which did.[195] The Respondent thus stresses that it was the Applicants' strategic choice not to plead more on Armenian law during the Arbitration, which refutes the Applicants' current position that they had been deprived of their right to be heard.[196]

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[192] Counter-Memorial, ¶ 55. *See also* Rejoinder, ¶¶ 31, 44.

[193] Rejoinder, ¶ 18, referring to the Revised Consolidated Hearing Transcript of the Arbitration, 215:21-216:1, A-0027-ENG.

[194] Rejoinder, ¶¶ 21-23, referring to the Revised Consolidated Hearing Transcript of the Arbitration, 1892:17-25, 1909:1-3, A-0027-ENG.

[195] Counter-Memorial, ¶ 55. *See also* Rejoinder, ¶ 18.

[196] Counter-Memorial, ¶¶ 56-59; Rejoinder, ¶¶ 30, 41, 44-46.

205. Third, the Respondent claims that the Tribunal closely analysed the evidence in the record, including the evidence introduced by the Applicants concerning the Armenian limitations period, when rendering the Award.

206. Specifically, the Respondent refers to, *inter alia*, paragraph 458 of the Award in which the Tribunal held, in the context of applying Article 340 of the Armenian Civil Code, that "*[t]he Claimants contend that this requirement was satisfied by the Respondent's statements on three occasions (15 February 2016, 18 March 2016, and 3 July 2017), each of which accordingly interrupted the statute of limitations. The Tribunal has examined these statements closely*". The Tribunal thus reached the opposite conclusion from the Applicants' position "*on its own*" on the basis of the evidence presented before it and by interpreting a statutory provision in accordance with its ordinary meaning. In the Respondent's view, nothing in the record suggests that the Tribunal imperfectly performed its decision-making power.[197] The Respondent also takes issue with the Applicants' remarks during the Hearing that the Respondent "*acknowledged outstanding legal obligations in at least four communications*", by including the email communication of April 5, 2016 as the fourth communication, as such position contradicts their earlier position during the Arbitration, which allegedly shows the Applicants' opportunistic behavior.[198]

207. Furthermore, the Respondent disagrees with the Applicants' view that the Tribunal "*narrowed its interpretation of Article 340(1) of the Armenian Civil Code in application*". For the Respondent, the Tribunal rightly held that (i) the Respondent continued to deny any breach on its part; (ii) the Respondent consistently maintained that the Concession Agreements were not terminated; and (iii) the limitations period was not interrupted in any event because the Applicants did not rely on the Respondent's contemporaneous statements in any way.[199]

[197] Counter-Memorial, ¶¶ 60-63; Rejoinder, ¶ 31. *See also* Rejoinder, ¶¶ 41-42, 47.

[198] Respondent's Rebuttal Statement, pp. 30-34.

[199] Counter-Memorial, ¶¶ 64-67. *See also* Rejoinder, ¶¶ 31, 40.

208. Fourth, the Respondent contends that the Applicants' assertions under this annulment ground only pertain to Rasia's claims, but not Mr. Borkowski's BIT claims or the Tribunal's determination on causation and damages. Therefore, even if successful, the Application can only amount to a partial annulment of the Award.[200]

c. The Committee's Analysis

209. In support of this ground of annulment the Applicants argue that the Tribunal did not afford the Parties an opportunity to submit arguments on the Tribunal's "*unique and counter-textual*" interpretation of the Armenian Civil Code which was dispositive of the Tribunal's conclusions in the Award. The Applicants assert that the Tribunal decided to interpret Article 340(1) of the Armenian Code of Civil Procedure "*largely on its own*" and did not put "*its invented legal requirements*" to the Parties and their Armenian legal experts.[201] It is the Applicants' position that the Tribunals' requirements were "*entirely unforeseeable to the Parties given that they (i) find no support in the text of the Code, nor in Armenian legal authority; and (ii) were never raised by the Tribunal or either Party at any time during the three-year arbitration".*[202] The Applicants submit that, had the Tribunal put this matter to the Parties, it would likely have not dismissed the Applicants' claims.[203]

210. As to the meaning of "*serious*", the Applicants endorse the statement in *MINE v. Guinea* that the departure "*must be substantial and such as to deprive a party of the benefit or protection which the rule was intended to provide*".[204] The Applicants add that this includes situations where the violation has a significant impact on the award.[205] The Applicants further contend, relying on *TECO v. Guatemala* and *Fraport v. Philippines*, that a tribunal must not surprise the parties with an issue that "*neither party has invoked, argued or reasonably could have anticipated during the proceedings"*, particularly with regard to

[200] Counter-Memorial, ¶¶ 181, 185. *See also* Rejoinder, ¶¶ 147-152.
[201] Transcript Day 1, 93:11-18, 106:3-11; Applicants' Opening Statement, pp. 34-35.
[202] Transcript Day 1, p. 93, lines 11-18, p. 106, lines 3-11; Applicants' Opening Statement, p. 35.
[203] Reply, ¶ 38.
[204] Reply, ¶ 27, citing *MINE* v *Guinea*, ¶ 5.05, AL-0006-ENG/AL-0023-ENG.
[205] Reply, ¶ 27. *See also* Transcript Day 2, p. 252, lines 16-23.

outcome-determinative issues.[206] The Respondent relies on the *Tulip* annulment decision to argue that the "*seriousness*" test is met when the observance of a rule has the potential to lead to a substantially different award and the departure is "*more than minimal*".[207] The Respondent also contends that *Fraport* should be distinguished because arguments on the statute of limitations were made during the Arbitration and no new evidence had been introduced by the Tribunal.[208]

211. As noted above, there is no question that the right to be heard is a fundamental rule of procedure and that a tribunal must ensure that parties have had an opportunity to brief the tribunal on the questions of law and fact on which the award is based. The Committee has reviewed the record of the original Arbitration with a view to examining whether the Parties did present arguments on the statute of limitations under Armenian law. The Committee notes that the Respondent raised the question of the statute of limitations concerning Rasia's contractual claims under Armenian law at the earliest possible time in the proceeding, i.e. with its counter-memorial. In that pleading, the Respondent argued that, given that the Concessions Agreements are governed by Armenian law, Rasia's contractual claims were time-barred under Articles 332 and 337(1) of the Armenian Civil Code and had thus expired.[209] The Respondent further submitted that the fact that Rasia's contractual claims expired by virtue of the statute of limitations under Armenian law also means that claims under the umbrella clause were untimely.[210]

212. The Claimants/Applicants in the Arbitration rebutted the Respondent's arguments in their reply and argued that the Armenian limitations period did not apply because Armenia's breaches of the Concession Agreements are governed by customary international law.[211] The Claimants/Applicants also relied on the provisions of Armenian civil law on the

[206] Reply, ¶ 28, citing *TECO v. Guatemala* ¶ 184, AL-0015-ENG; *Fraport v. Philippines*, ¶¶ 129, 178-179, 218-219, 224 and 247, AL-0016-ENG.

[207] Transcript Day 2, 280:17-25; Respondent's Opening Statement, p. 86. In its Rebuttal Statement, at p. 3, the Respondent also refers to *TECO v. Guatemala*, ¶ 85, ALA-0015-ENG, which states that a committee can determine "*whether the tribunal's compliance with a rule of procedure could potentially have affected the award*".

[208] Respondent's Rebuttal Statement, p. 12.

[209] Arbitration Counter-Memorial, ¶¶ 222-225.

[210] Arbitration Counter-Memorial, ¶ 225.

[211] Arbitration Reply, ¶ 606.

interruption of the limitation period, specifically Article 340 of the Civil Code which provides as follows: "*Running of the statute of limitations shall be interrupted by the filing of a claim in the prescribed manner, as well as by performing actions evidencing the acknowledgement of the debt by the person obliged*."[212]

213. The Respondent advanced some rebuttal arguments on this topic in its rejoinder where it maintained that the Armenian limitations period barred the claims and argued that the limitations period could only be interrupted by the filing of a court action since a letter providing notice of a dispute is not sufficient under Armenian law.[213]

214. The Claimants/Applicants did not address the question of the statute of limitations at the Arbitration hearing, in their opening or otherwise, while the Respondent referred to this question in two slides of its presentation and made several remarks on this topic during its opening.[214] It is worth noting incidentally that the hearing in the Arbitration was held in two parts, for a total of thirteen days: the first part on February 16-26, 2021 and the second on April 26 and 27, 2021.[215] It follows that the Claimants/Applicants also had these opportunities to present their defence and rebut the Respondent's arguments on the statute of limitations.

215. The Claimants/Applicants returned to this issue in their first post-hearing brief where they submitted that, even if, *arguendo*, recourse to Armenian procedural law were appropriate to interpret the Tribunal's jurisdiction, the Respondent's acknowledgment of its obligations under the Concession Agreements interrupted the statute of limitations on July 3, 2017 at the latest.[216]

216. In its first and second post-hearing briefs, the Respondent maintained its argument that Rasia's contractual and umbrella clause claims were also time-barred by Armenia's

[212] Arbitration Reply, ¶¶ 601-607.

[213] Arbitration Rejoinder, ¶¶ 340-345.

[214] Slides 14, and 92 of the Respondent's Opening Presentation of the Arbitration, A-0040-ENG; Revised Consolidated Hearing Transcript of the Arbitration, 149:1-11, 215:21-25, 216:1, 222:7-12, A-0027-ENG.

[215] Award, ¶¶ 73 and 88, A-0001-ENG.

[216] Claimants' First Arbitration Post-Hearing Brief, ¶¶ 306-310, A-0029-ENG.

three-year statute of limitations.[217] The Claimants/Applicants did not address the question of the statute of limitations in their second post-hearing brief.

217. It is important to recall that, in the Arbitration, the Claimants/Applicants accepted that the applicable limitations period for their contract claims under Armenian law is three years, that their alleged "*valuation date*" is March 18, 2015, and that the arbitration commenced on July 19, 2018, more than three years later.[218] Further, while the Claimants/Applicants contended that the statute of limitations was interrupted by a letter of December 16, 2015, notifying Armenia of the dispute, and by other actions by Armenia "*evidencing the acknowledgement of the debt*", no mention was made in any of the Parties' submissions in the Arbitration, nor at the hearing, of Article 333 of the Armenian Civil Code, to which the Applicants refer in these annulment proceedings and which provides for a 10-year (rather than 3-year) limitations period, "*[w]here the violation of the right of a person has caused damage to him or her and the violation is associated with entering into transactions as prescribed by this Code or with corrupt activity in the course of making those transactions*".[219] Similarly, while the Applicants in these proceedings appear to argue that the Tribunal should have conducted "*an effective examination*" of the issue relating to the statute of limitations, akin to the preliminary procedure that is apparently carried out by Armenian courts when examining a motion to apply a statute of limitations pursuant to Article 168 of the Armenian Civil Code,[220] no such argument was raised in the Arbitration by the Claimants/Applicants.

218. At the Hearing, the Applicants sought to justify the fact that they did not raise more arguments on the statute of limitations in the Arbitration by stating that it would have been "*strange*" for them to devote several pages to "*an issue that barely surfaced at all*".[221] The Applicants further contended that the question of whether the claims under the Concession Agreements were time-barred was "*virtually [] invisible*" when seen "*across the panoply*

[217] Respondent's First Arbitration Post-Hearing Brief, ¶¶ 171 and 221, A-0028-ENG; Respondent's Second Arbitration Post-Hearing Brief, ¶¶ 1(ii) and 27, RA-0010-ENG.

[218] *See supra*, ¶ 136.

[219] Reply, ¶ 4(ii); Armenian Civil Code, p. 226, RA-0015-ENG.

[220] Transcript Day 1, pp. 107-111; Applicants' Opening Statement, pp. 36-37.

[221] Transcript Day 2, 230:24-231:2.

of all the hundreds of arguments that were raised".[222] However, in the light of the record of the Arbitration as summarized above, it is hard for the Committee to agree with the Applicants' contentions. Quite to the contrary, it is clear that the question of the statute of limitations was a live issue and that both Parties exchanged arguments on it in their submissions. Consequently, when the Tribunal ruled on this question, it did not stray away from the "*legal framework*" established by the Parties, to borrow the expression employed by the *Klöckner I* committee cited above, but remained well within the boundaries of what had been argued between the Parties.

219. The Applicants contend that they were deprived of their right to be heard because the Tribunal ventured its own interpretation of the statute of limitations and "*invented new legal requirements*"[223] without asking the Parties or their Armenian lawyers specific questions about any of this, even though the Tribunal did ask a number of questions during the two hearings held in the Arbitration. The Applicants go as far as stating that the Tribunal "*affirmatively guided the Parties and their counsel away from addressing that statutory provision by directing them to focus on other interpretative questions during the two hearings and in their post-hearing submissions".*[224]

220. The Committee cannot accept the Applicants' allegations that the Tribunal failed to respect their right to be heard. As recalled above, written and oral submissions were presented by the Parties on the statute of limitations at every stage of the arbitral proceedings. If the Applicants chose, for their own reasons, not to address and rebut more extensively the Respondent's arguments in this regard, including by raising some of the defences that they put forward in these annulment proceedings for the first time, that was part of their strategic approach to the case the consequence of which they must bear and the Tribunal cannot be blamed for that.

221. With regard to the Applicants' complaint that the Tribunal somehow led the Parties astray by asking certain questions and by not raising questions about the statute of limitations at

[222] Transcript Day 2, 223:18-23.
[223] Transcript Day 2, 232:6-7.
[224] Reply, ¶ 2(i).

the hearing, it is impossible for the Committee to accept the Applicants' contention. The Parties to the Arbitration were of course free, as is always the case in international arbitration, to address in their post-hearing briefs any topic that was discussed at the hearing and that they considered important to the resolution of the case. In this particular instance, the Claimants/Applicants could have further briefed the Tribunal on the question of the statute of limitations, which was a very significant issue as it might have been dispositive of the case (as it ultimately was).

222. Moreover, it is good practice for parties not to read too much on questions that a tribunal may ask during arbitral proceedings. In this case, the President of the Tribunal appeared to have anticipated this risk as she carefully prefaced her questions with these words:

> "*[O]ne should not read anything into either the content of these questions nor the absence of questions on other parties of your briefs. These are not intended to be the most important issues, or perhaps even important issues at all. These were just notes I took and I am going to work through them in a somewhat random order, and read nothing into them, but there they are*."[225]

223. These directions are clear and could not be farther from the allegation that the Tribunal "*affirmatively guided the Parties and their counsel away from addressing that statutory provision*" as the Applicants contend.

224. The Applicants also assert that the Parties' "*exceedingly sparce treatment of the topic… did not reflect a 'strategic choice' but rather the Parties' natural reaction to the Tribunal's evident lack of interest in this statutory provision, based on its failure to ask a single question about it during two hearings and during the entire two-year post-hearing phase*".[226] However, an arbitral tribunal is under no obligation to ask questions and the fact that a tribunal refrains from asking specific questions on a particular topic should not be interpreted as lack of interest for that topic. Parties should put forward their respective cases on the basis of the arguments and evidence – including expert evidence on domestic law, if applicable – that they consider relevant in order to prevail in an arbitration and not

[225] Revised Consolidated Hearing Transcript of the Arbitration, 1892:17-25, A-0027-ENG.
[226] Reply, ¶ 43.

on the basis of speculation as to what might be a tribunal's thinking or its understanding of the case. Moreover, it is not for an arbitral tribunal to put questions to the parties in order to advance lines of argument that their counsel failed to make. As held by the *Klöckner I* committee, "*it should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments*".[227]

225. The Applicants further argue that the Tribunal's failure to give the Parties an opportunity to make submissions on the Tribunal's own interpretation of the statute "*resulted in a serious deprivation of the parties' due process rights, particularly the rights of the Claimants, whose claims were wrongfully dismissed on that basis*" and this is when "*ordinarily, the consequences of an alleged pleading deficiency falls on the party – in this case Armenia – which sponsored the affirmative defence at issue, not, as in this case, the party responding to that defence*".[228] Without entering into questions of allocations of burden of proof which do not fall within its remit, the Committee finds that this is another way of advancing the same argument, i.e. criticizing the Tribunal for the Parties' own failure to develop their arguments in the Arbitration. Moreover, as noted above, the Committee does not agree that the Tribunal violated a fundamental rule of procedure because it interpreted its statute of limitations as it did. The Parties were never deprived of the opportunity to put forward their arguments and defences – to the contrary, as discussed above, they had ample opportunity to do so.

226. The Committee is of the opinion that the case law cited by the Applicants does not support their argument that the Applicants' right to be heard under Article 52(1)(d) was violated because the Tribunal reached its decision on the basis of a theory that the Parties did not have the opportunity to discuss fully. While the Committee acknowledges that the cases on which the Applicants rely, *MINE v. Guinea*, *Tulip v. Turkey*, *Pey Casado v. Chile*, *TECO*

[227] *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, ¶ 83, AL-0012-ENG.
[228] Application, ¶ 79; Memorial ¶ 79.

v. Guatemala and *Fraport v. Philippines*,[229] contain definitions of the terms "serious" and "fundamental" in the context of Article 52(1)(d), they do not always deal with the right to be heard (as is the case in *MINE v. Guinea*) nor do they extend the legal standard of Article 52(1)(d) to situations where the parties did present before the tribunal all the arguments and evidence that they deemed relevant, as was the case in the present instance. Nor do these cases support the Applicants' argument that a tribunal must necessarily ask questions to the parties before it advances its own theory.

227. To the extent that the Applicants state that they were surprised by the Tribunal's interpretation of the Armenian statute, this may have been the case, but the Committee is unable to find anything in the Tribunal's conduct that was so arbitrary and unexpected to represent a serious departure from a fundamental rule of procedure. Having carefully reviewed the Award, the Committee is of the opinion that the Tribunal, having heard the Parties on the issue of the statute of limitations, did nothing more than analyse and interpret the provisions of the Armenian Civil Code which the Parties agreed were applicable to the time bar of Rasia's breach of contract claims (Articles 332, 337 and 340 of the Armenian Civil Code).[230]

228. With regard to the fact that the Tribunal allegedly replaced the word "*debt*" with the word "*wrongdoing*" in interpreting Article 340(1) of the Armenian Civil Code, this question has already been discussed at paragraphs 157-168 above. The same reasoning applies *mutatis mutandis* to this ground of annulment and, on that basis, the Committee reaches the conclusion that there was no violation of a fundamental rule of procedure also in this regard.

229. The Applicants further claim that the Tribunal should not have provided its "*general views*" on the merits of the Claimants'/Applicants' contract-based claims and that, by doing so, it seriously departed from a fundamental rule of procedure.

230. The Committee notes that the Award devotes a paragraph to explain that, "*[g]iven the way the treaty claims have been presented, the Tribunal considers it appropriate to provide its*

[229] Application, ¶¶ 62-64; Memorial, ¶¶ 62-64.
[230] Award, ¶ 445, A-0001-ENG.

general views on the underlying contractual claims, as a prelude to considering the BIT claims that remain for resolution".[231] This was because, as the Tribunal explains, the Parties "*presented those treaty claims as very much interwoven with the question of whether, and to what extent, Rasia and/or Armenia performed their respective contractual obligations*".[232]

231. As an introduction to the section of the Award entitled "*Liability*" the Tribunal explained that it began with a summary of the Parties' positions on the alleged breach of contractual obligations and an analysis of those positions "*[f]or clarity of exposition, and because many of the treaty claims in this case are predicated upon compliance or non-compliance with underlying rights and obligations arising from the Concession Agreements*".[233] The Tribunal also observed that "*[s]ome of the arguments concerning a breach of contractual obligations are similar to the allegations that the Respondent acted arbitrarily in violation of the BIT*".[234] These descriptions make it clear that the Tribunal felt it necessary to provide some "*general*" views on the Claimants/Applicants' contractual claims, in spite of its conclusion that they were time-barred, because of the way the case had been pleaded by the Parties. The Committee is thus satisfied that the Tribunal provided sufficient explanations for its reasoning – all the more so that this reasoning did not affect the ultimate outcome of the case. As the Tribunal specifically stated in the Award, "*the only relevance of the Tribunal's findings regarding the Road Concession (…) is the extent to which they may inform the analysis of Mr. Borkowski's BIT claims, which are not time-barred*".[235]

232. It follows from the above that the Tribunal did not depart from a fundamental rule of procedure when it provided its general views on the contractual claims.

233. Given the Committee's conclusions on this ground of annulment, the Respondent's argument that only partial annulment is permissible in this case is moot.

[231] Award, ¶ 472, A-0001-ENG.
[232] Award, ¶ 472, A-0001-ENG.
[233] Award, ¶ 474, A-0001-ENG.
[234] Award, ¶ 472, A-0001-ENG.
[235] Award, ¶ 544, A-0001-ENG.

234. In the light of the above, it is the Committee's conclusion that in the circumstances of this case, even if the Tribunal's analysis might have been unexpected by the Applicants, it fell within the legal and factual framework established by the Parties and cannot be successfully challenged on the ground that the Applicants did not anticipate it, or analysed and developed it insufficiently in their submissions during the Arbitration. It follows that there was no serious departure from a fundamental rule of procedure by the Tribunal in this case.

C. GROUND 3: FAILURE TO STATE REASONS ON WHICH THE AWARD IS BASED (ARTICLE 52(1)(E))

(1) Applicable Legal Standard of Review for Failure to State Reasons (Article 52(1)(e))

a. The Applicants' Position

235. The Applicants submit that generally there is a failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention if a tribunal's failure to address a particular question submitted to it might have affected its ultimate decision. While accepting that a tribunal cannot be required to address each and every piece of evidence in the record within its award, the Applicants insist that this cannot be construed to mean that a tribunal can simply gloss over evidence upon which the parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory.[236] Likewise, for the Applicants, "*insufficient*" and "*inadequate*" reasons can also result in annulment, especially so when the reasons supplied are so deficient and inaccurate.[237]

236. Referring to other *ad hoc* committees' rulings, the Applicants state that this provision of the ICSID Convention requires that readers can understand the facts and law applied by the tribunal in coming to its conclusion or that reasons in an award are adequate and sufficiently reasonable to bring about the result reached by the tribunal.[238] According to the Applicants, if there is no express rationale for the conclusion with respect to a pivotal or

[236] Application, ¶¶ 71-72; Memorial, ¶¶ 71-72.
[237] Reply, ¶¶ 35-36.
[238] Application, ¶ 73; Memorial, ¶ 73.

outcome-determinative point, an annulment must follow, whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations.[239]

b. The Respondent's Position

237. The Respondent refers to the annulment committee's decision in *Rumeli Telekom v. Kazakhstan*, in which the committee held, *inter alia*, that "*an* ad hoc *committee is entitled itself to seek to understand the reasons for the award from the record before the tribunal. Indeed, in appropriate cases, it should do so. As the* ad hoc *Committee held in* Soufraki*: [i]t is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons, so long as those reasons in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided*".[240]

c. The Committee's Analysis

238. The Committee recalls that Article 48(3) of the ICSID Convention provides that an award shall state the reasons upon which it is based. Arbitration Rule 59(1)(i) provides that the award shall contain "*the decisions of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based*".

239. Several committees have held that it does not matter for purposes of annulment whether a tribunal's reasoning is correct or convincing; what matters is that the flow of the reasoning can be followed to its conclusion. The Applicants have referred to the holding by the *MINE v. Guinea* Committee that "*the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*".[241] The Respondent relies on a passage of the *Rumeli Telekom AS v. Kazakhstan* annulment Decision citing in turn the *Soufraki* decision holding that "*[i]t is also possible that a tribunal may give reasons for its award without elaborating the factual or legal bases of such reasons, so*

[239] Application, ¶ 74; Memorial, ¶ 74.

[240] Counter-Memorial, ¶¶ 178-179. *See also* Rejoinder, ¶ 145.

[241] *MINE, v. Guinea*, ¶ 5.09, AL-0006-ENG/AL-0023-ENG.

long as those reasons in fact make it possible reasonably to connect the facts or law of the case to the conclusions reached in the award, annulment may appropriately be avoided".[242]

240. There also appears to be agreement in the case law of annulment committees that the requirement to state reasons is intended to ensure that parties can understand the reasoning of the tribunal, meaning that the reader can understand the facts and the law applied by the tribunal in coming to its conclusions. The correctness of the reasoning or whether it is persuasive is however not relevant for the task of *ad hoc* committees.[243]

241. The Committee considers that the absence of adequate or sufficient legal reasoning in an award, but not whether such reasoning is correct or persuasive, may amount to a failure to state reasons within the meaning of Art. 52(1)(e), and will apply this legal standard to the circumstances of this case.

(2) Application of the Legal Standard for Failure to State Reasons (Article 52(1)(e))

a. The Applicants' Position

242. First, the Applicants submit that the Tribunal's "*general views*" on the merits of their contract-based claims in the Award, which are highly selective and superficial, constitutes a failure to state reasons.[244]

243. Second, the Applicants contend that the Tribunal's failure to explain, in the context of the commencement date of the limitations period, why it did not consider the Respondent's breaches of the Concession Agreements after March 18, 2015, without providing explanation or justification, warrants annulment of the Award because it led to the wrong conclusion, which was outcome determinative, that all of the Applicants' contract-based claims were time-barred.[245] To the extent that the Tribunal suggests that it did consider

[242] Counter-Memorial, ¶ 178, Rejoinder, ¶ 145 and Respondent's Opening Statement, p. 119.

[243] Updated ICSID Background Paper on Annulment, May 5, 2016, ¶ 105, RAL-0002-ENG.

[244] Application, ¶¶ 14, 129; Memorial, ¶¶ 14, 129; Reply, ¶ 118. *See also* Application, ¶¶ 56, 75(vi); Memorial, ¶¶ 56, 75(vi).

[245] Application, ¶¶ 130-134; Memorial, ¶¶ 130-134; Reply, ¶¶ 119-123, 124. *See also* Application, ¶¶ 56, 75(vi); Memorial, ¶¶ 56, 75(vi).

these additional breaches by the Respondent, the Applicants aver that the Tribunal glossed over evidence upon which they had placed significant emphasis.[246]

244. Third, the Applicants reject the Respondent's assertions in its pleadings that the Applicants' arguments under this ground only pertain to Rasia's claims, but not Mr. Borkowski's claims or the Tribunal's determination on causation and damages. For the Applicants, this ignores the intertwined nature of their claims because had the Tribunal allowed the umbrella clause claim to proceed, this would have enabled the Applicants to seek a merits review of their claims. In other words, given that Rasia's and Mr. Borkowski's claims were overlapping causes of action, a finding that the Tribunal was wrong to bar the Applicants' umbrella claims suffices to annul the Award in full. In the same vein, a finding that the Tribunal erred in barring the Applicants' claims should result in an annulment in full, according to the Applicants.[247]

b. The Respondent's Position

245. The Respondent submits that the Award clearly provides reasons of its decisions.[248]

246. The Respondent argues that the Applicants' contention that "*the Tribunal either has jurisdiction, in which case it should proceed to the merits; or it lacks jurisdiction, in which case it lacks authority to rule on the merits*" is off the point as the Award held that the claims were inadmissible, but not that the Tribunal lacked jurisdiction to hear these claims. The Applicants' position in this regard is also incorrect, in the Respondent's view, as the Tribunal made it clear in the Award that it has jurisdiction over the BIT claims brought by Mr. Borkowski (with the exception of the umbrella clause claim).[249] In other words, the Tribunal ruled on the merits because these claims had to be resolved on the merits and the Tribunal's ruling was therefore necessary and appropriate.[250]

[246] Application, ¶ 135; Memorial, ¶ 135; Reply, ¶ 124.
[247] Reply, ¶¶ 128-129. *See also* Application, ¶ 59; Memorial, ¶ 59.
[248] *See* Counter-Memorial, ¶ 180.
[249] Counter-Memorial, ¶¶ 161-165.
[250] Rejoinder, ¶ 144.

247. Regarding the Applicants' complaint that the Tribunal failed to consider the Respondent's breaches after March 18, 2015 without providing explanation or justification, the Respondent explains that the Tribunal did take those facts into account but nevertheless decided that the limitations period began on March 18, 2015 because (i) the Applicants themselves stated that this date was "*the date on which the Claimants were substantially and irreversibly deprived of their investments*"; (ii) the Tribunal found, based on the record of the case, that the Applicants had failed to prove their theory of either continuous or egregious breaches of the Concession Agreements; and (iii) it is untrue that this was the "*Claimants' core argument*".[251]

248. The Respondent adds that the Applicants' assertions under this annulment grounds only pertain to Rasia's claims, but not Mr. Borkowski's BIT claims or the Tribunal's determination on causation and damages. Therefore, even if successful, the Application can only result in a partial annulment of the Award.[252]

c. The Committee's Analysis

249. The Applicants' arguments under this third ground of annulment are three-pronged. The Applicants first assert that the Tribunal provided "*general views*" on the merits of their contractual claims in spite of its finding that both Rasia's claims and Mr. Borkowski's umbrella clause claims were time-barred.[253] Second, the Applicants contend that the Tribunal failed to explain why it arbitrarily determined that the limitations period commenced on March 18, 2015 and ignored the Respondent's alleged breaches of the Concession Agreements after that date, reaching a decision that was outcome-determinative.[254] Third, the Applicants emphasize that their arguments on this ground concern both Rasia's claims and Mr. Borkowski's umbrella claims, as these are intertwined and therefore the Award should be annulled in its entirety.[255]

[251] Counter-Memorial, ¶¶ 161-177.

[252] Counter-Memorial, ¶¶ 184-185. *See also* Rejoinder, ¶¶ 147-152.

[253] Application, ¶¶ 14, 129 and 56, 75(vi); Memorial ¶¶ 14, 129 and 56, 75(vi); Reply ¶ 118.

[254] Application, ¶¶ 130-134 and 56, 75(vi); Memorial ¶¶ 130-134, and 56, 75(vi); Reply ¶¶ 119-124.

[255] Reply ¶¶ 128-129. *See also* Application, ¶ 59; Memorial, ¶ 59.

250. As discussed above, the Committee finds that the Tribunal made it clear in the Award why it provided "*its general views on the underlying contractual claims*" even though it held that both Rasia's claims and Mr. Borkowski's umbrella clause claims were time-barred under the Concession Agreements. The Tribunal explained that it wished to do so, not only because the Parties had devoted much time to briefing these issues, but "*[m]ore fundamentally (…) because the time bar for these particular claims does not dispose of the case*". The Tribunal went on to state as follows:

> *"Mr. Borkowski asserts a number of other treaty claims under the BIT, which are not subject to an equivalent time bar derived from Armenia's limitations period for breach of contract claims. Yet the Parties have presented those treaty claims as very much interwoven with the question of whether, and to what extent, Rasia and/or Armenia performed their respective contractual obligations. Given the way the treaty claims have been presented, the Tribunal considers it appropriate to provide its general views on the underlying contractual claims, as a prelude to considering the BIT claims that remain for resolution.*"[256]

251. It is obvious from this language that – contrary to what the Applicants contend – this part of the Award only deals with Mr. Borkowski's treaty claims, which were distinct from the contractual claims and still had to be addressed and decided separately on the merits. In addition, as the Tribunal explains in this passage of the Award, given the "*interwoven*" way in which the Parties presented the treaty claims in the Arbitration, it was necessary to address the contractual claims "*as a prelude*" to the treaty claims. Therefore, in subsequent paragraphs of the Award, the Tribunal provided a summary of the Parties' positions regarding the alleged breach of contractual obligations followed by an analysis of those positions "*for clarity of exposition and because many of the treaty claims in this case are predicated on contentions about compliance or non-compliance with underlying rights and obligations arising from the Concession Agreements*".[257]

252. The Committee finds these explanations clear and sufficient; the reasoning of the Tribunal follows logically and can be easily understood. Consequently, in the Committee's opinion,

[256] Award, ¶ 472, A-0001-ENG.

[257] Award, ¶ 474, A-0001-ENG.

the Tribunal did not fail to state the reasons why it provided some general views on Rasia's contractual claims before it dealt with Mr. Borkowski's treaty claims.

253. As to the Applicants' second argument that the Tribunal failed to consider the Respondent's alleged breaches after March 18, 2015, the Committee has already noted above that this date was hardly arbitrary or plucked out of the air by the Tribunal. As recalled in the Award, the Claimants/Applicants themselves consistently pleaded in the Arbitration that March 18, 2015 "*was the day that Claimants say they learned of the most significant violation of Rasia's Concession rights, which caused 'irreversibl[e]' loss to their investment*".[258] Thus, the Tribunal clearly explained why this was the most logical starting date to apply to the prescription period.

254. Finally, as to the Applicants' contention that a finding that the Tribunal erred in barring their claims should result in annulment in full of the Award,[259] the Committee notes that, in light of its findings above that the Award should not be annulled under any of the grounds put forward by the Applicants, there is no need to address this last argument.

D. AWARD ON COSTS

(1) The Parties' Position

255. In the Rebuttal Statements, the Applicants contended that should the Committee (partially) annul the Award, the Committee should also annul the Tribunal's finding on costs in the Award.[260]

(2) The Committee's Analysis

256. In the light of the Committee's dismissal above of the Applicants' grounds for annulment, the question of the possible annulment of the Tribunal's findings on costs in the Award is moot.

[258] Award, ¶ 449, A-0001-ENG.

[259] Reply, ¶ 129.

[260] Transcript Day 2, 258:23-260:19. *See also* Applicants' Rebuttal Statement, pp. 29-32.

V. COSTS

A. THE APPLICANTS' COST SUBMISSIONS

257. In their Memorial and Reply, the Applicants request that the Committee order the Respondent to bear all costs of these annulment proceedings, including the cost of the Applicants' legal representation, as well as all costs of the Applicants in the Arbitration proceedings, with interest.[261]

258. According to their submission on costs dated August 12, 2024, which was further amended by their letter of September 6, 2024, the Applicants incurred USD 1,581,024.86, for which they seek recovery, as follows:[262]

Category	Amount
ICSID Fees	USD 425,000.00
Armenia Counsel, Security Bond, and Other	USD 161,209.79
Quinn Emanuel Urquhart & Sullivan	USD 994,815.07

259. The Applicants further submit that should the Committee decide that each Party shall bear its own legal costs and expenses and that the costs of the annulment proceeding shall be shared equally by both Parties, the Committee should order the Respondent to reimburse the Applicants half of the costs of this annulment proceeding.[263]

260. The Applicants add that they should not bear the Respondent's legal costs and expenses in any event because the Applicants' concerns were not frivolous and were presented efficiently and in good faith.[264]

[261] Application, ¶ 145(iii); Memorial, ¶ 145(iii); Reply, ¶ 130(ii).

[262] Applicants' Submission on Costs, ¶ 2; Affidavit of Mr. Joseph K. Borkowski dated August 12, 2024; Applicants' letter dated September 6, 2024; Affidavit of Mr. Joseph K. Borkowski dated September 6, 2024.

[263] Applicants' Rebuttal Statement, p. 33.

[264] Applicants' Rebuttal Statement, p. 33.

B. THE RESPONDENT'S COST SUBMISSIONS

261. In its Counter-Memorial and Rejoinder, the Respondent requests that the Committee render a decision ordering the Applicants to pay the Respondent's costs in these annulment proceedings in an amount to be specified, including all attorneys' fees and expenses in connection with these proceedings, and all fees and expenses of the *ad hoc* Committee and the ICSID Secretariat, together with interest thereon.[265]

262. In its submission on costs dated August 12, 2024, the Respondent submits that the Applicants should bear all of the Respondent's costs and expenses of these proceedings totaling USD 382,248.00, broken down as follows:[266]

Category	Amount
Professional fees for outside counsel	USD 368,750.00
Travel, lodging, and related costs for attending hearing	USD 11,496.00
Copying and administrative costs	USD 2,002.00

263. The Respondent argues that the Respondent has wasted time and effort due to the Applicants' frivolous and inaccurate pleadings.[267]

C. THE COMMITTEE'S DECISION ON COSTS

264. Article 61(2) of the ICSID Convention provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

[265] Counter-Memorial, ¶ 194; Rejoinder, p. 86.

[266] Respondent's Submission on Costs, p.2.

[267] Transcript Day 1, 203:3-204:9. *See also* Respondent's Opening Statement, pp. 129-135.

265. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as it deems appropriate.

266. The Committee endorses the "costs follow the event" approach as a general guide for the allocation of costs in this proceeding.

267. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

Committee Members' fees and expenses	
Ms. Loretta Malintoppi	USD 98,113.21
Professor Hi-Taek Shin	USD 78,504.43
Ms. Adedoyin Oyinkan Rhodes-Vivour	USD 111,449.06
ICSID's administrative fees	USD 94,000.00
Direct expenses	USD 25,365.66
Total	**USD 407,432.36**

268. The above costs have been paid out of the advances made by the Applicants pursuant to Administrative and Financial Regulation 15(5).[268]

269. In reaching its decision on the allocation of costs, the Committee takes into account the fact that it found that every one of the Applicants' grounds for annulment were without merit and on that basis rejected the Application for Annulment in its entirety. The Committee further notes that, even though the Applicants were granted the stay request, the annulment was ultimately denied, and therefore the Applicants should bear the whole costs and the entirety of the Respondent's legal fees which the Committee finds quite reasonable. In the light of its decision to reject the Application for annulment in its entirety, the Committee also dismisses the Applicants' request for "all costs of the Applicants in the Arbitration proceedings" (see paragraphs 72-73 and 257 above).

[268] The ICSID Secretariat will provide the Parties with a Final Financial Statement of the case fund. The remaining balance will be reimbursed to the Applicants.

270. The Committee notes that the Respondent in its Counter-Memorial and Rejoinder, requested interest on its costs (see paragraphs 75 and 261 above) without specifying whether this should be simple or compound interest, the applicable interest rate, or the start and end dates.

271. In instances as this one, where no borrowing rate was established, tribunals have applied conservative measures, in particular USD LIBOR +2%. Since the LIBOR was permanently discontinued on June 30, 2023, the Tribunal finds it reasonable in the circumstances of this case to employ the USD Prime rate to the Respondent's costs.

272. The Tribunal does not find it appropriate in this case to award compound interest, particular in light of the fact that it is not sought by either Party.

273. As to the date from which interest should accrue, in the absence of any indication from the Respondent, the Tribunal finds that interest should run from the date of this Decision until final payment.

274. In conclusion, the Committee, in its discretion, grants simple interest at the US Prime rate from the date of this Decision until the date of full payment.

275. Accordingly, the Committee orders the Applicants to bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses. The Applicants shall also pay USD 382,248.00 to the Respondent to cover the entirety of the Respondent's legal fees and expenses plus interest on all these amounts at the US Prime rate.

VI. DECISION

276. For the reasons set forth above, the *ad hoc* Committee unanimously decides as follows:

(1) The Applicants' Application for annulment is rejected in its entirety;

(2) The stay of enforcement of the Award is terminated;

(3) The Applicants shall bear all costs of the annulment proceeding as set out at paragraph 267 above, in the amount of USD 407,432.36; and

(4) The Applicants are ordered to pay the Respondent's legal fees and expenses in the amount of USD 382,248.00 plus interest at the US Prime rate from the date of this Decision to the date of full payment.

Ms. Adedoyin Oyinkan Rhodes-Vivour
Member of the *ad hoc* Committee

Date: 4 November 2024

Professor Hi-Taek Shin
Member of the *ad hoc* Committee

Date: 4 November 2024

Ms. Loretta Malintoppi
President of the *ad hoc* Committee

Date: 4 November 2024