INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

GABRIEL RESOURCES LTD.

AND GABRIEL RESOURCES (JERSEY) LTD.

Applicants

VS.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31
ANNULMENT PROCEEDINGS

COUNTER-MEMORIAL ON ANNULMENT

7 July 2025

Before:

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

LALIVE

LDDP
LEAUA DAMCALI DEACONU PAUNESCU
Attorneys & Counselors

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1 INTRODUCTION

1 Further to Procedural Order No. 1 dated 11 February 2025 ("**PO1**") and the Parties' correspondence of 31 March 2025, Romania submits this Counter-Memorial on Annulment in response to the Applicants' Application on Annulment of 5 July 2024 (the "**Application**") and Memorial on Annulment of 3 April 2025 (the "**Memorial**").

2 None of the Applicants' complaints against the award rendered by the Tribunal in this matter on 8 March 2024 (the "**Award**") withstand the most basic scrutiny. The Application thus stands to be rejected and the Award upheld.

3 The finality of awards is a cornerstone of the ICSID Convention. The scope of review of ICSID awards is limited and, as one *ad hoc* annulment committee noted, only designed "to ensure the integrity of ICSID arbitration proceedings, not their substantive correctness."[1] As Article 53 of the ICSID Convention recalls, parties do not have a right of appeal and can obtain annulment only in exceptional cases.[2]

4 The Applicants attack the independence and impartiality of the two members of the Tribunal that, by a majority decision, rejected the claims in the Arbitration – Prof. Pierre Tercier (Tribunal president) and Prof. Zachary Douglas. On this basis, further to Article 52(1)(a) of the ICSID Convention, they request the annulment of the Award in its entirety.

5 However, none of the circumstances that the Applicants raise suggest a lack of independence or impartiality on the part of either arbitrator (let alone demonstrate it manifestly, as the Applicants are required to demonstrate). In many instances, their arguments are based on facts that they have known for years and about which they cannot now complain. In other instances, their case rests not on facts but on highly improper speculation. Fundamentally, the Applicants fail to provide any evidence that Profs. Tercier and Douglas in any way failed in their duties to act

[1] *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, Decision on Annulment, ICSID Case No. ARB/06/4, 26 April 2019, at **RAL-26**, p. 15 (para. 56).

[2] ICSID Convention Article 53 ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.").

independently and impartially or that they were influenced by factors other than the merits of the case.

6 In the alternative, the Applicants allege that "fatal defects" warrant the annulment of parts of the Award pursuant to Articles 52(1)(b), (d), and (e) of the ICSID Convention. These allegations represent thinly veiled, desperate attempts to relitigate their claims in the Arbitration, which is not the mandate of this Committee.

7 First, contrary to the Applicants' arguments, the Tribunal did not exceed its powers – let alone do so manifestly – regarding the application of the law to the claims.

8 Second, there was no serious departure from a fundamental rule of procedure during the arbitration. The Tribunal afforded ample opportunity to the Applicants to present their case. If anything, the Tribunal's leniency in according the Applicants additional bites at the apple caused the Respondent on multiple occasions to object and raise due process concerns.

9 Finally, the Award is comprehensive in its analysis, on the facts and the law. It cannot be said to fail to state the reasons for its conclusions.

10 Throughout their submissions and, in keeping with their approach in the Arbitration, the Applicants espouse the "kitchen sink approach" – raising a wide spectrum of arguments, no matter how weak – in hopes that something will stick. It must be stressed that they have the (high) burden of proof of their allegations. In all respects, they fail to discharge it.

11 As a testament to the weakness of their position, the Applicants do not pursue in their Memorial certain arguments advanced in their Application. Since the Applicants did not make clear whether they were dropping any arguments, the Respondent had no choice but to address them in this submission.

12 In this Counter-Memorial, the Respondent recalls the factual and procedural background to the dispute (**Section 2**) and the high threshold for annulment of an ICSID award (**Section 3**). The Respondent then sets out the reasons why the Committee should reject the Applicants' requests to annul the Award (**Section 4**), as well their alternative request to annul

portions thereof (**Section 5**). The Respondent's request for the reimbursement of its costs in connection with these proceedings (plus interest) and prayers for relief are set out in **Sections 375 and 7**.

13 In accordance with Sections 14.3 and 16.6 of PO1, this Counter-Memorial is accompanied by the following documents:

i) Exhibits **RA-19** to **RA-76**, which comprise 28 documents representing procedural correspondence and orders from the arbitration,[3] and 30 ("new") documents which, in accordance with Section 16.3 of PO1, are submitted in response to the grounds invoked in support of the Applicants' request to annul the Award in its entirety.

ii) Legal authorities **RAL-26** to **RAL-44**;[4]

iii) certain pleadings from the underlying Arbitration;[5] and,

iv) an index of all supporting documentation.

[3] For good order, the Respondent also resubmits exhibits already submitted in these Annulment proceedings (prior to this Counter-Memorial) as RA-1 to RA-18.

[4] For good order, the Respondent also resubmits legal authorities already submitted in these Annulment proceedings (prior to this Counter-Memorial) as RAL-1 to RAL-25. Separately, in accordance with Section 16.6.1 of PO1, the Respondent refers to and provides certain legal authorities that had been submitted in the arbitration by the Respondent (RLA-111, RLA-178, and RLA-190) and the Applicants (CLA-28, CLA-76, CLA-83, CLA-122, CLA-163, CLA-270, CLA-311).

[5] This Counter-Memorial also refers to five exhibits from the underlying Arbitration to which the Applicants referred in their Application and Memorial: C-2889, R-197, R-597, Pop-15 and Pop-29.

2 FACTUAL AND PROCEDURAL BACKGROUND

15 The Arbitration between Gabriel Resources Canada and Gabriel Resources Jersey (individually "**Gabriel Canada**" and "**Gabriel Jersey**", and together the "**Applicants**"), on the one hand, and Romania (the "**Respondent**") lasted over eight years[6] and the facts underlying the dispute spanned some fifteen years.

16 The Applicants' description – in the Annulment Application and the Memorial – of the factual background to the dispute, the Arbitration proceedings, the Award and these Annulment Proceedings is incomplete and often inaccurate. The Respondent sets the record straight in the following sections.

2.1 Factual Background to the Dispute

17 The Applicants' summary of the "facts leading to the dispute" is incomplete and misleading.[7]

18 First, it is undisputed that from its inception, the Roșia Montană Project (the "**Project**")[8] was structured as a joint venture between Gabriel Jersey and the Respondent, RMGC. Gabriel Jersey held an 80.69% equity stake, while the State-owned company Minvest held 19.31%.[9] The Applicants, however, do not mention in the Memorial the 4% royalty to which the State would have been entitled under the Roșia Montană License, had the Project gone forward.[10]

19 The Respondent thus had financial exposure and a vested interest in the Project's success. As the Tribunal majority noted:

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[6] The Request for Arbitration was filed on 21 July 2015 and the Award issued on 8 March 2024.

[7] Memorial on Annulment, p. 47 *et seq.* (paras. 113-120); Annulment Application, p. 5 *et seq.* (paras. 16-33).

[8] Award, p. 156 *et seq.* (paras. 777-781).

[9] Award, p. 3 *et seq.* (paras. 5, 10, and 120); Memorial on Annulment, p. 48 (para. 115(a)).

[10] Annulment Application, p. 5 (para. 18) (emphasizing that the Project "would have generated jobs, taxes, and other indirect benefits in an area of high unemployment and poverty" and that the Applicants had undertaken to "provide all the funding needed to develop the Projects."); Award, p. 26 (para. 120).

> "The Tribunal recognizes the fact that [Applicants] made substantial investments in this Project that regrettably did not materialize. It is important to recall, however, that it did not materialize for the Government either as [Applicants]' joint venture partner in the Project. This is not a case where a State has abused its sovereign powers to profit from the efforts and capital of private investors at the expense of those investors. Nor is it a case where a State has intervened to transfer a lucrative project from one private investor to a more favored one. This is a case where the environmental, social, cultural and economic challenges facing a massive mining project have proven so far to be insurmountable in circumstances where blame cannot be fairly attributed to any one party or any one cause."[11]

20 Second, the Applicants list what they portray as the "essential facts that gave rise to the claims," without including references for most of their propositions.[12] They also do not distinguish between those facts that were undisputed in the Arbitration[13] versus those that were disputed. Indeed, in some cases, in the Application or the Memorial, the Applicants put forward **their case on the facts** (sometimes now recast or tweaked for purposes of these annulment proceedings), not an agreed account of the facts (or of the Tribunal's findings of fact).[14]

21 For instance, the Applicants emphasize that they invested "over US$ 760 million" into the Project,[15] although this figure was unsubstantiated and disputed in the Arbitration (and cannot be found in the Award).

22 The Applicants also quote two excerpts from a television interview that former Prime Minister Victor Ponta gave in October 2013, suggesting that

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[11] Award, p. 351 (para. 1320).

[12] Memorial on Annulment, p. 47 *et seq.* (para. 115); Annulment Application, p. 5 *et seq.* (paras. 16-33).

[13] Such is the case for instance for the summary description at Memorial on Annulment, p. 47 *et seq.* (para. 115(a)-(c)).

[14] Such is the case for instance for the summary description at Memorial on Annulment, p. 47 *et seq.* (para. 115(d)-(i)); Annulment Application, p. 7 *et seq.* (paras. 24-33); see also, *e.g.*, paras. 27, 29, and 34 below.

[15] Memorial on Annulment, p. 1 (para. 2); Annulment Application, p. 5 (para. 19).

the Government was aware of its obligations under the law "but instead '[…] are basically performing a nationalization." [16] This is a mischaracterization of Mr. Ponta's statements. The first excerpt that the Applicants quote can be found *in extenso* in the Award.[17] Mr. Ponta was referring to the "statement by the European Commissioner," not his own view or that of the Government. The second excerpt does not comprise any recognition that a nationalization had occurred in the specific case.

23 The Respondent includes these references simply to show that it does not accept the Applicants' portrayal of the relevant facts giving rise to the dispute. The Respondent does not, however, attempt to address in this submission each statement by the Applicants with which the Respondent disagrees.[18] It is indeed not the mandate of this Committee to serve as a court of appeals or to examine the Tribunal's findings of fact.

24 The Respondent sets out below four key factual themes relating to the underlying dispute that may be useful for the Committee to have in mind when reviewing the submissions.

25 The first factual theme relates to the permitting procedure for the issuance of the environmental permit for the Project, which notably included an Environmental Impact Assessment ("**EIA**"). The Tribunal describes in the Award the actors involved in this administrative procedure, including the Technical Assessment Committee ("**TAC**") "composed of central public authorities chaired by a Ministry of Environment State Secretary."[19]

26 The Tribunal detailed the procedure, starting with RMGC's application for an environmental permit in December 2004 and submission of an EIA Report in 2006 and an update in 2010, that were subject to extensive public

[16] Memorial on Annulment, p. 49 (para. 115 (f)). In the Application, the Applicants referred to a "series of prearranged votes" leading to the rejection of the Draft Law in Parliament. They rightly no longer state this in the Memorial, as there is no basis for such a statement. Annulment Application, p. 8 (para. 29); see also Memorial on Annulment, p. 69 (fn. 225) (noting that the Applicants' "claim was not that the Government illegitimately influenced the political votes taken in Parliament.").

[17] Award, p. 292 (para. 1126).

[18] For the avoidance of doubt, the fact that the Respondent does not address a particular argument by the Applicants should not be understood as an acceptance.

[19] Award, p. 8 (para. 19).

consultations.[20] Over the years, the TAC convened numerous meetings to assess RMGC's EIA Report.[21] The Award describes the many "technical and other elements [that] were subject of discussions [and] that took place within as well as outside the environmental permitting process." As noted above, the Project faced "environmental, social, cultural and economic challenges," requiring a careful assessment of issues arising in connection with the Waste Management Plan, the Water Law and Water Framework Directive, surface rights, zoning and urbanism certificates, cultural heritage and financial guarantees.[22]

27 One of the Applicants' allegations in the Arbitration – and reiterated in the present proceedings – was that the TAC's review was "nearing completion" as of November 2011 such that the environmental permit could have been issued, but was not.[23] This allegation was, however, contradicted by the evidentiary record; the Tribunal majority indeed found that it "c[ould] [not] conclude that the 29 November 2011 meeting was the last TAC meeting, that matters were resolved at that time, and that Romania should have issued the Environmental Permit but did not."[24] Several substantive issues remained outstanding and in need of further clarifications.[25] Nor were the conditions met at a later stage, despite the Applicants' attempt to allege otherwise.[26]

28 The Tribunal majority noted that there were "discussions and/or disagreements on all of these points, which undeniably occurred during the TAC meetings or the EIA Process and thus impacted the process", but that what mattered for the Tribunal's assessment of the claims was whether these discussions, "right or wrong, were genuine and whether due process

[20] Award, p. 8 *et seq.* (paras. 21-32) (also explaining why the EIA process was suspended between 2007 and 2011) and p. 157 *et seq.* (paras. 782-784 and 961-963). Further public consultations took place in 2013. See Award, p. 238 (para. 977 last two bullet points).

[21] Award, p. 11 *et seq.* (paras. 33-55 and 967-968) (for the years 2011-2013) and p. 39 *et seq.* (paras. 189-192) (for the years 2014-2015).

[22] Award, p. 15 *et seq.* (paras. 56-118, 983-992, 999-1009, 1016-1031, and 1041-1073).

[23] Memorial on Annulment, p. 48 (para. 115(d)); Annulment Application, p. 7 (para. 23) (stating that the Ministry of Environment had "completed its technical review […] in November 2011").

[24] Award, p. 239 (para. 981) and p. 215 *et seq.* (paras. 969-982).

[25] See Award, p. 235 *et seq.* (paras. 976-977).

[26] See Award, p. 328 *et seq.* (paras. 1234-1244); Annulment Application, p. 7 (para. 25).

was respected at all times. The Tribunal s[aw] no evidence that this was not the case."[27]

29 In the same vein, the Applicants continue to complain that authorities wrongfully failed to grant exploitation licenses for two neighboring deposits covered by the Bucium Exploration License.[28] That claim too was carefully considered and rejected by the Tribunal majority.[29]

30 The second factual theme pertains to the discussions (attempted renegotiations) held between RMGC, the Applicants, and the Respondent in 2011-2013 relating to the economic terms of the Roșia Montană License and thus of the Project. The Tribunal addresses in detail in the Award the context and scope of the discussions.[30]

31 Although the Applicants continue to argue that they were coerced into renegotiating the terms of the Roșia Montană License, as a condition to receiving the environmental permit, that claim was rejected by the Tribunal majority.[31]

32 The third factual theme relates to the Government's submission in the fall of 2013 of a draft law to Parliament to facilitate the permitting process (the "**Draft Law**"),[32] followed by the Parliament's rejection of the Draft Law.

33 The Tribunal detailed the factual chronology relating to the preparation of the Draft Law, its submission to Parliament on 27 August 2013 and its rejection.[33] The Tribunal majority rejected the claims that the submission of the law to Parliament and its rejection by the Parliament amounted to breaches of the BIT. They emphasized that "the Project was of great

[27] Award, p. 238 *et seq.* (para. 978).

[28] Memorial on Annulment, p. 49 *et seq.* (para. 115(h)). These potential deposits are named Rodu Frasin and Tarniţa. Award, p. 6 *et seq.* (paras. 17 and 195-196).

[29] Award, p. 3 *et seq.* (paras. 7, 197-198, 1149-1160, and 1163).

[30] Award, p. 26 *et seq.* (paras. 119-149 and 946-947).

[31] Award, p. 212 (para. 960); see also Memorial on Annulment, p. 48 *et seq.* (para. 115(d)); Annulment Application, p. 6 (para. 21).

[32] Annulment Application, p. 8 (para. 28) (also referring to alleged "baseless accusations of corruption" leveled by opposing political leaders).

[33] Award, p. 33 *et seq.* (paras. 160-171 and 1095-1133); see also Award, p. 305 (paras. 1146-1147).

national interest and a sensitive matter", such that "the process through Parliament would be open and transparent and interested parties/public/voters could participate in a debate and a democratic decision could be made." [34] They also referred to the Applicants' participation in the discussions in 2013, regarding changes to be made to the legislation and their contemporaneous support of the Draft Law.[35] The Award further notes that the purpose of the Draft Law was to facilitate permitting,[36] and clarifies that the decision on the Draft Law was not synonymous with a decision on the Project, on which discussions continued thereafter in accordance with Romanian law.[37] Moreover, the Tribunal noted the mass street protests that took place at that time.[38]

34 The final factual theme addressed in the Arbitration relates to certain "post-2013 events,"[39] including cultural heritage protections accorded to the Roșia Montană site, *inter alia* through the Romanian List of Historical Monuments ("**LHM**") and the designation of the site on the UNESCO World Heritage List. Although the Applicants continue to argue that these events were "incompatible with implementing the Project" and thus "legally impermissible,"[40] these claims were examined and rejected in the Award.[41]

2.2 The Arbitration

35 In the Application, the Applicants describe "the Arbitration" in six short paragraphs. In addition to noting the applicable BITs and recalling one of their claims, they recall the main steps of the constitution of the Tribunal,

[34] Award, p. 302 *et seq.* (paras. 1135 and 1141).

[35] Award, p. 302 *et seq.* (paras. 1136-1138).

[36] Award, p. 304 (para. 1140) (by "assist[ing] the Project to move forward and to be implemented", as was done for other projects in Romania, by "overcom[ing] obstacles related to outstanding issues, such as cultural issues, water management permit, surface rights and the ability to secure necessary land […] The Draft Law itself would eventually authorize environmental permitting."); see also Award, p. 304 (para. 1143).

[37] Award, p. 304 *et seq.* (paras. 1142 and 1235).

[38] Award, p. 34 (paras. 162 and 165).

[39] Award, p. 35 *et seq.* (paras. 172-204).

[40] Memorial on Annulment, p. 50 (para. 115(i)); Annulment Application, p. 9 (para. 31).

[41] Award, p. 35 *et seq.* (paras. 172-188 and 1245-1304).

namely that Prof. Horacio Grigera Naón[42] and Prof. Douglas[43] were appointed by the Parties and served on the Tribunal as of June 2016, and that Prof. Tercier was appointed by the ICSID Secretary-General as president in April 2018 to replace Ms. Teresa Cheng.[44] To allow the Committee to have a full record, the Respondent makes a few additional comments and submits the contemporaneous communications between the Parties and ICSID.[45]

36 Following Ms. Cheng's resignation on 7 February 2018, ICSID informed the Parties that the president would be appointed by the same method by which Ms. Cheng had been appointed, namely by the Secretary-General. ICSID's first proposal was to appoint Prof. Lucy Reed. The Applicants asked for an alternative candidate "with fewer connections to the participants in this arbitration."[46] Prof. Reed provided comments in response, to dispel any doubts, but nevertheless accepted the Applicants' request to allow "all parties to be fully confident in the independence and impartiality of all arbitrators."[47]

37 ICSID then proposed Prof. Tercier, who was appointed on 5 April 2018.[48] The proceedings resumed on that day in accordance with ICSID Arbitration Rule 12. As demonstrated in this submission, the Tribunal was properly constituted and the Applicants' complaints to the contrary are both untimely and unfounded.

38 The Arbitration proceedings, which were governed by the 2006 ICSID Arbitration Rules,[49] are set out in a detailed chronology spanning over 50

[42] Prof. Grigera Naón accepted the Applicants' appointment on 3 December 2015.

[43] Prof. Douglas accepted the Respondent's appointment on 20 November 2015.

[44] Annulment Application, p. 9 *et seq.* (paras. 34-39); Award, p. 42 *et seq.* (paras. 210 and 259).

[45] Letter from Respondent to ICSID dated 5 March 2018, at **RA-19**; Email from Respondent to ICSID dated 16 March 2018, at **RA-20**; Letter from Respondent to ICSID dated 19 March 2018, at **RA-21**; Letter from Respondent to ICSID dated 29 March 2018, at **RA-22**; see also para. 160 below.

[46] Letter from Claimants to ICSID dated 20 February 2018, at **A-3**, p. 1.

[47] Letter from Tribunal Secretary to Parties dated 22 February 2018, at **A-4**, p. 2.

[48] Award, p. 47 (para. 259).

[49] References to the ICSID Arbitration Rules in this submission are to the 2006 version, unless stated otherwise.

pages in the Award.[50] They included two provisional measures applications in 2016 (and emergency temporary provisional measures, several rounds of written submissions, and a hearing); two rounds of written submissions on jurisdiction and the merits between June 2018 and May 2019 (also including a document production phase); a surrejoinder from the Applicants to address a jurisdictional objection the Respondent filed with its Rejoinder; the exchange of rebuttal and surrebuttal (documentary) evidence following the submission of the Rejoinder; the application from the European Commission to intervene as a non-disputing party; a first two-week hearing on the merits in December 2019; [51] *amici curiae* applications from NGOs; a post-hearing submission by the Applicants in response to questions from the Tribunal in May 2020;[52] a response to that submission by the Respondent in July 2020; a second hearing of nearly two weeks (during which technical and quantum experts were examined) in September 2020; two simultaneous exchanges of post-hearing briefs in February 2021 and April 2021; the Applicants' submission of new evidence in October 2021; the exchange of submissions in response to Tribunal questions in June and September 2022; and finally, cost submissions in December 2022. [53] The proceedings were closed on 14 September 2023, over seven years after their commencement.[54]

39 The manner in which the Applicants have summarized their claims in the annulment proceedings wrongly suggests that those claims were clearly and consistently articulated from the outset and throughout the proceedings.[55] They were not.

40 On the contrary, the Applicants' description of their claims was constantly evolving as demonstrated by their late introduction of (i) a first alternative claim after the first hearing in December 2019, (ii) a "new claim (a new

[50] Award, p. 42 *et seq.* (paras. 205-549).

[51] See Award, p. 59 *et seq.* (paras. 346, 366, 368, and 378) (explaining the bifurcation of the hearing because of the number of witnesses to be examined).

[52] Procedural Order No. 27 dated 10 March 2020, at **RA-23**, p. 2.

[53] See Award, p. xiv (table of main submissions).

[54] Award, p. 95 (para. 548).

[55] Memorial on Annulment, p. 50 *et seq.* (paras. 117-120); see also Annulment Application, p. 10 (para. 35).

valuation date)" at the hearing in September 2020, and (iii) a second alternative claim in June 2022.[56]

41 Despite the Respondent's objections,[57] the Tribunal admitted the claims and evidence.[58] The Applicants confirmed at the end of each hearing that they had no objections to the way the proceedings had been conducted.[59] The Applicants were thus afforded more than ample opportunity to present their case and it cannot be said that the Tribunal seriously departed from any fundamental rules of procedure.

2.3 The Award

42 The 361-page Award of 8 March 2024 presents a detailed overview of the facts, which starts at the inception of the mining project and the joint venture with Romania, presents the mining licenses at the heart of the dispute, sets out in detail the environmental permitting process, and goes through the relevant events giving rise to the dispute that spanned some 15 years.[60]

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[56] Award, p. 312 *et seq.* (paras. 1180 and 1206) and p. 87 *et seq.* (paras. 492 and 503).

[57] See, *e.g.*, Letter from Respondent to Tribunal dated 20 April 2022, at **RA-24**, p. 2 ("The [Applicants] have been afforded **every opportunity in this arbitration to make their case**, including in their pleadings, the two hearings, two rounds of responses to questions from the Tribunal issued in Procedural Order No. 27, and two rounds of post-hearing briefs. The [Applicants] were also **afforded the extraordinary opportunity to submit – in two separate instances – additional evidence outside the originally contemplated procedural schedule, together with additional submissions** regarding the alleged significance of this evidence. Not surprisingly, the [Applicants] took advantage of the Tribunal's permissive approach, **introducing a new claim after the hearings had been closed**, as recognized by the Tribunal in its message. Along the way, they [have] also taken advantage of the many additional opportunities to produce new evidence.") and p. 3 ("as the Respondent also demonstrated, as Romania has not had the opportunity to adduce evidence in response to the new claim, its **belated admission would amount to a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d)** of the ICSID Convention. Providing the [Applicants] with yet a further opportunity to elaborate on their inadmissible claim – including on the quantification of alleged damages – after the Respondent has been denied the opportunity to submit witness and expert evidence in response, would constitute a further and separate serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention.") (emphasis added).

[58] See, *e.g.*, Award, p. 90 (para. 503); see also para. 271 below.

[59] Award, p. 104 (para. 557).

[60] Award, p. 3 *et seq.* (paras. 6-204).

43 Over more than 250 pages, the Tribunal details the Parties' positions, the evidentiary record, and its analysis, resulting in (i) the Tribunal's unanimous finding that it had jurisdiction and that the claims – even those made at the eleventh hour – were admissible, and (ii) by a majority, a dismissal of the claims on the merits and ordering the Applicants to pay Romania its costs in connection with the arbitration proceedings and a portion of its legal costs.[61]

44 The Award is robust in all respects. The Applicants' complaints that the Tribunal majority failed in certain respects to provide reasons for its decisions and that it manifestly exceeded its powers in certain respects are again, not credible.

2.4 The Annulment Proceedings

45 From the outset of these proceedings, the Applicants have made spurious arguments and unfounded requests, causing delay and generating extra costs for the Respondent (in legal fees and arbitration costs). The Respondent recalls a few examples below.

46 First, the Applicants requested the implementation of a procedure to appoint the Committee (namely following a recommendation from the PCA), allegedly because of "compromising connections" that the ICSID Team Leader and Acting Secretary-General shared "with the Tribunal majority."[62] There are no "compromising connections", as explained in Section 4.1 below. In any event, the Committee was properly constituted on 8 October 2024.[63]

47 Second, the Applicants unsuccessfully sought to stay the enforcement of the Award but did not comply with the Committee's conditions for the continuation of the stay set out in the Decision of 7 March 2025, within the timeline specified therein as extended on 10 April 2025.

48 Third, the Applicants challenged Prof. Dr. Maxi Scherer, despite having previously confirmed that they "d[id] not have any observations on the

[61] Award, p. 154 *et seq.* (paras. 765, 1321, 1357, and 1358).

[62] Annulment Application, p. 3 *et seq.* (paras. 12-15).

[63] See also Email from ICSID to Parties dated 16 August 2024.

proposed *ad hoc* Committee members".[64] Using Prof. Dr. Scherer's inconsequential disclosure of 23 October 2024 as an excuse, on 30 October 2024 the Applicants asked her to step down on the basis of alleged connections with the Respondent's counsel team, Prof. Tercier, and the subject of the annulment application, which would allegedly affect her impartiality and independence.[65] As the Respondent noted, these allegations were untimely and baseless under any standard of impartiality and independence.[66] Suddenly, on 6 December 2024, the Applicants withdrew their proposal for disqualification, without explanation.[67]

49 In their proposal to disqualify Prof. Dr. Scherer, the Applicants noted that they "would not invite a Committee member to resign or propose to disqualify her – with all the attendant risks that procedure entails – if their concerns about impartiality and independence were not genuine, serious, and abiding."[68] A *contrario*, this means that they have no concerns where they have made no such application, for instance against the arbitrators during the Arbitration as discussed below in Section 4.1.

50 These frivolous procedural motions and arguments come against the backdrop of an Award that is accruing interest and with which the Applicants refuse to comply, even though Gabriel Canada's public disclosures continue to refer to financing secured for purposes of funding these proceedings.[69]

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[64] Email from Applicants to ICSID dated 27 September 2024.

[65] Letter from Applicants to Committee dated 30 October 2024 (concluding that "Prof. Dr. Scherer would not be able to make an impartial and independent decision on the annulment application in this case as needed to ensure the integrity of these proceedings").

[66] Letter from Respondent to Committee dated 8 November 2024; Romania's Reply on Disqualification Proposal dated 25 November 2024, p. 6 *et seq.* (sections 3 and 4).

[67] Letter from Applicants to ICSID dated 6 December 2024 (simply stating that the "Applicants conclude that it is not in the interest of these annulment proceedings to pursue the proposal to disqualify and accordingly hereby withdraw that proposal.").

[68] Applicants' Proposal to Disqualify dated 16 November 2024, p. 7 (para. 13).

[69] *E.g.*, Gabriel Canada MD&A, Third Quarter 2024, at **RA-9**, p. 4; Junior Mining Network, Gabriel Resources: US$1.5 Million Loan dated 29 November 2024, at **RA-10**; see also Respondent's Reply to Applicants' Comments on Forms of Security dated 21 February 2025, p. 11 (para. 32); Letter from Respondent to Committee dated 8 April 2025, p. 2 (para. 5) (referring to a "Second Tranche Closing of US$4 Million Private Placement").

3 INTRODUCTORY COMMENTS ON THE APPLICABLE LEGAL STANDARDS

51 It is trite to note, as consistently stated by committees, that the function of an ICSID *ad hoc* annulment committee is to determine whether any of the five grounds exhaustively listed in Article 52 of the ICSID Convention has been made out.[70] Not more, and not less,[71] and the Applicants bear that burden of proof.[72]

52 As the 2024 ICSID Background Paper on Annulment recalled, "[a]nnulment is an exceptional and narrowly circumscribed remedy" and the scope of review of an award limited:[73]

> "the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, **annulment was designed purposefully to confer a limited scope of review** which would safeguard against 'violation of the fundamental principles of law governing the Tribunal's proceedings'."[74]

53 Furthermore, it deserves reminding, given the thrust of the Applicants' pleadings, that annulment proceedings are not appeals on the merits. The list at Article 52 does not include an appeal mechanism, nor any review of the merits of an award. As noted above, the function of annulment committees is "to ensure the integrity of ICSID arbitration proceedings,

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[70] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated 5 February 2016, at **AL-12**, p. 21 (para. 67) ("[I]t is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds."); see also, *e.g.,* ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 *et seq.* (para. 80).

[71] See BIICL Baker Botts Empirical Study: Annulment in ICSID Arbitration, at **RAL-27**, p. 8 (by January 2021 "only six ICSID awards have been annulled in full […] compris[ing] less than 2% of the total awards to have been issued to date under the ICSID Convention. The odds of successfully overturning an award in its entirety therefore remain exceptionally low. Those figures are consistent with the intended extraordinary and limited nature of the remedy. A further thirteen awards have been annulled in part.").

[72] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 21 *et seq.* (para. 69); *Bernhard von Pezold and Others v. Republic of Zimbabwe*, Decision on Annulment, ICSID Case No. ARB/10/15, 21 November 2018, at **RAL-28**, p. 52 (para. 238).

[73] ICSID Background Paper on Annulment 2024, at **AL-21**, p. 46 *et seq.*

[74] ICSID Background Paper on Annulment 2024, at **AL-21**, p. 40 (para. 77) (emphasis added).

not their substantive correctness."[75] In other words, and as constantly recalled by annulment committees, no annulment can be grounded on a party or committee's (dis)agreement with a tribunal's conclusions on the merits of the dispute.[76] Nor can annulment committees "second guess the evaluation of evidence [legal or factual] by the Tribunal."[77]

54 Finally, even where one of the annulment grounds is made out, *i.e.*, "even if an annullable error is found," an annulment committee still has discretion in deciding whether to annul an award at issue.[78]

[75] *Vestey v. Venezuela,* Decision on Annulment, dated 26 April 2019, at **RAL-26**, p. 15 (para. 56); see also, *e.g.*, *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007, at **AL-60**, p. 11 (para. 20) ("The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings") and p. 12 (para. 23) (referring to a committee's power to verify "the integrity" of "the tribunal", "of the procedure", and "of the award", and noting that the "[i]ntegrity of the dispute settlement mechanism, integrity of the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.").

[76] ICSID Background Paper on Annulment 2024, at **AL-21**, p. 53 *et seq.* ("(3) *Ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own").

[77] *Fábrica de Vidrios Los Andes C.A v. Bolivarian Republic of Venezuela*, Decision on Annulment, ICSID Case No. ARB/12/21, 22 November 2019, at **RAL-29**, p. 29 (para. 97); *Venezuela Holdings, B.V. et al. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment of Mar. 9, 2017, at **AL-71**, p. 39 (para. 114).

[78] See *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 22 *et seq.* (paras. 71-73) ("The Committee concludes that, even if an Article 52(1) ground is made out, it nevertheless retains a discretion as to whether or not to annul the award."); see also ICSID Background Paper on Annulment 2024, at **AL-21**, p. 71 *et seq.* (under "(4) *Ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards").

4 THE APPLICANTS' REQUEST TO ANNUL THE AWARD IN ITS ENTIRETY IS BASELESS AND A DISGUISED APPEAL ON THE MERITS

55 The Applicants invoke two grounds of the ICSID Convention to request that the Committee annul the Award in its entirety, namely:

i) the purportedly improper constitution of the Tribunal (Article 52(1)(a)), and,

ii) the purported denial of the right to be heard by an independent and impartial tribunal treating the parties equally, amounting to a serious departure from fundamental rules of procedure (Article 52(1)(d)).

56 Neither argument withstands the most basic scrutiny, as demonstrated in **Sections 4.1** and **4.2** below.

4.1 The Tribunal was Properly Constituted

57 The Applicants wrongly allege that the Tribunal was not properly constituted under Article 52(1)(a).[79]

58 In their Application, the Applicants argued that "the Tribunal majority", *i.e.*, both Profs. Douglas and Tercier, lacked independence and impartiality.[80] However, in their Memorial, the Applicants only put forward – supposedly "[i]n the interest of efficiency" – arguments regarding Prof. Douglas.[81] Accordingly, the Respondent understands that the Applicants have for all intent and purposes waived their arguments concerning Prof. Tercier. These will be addressed for the sake of completeness only.

59 The Respondent stresses at the outset that the Applicants never requested the disqualification of Profs. Tercier and Douglas, nor raised complaints in connection with either arbitrator following their appointment to the

[79] Memorial on Annulment, p. 4 *et seq.* (section II.A.1, paras. 14-23); see also Annulment Application, p. 11 *et seq.* (paras. 44-48).

[80] See, *e.g.*, Annulment Application, p. 13 *et seq.* (paras. 49) (summarizing the reasons why the "Tribunal" was not properly constituted).

[81] Memorial on Annulment, p. 1 *et seq.* (paras. 5 and 8-12).

Tribunal.[82] This is the case, even though all of the issues of which the Applicants now complain were either known or should have been known to them at the time.

60 In any event, none of the issues are of any relevance, nor could they on any stretch of the imagination give cause for annulment of the Award. The Applicants' case under Article 52(1)(a) is patently without merit both as a matter of law (**Section 4.1.1**) and fact (**Sections 4.1.2** and **4.1.3**).

4.1.1 It is an extremely high bar to conclude that an ICSID tribunal was improperly constituted

61 The Applicants wrongly allege that the Tribunal majority was not properly constituted, because of undisclosed "connections",[83] "client work" and other "factors".[84]

62 Article 52(1)(a) does not specify in which circumstances an ICSID tribunal is improperly constituted. When assessing claims under this provision, ICSID annulment committees have in part considered whether the arbitrators at issue manifestly lacked the qualities set out in Article 14(1) of the ICSID Convention,[85] including independence and impartiality.[86]

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[82] At the time of Prof. Tercier's appointment, the Applicants requested that their correspondence be withdrawn from the record and thus *a fortiori* waived the right to complain about the issues raised therein. Letter from Claimants to ICSID dated 29 March 2018 and Letter from ICSID to the Parties dated 30 March 2018, at **A-10**.

[83] Annulment Application, p. 26 *et seq.* (section III(A)(5)). As explained in para. 58 above, the Applicants have not developed these arguments in the Memorial.

[84] Memorial on Annulment, p. 1 *et seq.* (para. 6 and section II(A)); Annulment Application, p. 11 *et seq.* (section III(A)).

[85] *ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025, at **AL-51**, p. 40 (para. 186) (rejecting annulment request, including on grounds that arbitrator was not independent and impartial); see also Memorial on Annulment, p. 5 (paras. 15-16).

[86] See ICSID Convention Article 14(1) ("Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."). Reading the Spanish and English texts of the ICSID Convention together, Article 14(1) requires both independence and impartiality. See also Memorial on Annulment, p. 5 (para. 16) (referring to *Blue Bank International & Trust v. Venezuela*, ICSID Case No. ARB/12/20, Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 11 (para. 59)).

63 As part of this assessment, some committees have applied the test set out in *Blue Bank v. Venezuela*,[87] where the tribunal held that "[t]he applicable legal standard [for Article 14(1)] is an 'objective standard based on a reasonable evaluation of the evidence by a third party'".[88]

64 As the Applicants also note, the *EDF v. Argentina* annulment committee formulated the standard under Article 14(1) as follows:

> "whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality."[89]

65 When describing the qualities under Article 14(1), the Applicants note that "independence relates to 'the absence of external control,' particularly of relationships with a party that might influence an arbitrator's decision".[90] To show a lack of independence, a party must demonstrate that those elements which they consider sufficient to establish the "appearance of dependence or bias"[91] influenced the arbitrator's decision.[92]

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[87] See, *e.g.*, *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 37 (para. 109); *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment, at **AL-16**, p. 18 *et seq.* (para. 78).

[88] *Blue Bank v. Venezuela,* Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 11 (para. 60).

[89] Memorial on Annulment, p. 6 (para. 17) (referring to *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 37 *et seq.* (paras. 109 and 111).

[90] Memorial on Annulment, p. 5 *et seq.* (paras. 16, 53, 84, and 86) (referring *inter alia* to *Blue Bank v. Venezuela,* Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 11 (para. 59), *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022, at **AL-52**, p. 9 (para. 46) and *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025, at **AL-57**, p. 3 (para. 13)).

[91] Memorial on Annulment, p. 6 (para. 18).

[92] See *Nations Energy Corporation, Electric Machinery Enterprises Inc., and Jaime Jurado v. Republic of Panama*, Decision on the Proposal to Disqualify Dr. Alexandrov, ICSID Case No. ARB/06/19, 7 September 2011 (Spanish original with unofficial partial translation), at **RAL-18**, p. 1 (para. 68) ("The Applicants have […] not submitted any information that objectively demonstrates or suggests that the existence of such a relationship is likely to influence the judgement of Dr. Alexandrov.").

66 The Applicants have, however, omitted to address the following key aspects of the legal standard for assessing whether a tribunal was properly constituted under Article 52(1)(a).

67 First, the Applicants disregard the need for a "manifest" lack of impartiality and independence. Indeed, under Article 57 of the ICSID Convention, a party may move to disqualify an arbitrator only if he or she manifestly lacks the qualities described in Article 14(1).[93] To be "manifest", the lack of independence and impartiality must be "evident" or "obvious."[94]

68 In this regard, the *EDF v. Argentina* committee applied a two-prong test that the *SGS v. Pakistan* tribunal had articulated in the context of an unsuccessful arbitrator challenge:

> "The standard of appraisal of a challenge set forth in Article 57 […] may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature as to 'indicat[e] a manifest lack of the qualities required by' Article 14(1)."[95]

69 For the first prong, the movant must establish facts "of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case." Furthermore, "mere speculation or inference" is not sufficient and

[93] See ICSID Convention Article 57 ("A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a **manifest** lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.").

[94] *Blue Bank v. Venezuela,* Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 11 (para. 61).

[95] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 *et seq.* (paras. 110 and 174) (referring to *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 (para. 20) (dismissing the challenge to the arbitrator noting that, without "something more", it was mere speculation that the arbitrator would be predisposed to vote for the Respondent in the circumstances where the challenged arbitrator and counsel for the Respondent acted with reversed roles in the two parallel proceedings)); see also *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, PCA Case No. IR-2019/1, PCA Secretary-General Recommendation dated 4 March 2019, at **AL-17**, p. 8 (para. 50).

cannot "be a substitute for such facts."[96] Similarly, "the mere fact that a relationship [between a party and an arbitrator] exists 'in and of itself is not sufficient'".[97] Rather, the facts must be evaluated qualitatively to decide whether they constitute facts indicating a manifest lack of the qualities of independence and impartiality.[98]

70 As for the second prong, relating to the "nature" of the facts from which a manifest lack of independence and impartiality can be inferred, the *SGS v. Pakistan* tribunal held that such "inference must rest upon, or be anchored to, the facts established."[99] In other words, inferences cannot "themselves rest merely on other inferences."[100]

71 Second, an *ad hoc* committee faced with an Article 52(1)(a) claim must consider whether the applicant could have challenged the arbitrator under Articles 14 and 57 during the arbitration proceedings. To the extent the applicant could have done so, it was required to have done so promptly.

72 Indeed, under Article 9(1) of the ICSID Arbitration Rules, a proposal for disqualification under Article 57 of the Convention must be raised

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

[97] *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011, at **RAL-18**, p. 1 (para. 66).

[98] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, ICSID Case No. ARB/03/19, 12 May 2008, at **RAL-21**, p. 18 *et seq.* (paras. 33 and 35) (identifying four criteria when assessing such connection and "its effect on that arbitrator's independence and impartiality", *i.e.*, (i) proximity, (ii) intensity/frequency, (iii) dependence for benefits or advantages and (iv) materiality.").

[99] *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 *et seq.* (para. 21) ("It is important to stress that the inference which constitutes the second constituent element must itself be reasonable. There must, in other words, if the challenge is to succeed, be **a clear and reasonable relationship between the constituent facts and the constituent inference** they generate.") (emphasis added).

[100] *SGS v. Pakistan*, Decision on Proposal to Disqualify dated 19 December 2002, at **RAL-19**, p. 5 (para. 20); *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 38 *et seq.* (paras. 110 and 174).

"**promptly**, and in any event before the proceeding is declared closed".[101] Otherwise, under Rule 27, a party that fails to raise an issue promptly is deemed to have waived its right to object.[102]

73 *A fortiori*, that party cannot raise the issue even later, as grounds for annulment,[103] where it can be shown that the party previously already had "actual or constructive knowledge" of the issue, or "reasonably ought to have been aware" of it "had it been vigilant",[104] as the Applicants acknowledge.[105]

74 As the *EDF v. Argentina* committee stated:

> "[A] party **which is, or should have been, aware** of the facts which it claims give rise to reasonable doubt about whether an arbitrator

[101] 2006 ICSID Arbitration Rules, at **RLA-111**, p. 107 (Rule 9(1)) ("A party proposing the disqualification of an arbitrator pursuant to Article 57 […] shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."); see also *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 40 *et seq.* (para. 187) (noting that the right to raise the matter of alleged lack independence and impartiality must be exercised promptly).

[102] 2006 ICSID Arbitration Rules, at **RLA-111**, p. 113 (Rule 27) ("A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.").

[103] See C. Schreuer, *et al.*, *Schreuer's Commentary on the ICSID Convention*, 3rd ed., Cambridge University Press, 2022, at **AL-62**, p. 28 (p. 1266 of the original) (para. 143) ("A party that is aware of circumstances that would affect the tribunal's proper constitution must be expected to raise this point as early as possible. **It cannot be allowed to withhold this argument in order to ambush the proceedings** at a moment convenient to it.") (emphasis added).

[104] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated 11 June 2020, at **AL-18**, p. 61 (para. 189) (where the investors argued that the State-party had waived its right to challenge an arbitrator because it "knew or should have known about such [undisclosed] relationship" before the award was issued. The committee assessed whether there was "proof either of Spain's knowledge of these materials [which predate the award] or that it knew of the extent of the relationship" and whether these materials suggested that "Spain had actual or constructive knowledge of or that had it been vigilant it ought to have reasonably been aware of the long and extensive relations"); ICSID Background Paper on Annulment 2024, at **AL-21**, p. 84 (para. 86) ("*Ad hoc* Committees have also indicated that a party with knowledge of an alleged improper constitution of the Tribunal that fails to raise such issue during the original proceeding may be taken to have waived its right to bring an annulment application on this basis.").

[105] Memorial on Annulment, p. 34 (para. 71).

> possesses the requisite qualities of independence and impartiality has a duty to raise the issue promptly. If it fails to do so, it will have waived its right to object. **A party which could have raised the matter under Articles 57 and 58 before the proceedings were declared closed but failed to do so cannot, therefore, raise it on annulment.** The mechanism created by the ICSID Convention for resolving challenges to arbitrators does not permit a party to keep such a challenge up its sleeve for use only at the annulment stage."[106]

75 Third, this standard is high. Parties seeking, in the course of arbitration proceedings, to disqualify an arbitrator under Articles 14 and 57 have "the burden of proving facts that make it evident and highly probable, *and not merely possible*, that [the arbitrator] cannot be relied upon to render an independent and impartial decision."[107] The bar is *a fortiori* higher in the context of annulment proceedings and indeed Article 52(1)(a) has been successfully invoked in two cases only, which were very different from the present case.[108]

76 Finally, an ICSID arbitrator's disclosure obligations must be recalled. Under Rule 6(2) of the 2006 ICSID Arbitration Rules, arbitrators were required to make disclosures (if any) upon appointment,[109] as did the three arbitrators in this case.[110] Arbitrators were and are also required to disclose

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[106] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 45 (para. 131) (emphasis added).

[107] *Nations Energy et al. v. Panama*, Decision on Proposal to Disqualify dated 7 September 2011, at **RAL-18**, p. 1 (para. 65) (emphasis in original).

[108] See *Eiser v. Spain,* Annulment Decision dated 11 June 2020, at **AL-18** (where the arbitrator had close ties with the claimant's expert, over several years and across several cases); *Rockhopper Italia S.P.A. et al. v. Italian Republic*, Decision on Annulment, ICSID Case No. ARB/17/14, 2 June 2025, at **RAL-30** (where the arbitrator failed to disclose criminal proceedings in which he had been involved in the respondent State).

[109] 2006 ICSID Arbitration Rules, at **RLA-111**, p. 106 *et seq.* (Rule 6(2)) (requiring disclosure of "past and present professional, business and other relationships (if any) with the parties" and "any other circumstance that might cause [the arbitrator's] reliability for independent judgment to be questioned by a party)").

[110] See Letter from ICSID to the Parties dated 5 April 2018, at **A-11** (enclosing Prof. Tercier's Declaration and Statement of Independence); Letter from ICSID to the Parties, enclosing statement and Prof. Douglas CV dated 20 November 2015, at **A-62**; Letter from ICSID to Parties (enclosing statement and Prof. Grigera Naón's CV) dated 3 December 2015, at **RA-25**.

relationships or circumstances that might subsequently arise and that might give rise to doubts regarding their independence and impartiality.[111]

77 In this regard, the Applicants refer to the IBA Guidelines on Conflicts of Interest in International Arbitration (the "**IBA Guidelines**") as amended in 2024 and the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution of 2024.[112] Neither of these instruments came into being until after the proceedings were closed.[113] They thus could not have provided guidance to the arbitrators in this case.

78 As for the 2014 IBA Guidelines, the Respondent accepts that, while not binding, those guidelines broadly represent prevailing practices and can provide guidance on disclosure obligations and conflicts of interest.[114] With a view to assisting parties and arbitrators to navigate such obligations, these guidelines identify situations that may or may not constitute conflicts of interest or require disclosure, and categorize them into the so-called Red, Orange and Green Lists.[115] Situations on the Red List "give rise to justifiable doubts as to the arbitrator's impartiality and independence", depending on the circumstances of the case, such that "an objective conflict of interest exists."[116] At the other end of the spectrum, there is no

[111] 2006 ICSID Arbitration Rules, at **RLA-111**, p. 106 *et seq.* (Rule 6(2) sets out a continuing obligation to "promptly […] notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding"); see also Memorial on Annulment, p. 30 *et seq.* (para. 60).

[112] Memorial on Annulment, p. 7 (paras. 21-22).

[113] Award, p. 95 (para. 548) (noting that the proceedings were closed on 14 September 2023).

[114] 2014 IBA Guidelines on Conflicts of Interest in International Arbitration dated 23 October 2014, at **RAL-31**; see also *Total v. Argentina*, Decision on Proposal to Disqualify dated 26 August 2015, at **RAL-16**, p. 21 (para. 98) ("as has been repeatedly stated in previous decisions concerning disqualification in ICSID cases, these Guidelines are merely indicative and not binding.").

[115] 2014 IBA Guidelines, at **RAL-31**, p. 2 (para. 3) ("in order to […] avoid unnecessary challenges […], the Guidelines list specific situations indicating whether they warrant disclosure or disqualification of an arbitrator. Such lists, designated 'Red', 'Orange' and 'Green' (the 'Application Lists'), have been updated and appear at the end of these revised Guidelines.") and p. 17 (para. 1).

[116] 2014 IBA Guidelines, at **RAL-31**, p. 17 (para. 2).

duty to disclose situations falling within the Green List as "no appearance and no actual conflict of interest exists from an objective point of view."[117]

79 The Applicants acknowledge (by reference to the 2024 IBA Guidelines and UNCITRAL Code of Conduct of 2024) that arbitrators need only disclose facts and circumstances that are likely to give rise to justifiable doubts as to their independence or impartiality.[118] In turn, "justifiable doubts" arise where a reasonable third person, having knowledge of the relevant facts and circumstances, would conclude that there is a likelihood that the arbitrator "may be **influenced by factors other than the merits of the case** as presented by the parties in reaching his or her decision."[119]

80 For instance, where ICSID arbitrators (or their law firm) were engaged as counsel in separate proceedings during the arbitration, disqualification proposals succeeded when such arbitrators were considered to be influenced by the similarity of parties, or of legal and/or factual issues, which put them in a situation of conflict of interest.[120] Such factors could indeed put the arbitrator in possession of information or knowledge that is

[117] 2014 IBA Guidelines, at **RAL-31**, p. 19 (para. 7) (also noting "there should be a limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of 'the eyes' of the parties.").

[118] Memorial on Annulment, p. 31 *et seq.* (paras. 61-62).

[119] 2014 IBA Guidelines, at **RAL-31**, p. 5 (Part I: General Standards Regarding Impartiality, Independence and Disclosure, section 2(c)) (emphasis added).

[120] *Caratube v. Kazakhstan*, ICSID Case No. ARB/13/13, Disqualification Decision dated 20 March 2014, at **AL-43**, p. 24 *et seq.* (paras. 75 *et seq.*) (where the disqualification proposal was accepted on the basis of the similarly between the arbitration and the separate proceedings, in which the challenged arbitrator was involved, due to a "significant overlap in the underlying facts" and "the relevance of these facts for the determination of legal issues in the […]arbitration"); *Blue Bank v. Venezuela,* Decision on the Proposals to Disqualify a Majority of the Tribunal dated 12 November 2013, at **AL-14**, p. 12 (para. 68) (where the disqualification proposal was accepted on the basis that the arbitrator's law firm was working on parallel proceedings against the respondent (Venezuela) and issues similar to the ones in the arbitration were "likely to be discussed"); *Participaciones Inversiones Portuarias v. Gabon*, ICSID Case No. ARB/08/17, Decision on Proposal to Disqualify dated 12 November 2009 (FR), at **AL-3**, p. 8 *et seq.* (para. 32) (refiled with partial translation at **RAL-32**) (where the challenged arbitrator had issued an award a year earlier in another case against Gabon, the disqualification proposal was rejected by the unchallenged arbitrators who held that "it does not appear from the documents in the file that the two cases have any factual elements in common, apart from the same context of privatization at the end of the 1990s").

"likely to create an imbalance within the Tribunal"[121] or result in it being "highly likely" that the arbitrator would "prejudge legal issues" in the arbitration.[122]

81 The Applicants also argue (without any legal support) that the allegedly repeated failures to disclose facts and circumstances taken "[c]umulatively" provide "a further basis" for the Award to be annulled.[123] However, as one annulment committee aptly stated recently:

> "Even assembled, futile facts and circumstances cannot give rise to a reasonable suspicion of bias and are irrelevant to ground a challenge under Article 52(1)(a)."[124]

82 As another tribunal stated:

> "the Claimant's own methodology brings about its own demise: **0 remains 0** and not 7. Two or more factors which do not satisfy the test required under Article 57 cannot, by mere 'combination,' meet that test."[125]

83 Finally, the Applicants fail to note that, under the 2014 IBA Guidelines "the fact that an arbitrator did not disclose [relevant] facts or circumstances should not result automatically in non-appointment, later disqualification, or a **successful challenge to any award**".[126] Stated differently, even where an ICSID annulment committee concludes that an arbitrator failed to make

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[121] *Participaciones v. Gabon*, Decision on Proposal to Disqualify dated 12 November 2009, at **AL-3**, p. 8 *et seq.* (para. 32) (refiled with partial translation at **RAL-32**).

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

[123] Memorial on Annulment, p. 43 *et seq.* (section II(A)(5)).

[124] *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 109 (para. 378).

[125] *Electrabel S.A. v. Hungary*, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, ICSID Case No. ARB/07/19, 25 February 2008, at **RAL-33**, p. 10 (para. 39) (emphasis added); see also K. Daele, *Standards for Disqualification*, Chapter 5 in Challenge and Disqualification of Arbitrators in International Arbitration, Kluwer International Law 2012, at **AL-39**, p. 22 (para. 5-074) (reporting on the *Amco v. Indonesia* Challenge Decision of 24 June 1982: "[Indonesia] has alleged that a combination of facts may have a greater impact than just their summing up. This is a right view, **provided each fact has a minimum [bearing on] its own**, which in the view of the undersigned, is not the case here." (emphasis added)).

[126] See 2014 IBA Guidelines, at **RAL-31**, p. 18 (para. 5) (emphasis added).

certain disclosures, the moving party must meet its burden of proof under Article 52(1)(a) as well as Articles 14 and 57, as set out above. Furthermore, "[n]ondisclosure cannot by itself make an arbitrator partial or lacking independence: only the facts or circumstances that he or she failed to disclose can do so."[127]

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84 In conclusion, the legal standard under Article 52(1)(a) may be summarized as follows:

i) Under Articles 14 and 57 of the ICSID Convention, applicants are required to show that one or more of the arbitrators manifestly lacked the qualities of independence and impartiality;

ii) In that regard, applicants are required to establish facts that make it evident and highly probable (and not merely possible), that the arbitrator(s) could not be relied upon to render an independent and impartial decision;

iii) If the applicants could have, but failed to raise their objections concerning the arbitrator(s) during the arbitration proceedings and promptly, they waived the right to raise those objections later on (including as a basis for annulment);

iv) The alleged lack of independence and impartiality must be "evident" or "obvious" based on a qualitative assessment of established facts and not merely based on inference or speculation;

v) The applicants must show that the arbitrator(s) were influenced by factors other than the merits of the case and thus had a conflict of interest; and,

vi) Even if an ICSID annulment committee concludes that an arbitrator should have disclosed a particular fact to the parties, the applicant must still meet its burden of proof in connection with Article 52(1)(a) under

[127] 2014 IBA Guidelines, at **RAL-31**, p. 18 (para. 5); see also UNCITRAL Code of Conduct, at **AL-53**, p. 7 *et seq.* (Article 11.8) ("The fact of non-disclosure does not in itself necessarily establish a lack of independence or impartiality […] Rather, it is the content of the disclosed or omitted information that determines whether there is a violation of article 3").

the ICSID Convention (together with Articles 14 and 57) as set out above.

85 As shown in the following section, the Applicants' case falls far short of meeting the above standard.

4.1.2 Independence and impartiality of Prof. Douglas

86 The Applicants put forward three arguments as to why, in their view, the Tribunal was improperly constituted under Article 52(1)(a) in connection with purported acts or omissions by Prof. Douglas, namely, in short, that:

i) his involvement as counsel in a UK litigation (and that of former co-tenants at Matrix Chambers in a related case) purportedly amounted to a conflict of interest vis-à-vis the Arbitration;

ii) his involvement with the MIDS academic program purportedly casts doubt as to his independence and impartiality given LALIVE's support of that program; and,

iii) his acquisition of Swiss nationality in 2023 allegedly undermined the appearance of neutrality of the Tribunal.

87 The Respondent addresses these arguments below, in the order in which the Applicants have presented them. As demonstrated below, these arguments are patently baseless and do not begin to meet the legal requirements set out in Section 4.1.1 above.

4.1.2.1 Prof. Douglas' work for Friends of the Earth UK and Matrix Chambers' work for ClientEarth could not lead a reasonable third party to doubt Prof. Douglas' independence and impartiality

88 The Applicants claim that (i) Prof. Douglas' representation of an NGO known as Friends of the Earth and (ii) his former co-tenants at Matrix Chambers' representation of the NGO known as ClientEarth, would lead a reasonable third party to doubt Prof. Douglas' independence and impartiality.[128] They also claim that his non-disclosure of these alleged

[128] Memorial on Annulment, p. 8 *et seq.* (paras. 24-26 and 40).

"connections" provides "a further basis to conclude that the Tribunal was not properly constituted".[129] These claims have no merit whatsoever.

Prof. Douglas' representation of Friends of the Earth UK

89 According to the Applicants, in 2022, Prof. Douglas represented Friends of the Earth in a "litigation to block the UK Government from financing a liquified natural gas project" in Mozambique, which amounted to an "irreconcilable conflict" that "would raise justifiable doubts about his independence and impartiality [in the Arbitration] to any objective observer".[130]

90 Putting aside the fact that the evidence is limited,[131] Prof. Douglas' involvement with Friends of the Earth does not constitute a conflict of interest by any stretch of the imagination.[132] Nor can it possibly represent or give rise to justifiable doubts as to Prof Douglas's independence or impartiality.

91 First, the factual context and legal issues in that case were unrelated to the Arbitration. In that case, which was before the UK Court of Appeal, Friends of the Earth (as claimant) challenged the UK Government's approval of a USD 1.15 billion investment in a liquified natural gas project in Mozambique.[133] The main legal issue was whether this approval breached the commitments of the UK and Mozambique under the Paris Climate Change Agreement.[134] The case had nothing to do the with the non-issuance of an environmental permit for a mining project in Romania.

[129] Memorial on Annulment, p. 34 (para. 72).

[130] Memorial on Annulment, p. 8 *et seq.* (paras. 27(a), 36 and 29, respectively).

[131] To evidence Prof. Douglas' involvement in this case, the Applicants have only produced exhibits that post-date November 2022. Memorial on Annulment, p. 8 *et seq.* (para. 27, fns. 23-24). It is not known when Prof. Douglas was instructed, for how long he worked on the case, nor what the scope of his involvement was.

[132] The Applicants have not argued – let alone shown – that this situation falls within the Red List (or Orange List) of the 2014 IBA Guidelines.

[133] Memorial on Annulment, p. 8 *et seq.* (para. 27(a)).

[134] *Friends of the Earth v. UKEF*, Court of Appeal Judgment dated 13 January 2023, at **A-55**, p. 5 *et seq.* (para. 20).

92 Second, Friends of the Earth did not participate or seek to participate in the Arbitration (as an *amicus* or otherwise).

93 Furthermore, the Applicants argue that Prof. Douglas "took on Friends of the Earth as a client".[135] Prof. Douglas appears to have represented **Friends of the Earth UK**. This is a registered private limited company, which is a chapter of the Friends of the Earth International network alongside over 70 other chapters that campaign on various environmental and social issues.[136] While affiliated with Friends of the Earth International, Friends of the Earth UK remains an autonomous, independent entity, itself comprising more than 200 groups across England, Wales and Northern Ireland.[137]

94 The Applicants try to connect Friends of the Earth UK to the Arbitration through a third entity, the Center for International Environmental Law ("**CIEL**").[138] However, CIEL was a proposed intervener in the Friends of the Earth Mozambique case,[139] as well as one of the NGOs that submitted an *amicus* brief on behalf of prospective *amici* in the Arbitration.[140]

95 In the absence of overlap in parties, factual or legal issues between the Friends of the Earth Mozambique case and the Arbitration, that case could not have provided Prof. Douglas with access to any information "likely to create an imbalance within the Tribunal", or caused him to be influenced by factors other than the merits of the Arbitration.[141] There is no conflict

[135] Memorial on Annulment, p. 8 *et seq.* (para. 27(a)).

[136] GOV.UK, Friends of the Earth Limited Overview, at **RA-26**; Friends of the Earth International, Organisation, at **RA-27** (describing "a highly decentralised federation" comprising over 70 "autonomous organisations"); Friends of the Earth International, What we do, at **RA-28**.

[137] Friends of the Earth, About us, at **RA-29**.

[138] Memorial on Annulment, p. 9 *et seq.* (para. 30).

[139] Memorial on Annulment, p. 9 *et seq.* (para. 30) (referring to *Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Written Submission on Behalf of the Proposed Intervener Center for International Environmental Law dated 10 November 2022, at **A-155**).

[140] CIEL was not an *amicus*, but submitted an *amicus* brief on behalf of Alburnus Maior, Greenpeace CEE Romania and Independent Centre for the Development of Environmental Resources (ICDER). Award, p. 54 (para. 316).

[141] See para. 79 above.

of interest, let alone the appearance of one, nor are there any "justifiable doubts" as to Prof. Douglas' independence and impartiality.

96 The Applicants' reliance on the cases of *Grand River v. United States*, *RSE v. Latvia* and *Vito Gallo v. Canada*[142] is inapposite. In those cases (two of which were UNCITRAL cases), an arbitrator was successfully challenged at the outset of the proceedings on the grounds of a conflict of interest or an issue conflict. However, in each of those cases, the arbitration and the separate proceedings in which the arbitrator was involved presented the same or similar factual or legal issues,[143] and in one instance also involved the same party,[144] as summarized below:

i) In *RSE v. Latvia*, an UNCITRAL case, the respondent challenged an arbitrator on the grounds of an issue conflict arising from the arbitrator's work as counsel in several past and pending ECT arbitrations. The challenge decision held that the "the sheer number of cases generates a serious risk that overlapping questions of interpretation and application of the ECT will arise in this case as in those other arbitrations under the same treaty." This risk would "seed justifiable doubts in the mind of a reasonable and informed third person" as to whether the arbitrator's "consideration of the present case will be influenced by her duty to defend the interests of her investor claimant clients in disputes arising under the ECT."[145]

ii) In *Vito Gallo v. Canada*, another UNCITRAL case, the challenged arbitrator was also simultaneously acting as an advisor to Mexico, which had the legal right to intervene and make submissions to the tribunal on questions of interpretation of the NAFTA (under Article 1128 of that treaty). The challenge decision noted that Mexico's "immanent right under Article 1128" to participate in the proceedings

[142] Memorial on Annulment, p. 28 *et seq.* (paras. 52-55).

[143] *RSE v. Latvia,* Challenge Decision dated 24 June 2022, at **AL-52**; *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated 14 October 2009, at **AL-8**.

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

[145] *RSE v. Latvia,* Challenge Decision dated 24 June 2022, at **AL-52**, p. 8 *et seq.* (paras. 42 and 46).

created a perceptible conflict of interest as "the arbitration would have had to proceed under the shadow of this possibility."[146]

iii) In *Grand River v. United States*, the challenged arbitrator was representing a client in proceedings that were directly adversarial to the respondent in the arbitration and these proceedings had the similar aim of assessing the United States' compliance with its international commitments. The challenge decision noted that it was in view of this "basic similarity" that "representing or assisting parties in the latter set of procedures would be incompatible with simultaneous service as arbitrator in the NAFTA proceeding."[147]

97 The cases on which the Applicants rely are thus fundamentally different and operate against the Applicants' case.

98 The Applicants further argue that under ICSID Arbitration Rule 6(2) and the 2024 IBA Guidelines, Prof. Douglas had an obligation to disclose his involvement in the Friends of the Earth Mozambique case.[148] However, as set out above, the situation did not amount to a conflict of interest or raise any justifiable doubts regarding Prof. Douglas' independence and impartiality. Nor did this situation fall under the Red or Orange Lists of the 2014 IBA Guidelines.[149] Accordingly, Prof. Douglas was under no obligation to disclose his instruction in that separate case, in the Arbitration.[150] Moreover, at that time, the Arbitration was at an advanced stage, the Tribunal was discussing with the Parties the schedule for the filing of their cost submissions.[151]

99 The Applicants argue that the impartiality and independence of an arbitrator can be questioned when he (or his firm) acts "for a client that is engaged in public activism against one of the disputing parties [and] the

[146] *Vito Gallo v. Canada,* Challenge Decision dated 14 October 2009, at **AL-8**, p. 10 *et seq.* (paras. 31 and 35).

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

[148] Memorial on Annulment, p. 30 *et seq.* (paras. 59-67).

[149] See paras. 77-78 above.

[150] See paras. 79-81 above.

[151] See Award, p. 94 (para. 543).

claims in the arbitration". They further contend that Prof. Douglas must have known of "his client's" purported protests against the Project.[152]

100 This contention – which is convenient given that arbitrators are not part of annulment proceedings and cannot say otherwise (however unfounded and insulting an applicant's annulment arguments might be) – is a red herring.

101 First, Prof. Douglas' "client" – Friends of the Earth UK – did not engage in public activism against Gabriel Resources Canada or Gabriel Resources UK or their claims in the Arbitration.

102 Second, the Applicants portray the (broader) Friends of the Earth network as one of the principal NGO actors opposed to the Roşia Montană Project.[153] However, Friends of the Earth was one of many NGOs that supported the local NGOs in their campaign against the Project over the course of some fifteen years, as the Applicants recognize.[154]

103 Third, as noted above, "Friends of the Earth" comprises many chapters around the world, which defend numerous causes.[155] The Applicants have dedicated over 20 exhibits and an annex to illustrate Friends of the Earth's purported activism against the Project; [156] however, apart from one

[152] Memorial on Annulment, p. 18 *et seq.* (paras. 36 and 57).

[153] Memorial on Annulment, p. 11 *et seq.* (paras. 33 and 34).

[154] Memorial on Annulment, p. 9 (para. 29) ("since 2002, Friends of the Earth was **among a group of NGOs** that engaged in a public campaign advocating against the Roşia Montană Project, and later specifically against Gabriel's arbitration claims, as well as against investor-State arbitration generally") (emphasis added); see also, *e.g.*, Alburnus Maior, Earthworks, Friends of the Earth, Greenpeace in Romania, MiningWatch Canada Press Release dated 23 January 2007, at **A-119**, p.1 (referring to a statement signed by **80** organisations across Romania, Hungary, the Czech Republic, Moldova, Canada, and the United States).

[155] See para. 93 above.

[156] Memorial on Annulment, p. 11 *et seq.* (para. 34(a)-(r); Annex 1).

instance,[157] they all refer to other chapters of the organization[158] and to scores of other NGOs.[159]

104 Fourth, any party or person "advocating against" the Project,[160] would also have been advocating against the Respondent, given that the Project was a joint venture (RMGC) between the Applicants and the Respondent.

105 Indeed, as the Award notes, the Respondent defended the Project for years against NGOs – defending permits issued by State authorities for the Project – in Romanian courts.[161]

106 The argument is even more obscure as regards the Applicants' reference to Friends of the Earth's stance regarding investor state dispute settlement and how that could have possibly influenced Prof. Douglas.[162]

107 Equally obscure is the connection that the Applicants seek to draw with Prof. Joost Pauwelyn, one of Prof. Douglas' colleagues at the Graduate Institute.[163] It is unclear how Prof. Pauwelyn's reference to a publicly available Friends of the Earth pamphlet (regarding the *Gabriel v. Romania*

[157] Tax Justice Network Post dated Aug. 14, 2015 with full text of Letter to UK Prime Minister David Cameron and signatories, at **A-123** (Friends of the Earth UK is one of eleven signatories of this open letter, sent to the UK Prime Minister in the context of the protests around the proposed TransAtlantic Trade and Investment Partnership).

[158] Friends of the Earth International (**Pop-29**, p. 3; **A-60**; **A-116**; **A-117**; **R-137**), Friends of the Earth USA (**A-119**; **Pop-15**; **A-117**), Friends of the Earth Europe (**A-56**; **A-59**; **A-60**; **A-156**; **A-154**; **C-2889**), Friends of the Earth Hungary (**A-119**; **A-152**; **A-156**; **A-157**; **A-158**; **A-159**; **A-160**; **Pop-15**; **R-597**), Friends of the Earth Canada (**A-118**; **A-120**; **A-121**; **A-122**), Friends of the Earth France (**A-156**), Friends of the Earth Northern Ireland (**A-153**); Friends of the Earth Slovakia-CEPA (**A-156**).

[159] See Memorial on Annulment, p. 11 *et seq.* (evidence cited in fns. 31-59 referring *inter alia* to Alburnus Maior, Bank Watch CEE, Mineral Policy Center, Greenpeace CEE, Miningwatch Canada, Canada Save Rosia, Terra Mileniul III, Peace Action, Training and Research Institute of Romania (PATRIR), Earthworks, Green Transylvania).

[160] Memorial on Annulment, p. 9 (para. 29).

[161] See, *e.g.*, Award, p. 257 *et seq.* (paras. 1038, 1088 and 1269) (noting that the Government defended the validity of the relevant urbanism plans and certificates, as well as the archaeological discharge certificates before the Romanian courts).

[162] Memorial on Annulment, p. 9 (para. 29).

[163] Memorial on Annulment, p. 16 *et seq.* (para. 34(o)).

case) in his course on International Investment Law at the Graduate Institute could have possibly influenced Prof. Douglas in the Arbitration.[164]

108 Fourth, the Applicants argue that, as part of its "social license" argument, the Respondent relied on Friends of the Earth's opposition campaign against the Project and on evidence that "featured Friends of the Earth […] at the heart of that opposition".[165]

109 This argument is wildly misleading. The Respondent's pleadings contain no references to any Friends of the Earth entities; there are only sparse and incidental references in its expert reports and a couple of exhibits (none of which relate to Friends of the Earth UK).[166]

110 Furthermore, the Respondent's "social license arguments" were based on a broad range of witness (fact and expert) and documentary evidence relating to the public consultations about the Project,[167] petitions about the Project,[168] the NGO court challenges against the permits issued by the Romanian authorities for the Project,[169] and public protests.[170] In any

[164] Friends of the Earth, Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice, June 2019, at **A-60** (a 75-page pamphlet issued by Friends of the Earth Europe and International among others of which a mere 5 pages cover the *Gabriel v. Romania* case).

[165] Memorial on Annulment, p. 10 (para. 31).

[166] See Memorial on Annulment, p. 10 (para. 31) (referring **only** to four exhibits and two paragraphs in two expert reports). Rather, the NGOs "featured" in the Respondent's pleadings and evidence in the Arbitration were Alburnus Maior, ICDER, the Legal Resources Center, Greenpeace Romania, Mining Watch Romania, the Roşia Montană Cultural Foundation, and *Asociaţia Salvaţi Bucureştiul*.

[167] See, *e.g.*, Respondent's Counter-Memorial in the Arbitration, p. 42 *et seq.* (sections 3.1 and 3.2, notably para. 127) (noting that in 2006 "the Ministry of Environment received an unprecedented number of comments – 5,610 questions and 93 contestations from over 6,000 people") and p. 121 *et seq.* (section 5.7) (referring to dozens of exhibits and witness evidence).

[168] See, *e.g.*, Respondent's Counter-Memorial in the Arbitration, p. 69 *et seq.* (paras. 182 and 261).

[169] See, *e.g.*, Respondent's Counter-Memorial in the Arbitration, p. 54 *et seq.* (sections 3.4 and 4.5) and Annex IV (summarizing the over 70 court or administrative challenges that the Project faced in Romania, filed by Alburnus Maior and other Romanian NGOs); Respondent's Rejoinder in the Arbitration, p. 323 *et seq.* (section 8.2.2.2) (referring to dozens of exhibits and expert evidence).

[170] Respondent's Counter-Memorial in the Arbitration, p. 106 *et seq.* (sections 5.2 and 5.11); Respondent's Rejoinder in the Arbitration, p. 330 *et seq.* (section 8.2.2.6) (referring to dozens of factual, witness and expert evidence).

event, the Tribunal majority's decision did not turn on the Respondent's social license arguments.[171]

111 Fifth, the Award does not refer to any of the Friends of the Earth entities.

112 In sum, the Applicants grossly overstate and misdescribe the role that the "Friends of the Earth" – whatever the entity – played in the underlying dispute as well its relevance to the claims and defenses in the Arbitration. They furthermore fail to explain how any reasonable person, having knowledge of the relevant facts and circumstances, could conclude that there was a likelihood of Prof. Douglas being influenced in the Arbitration on this basis, such as to raise justifiable doubts regarding his independence and impartiality.

Matrix Chambers' representation of ClientEarth

113 The Applicants refer to the representation of ClientEarth by Prof. Douglas' former co-tenants at Matrix Chambers, in yet another unrelated court case as an "aggravating factor" that "severely compromised […] the appearance of [Prof. Douglas'] independence and impartiality [in the Arbitration]".[172]

114 This argument is also manifestly void of any merit, not to say bewildering.

115 First, the factual context and legal issues in that case were unrelated to the Arbitration. That case was between ClientEarth *et al.* (represented by Prof. Douglas' former co-tenants) and the UK Government, before the UK High Court. At issue was the Government's climate change policies and Net Zero Strategy.[173] The proceedings had nothing to do with the Roșia Montană mining project.

116 ClientEarth *et al.* were granted permission in March 2022 to apply for judicial review of measures (themselves dated October 2021), with a

[171] Award, p. 348 *et seq.* (paras. 1310-1312) (noting in the causation section that the Parties had raised arguments in relation to social license which the Tribunal did not address for judicial economy).

[172] Memorial on Annulment, p. 19 *et seq.* (paras. 38, 40, 47, 48, and 50).

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

decision issued four months later, in July 2022.[174] At the time of that litigation, the Arbitration was at an advanced stage. Indeed, this was only a few months before the Respondent's last main submission (responding to Tribunal questions in September 2022).[175]

117 Second, as noted above and contrary to the Applicants' insinuations, ClientEarth was not an *amicus* to the Tribunal in the Arbitration.[176] Rather, together with other NGOs, ClientEarth assisted three *amici* in filing their submission to the Tribunal.[177] The Applicants' argument that this *amicus* submission shows that ClientEarth was "in strong opposition to Gabriel's claims" is thus incorrect.[178]

118 There was therefore no overlap in parties, factual or legal issues between the Arbitration and Matrix Chambers' ClientEarth case.

119 The Applicants speculate that i) Prof. Douglas would have known about his former co-tenants' acting for ClientEarth in that case, and ii) this would have led to "sharing legal knowledge and experience".[179]

120 The Applicants fail to explain – let alone demonstrate – how Prof. Douglas' former Matrix co-tenants' involvement in that case could have possibly provided Prof. Douglas with access to any information that was "likely to create an imbalance within the Tribunal" or cause Prof. Douglas to be influenced by factors other than the merits of the Arbitration.[180]

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[174] *Friends of the Earth, ClientEarth, Good Law Project and Joanna Wheatley v. Secretary of State for Business, Energy and Industrial Strategy*, [2022] EWHC 1841 (Admin), Judgment dated 18 July 2022, at **A-72**, p. 4 *et seq.* (paras. 16 and 21).

[175] Award, p. 70 *et seq.* (paras. 404 and 539).

[176] Memorial on Annulment, p. 26 (para. 46, see also para. 38(a)) (describing ClientEarth as "an NGO that made a Non-Disputing Parties' Submission in this arbitration"); see also para. 94 above.

[177] See Application and Amicus Curiae Submission from CIEL, ClientEarth, and ECCHR to Tribunal President dated 2 November 2018, at **A-145**, p. 1; Award, p. 45 *et seq.* (paras. 236 and 316).

[178] Memorial on Annulment, p. 22 *et seq.* (paras. 41 and 44). Similarly, it also does not serve to demonstrate an "alignment of interest" between Friends of the Earth and ClientEarth. Memorial on Annulment, p. 21 *et seq.* (para. 40).

[179] Memorial on Annulment, p. 20 *et seq.* (para. 39(a)) (referring to Matrix Chambers - Core Values, at **A-69**).

[180] See para. 79 above.

121 The fact that Prof. Douglas' co-counsel in the Friends of the Earth case was the same lawyer in the Client Earth case (where Friends of the Earth UK was a party), or that the two cases may have involved similar issues,[181] does not further the Applicants' claim in the absence of overlap **with the Arbitration**. Thus, no duty of loyalty can be said to have arisen which would give rise to justifiable doubts, let alone compromise Prof. Douglas' impartiality and independence in the Arbitration, as the Applicants wrongly state.[182]

122 Lastly, the Applicants complain that Prof. Douglas and Mr. Toby Fisher co-drafted in February 2023 an unrelated legal opinion on the legal requirement of a moratorium on deep sea mining under the United Nations Convention on the Law of the Sea commissioned by Pew Charitable Trusts. [183] As a result, according to the Applicants, Prof. Douglas "maintained a direct professional relationship" with Mr. Fisher, who is allegedly the spouse of ClientEarth's CEO.[184] Putting aside the fact that the Applicants have not provided any evidence that Prof. Douglas was even aware that Mr. Fisher was married or of his wife's position, the Applicants fail to explain how co-authoring a legal opinion on an issue unconnected to the Arbitration and to ClientEarth, for an unrelated party, could possibly entail a conflict of interest for Prof. Douglas, or give rise to any justifiable doubts regarding his independence and impartiality.

123 The Applicants further claim that under the ICSID Arbitration Rule 6(2) and IBA Guidelines, Prof. Douglas had an obligation to disclose "client advocacy" by his former co-tenants in the ClientEarth case.[185] Once again, as shown above, this situation did not amount to a conflict of interest or raise any justifiable doubts regarding Prof. Douglas' independence and impartiality. It also does not fall under the Red or Orange Lists of the 2014

[181] Memorial on Annulment, p. 20 (para. 38(b)).

[182] Memorial on Annulment, p. 29 *et seq*. (para. 56).

[183] *In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction*, Opinion dated 10 February 2023, at **A-102**; see also Seabed Mining Moratorium Is Legally Required by U.N. Treaty, Legal Experts Find, The Pew Charitable Trusts dated 26 September 2023, at **RA-30** (confirming that the legal opinion was commissioned by Pew Charitable Trusts).

[184] Memorial on Annulment, p. 21 (paras. 39(c)-(d)).

[185] Memorial on Annulment, p. 30 *et seq.* (paras. 59-67).

IBA Guidelines.[186] Therefore, Prof. Douglas was under no obligation to disclose his instruction in that separate case, in the Arbitration.[187]

124 Furthermore, the mere existence of a relationship in and of itself is also not sufficient – without further evaluation – to give rise to doubts regarding an arbitrator's ability to exercise independent and impartial judgment.[188] In the present case, an evaluation of the alleged relationships between Matrix Chambers and ClientEarth and between Prof. Douglas and Friends of the Earth show that this threshold has not been met.

4.1.2.2 Contacts with LALIVE through a public teaching program (MIDS) do not affect Prof. Douglas' independence and impartiality

125 The Applicants allege that the "undisclosed financial and material support" provided by LALIVE to "Prof. Douglas' MIDS Program" casts doubt on his independence and impartiality.[189] These allegations go beyond the pale.

126 It is public knowledge that Prof. Douglas has been involved with the MIDS Program for years – since well before his appointment to the Tribunal in November 2015.[190] Moreover, contrary to the Applicants' allegations,[191] LALIVE's support of the MIDS program has also been public for years.[192]

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[186] See para. 79 above.

[187] See paras. 95-99 above.

[188] See para. 69 above.

[189] Memorial on Annulment, p. 34 *et seq.* (section II.3). The MIDS Program is the Master in International Dispute Settlement program attached to the *Université de Genève* and the Graduate Institute of International and Development Studies in Geneva.

[190] Memorial on Annulment, p. 35 (para. 74) (faculty member and professor for the MIDS Program **since 2011**) and p. 40 (para. 89); MIDS Program Brochure 2012-2013, at **RA-31**, p. 5. The Applicants noted Prof. Douglas' involvement with the MIDS when ICSID proposed the appointment of Prof. Tercier. Letter from Claimants to ICSID Secretary-General dated 5 March 2018, at **A-6**, p. 2 (fn. 4).

[191] Memorial on Annulment, p. 40 *et seq.* (paras. 89, 92, and 93).

[192] MIDS website as of 16 September 2015, at **RA-32** (*i.e.*, from the time of Prof. Douglas' appointment to the Tribunal showing that the MIDS' annual reports and brochures have been published at least since 2010); MIDS Program Brochure 2015-2016, at **RA-33**, p. 10 *et seq.* (p. 18 and 20 of the PDF) (referring to internships provided by law firms including LALIVE, Prof. Lalive's lectures at the MIDS, as well as the LALIVE lecture). This information would also have been directly available to White & Case. MIDS Program Brochure 2015-2016, at **RA-**

For that reason alone, and the reasons that follow, the Applicants' complaints are untimely and improper.

127 The Applicants argue that Prof. Douglas "administers" the MIDS Program, of which he is a full-time faculty member and "in charge of its programming," such that this program is "the main platform for [Prof. Douglas'] academic and research activities".[193]

128 At the time of his appointment to the Tribunal in November 2015, Prof. Douglas had been on the MIDS faculty and a member of MIDS (and CIDS) committees for a few years (since 2011).[194] He became MIDS program director in September 2024, nearly six months after the Award was rendered.[195] However, this does not provide any evidence for the Applicants' argument that the MIDS is his "main platform."[196]

129 The Applicants further argue, without evidence, that LALIVE is the "principal partner and financial supporter of the institution and [MIDS] program."[197] LALIVE is proud to support the MIDS program and has done so for many years. It is, however, one of many partners and supporters.[198] The Graduate Institute has never described LALIVE as being its "principal partner," nor has LALIVE ever held itself out as such.

130 The Applicants refer to other circumstances, such as Prof. Pierre Lalive's role as dean of the *Université de Genève* and as professor at the MIDS,[199] which was years (1966 and 2008, respectively) before Prof. Douglas

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33, p. 3; MIDS Program Brochure 2018-2019, at **RA-34**, p. 3 (showing that Ms. Carolyn Lamm, partner at White & Case, sat on the MIDS advisory board).

[193] Memorial on Annulment, p. 34 *et seq.* (paras. 73 and 75).

[194] MIDS Program Brochure 2015-2016, at **RA-33**, p. 3 (p. 5 of the original); MIDS 2022-2023 Program Brochure, at **A-78**, p. 2.

[195] LinkedIn Announcement of Prof. Douglas's appointment as MIDS Program Director dated 27 September 2024, at **RA-35**. The Applicants wrongly suggest he became director earlier. See Memorial on Annulment, p. 35 (para. 75) (referring to MIDS Profile for Prof. Douglas, at **A-150** and MIDS 2022-2023 Program Brochure, at **A-78**).

[196] Memorial on Annulment, p. 34 *et seq.* (paras. 73, 75, 79, and 81) (also referring to the MIDS as his "principal platform" and "longtime platform").

[197] Memorial on Annulment, p. 34 *et seq.* (paras. 73, 76, 79, and 92) (also referring to LALIVE *inter alia as* "principal supporter of the MIDS program" and its "principal sponsor").

[198] See MIDS, Partners, at **RA-36**.

[199] Memorial on Annulment, p. 35 (para. 76).

joined the MIDS and was appointed to the Tribunal.[200] This fact thus has no relevance to Prof. Douglas or this Arbitration.

131 The other facts on which the Applicants rely do not create any "dependence for benefits or advantages."[201] They mainly refer to the "financial support" that is granted via scholarships and internships offered by LALIVE to MIDS students and graduates, which both the firm and the institution advertise publicly.[202] Since 2019, LALIVE has provided a scholarship to one student at the MIDS to cover tuition fees and living expenses for the duration of the program.[203] The Applicants disregard the fact that similar scholarships are provided to MIDS students by other law firms.[204] Nor is LALIVE alone in offering internships to MIDS graduates; White & Case along with many other firms do as well.[205]

132 The other ties between LALIVE and the MIDS program to which the Applicants point to suggest that Prof. Douglas is somehow dependent on LALIVE are equally absurd:

i) The LALIVE Lecture that the firm organises and co-hosts with the Graduate Institute,[206] has been delivered annually since 2007 by leading academics and practitioners with the goal of providing a "forum for intellectual reflection on recent developments in the interface between public and private international law". It is open to all members of the dispute resolution community.[207]

[200] See LALIVE, Professor Pierre Lalive, at **RA-37**.

[201] See fn. 98 above.

[202] Memorial on Annulment, p. 36 *et seq*. (paras. 77-78).

[203] LALIVE, About us - Academia, at **A-84**, Partnership MIDS & LALIVE, at **A-85**, CIDS Annual Report 2022, at **A-86**, p. 28.

[204] MIDS, Scholarships, at **RA-38**.

[205] MIDS 2022-2023 Program Brochure, at **A-78**, p. 11 (listing over 40 law firms including "White&Case (Frankfurt, Paris, Washington)").

[206] Memorial on Annulment, p. 36 (para. 77).

[207] LALIVE, About us - Academia, at **A-84**; LALIVE Announcement of first LALIVE Lecture dated 9 July 2007, at **RA-39**.

ii) The annual half-day seminar conducted by LALIVE for MIDS students regarding the practice of international arbitration[208] is one of many seminars (with external speakers) organised by the MIDS.[209]

133 The Applicants draw an untenable conclusion from the two propositions at paragraphs 127 and 129 above, namely that, as a result, while LALIVE did not provide any "direct compensation" to Prof. Douglas, it allegedly "contributed a material benefit" to him. They go on to say that "any reasonable third party would question whether Prof. Douglas might consciously or unconsciously be predisposed to rule in Respondent's favor or be influenced by factors other than the merits of the case."[210]

134 The Committee should see the Applicants' arguments for what they are: a **wild conspiracy theory** based on improper and unsupported insinuations.

135 The Applicants misportray LALIVE's support to the MIDS students as an "undisclosed commercial relationship" between LALIVE and Prof. Douglas and refer to the 2024 IBA Guidelines Non-waivable Red List.[211] No such relationship exists.

136 The only case on which the Applicants rely in support of their claim that "analogous undisclosed commercial relationship [have] led to the vacatur of arbitral awards" [212] is fundamentally different from the present circumstances.[213] The Applicants' comparison to the *Vento Motorcycles* case confirms that the standard to establish that an arbitrator "could be

[208] Memorial on Annulment, p. 36 (para. 77).

[209] MIDS 2022-2023 Program Brochure, at **A-78**, p. 9.

[210] Memorial on Annulment, p. 34 *et seq.* (paras. 73 and 86 respectively).

[211] Memorial on Annulment, p. 37 *et seq.* (para. 83).

[212] Memorial on Annulment, p. 38 *et seq.* (para. 84).

[213] *Vento Motorcycles v. Mexico,* Decision dated 4 February 2025, at **AL-57**, p. 1 *et seq.* (paras. 3, 10, 11, and 13) (this case involved several instances of direct communication, during the course of the underlying NAFTA arbitration, between Mexico's lead counsel and the Mexican nominee to the tribunal (Mr. Perezcano), in order to offer to, and then confirm the appointment of, Mr. Perezcano to future arbitration panels under different Mexican trade agreements. The Ontario Superior Court of Justice held that this conduct gave rise to a "reasonable apprehension of bias" as "Mr. Perezcano had an incentive to please Mexico" given that "Mexico [was] holding out the possibility of the appointments to the rosters during the arbitration").

influenced by factors other than the merits of the case"[214] is high and not met in the present case.

137 LALIVE's support of the MIDS program and its students – like that of other law firms – cannot be confused with any sort of relationship with one of its faculty members. The support provided by LALIVE to the MIDS students or in the co-hosting of the LALIVE lecture cannot amount to providing Prof. Douglas with an "incentive to please"[215] LALIVE or Romania.

138 In sum, the Applicants have failed to establish any circumstances that would give rise to a manifest lack of independence and impartiality on the part of Prof. Douglas.

139 It is normal for international law firms to provide support to teaching institutions, as also illustrated by White & Case's support of the Queen Mary University of London,[216] and the American University Center for International Commercial Arbitration[217] (where Prof. Grigera Naón serves as Director of the Center for International Commercial Arbitration).[218]

140 Separately, the Applicants further complain that Prof. Douglas failed to disclose his introduction (with Mr. Michael E. Schneider) of the LALIVE Lecture in 2022 and 2023, while he had disclosed his intention to attend

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

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

[216] Queen Mary University of London, Research (excerpts from various years), at **RA-40**, (showing that White & Case sponsored a survey on international arbitration in 2010, 2012, 2015, 2018, 2021 and 2025).

[217] American University Washington DC, Advisory Board dated 26 June 2025, at **RA-41**; American University Washington DC, 2021 Lecture dated 2 November 2021, at **RA-42** (showing that Ms. Carolyn Lamm, partner at White & Case, sits on the External Advisory Board of the Center for International Commercial Arbitration and delivered the 2021 annual lecture); American University Washington DC, Faculty, at **RA-43** (including Mr. Jonathan C. Hamilton, former White & Case partner); Mentorship Program of the American University, Washington, DC, at **RA-44** (including several of White & Case lawyers and former lawyers as mentors to students doing the LLM in International Arbitration and Business Law); Advisory Council of the American University, Washington, DC, at **RA-45** (Prof. Grigera Naón is on the faculty of the Business Law Program, and White & Case partner Rafael Roberti sits on the Advisory Council of that program).

[218] American University Washington DC, Facility Profile: Horacio Naón dated 26 June 2025, at **RA-46**.

the LALIVE Lecture and dinner in 2019.[219] Prof. Douglas' introductory comments at the LALIVE Lecture with Mr. Schneider cannot predispose him towards LALIVE (or Romania) in the Arbitration.[220] Mr. Schneider was never even involved in this case. The circumstances would not fall under either the Red or Orange Lists of the 2014 IBA Guidelines, and Prof. Douglas was not required to make any disclosures.[221]

141 In any event, when Prof. Douglas made the disclosure in 2019, the Applicants did not make any observations or complaints.[222] They do not explain why the situation would be any different in 2022 or 2023.

4.1.2.3 Prof. Douglas' acquisition of Swiss nationality is irrelevant

142 The Applicants complain that Prof. Douglas did not disclose that he acquired Swiss nationality in August 2023 (nor that he had applied or was intending to apply for it) and that this was only disclosed in the Award in March 2024.[223] The Applicants claim that they were not given the "opportunity to challenge the apparent lack of neutrality that resulted from having a Tribunal where the President shared nationality with only one of the party-appointed arbitrators". In their view, Prof. Douglas' acquisition of Swiss nationality "undermined the appearance of neutrality on (sic) the Tribunal".[224]

143 These arguments are unfounded and improper.

144 Neither the ICSID Convention, nor the ICSID Rules prohibits the president and co-arbitrator from sharing the same nationality. It is the concurrence

[219] Memorial on Annulment, p. 40 (paras. 90-91).

[220] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.4) the situation where "The arbitrator was a speaker, moderator, or organiser in one or more conferences […] with another arbitrator or counsel to the parties."). However, this would not even fall under this item in the Green List as Mr. Schneider never served as counsel in this case.

[221] Memorial on Annulment, p. 39 (para. 87); see para. 78 above.

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

[223] See Award, p. 100 (para. 553).

[224] Memorial on Annulment, p. 41 *et seq.* (paras. 99 and 95-96 respectively).

of nationality between a member of the tribunal and a party that is prohibited.[225]

145 The Applicants' quote from the ICSID 2024 Background Paper is misleading as they omit the phrase in bold below:

> "[t]hese [nationality] restrictions serve as a crucial safeguard against potential biases and conflicts of interest, **ensuring that committee members do not possess the same nationality as the disputing parties**, thereby maintaining the integrity and impartiality of the proceedings".[226]

146 The Applicants' statement that ICSID would not have appointed Prof. Tercier, a Swiss national, to the Tribunal in 2018 if Prof. Douglas had also been a Swiss national at the time, is pure speculation.[227] This is irrelevant in any event, given that – as noted above – there is no such rule, and that only the appointment of arbitrators of the same nationality as a party is avoided.

147 It is also unclear how Prof. Douglas' "application for and acquisition of Swiss nationality during the [A]rbitration" would create "the appearance of an imbalance to any reasonable third party".[228]

148 Furthermore, Prof. Douglas acquired Swiss nationality in August 2023, *i.e.*, nearly three years after the final hearing in this case and just one month before the Tribunal declared the proceedings closed.[229]

149 Moreover, the Applicants speculate that Prof. Douglas must have applied for Swiss citizenship or was intending to do so at the time of Prof. Tercier's appointment in 2018 but failed to make any related disclosure at the

[225] ICSID Convention Arts. 13(2), 38, 39, 52(3); ICSID Arbitration Rules 1(3), 3(1)(a)(i), 3(1)(b)(i) (referred to in Memorial on Annulment, p. 42 (para. 96).

[226] Memorial on Annulment, p. 42 (para. 97) (referring to ICSID Background Paper on Annulment 2024, at **AL-21**, p. 15 (para. 45).

[227] Memorial on Annulment, p. 43 (para. 99); see paras. 69-70 above.

[228] Memorial on Annulment, p. 43 (para. 99).

[229] Award, p. 95 (para. 548) (noting that the Tribunal formally declared the proceedings closed in accordance with ICSID Arbitration Rule 38(1) on 14 September 2023).

time.[230] However, at that time it was well known to all (including the Applicants) that Prof. Douglas had been a member of the faculty of the MIDS (in Geneva, Switzerland) since 2011.[231] The Applicants do not explain why acquiring Swiss citizenship in 2023 – as opposed to being based in Switzerland for over a decade – would have any influence on Prof. Douglas' decision-making in the Award, or pre-dispose him towards Prof. Tercier, LALIVE or Romania.

150 Accordingly, Prof. Douglas' acquisition of Swiss nationality in August 2023 does not amount to a manifest lack of independence and impartiality, nor was it a circumstance that he could have been expected to disclose.

4.1.3 Independence and impartiality of Prof. Tercier

151 The Applicants refer to Prof. Tercier's so-called "numerous one-sided connections with Prof. Douglas and with Respondent's Geneva-based counsel team" which allegedly caused the Applicants to "object" to Prof. Tercier's appointment in 2018, considering the allegedly "material imbalance among the members of the Tribunal and Parties, all to the side of the Respondent."[232]

152 In the Application, the Applicants characterized Prof. Tercier's alleged failure to disclosure these "connections" as a self-standing basis to argue that the Tribunal was improperly constituted under Article 52(1)(a).[233] They, however, no longer appear to consider these alleged connections a "critical […] defect[]" since they only mention them in passing in their Memorial.[234]

153 For the sake of completeness, the Respondent demonstrates how irrelevant and innocuous these so-called connections involving Profs. Tercier and Douglas (and LALIVE) are. Indeed, they could not possibly call into

[230] Memorial on Annulment, p. 41 (para. 95).

[231] Memorial on Annulment, p. 35 (para. 74); see also Letter from Respondent to ICSID dated 8 November 2015, at **RA-48** (setting out Prof. Douglas' contact details as "Matrix Chambers, 9 rue de Candolle, 1205 Geneva Switzerland").

[232] Memorial on Annulment, p. 3 *et seq.* (paras. 11 and 98).

[233] Annulment Application, p. 18 *et seq.* (paras. 62, 79 and 83-97).

[234] Memorial on Annulment, p. 1 *et seq.* (paras. 5, 11 and 98).

question his independence or impartiality (**Section 4.1.3.2**). Before doing so, the Respondent recalls that the Applicants did not seek to disqualify Prof. Tercier (or, as noted above, Prof. Douglas), nor raise any objection relating to these connections at any time after his appointment and throughout the Arbitration (**Section 4.1.3.1**).

4.1.3.1 The Applicants did not challenge Prof. Tercier's independence and impartiality in the Arbitration

154 The Applicants emphasize their "object[ion]" to Prof. Tercier's appointment in 2018.[235]

155 However, as the Respondent noted at the time, the Applicants' "comments relate[d] to the alleged 'advisability,' 'appropriateness' and 'suitability' of the appointment rather than Prof. Tercier's impartiality and independence" and could not serve as grounds for disqualification under Articles 14 and 57.[236]

156 Furthermore, the Applicants withdrew their objections before Prof. Tercier was appointed.[237] At no point did they challenge him during the proceedings.

157 The Applicants suggest that "proposing disqualification would have been futile in this case" and not have provided an "effective right of challenge" because of the ICSID Secretary-General's alleged involvement in the Chairman's decision on a disqualification proposal under Article 58 of the ICSID Convention.[238] These assertions are totally unsupported.[239]

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[235] Memorial on Annulment, p. 3 *et seq.* (paras. 11 and 98); Annulment Application, p. 15 *et seq.* (paras. 54-57 and 59).

[236] Letter from Respondent to ICSID dated 19 March 2018, at **RA-21**.

[237] Letter from Claimants to ICSID dated 29 March 2018 and Letter from ICSID to the Parties dated 30 March 2018, at **A-10**.

[238] Annulment Application, p. 18 (para. 59 and fn 42). The Applicants did not pursue this argument in the Memorial.

[239] The Applicants' own evidence specifically states that the Chairman of the Administrative Council, and not the ICSID Secretary-General, makes the appointment under Article 58. I. Shihata and A. Parra, "The Experience of the International Centre for Settlement of Investment Disputes", *ICSID Review—Foreign Investment Law Journal* (1999), at **AL-2**, p. 310 and p. 313;

158 Irrespective of why the Applicants chose not to challenge Prof. Tercier at the time of appointment or later during the Arbitration if they felt that they had cause to do so, the Applicants had access to a procedural remedy which they did not exercise. Two consequences ensue.

159 First, it is too late for the Applicants to now raise complaints regarding Prof. Tercier's appointment. Indeed, as noted above, if parties do not promptly raise issues which may give rise to reasonable doubts about an arbitrator's independence and impartiality, they are precluded from objecting later on.[240]

160 Furthermore, in the Application, the Applicants present a one-sided account of the procedure leading to Prof. Tercier's appointment and selectively rely on his disclosures at the time.[241] They also disregard the Respondent's correspondence, which had sought to set the record straight.[242] They gloss over the fact that following ICSID's proposal to

Participaciones v. Gabon, Decision on Proposal to Disqualify dated 12 November 2009, at **AL-3**, p. 1 (refiled with partial translation at **RAL-32**) (contrary to the Applicants' summary, the Secretary-General here communicated to the parties the decision of the Chairman); see also, *e.g.*, *VM Solar Jerez v. Spain*, Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil dated 24 July 2020, at **RAL-34**, p. 21 (para. 80) (noting that the Chairman always takes the final decision on a disqualification as required under Article 58).

[240] See para. 72 above.

[241] Contrast Annulment Application, p. 15 *et seq.* (paras. 53-55) with Letter from ICSID Secretary-General to Parties dated 26 February 2018, at **A-5**, p. 2 and with Letter from ICSID to Parties dated 8 March 2018, at **A-7** (showing, *e.g.*, that the Applicants emphasize that Prof. Tercier had a "personal connection" with Prof. Douglas and not Prof. Grigera Naón, although Prof. Tercier had sat on "several" cases with Prof. Grigera Naón (of which the Respondent was aware of three) but had never completed a case with Prof. Douglas. They also stress how Profs. Tercier and Douglas are on the same faculty, but disregard Prof. Tercier's clarifications that he teaches a short **four-day** Intensive Course on ICC arbitration. They also fail to mention that the case Prof. Tercier had arbitrated involving a Romanian State company had **ended** in 2016. Moreover, the Applicants emphasize that "no one on [Applicants'] counsel team has served with Prof. Tercier as an arbitrator" and "as a peer in confidential deliberations" and point to cases on which he sat with either Mr. Scherer or Mr. Schneider, although Prof. Tercier noted that these cases terminated in 1993 and 2012).

[242] Letter from Respondent to ICSID dated 5 March 2018, at **RA-19** (noting that "the Respondent has no observations to make regarding the proposal"); Email from Respondent to ICSID dated 16 March 2018, at **RA-20**; Letter from Respondent to ICSID dated 19 March 2018, at **RA-21** (noting that the Applicants comment on the alleged "advisability," "appropriateness" and "suitability" of Prof. Tercier's appointment rather than his impartiality and independence and that they had not complained about the same procedure previously being followed to appoint Ms. Lucy Reed); Letter from Respondent to ICSID dated 29 March 2018, at **RA-22**.

appoint Prof. Tercier, the Applicants made three rounds of comments, after which they acknowledged the ICSID Secretary-General's letter informing the Parties of his decision to proceed with the appointment of Prof. Tercier.[243] The Tribunal was thus reconstituted on 5 April 2018.[244]

161 Second, it follows from the circumstances above that it is now also too late for the Applicants to rely on facts over which they had actual or constructive knowledge already at the time.[245] Such is, however, the case of most of the facts about which the Applicants complain and which are addressed in the following section.

4.1.3.2 The so-called connections involving Prof. Tercier do not amount to any circumstance that could affect his independence and impartiality

162 The Applicants refer to purported connections that Prof. Tercier was not required and could not have been expected to disclose as they could not possibly have impacted his independence and impartiality.[246]

163 The purported connections at issue are commonplace in the world of international arbitration, which requires academic and scientific cooperation. The Applicants indeed acknowledge that "interaction among specialists in the field may be expected"[247] and, as the *Suez v. Argentina* tribunal held, arbitrators share a variety of connections:

> "Arbitrators are not disembodied spirits dwelling on Mars, who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world,

[243] Letter from Claimants to ICSID dated 29 March 2018 and Letter from ICSID to the Parties dated 30 March 2018, at **A-10**.

[244] Letter from ICSID to the Parties dated 5 April 2018, at **A-11**.

[245] See paras. 71-73 above.

[246] Annulment Application, p. 28 *et seq.* (para. 83).

[247] Annulment Application, p. 27 (para. 80).

> **arbitrators have a variety of complex connections with all sorts of persons and institutions**."[248]

164 In this regard, the inclusion of certain situations that an arbitrator need not disclose in the IBA Guidelines (in the Green List) demonstrates that some situations are so frequent in the arbitration community that it is worth confirming that no appearance or actual conflict of interest exists.[249]

165 The first set of "connections" on which the Applicants rely, arise out of the purported "business relationships" between Profs. Tercier and Douglas and LALIVE in the context of the MIDS program.[250] No such business relationship exists. Prof. Tercier has taught a course on ICC arbitration and been involved with the MIDS in different capacities since its inception in 2008.[251] This involvement does not create a business relationship with either Prof. Douglas or LALIVE.

166 The MIDS program is addressed in Section 4.1.2.2 above as regards Prof. Douglas. In relation to the comments specifically regarding Prof. Tercier,[252] the Respondent has the following additional observations:

i) The MIDS faculty comprises over 30 individuals, including from law firms specialized in international arbitration and arbitral institutions such as the ICC and ICSID.[253] The undated webpage excerpt produced by the Applicants lists Prof. Tercier among the visiting professors.[254] Teaching in the same faculty does not create any appearance or actual conflict of interest.[255]

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[248] *Suez et al. v. Argentina*, Decision on Second Proposal to Disqualify dated 12 May 2008, at **RAL-21**, p. 18 (para. 32) (emphasis added).

[249] 2014 IBA Guidelines, at **RAL-31**, p. 19 (para. 7); see para. 78 above.

[250] Annulment Application, p. 28 *et seq.* (para. 83).

[251] *E.g.*, MIDS Program Brochure 2012-2013, at **RA-31**, p. 8.

[252] Annulment Application, p. 28 *et seq.* (para. 83(a)-(c)).

[253] MIDS, Faculty, at **RA-49** (including fourteen partners in law firms specialized in international arbitration and four faculty from top institutions, including the ICC and ICSID).

[254] MIDS Faculty, at **A-47**, p. 2 *et seq.*

[255] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.3) the situation where "The arbitrator teaches in the same faculty or school as another arbitrator").

ii) As is common for cases of this size and nature, Prof. Tercier proposed the appointment of Ms. Maria Athanasiou, one of his associates, as assistant to the Tribunal.[256] Her CV, circulated to the Parties at the time, stated that she had graduated from the MIDS in 2011, *i.e.*, seven years earlier.[257] This does not assist the Applicants' argument that there are "business relationships" between Profs. Tercier, Douglas and LALIVE. Being a graduate of an academic program does not create a special relationship with the faculty or supporters of that program. In any event, the Applicants did not object to the appointment of Ms. Athanasiou, nor did they raise any complaints subsequently.[258]

iii) To "suggest a degree of consistent collaboration" among faculty members, the Applicants refer to a one-hour panel featuring Profs. Tercier and Douglas (as well as Prof. Bermann during a one-day conference in September 2018.[259] This type of academic collaboration cannot be indicative of any "business relationship" between them.[260]

167 Second, the Applicants refer to "professional connections" between Prof. Tercier and LALIVE in the context of ASA (Swiss Arbitration Association) and the ASA Bulletin, its publication.[261] The Applicants are not serious:

i) Prof. Tercier's involvement with ASA and that of LALIVE lawyers is and has always been public, and was known to the Applicants, who expressly referred to this connection in their letter of 5 March 2018.[262]

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[256] Annulment Application, p. 29 (para. 83(b)).

[257] Letter from Tribunal to Parties, enclosing CV of Ms. Athanasiou dated 14 April 2018, at **A-12**, p. 6.

[258] See Annulment Application, p. 29 (fn. 89).

[259] Annulment Application, p. 29 (para. 83(c)).

[260] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.4) the situation where "The arbitrator was a speaker, moderator, or organiser in one or more conferences […] with another arbitrator or counsel to the parties.").

[261] Annulment Application, p. 31 *et seq.* (paras. 84-85).

[262] Letter from Claimants to ICSID Secretary-General dated 5 March 2018, at **A-6**, p. 2 (fn. 4); see also Annulment Application, p. 16 (para. 54(iii)).

In any event, being a member of the same professional association does not create any appearance or actual conflict of interest.[263]

ii) The Applicants note that Prof. Tercier was "a long-standing member of the Board of Directors of ASA" and that he "did not disclose the extent of his professional connections to LALIVE partners though [*sic*] the activities of the ASA or the ASA Bulletin."[264] If Prof. Tercier did not disclose it, it is probably because these circumstances need not be disclosed and cannot affect an arbitrator's independence and impartiality. ASA, like all leading organisations in the field, is eminently international:

> "The Swiss Arbitration Association (ASA, Association Suisse de l'Arbitrage) is an association with over 1000 members in Switzerland and all over the world. ASA is Switzerland's leading arbitration organisation and brings together the world's most eminent arbitration practitioners from six continents and 50+ jurisdictions."[265]

iii) So is the ASA board. Prof Tercier's involvement or that of LALIVE partners in ASA or its publication (the ASA Bulletin) is normal and innocuous for conflict purposes.

iv) In any event, serving as an "officer of the same professional association" does not create any appearance or actual conflict of interest.[266]

v) Prof. Tercier has been a "regular contributor to [ASA's] conferences and publications" over the years, alongside hundreds of academics and practitioners. Papers presented at the ASA annual conference and *ad*

[263] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.1) the situation where "The arbitrator has a relationship with […] the counsel for one of the parties, through membership in the same professional association").

[264] Annulment Application, p. 32 (para. 85).

[265] Swiss Arbitration Association, Overview, at **RA-50**.

[266] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (item 4.3.3).

hoc arbitration brochures are readily available to the public through the ASA Special Series,[267] including the Applicants.[268]

vi) The ASA Bulletin's Advisory Board, of which Prof. Tercier is a member, does not intervene in the editorial process and has no real function at this stage, certainly not in relation to "operational" tasks. It is more of a legacy, than expecting or receiving any actual contribution. This should be obvious from the names of other Advisory Board members, including Prof. Dr. Franz Kellerhals, Prof. François Knoepfler, Dr. Werner Wenger, and Dr. Matthieu de Boisséson, most of whom are retired. In any event, being on the same editorial board of an academic journal is not relevant for conflict purposes.[269]

168 Third, the Applicants describe the purportedly "strong connections" between Prof. Tercier and the founding members of LALIVE and the "camaraderie and personal and professional interconnection among Prof. Tercier, Prof. Douglas, and LALIVE".[270] Again, the Applicants blow these elements out of proportion :

i) To mark its 50th anniversary, in 2011, ICCA hosted a conference in Geneva, Switzerland, which brought together academics and practitioners from around the world, including one of ICCA's first members (Prof. Pierre Lalive) and one of the co-chairs of the ICCA 50 Organizing Committee (Prof. Tercier).[271] All of this was public and Prof. Lalive was never involved in the Arbitration, having passed away long before its commencement.

ii) The *Liber Amicorium* published in 2015 in honor of then LALIVE partner Mr. Schneider's 75th birthday, contains 30 chapters (of which Prof. Tercier wrote one), which naturally describe the person honored "in warm terms" as is typical for this type of publication.[272] In any

[267] Swiss Arbitration Association, ASA Special Series, at **RA-51**.

[268] *E.g.*, ASA Special Series No. 38 (ASA 2011 Annual Conference), at **A-45**.

[269] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (item 4.3.3).

[270] Annulment Application, p. 32 *et seq.* (paras. 86-87 and 89-90).

[271] ICCA, ICCA Geneva 2011 - 50th Anniversary Conference, at **RA-52**.

[272] Flyer for Stories from the Hearing Room: Experience from Arbitral Practice, at **RA-53** (noting that the essays celebrate "a leading – indeed iconic – figure", whose "creativity and

event, as noted above, Mr. Schneider has never been involved in this case.

iii) Prof. Tercier continued to teach "some classes" at the University of Fribourg after June 2008. He does not appear on the website of the Institute for International Business Law, in the context of which LALIVE Partners Mr. Schneider and Dr. Bernd Ehle have, since 2012, delivered a lecture on construction contracts, at the LALIVE offices in Geneva and not at the University of Fribourg.[273] They have not interacted with Prof. Tercier in the context of this program. In any event, neither has been involved in this case.

iv) Prof. Tercier judged the final round of the Frankfurt Investment Arbitration Moot Competition in March 2021 with Mr. Schneider. As noted above, no conflict arises from this type of academic collaboration.[274] This will all the more be the case where a moot competition is involved.

v) The Applicants describe the "kinship" between Profs. Tercier and Douglas by referring to a one-time donation the former purportedly made in 2019 (with over 1000 other "friends, godmothers and godfathers") to the charitable foundation of which the latter's wife is purportedly a member of the board and which was aimed at promoting local biodiversity and traditional farming methods.[275] Even if true, such a donation does not evidence a kinship with anyone or show anything other than support of a charitable cause unrelated to this Arbitration.[276]

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dedication […] have inspired, and continue to inspire, arbitration practitioners around the world" and highlight "Michael's boundless energy, creative thinking, and questioning of conventional ideas").

[273] Letter from ICSID to the Parties dated 5 April 2018, at **A-11**, p. 7; University of Fribourg, IBL Teaching Staff, at **RA-54**.

[274] At most, judging a mock arbitration competition may be considered analogous to the Green List (item 4.3.4) situation where "The arbitrator was a speaker, moderator, or organiser in one or more conferences […] with another arbitrator or counsel to the parties." - 2014 IBA Guidelines, at **RAL-31**, p. 26.

[275] Fondation Opaline Activity Report for 2019, at **A-97**, p. 6 and 8 (unofficial translation).

[276] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.1) the situation where "The arbitrator has a relationship with another arbitrator […] through membership in the same […] charitable organisation").

vi) The celebration of Prof. Tercier's 80th birthday during half a day in May 2023 was a public event.[277] The organizing committee comprised over twenty people and another twenty addressed the audience, in person or via video, as the Applicants' evidence shows.[278] Neither LALIVE representative involved in the organization of the event – Ms. Catherine Kunz (LALIVE partner) and Ms. Trisha Mitra-Veber (a LALIVE associate from 2021-2024, based in London) – was ever involved in the Arbitration.[279]

vii) Contrary to the Applicants' suggestion, Ms. Nhu-Hoang Tran Thang, a former LALIVE associate, was never involved in the Arbitration.[280] Whether Ms. Tran Thang "liked" LinkedIn posts relating to the Award does not demonstrate any "personal and professional interconnection" between Prof. Tercier and LALIVE. In the Linkedin environment, to "like" a post is the equivalent of a nodding in a conference room when hearing news that sounds interesting. Since these reactions cannot generate any effects in a natural social environment, they cannot generate effects in a virtual, social media environment.

169 Fourth, the Applicants complain that Prof. Tercier has "overwhelmingly" decided investor-State cases in favor of State parties.[281] However, the Applicants had already complained about Prof. Tercier's prior cases and track record at the time of his appointment and yet did not challenge him, for indeed there was no basis to do so, also in light of his comments at the time (which they disregard in their Application).[282] They cannot do so now.

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[277] CIDS, Celebration of the 80th birthday of Professor Pierre Tercier, at **RA-55**.

[278] N. Tran Thang LinkedIn Post regarding Birthday event, at **A-49**; Event flyer for Celebration of 80th Birthday of Professor Pierre Tercier for May 12, 2023, at **A-48**.

[279] See 2014 IBA Guidelines, at **RAL-31**, p. 26 (including on the Green List (item 4.3.4) the situation where "The arbitrator […] participated in […] working parties of a professional, social […] organisation, with another arbitrator or counsel to the parties.").

[280] Annulment Application, p. 34 (para. 90).

[281] Annulment Application, p. 35 (paras. 92-94). The Applicants also raised this argument in relation to Prof. Douglas (at para. 95) but no longer do so in the Memorial. The Respondent's arguments in response to Prof. Tercier apply *mutatis mutandis*.

[282] Letter from ICSID to Parties dated 8 March 2018, at **A-7**, p. 3 (conveying Prof. Tercier's explanation that "I do not consider that decisions rendered in investment arbitration cases have to represent an equal proportion of victory and loss for investors and States. I make my decision

170 Fifth, the Applicants refer to an UNCITRAL case in which Profs. Tercier and Douglas have apparently served as arbitrators since 2020.[283] This case is unrelated to the present dispute. It relates to "claims arising out of the [Ukrainian] State authorities' alleged actions to freeze the claimants' acquisition of shares in aerospace company Motor Sich", a "manufacturer of aircraft engines.[284] Moreover, nothing prevented Profs. Tercier and Douglas from accepting those appointments and they had no obligation to disclose them to the parties in this Arbitration.[285] Their appointments were furthermore reported at the time.[286]

171 The facts above speak for themselves. They amount to nothing more than hot air and do not begin to represent elements that could call into doubt Prof. Tercier's independence and impartiality, let alone in a manifest way. **Zero plus zero remains zero**.[287]

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172 In sum, none of the circumstances that the Applicants raise suggest a lack of independence and impartiality on the part of Profs. Tercier and Douglas

in every case based on the facts of the case and the applicable law, and not with statistical considerations in mind. Moreover, the statistics quoted by [Applicants] are not representative, given that I only acted in a limited number of investment arbitration proceedings. In any event, most of the awards rendered by arbitral tribunals I was a member of were taken unanimously.").

[283] Annulment Application, p. 33 (para. 88). The status of this case is unclear. The last information added to the JusMundi website is the Request for Arbitration of December 2020.

[284] UN Trade and Development, *Wang and others v. Ukraine* (2020), at **RA-56**; *Wang Jing v. Ukraine*, PCA (UNCITRAL), registered Dec. 5, 2020, at **A-94** (noting that this dispute opposes Chinese and Ukrainian parties in the aviation industry. The arbitration is administered by the PCA, and seated in the Hague, governed by the UNCITRAL Arbitration Rules. The law applicable is the China-Ukraine 1992 BIT).

[285] Under the 2014 IBA Guidelines, Profs Tercier and Douglas had no obligation to disclose their concurrent appointment to **one** case during the course of the Arbitration. 2014 IBA Guidelines, at **RAL-31**, p. 21 ("d[id] not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal" and that this was to be considered for disclosure on a case-by-case basis only where there was such frequency, of the two arbitrators serving together, as to create a perceived imbalance within the tribunal.).

[286] D. Charlotin, "Pierre Tercier is tapped to chair under-the-radar UNCITRAL BIT arbitration brought by Chinese claimants", *IA Reporter*, 22 Feb. 2022, at **RA-57**.

[287] See *Electrabel S.A. v. Hungary*, Decision on the Claimant's Proposal to Disqualify a Member of the Tribunal, ICSID Case No. ARB/07/19, 25 February 2008, at **RAL-33**, p. 10 (para. 39).

(let alone demonstrate it manifestly). The Applicants have not established facts that make it evident and highly probable (and not merely possible), that Profs. Tercier and Douglas could not be relied upon to render an independent and impartial decision, nor have they demonstrated that either arbitrator was influenced by factors other than the merits of the case. Furthermore, the Applicants either i) raised and withdrew, or ii) could have raised, most of these objections or concerns during the Arbitration and thus waived the right to do so later on, including as a basis for annulment.

173 In conclusion, the Applicants' request to annul the Award on the basis of Article 52(1)(a) is void of merit and must be rejected.

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

174 The Applicants request the annulment of the Award based on purportedly "serious departures from the fundamental rules of procedure that are necessary to ensure a fair process" pursuant to Article 52(1)(d).[288] As also explained in Section 5.2 below, this ground has "a high standard for its acceptance".[289]

175 The Applicants quote the principle set out in *Eiser v. Spain* that the right to be heard by an independent tribunal is a fundamental rule of procedure.[290] They state that the "lack of a reliably independent and impartial tribunal" will also lead to a "serious departure from the fundamental right to be heard" and a failure to afford "equal treatment of the parties."[291]

176 It is undisputed that the "right to be heard" and the principle of equal treatment of the parties amount to fundamental rules of procedure.[292] However, it is also undisputed that under Article 52(1)(d) the applicant

[288] Memorial on Annulment, p. 44 *et seq.* (paras. 103-110); see also Annulment Application, p. 36 *et seq.* (paras. 98-105).

[289] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of Nov. 2, 2015, at **AL-77**, p. 131 (para. 569).

[290] Memorial on Annulment, p. 45 (para. 106).

[291] Memorial on Annulment, p. 44 (paras. 104, 107 and 108).

[292] See ICSID Background Paper on Annulment 2024, at **AL-21**, p. 90 *et seq.* (paras. 104-105).

must show a "departure" from those rules, which was "serious".[293] Yet, the Applicants fail to make that showing, for indeed there was no such departure.

177 The Applicants allege that the "same circumstances" which allegedly show that the "Tribunal majority including Prof. Douglas" [294] lacked independence and impartiality "necessarily [amount to] a serious departure from the fundamental right to be heard" and "also denied [Applicants] equal treatment".[295] As demonstrated in Section 4.1 above, the Tribunal did not lack these qualities, such that the premise for the Applicants' claim under Article 52(1)(d) must, in turn, also fail.[296]

178 The Applicants have not shown any separate basis for a "departure" from these principles.[297] In any event, the Applicants' right to be heard and treated fairly were not encroached upon in the Arbitration. In fact, they were afforded multiple opportunities to present their case, leading the Respondent on several occasions to raise due process concerns and to reserve its rights under Article 52 of the ICSID Convention.[298]

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[293] Memorial on Annulment, p. 45 (para. 105); *Eiser v. Spain,* Annulment Decision dated 11 June 2020, at **AL-18** p. 83 (para. 238).

[294] The Applicants' argument was initially made with regard to Profs. Tercier and Douglas but only maintained in the Memorial with regards to Prof. Douglas. Contrast Annulment Application, p. 37 (para. 102) with Memorial on Annulment, p. 46 (para. 109).

[295] Memorial on Annulment, p. 1 *et seq.* (paras. 6 and 107-108); Annulment Application, p. 37 (para. 99).

[296] See *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 127 (para. 423) ("the Applicant's attack of Mr Fortier and Judge Keith under Article 52(1)(d) fails because of the rejection of its assertions under Article 52(1)(a). Independence and impartiality of both arbitrators are beyond the reach of the attacks that have been mounted."), see also p. 129 (para. 426).

[297] As addressed in Section 5.2 below, the Applicants also seek annulment of **portions** of the Award on the basis of Article 52(1)(d), and have developed in that context their arguments of a breach of their right to be heard and to equal treatment.

[298] Letter from Respondent to Tribunal dated 26 September 2019, at **RA-58**; Letter from Respondent to Tribunal dated 19 November 2019, at **RA-59** (referring also to Letter from Respondent to Tribunal dated 16 October 2019, at **RA-60**); Letter from Respondent to Tribunal dated 24 April 2020, at **RA-61**; Letter from Respondent to Tribunal dated 29 April 2020, at **RA-62**; Letter from Respondent to Tribunal dated 1 October 2020, at **RA-63**; Letter from Respondent to Tribunal dated 4 October 2020, at **RA-64**; Letter from Respondent to Tribunal dated 30 October 2020, at **RA-65**; Letter from Respondent to Tribunal dated 26 August 2021,

179 To the extent there was, in their view, a serious violation of procedural rules during the Arbitration as a result of a lack of independence and impartiality of the Tribunal (*quod non*), the Applicants should have raised that at the time, in accordance with ICSID Arbitration Rule 27. They did not and thus waived the right to do so now.[299]

180 The Applicants *a fortiori* must prove that the departure from the fundamental rule of procedure was "serious". *Ad hoc* committees have considered whether the departure was "such as to deprive a party of the benefit or protection which the rule was intended to provide"[300] and the impact of this departure on the tribunal's decision.[301]

181 The Applicants have failed to demonstrate that the departure was so "serious" as to "produce[] a **material impact** on the award".[302] They seek to minimize this point in the Memorial, noting the *Perenco v. Ecuador ad hoc* committee's statement that the departure from the fundamental rule of

at **RA-66**; Letter from Respondent to Tribunal dated 14 September 2021, at **RA-67**; Respondent's Second Post-Hearing Brief in the Arbitration dated 23 April 2021, p. 107 (para. 219); Respondent's Response to Claimants' Observations on New Exhibits dated 6 December 2021, p. 17 (para. 51); Respondent's Submission on Costs in the Arbitration dated 16 December 2022, p. 7 (fn. 22); see also Procedural Order No. 30 dated 28 April 2020, at **RA-68**, p. 5 (para. 19); Procedural Order No. 34 dated 22 October 2020, at **RA-69**, p. 6 (para. 37); Procedural Order No. 35 dated 30 September 2021, at **RA-70**, p. 5 (para. 33).

[299] *Victor Pey Casado v. Chile (I)*, Decision on the Application for Annulment of the Republic of Chile, ICSID Case No. ARB/98/2, at **AL-11**, p. 36 (para. 82) ("Pursuant to ICSID Arbitration Rules 27 and 53, a party may lose its right to object on the ground of a serious departure from a fundamental rule of procedure if it has failed to raise its objection to the tribunal's procedure upon becoming aware of it, or 'promptly' as mentioned in Rule 27"); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021, at **AL-58**, p. 31 (paras. 139-141).

[300] See, *e.g.*, *MINE v. Guinea*, ICSID Case No. ARB/84/4, Decision on the Application for Partial Annulment of the Arbitral Award dated 6 January 1988, at **AL-1,** p. 104 (para. 5.05); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of Feb. 5, 2002, at **AL-72**, p. 16 (para. 58).

[301] See, *e.g.*, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment of Feb. 21, 2014, at **AL-67**, p. 18 (para. 99); *Perenco v. Ecuador,* Decision on Annulment dated 28 May 2021, at **AL-58**, p. 29 (para. 133); *Victor Pey Casado v. Chile (I),* Decision on Annulment dated 18 December 2012, at **AL-11**, p. 35 (para. 80); *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 33 *et seq.* (paras. 129-130).

[302] Annulment Application, p. 38 (para. 103) (emphasis added) (relying on *Eiser v. Spain,* Annulment Decision dated 11 June 2020, at **AL-18**, p. 88 (paras. 252 and 254)).

procedure need not be outcome-determinative but the movant must show that the departure could have led to a "*potentially* different" decision.[303]

182 According to that *ad hoc* committee, however, applicants have "the burden to demonstrate that there is a distinct possibility that **the departure may have made a difference on a critical issue of the Tribunal's decision**."[304] In other words, the Applicants would have to show (but did not) that there was a distinct possibility that the Tribunal would "reach a result substantially different from what it would have awarded had such a rule been observed".[305]

183 In support of their position that the alleged lack of independence and impartiality of the "Tribunal majority including Prof. Douglas" "undoubtedly may have had material impacts on the Award", the Applicants refer to Prof. Grigera Naón's dissent.[306]

184 However, there is nothing in the dissent to suggest, even indirectly, any lack of independence and impartiality on the part of Prof. Douglas (or of Prof. Tercier), nor that such alleged lack of independence and impartiality had "material impacts on the Award". The dissent solely addresses the manner in which the Tribunal majority applied the law to the facts, something which falls outside the scope of Article 52(1)(d) (and Article 52(1)(b) as discussed below).

185 In conclusion, the Applicants' request to annul the Award on the basis of Article 52(1)(d) is void of merit and must be rejected.

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[303] Memorial on Annulment, p. 45 (para. 105) (emphasis in original) (relying on *Perenco v. Ecuador,* Decision on Annulment dated 28 May 2021, at **AL-58**, p. 29 (para. 133)).

[304] *Perenco v. Ecuador,* Decision on Annulment dated 28 May 2021, at **AL-58**, p. 30 (para. 137) (emphasis added).

[305] *Wena Hotels v. Egypt,* Decision on Annulment dated 5 February 2002, at **AL-72**, p. 16 (para. 58); see also *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment of Dec. 30, 2015, at **AL-59**, p. 24 (para. 78); *Enron Creditors Recovery Corp. and Ponderosa Assets LP v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of July 30, 2010, at **AL-66**, p. 23 (para. 71).

[306] Annulment Application, p. 38 (para. 104); Memorial on Annulment, p. 46 (para. 109).

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

186 The Applicants request in the alternative that the Committee annul the "part of the Award issued by majority – that is, the part addressing the merit of Gabriel's claims and the part (based on that liability ruling) awarding costs to Respondent".[307] They invoke three grounds: manifest excess of power, serious departure from fundamental rules of procedure, and failure to state reasons (Articles 52(1)(b), (d) and (e)).

187 As shown below, the Applicants' arguments are without merit and their application for partial annulment therefore stands to be denied.

5.1 The Tribunal Majority Did Not Manifestly Exceed Its Powers

188 The Applicants claim that the Tribunal majority "manifestly exceeded its powers by failing to apply the applicable law" pursuant to Article 52(1)(b), which they state covers the situations where the tribunal (i) failed to apply the applicable rules of law pursuant to Article 42(1), (ii) correctly identified the applicable laws, but failed to apply them, or (iii) decided the dispute *ex aequo et bono* without the parties' agreement under Article 42(3).[308] This case does not fall within any of these situations.

189 The Respondent demonstrates below that the Applicants did not accurately set out the legal standard under Article 52(1)(b) (**Section 5.1.1**). It recalls the laws applicable to this dispute (**Section 5.1.2**) and notes that the Award was not a decision *ex aequo et bono* (**Section 5.1.3**). As explained in **Section 5.1.4**, the Committee should dismiss the claim that the Tribunal majority failed to apply the applicable law in this case.

[307] The Applicants request the annulment of the following paragraphs of the Award: paras. 767-1357 and 1358.2, except for paras. 1183-1185, 1220-1223, and 1358.1. Memorial on Annulment, p. 47 (paras. 111-112 and fn. 156).

[308] Memorial on Annulment, p. 54 (paras. 132-133, 135, and 137).

5.1.1 The legal standard for "manifest excess of powers" does not allow a committee to substitute the tribunal's interpretation of the applicable law with its own or that of one of the parties

190 Rather than properly engaging with the legal difficulties of their application, the Applicants argue that a manifest excess of power "does not need to 'leap out of the page on a first reading of the award'".[309]

191 However, the threshold is high. The Applicants must show an excess of powers that is "manifest",[310] which refers to "how readily apparent the excess is".[311] It is well established that the term "manifest" means "obvious, clear or self-evident".[312] As the *Wena Hotels v. Egypt* annulment committee stated:

> "[t]he excess of power **must be self-evident** rather than **the product of elaborate interpretations** one way or the other. When the latter happens the excess of power is no longer manifest."[313]

192 Constructing such "elaborate interpretations" is, however, exactly what the Applicants have done. They also wrongly request that the Committee "conduct its own substantive analysis"[314] and ignore the "consensus of *ad*

[309] Memorial on Annulment, p. 55 (para. 134) (quoting *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 70 *et seq.* (para. 193)).

[310] *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Application for Annulment of Mar. 20, 2023, at **AL-68**, p. 37 (para. 129) ("The term '*manifest'* is treated as a high threshold to reinforce the primary principle that annulment is not a procedure by which parties may relitigate prior legal arguments, supplemented or not by post-Award arguments, evidence and/or authorities. It is a narrow and limited remedy available for review of procedural aspects of the decision-making process, based on five identified grounds.").

[311] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 70 (para. 192); see also BIICL Baker Botts Report, at **RAL-27**, p. 31.

[312] See *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 19 (para. 77) ("plain on its face, evident, obvious, or clear."); *Soufraki v. UAE,* Decision on Annulment dated 5 June 2007, at **AL-60**, p. 19 *et seq*. (paras. 39-40) ("at once […] textually obvious and substantively serious"); ICSID Background Paper on Annulment 2024, at **AL-21**, p. 85 (para. 89, fns. 168-169).

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

[314] Memorial on Annulment, p. 55 (para. 134).

hoc committees" (including within the legal authorities that they rely on) that "a **plausible**, **debatable** or otherwise **tenable** decision escapes annulment".[315]

193 While an annulment committee may go beyond the tribunal's "own description of what it is doing",[316] in the words of the *EDF v. Argentina* committee, it may not "reopen[] debates on questions of fact" and must simply "check whether it could come to [the] solution [adopted by the tribunal], **however debatable**." That committee agreed with prior committees that a "debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest'."[317] While an annulment committee can examine the factual and legal elements on which a tribunal based its decision, the tribunal remains "the judge of the admissibility of any evidence adduced and of its probative value".[318] Moreover, a tribunal does **not** fail to apply the law merely by virtue of not having ruled

[315] *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 46 (para. 200) (emphasis added) ("the reprehensible excess of powers should not give rise to discussion. Hence the consensus of *ad hoc* committees is that a plausible, debatable or otherwise tenable decision escapes annulment. It follows that there is general agreement that errors of law are not deficiencies for Article 52(1)(b) purposes."); see also *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 29 (para. 114); *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, Decision of the Ad Hoc Committee, ICSID Case No. ARB/03/28, 1 March 2011, at **CLA-311**, p. 32 (para. 99).

[316] Memorial on Annulment, p. 55 (para. 134) (quoting C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 48 (p. 1306 of the original) (para. 310)).

[317] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 70 (para. 193) (quoting with approval *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, Decision of the Ad Hoc Committee, ICSID Case No. ARB/03/28, 1 March 2011, at **CLA-311**, p. 32 (para. 99)) (emphasis added); see also, *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 19 (para. 77) ("Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other', is not manifest. […] 'If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive'.") (emphasis in original).

[318] *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 29 (para. 114) (referring *inter alia* to ICSID Arbitration Rule 34); see also *Soufraki v. UAE,* Decision on Annulment dated 5 June 2007, at **AL-60**, p. 41 *et seq.* (para. 87) ("[…] failure to apply the proper law must also be distinguished from failure to apply the proper law to the true or correct facts.").

separately on **every** argument of law or point of fact, provided it decided the questions put to it in line with Article 48(3) of the ICSID Convention.[319]

194 A solution is "debatable" where it is supported by reasonable arguments, even if other points of view would also have been possible, some of which a party or committee may even have found more compelling or accurate.[320]

195 There is a difference – which the Applicants ignore – between "*non-application* of the applicable law (which is a ground for annulment), and an *incorrect application* of the applicable law (which is not)."[321] When assessing a claim under Article 51(1)(b), annulment committees have remained cautious to distinguish a departure from the applicable law, from an error in the application or interpretation of that law.[322] Undisputedly, such errors cannot form the basis of annulment[323] (absent a gross or egregious error of law, as the Applicants accept but have not claimed).[324]

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[319] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 129 (para. 346).

[320] *CMS Gas Transmission Company v. Argentine Republic*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, 25 September 2007, at **RLA-190**, p. 36 (para. 136) ("[…] the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal."); *Caratube v. Kazakhstan,* Decision on Annulment dated 21 February 2014, at **AL-67**, p. 28 (para. 144).

[321] *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 22 (para. 68) (emphasis in original).

[322] *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 22 *et seq.* (paras. 68 and 219-220); *Rasia FZE and Joseph K. Borkowski v. Republic of Armenia,* Decision on Annulment, ICSID Case No. ARB/18/28, 5 November 2024, at **RAL-35**, p. 21 (para. 88).

[323] See *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 52 (para. 220) ("The Committee cannot accept any suggestion that where a tribunal errs in articulating or applying the applicable law, it thereby ultimately fails to apply the applicable law and thus manifestly exceeds its powers. Such an argument, if accepted, and even if confined to cases where an error of law by the tribunal is manifest, would obliterate the distinction which an annulment committee is required carefully to maintain between non-application of the applicable law and alleged error in applying the applicable law. An error of law, like an error of fact, is not of itself a ground of annulment."); see also ICSID Background Paper on Annulment 2024, at **AL-21**, p. 8 *et seq.* (paras. 22 and 96) (recalling the rejection of a proposal during the drafting of the ICSID Convention to include such a ground of annulment).

[324] Memorial on Annulment, p. 56 (para. 138).

In addition, annulment committees have been mindful not to step in the shoes of the tribunal and to act as an appellate court.[325]

196 In sum, provided the Tribunal issued a tenable decision on the basis of the applicable law, which it did as explained in Section 5.1 (and in Section 5.3 addressing the claim of a failure to state reasons), the Committee cannot second-guess the legal and factual findings in the Award. It must dismiss the Applicants' request to annul the Award pursuant to Article 52(1)(b).

5.1.2 The Tribunal majority correctly identified the applicable law

197 An ICSID tribunal may exceed the scope of its authority if it fails to apply (or derogates from) the rules on applicable law pursuant to Article 42(1) of the ICSID Convention.[326] This requires as a first step that the tribunal identify the applicable law. In this case, it is undisputed and noted in the Award that the Tribunal was required to apply:[327]

i) the Canada-Romania BIT and "applicable rules of international law" to Gabriel Canada's claims; and,

ii) the UK-Romania BIT and, in the absence of a choice of law clause, "Romanian law and such rules of international law as may be applicable" to Gabriel Jersey's claims.

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[325] *E.g.*, *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 22 (para. 69) ("Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal […]"), and p. 91 *et seq.* (para. 220) ("in circumstances where it has not been established that the tribunal failed to apply the applicable law, there will normally be **no occasion** for an *ad hoc* committee **to enquire whether or not the tribunal** may have **erred** in its articulation or application of the applicable law, or whether the tribunal may have made an error of fact.") (emphasis added); *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 281 (para. 779); *Fraport Airport v. the Philippes*, Decision on the Application for Annulment, ICSID Case No. ARB/03/25, 23 December 2010, at **CLA-28**, p. 44 (para. 112); *Amco Asia Corporation and others v. Republic of Indonesia*, Ad hoc Committee Decision on the Application for Annulment, ICSID Case No. ARB/81/1, 16 May 1986, at **RAL-36**, p. 6 (para. 23).

[326] Memorial on Annulment, p. 54 (para. 133); *MINE v. Guinea*, Decision on Partial Annulment dated 6 January 1988, at **AL-1**, p. 104 (para. 5.03); *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 28 (para. 110).

[327] Award, p. 106 *et seq.* (paras. 562-565); Memorial on Annulment, p. 57 (paras. 140-141 first paragraph).

198 The Tribunal also noted the relevance of Romanian law "to determine, where appropriate, the scope and extent of the rights and obligations of the Parties".[328]

199 Separately, it is undisputed that the Tribunal did not have a mandate to decide the dispute *ex aequo et bono*.[329]

200 The Applicants take issue with the Tribunal majority's statement that "it is adjudicating the present case **under international law**; as such, its mandate is not to review the merits of a State's decision by reference to the applicable domestic law".[330] However, this statement does not imply that the Tribunal majority did not consider the Romanian legal framework surrounding the impugned acts and omissions on the part of the Respondent.

201 Rather, the Tribunal majority was recalling the well-established principle that ICSID tribunals are not to serve as appellate courts reviewing the merits of a State's decision under domestic law.[331] They are to assess the claims under international law, but by reference to domestic law.[332] Similarly, annulment committees do not act as appellate courts to review the manner in which domestic law was applied.[333]

202 The Applicants argue that the assessment of Romanian law was "essential" or "necessary" to decide the merits of the treaty claims,[334] and that the

[328] Award, p. 107 (para. 566); Memorial on Annulment, p. 58 (para. 141 second paragraph).

[329] See Section 5.1.3 below.

[330] Memorial on Annulment, p. 62 (para. 149) (quoting Award, p. 201 (para. 945) (emphasis in original)).

[331] *E.g.*, *Awdi v. Romania,* Award dated 2 March 2015, at **CLA-76**, p. 87 (para. 327) ("As stated by an investment treaty tribunal, '[a]n ICSID Tribunal will not act as an instance to review matters of domestic law in the manner of a court of higher instance.").

[332] See, *e.g.*, *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 94 (para. 319) ("The Committee finds that, **in spite of referring to and applying domestic law** in the instances above, the Tribunal ultimately found liability under international law **on the basis of an international law analysis**. The Committee considers that, contrary to Guatemala's contentions, the Tribunal did not equate domestic law with international law, but carefully distinguished between the two.") (emphasis added).

[333] See para. 53 above.

[334] Memorial on Annulment, p. 63 *et seq.* (paras. 154, 160, 172, and 175).

Tribunal majority's alleged failure to apply Romanian law "made it impossible to apply the standards of treatment set out in the BITs."[335]

203 However, it was undisputed in the Arbitration that Romanian law was relevant to and governed issues relating to the "existence or scope" of the Applicants' property rights and the permitting process,[336] to refer to Prof. Douglas' treatise that the Applicants quote.[337] Furthermore, as noted above, the Tribunal recognized the relevance of Romanian law to assess the Parties' rights and obligations.

204 The role accorded by tribunals to international law and domestic law in resolving the dispute has been discussed in past cases, including in the *Enron v. Argentina* annulment decision on which the Applicants rely to note that a tribunal cannot merely identify the applicable law (in that instance customary international law), but must also apply it.[338]

205 For present purposes, the more useful portion of that decision is where the committee assessed whether the tribunal had applied the applicable (in that case international) law in the context of the tribunal's findings on Argentina's breach of the FET standard. It noted that Argentine law was only relevant "as a matter of *fact*" to the finding whether the regulatory framework included guarantees on which the claimants had relied when making their investment.[339] According to another annulment committee (which the Applicants also quote):

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[335] Memorial on Annulment, p. 58 *et seq.* (paras. 142-145 and 149-151).

[336] See Section 5.1.4 below.

[337] Memorial on Annulment, p. 60 *et seq.* (paras. 146 and 154) (quoting Z. Douglas, The International Law of Investment Claims. 2010, CUP, at **AL-69**, p. 6 *et seq.* (paras. 113-114) (noting that "nonfeasance in deciding the law applicable to issues relating to the existence or scope of the bundle of rights comprising the investment" affects the assessment of an alleged violation of international law)) and p. 60 (para. 147) (also quoting **AL-69**, p. 3 *et seq.* (para. 95) (commenting on the *MTD v. Chile* decision that "the Tribunal should have applied Chilean law to those questions which were necessary for its determination and of which Chilean law was the governing law.")).

[338] See Memorial on Annulment, p. 56 (para. 137).

[339] *Enron Creditors Recovery Corp. et al. v. Argentina*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic dated 30 July 2010, at **AL-10**, p. 97 (para. 231) (emphasis in original); see also **AL-10**, p. 94 *et seq.* (paras. 227- 232) (noting specifically at para. 231 that "[t]hese paragraphs contain no reference to any liability on the part

> "In every case it will be seen on analysis that either the provisions of internal law are relevant **as facts in applying the applicable international standard**, or else that **they are actually incorporated in some form**, conditionally or unconditionally, **into that standard**."[340]

206 The Applicants have not made any such demonstration.

207 While the Respondent addresses the Tribunal majority's application of Romanian law and international law in more detail in Sections 5.1.4.1 and 5.1.4.2, it makes the following remarks on the Applicants' comments regarding the BIT standards.

208 **In relation to FET**, the Applicants allege that the Tribunal majority did not define "what it means by arbitrary" and argue (without providing any support) that "it is impossible" to apply the standard "without addressing the legal framework within which the conduct was taken and/or the nature and scope of the rights and obligations alleged to be at issue".[341]

209 The Applicants disregard the Tribunal majority's explanations regarding its interpretation of the FET standards under the two BITs, which both cover the question "whether the State acted arbitrarily".[342] Relying on the *Cargill v. Mexico* award, the Tribunal majority expressly indicated that "**non-arbitrariness** […] require[s] due process to be followed at all times when the investor is present in the host State", a "simple error" would in principle not be sufficient to establish a breach, and "[u]ltimately, what matters is an objective assessment of the facts in a particular case."[343] That tribunal had noted that arbitrariness may lead to a breach "only when the

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of Argentina under Argentine law. There is no suggestion that the finding of liability for breach of the [FET] clause of the BIT was premised on any finding that Argentina was in breach of, or liable to the Claimants […] under Argentine domestic law.").

[340] Memorial on Annulment, p. 61 (para. 148) (quoting *Venezuela Holdings, B.V. et al. v. Venezuela*, Decision on Annulment dated 9 March 2017, at **AL-71**, p. 68 (para. 181) (emphasis added)).

[341] Memorial on Annulment, p. 59 (para. 144), see also p. 58 (para. 142, fn. 187) (referring to the extensive legal opinions submitted in the Arbitration addressing Romanian law).

[342] Award, p. 179 *et seq.* (paras. 851-860).

[343] Award, p. 180 (para. 854) (emphasis added).

State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure."[344]

210 **In relation to expropriation**, the Applicants argue that the Tribunal failed "to consider the conditions established in law under which the [Applicants] were entitled to use and enjoy their investments".[345] However, the paragraph of the Award to which the Applicants cite[346] is part of the Tribunal majority's presentation of the principles of expropriation, including the contours of an indirect expropriation.[347] One of the relevant factors is the "effect" or "degree of impact" of "the measure(s)," which includes an assessment of the domestic legal framework, as shown by the case law cited by the Tribunal majority.[348] Moreover, the Award contains references to the question whether the "process […] would be […] in accordance with the law."[349]

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

211 According to the Applicants, the Tribunal majority wrongly decided the dispute "based on equitable considerations".[350] They argue that a tribunal

[344] *Cargill, Incorporated v. United Mexican States*, Award, ICSID Case No. ARB(AF)/05/2, 18 September 2009, at **CLA-163**, p. 82 (paras. 292-293), see also **CLA-163**, p. 81 (para. 291) (quoting the ICJ's ELSI case, where it stated that "Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law."); see also, *e.g.*, *OI European Group B.V. v. Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/11/25, 10 March 2015, at **RLA-178**, p. 106 (para. 494); *Parkerings-Compagniet AS v. Republic of Lithuania*, Award, ICSID Case No. ARB/05/08, 11 September 2007, at **CLA-270**, p. 67 (para. 315) ("[FET] is denied when the investor is treated in such an unjust or arbitrary manner that the treatment is unacceptable from an international law point of view. Indeed, many tribunals have stated that not every breach of an agreement or of domestic law amounts to a violation of a treaty.").

[345] Memorial on Annulment, p. 59 *et seq.* (paras. 145 and 149).

[346] Memorial on Annulment, p. 59 (para. 145) (referring to Award, p. 198 (para. 931)).

[347] Award, p. 192 *et seq.* (paras. 910-938, notably paras. 929-930).

[348] Award, p. 198 (paras. 930-931) (referring to *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/99/6, 12 April 2002, at **CLA-83**, p. 26 (para. 107) and quoting from *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, 29 May 2003, at **CLA-122**, p. 43 (para. 114); see also **CLA-122**, p. 45 (para. 117).

[349] Award, p. 201 (paras. 944); see also p. 210 (para. 958) (finding "no evidence […] that actual steps were taken to interfere unlawfully").

[350] Memorial on Annulment, p. 76 (para. 187).

fails to apply the law when it decides based on "equitable, economic, or political considerations" rather than the law agreed by the parties.[351]

212 Commentators have underlined the high threshold required for a successful claim that the tribunal's decision is *ex aequo et bono*:

> "an unauthorized decision *ex aequo et bono* should not be assumed lightly. As long as the tribunal identifies the applicable law correctly and strives to apply it, it is impossible to conclude that the tribunal has disregarded the law for the sake of equity. Nor does a tribunal necessarily decide *ex aequo et bono* if it does not cite detailed legal authority for a particular finding. Also, not every reference to equity in a tribunal reasoning indicates that it has decided *ex aequo et bono*."[352]

213 Moreover, the mere "invocation of equitable considerations is **not** properly regarded as **automatically** equivalent to a decision *ex aequo et bono*" and the context of the tribunal's conclusions and findings is key.[353]

214 The Applicants rely on a few selected paragraphs of the Award taken out of context to argue that these are "notable indications" that "the majority decided the case based on its own subjective notions of equity rather than the law".[354] The Applicants' claim is without any merit.

215 Far from suggesting any "invocation of equitable considerations"[355] by the Tribunal majority, the identified paragraphs of the Award,[356] when read in

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[351] Memorial on Annulment, p. 55 (paras. 135-136) and p. 75 *et seq.* (paras. 186-188).

[352] C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 46 *et seq.* (p. 1303 *et seq.* of the original) (paras. 297, 304-306 and 309-310); see also *Victor Pey Casado v. Chile (I),* Decision on Annulment dated 18 December 2012, at **AL-11**, p. 165 (para. 341) ("There is not a scintilla of evidence that allows Chile, confronted with an Award of 233 pages (in the French version) and a detailed analysis by the Tribunal of the many complex factual and legal issues of which it was seized by the parties, to argue that the Tribunal issued an ex aequo et bono decision. The Award is not an *ex aequo* et bono decision and the Respondent's request is dismissed.").

[353] *Amco v. Indonesia,* Ad hoc Committee Decision on the Application for Annulment, dated 16 May 1986, at **RAL-36**, p. 6 *et seq.* (paras. 25 and 28) (emphasis added).

[354] Memorial on Annulment, p. 75 *et seq.* (para. 186, fns. 246-250).

[355] See fn. 353 above.

[356] Memorial on Annulment, p. 75 *et seq.* (fns. 246-250).

context, show that the Tribunal majority evaluated the facts and applied the applicable law.[357]

216 Accordingly, the Tribunal applied legal standards throughout the Award. There is no basis for the Applicants' argument that the Tribunal decided the dispute *ex aequo et bono* and the Applicants failed to discharge their burden of proof in that regard.

5.1.4 The Applicants invoke a purported failure to apply the applicable law where they disagree with the Tribunal majority's interpretation and application of the law

217 The Applicants complain that the Tribunal majority "failed to apply the applicable BIT standards" to what they describe as "foundational aspects of any liability determination under international law" in relation to issues under Romanian law[358] as well as "in several other respects".[359]

218 The Applicants' position is not tenable; their criticisms are simply aimed – improperly – at revisiting the Award.

[357] *E.g.*, Award, p. 158 *et seq.* (paras. 783-785) (setting out the factual context, prior to the assessment of the principal claim in the following section B.IV.3), p. 264 *et seq.* (paras. 1074 and 1090) (setting out some of the factual analysis regarding the cultural heritage issues under the principal claim, to which the applicable law is applied at para. 1092), p. 304 (para. 1143) (setting out one of the factual analysis regarding the "Draft Law" issue under the principal claim, followed by the application of the applicable law at para. 1148), p. 309 *et seq.* (paras. 1166-1167) (concluding on the principal claim after applying the applicable law to the facts), p. 316 (para. 1196) (setting out the factual context regarding the first alternative claim, followed by the application of the applicable law at paras. 1199-1200), p. 328 *et seq.* (paras. 1236-1238, 1240-1241, 1245, and 1269) (setting out some of the factual analysis regarding the second alternative claim, followed by the application of the applicable law at paras. 1306-1307), p. 349 (para. 1312) (setting out ancillary factual analyses, following the rejection of the second alternative claim based on the applicable law at paras. 1306-1307), and p. 350 *et seq.* (paras. 1319-1320) (overall conclusion on liability following references in preceding paragraphs to the applicable law in the determination of liability, *e.g.*, at paras. 1092, 1166, 1199, 1306 and 1307).

[358] Memorial on Annulment, p. 62 *et seq.* (paras. 150-176), see also p. 58 (para. 142).

[359] Memorial on Annulment, p. 72 *et seq.* (paras. 177-185). Previously, the Applicants addressed this issue under the heading "The Majority disregarded the Applicable International Law". Annulment Application, p. 45 *et seq.* (paras. 125-143).

5.1.4.1 The Tribunal majority's assessment of liability took into account the applicable Romanian legal framework

219 According to the Applicants, the Award "suffers from fundamental defects mandating annulment"[360] because the Tribunal majority purportedly failed to consider the applicable Romanian legal framework when assessing liability under international law.

220 More specifically, the Applicants refer to (i) their and RMGC's contractual rights, (ii) the environmental permitting process, (iii) the Bucium Applications, and (iv) the UNESCO designation.[361]

221 These complaints have no basis. As noted above, the Applicants have not demonstrated how the applicable treaty standards "required [the] analysis" whether the State had "interfered" with the Applicants' contractual rights and "conduct[ed] the permitting procedure in accordance with […] the law regulating the EIA process".[362] The below sections address in turn the Applicants' three arguments.

The Tribunal majority did not disregard the Applicants' and RMGC's contractual rights under Romanian law

222 The Applicants argue that the Tribunal majority failed to apply Romanian law to "assess []", "determine", or "analys[e]" the Applicants' and RMGC's contractual rights in the context of its assessment of the principal claim.[363] Those rights arose under the relevant contracts governed by Romanian law (namely Gabriel's shareholder agreement with Romania as

[360] Memorial on Annulment, p. 47 (para. 111).

[361] Memorial on Annulment, p. 62 *et seq.* (paras. 150-176).

[362] Memorial on Annulment, p. 63 (paras. 154 and 170), see also p. 64 *et seq.* (paras. 160, 172 and 175) (referring to the "essential" and "necessary" "steps" of the analysis which the Applicants allege are lacking).

[363] Memorial on Annulment, p. 63 *et seq.* (paras. 152, 154, 155, and 158). In section III.B.2.a of the Memorial, the Applicants refer to four paragraphs of the Award which deal with their principal claim. Award, p. 202 *et seq.* (paras. 947, 951, 954, and 955).

"embodied in RMGC's Articles of Association", the Roșia Montană License held by RMGC), as the Award describes.[364]

223 To the extent they can be understood, the Applicants' flawed arguments must be dismissed for the following reasons.

224 First, the Applicants had relied on these contracts in support of Gabriel Jersey's claim that Romania had entered into obligations (which it allegedly failed to observe) with regard to Gabriel Jersey's investment. The Tribunal majority addressed these arguments when analyzing Gabriel Jersey's umbrella clause claim under the UK-Romania BIT.[365]

225 In the present proceedings, the Applicants do not invoke an alleged disregard of their contractual rights in the context of the umbrella clause, but rather in relation to their principal claim.[366] At the heart of that claim were the Roșia Montană License negotiations in 2011, which the Award sets out in detail.[367]

226 The Applicants now allege that the Tribunal majority's analysis of this claim started from a "point of departure" that some "economic issues" were "outstanding" and thus ignored the Applicants' "established contract rights".[368] Yet, the Applicants do not identify any statutory provision or contractual clause that the Tribunal majority disregarded. On the contrary, they elsewhere admit that the Tribunal majority "recognized […] the

[364] Memorial on Annulment, p. 63 *et seq.* (paras. 153 and 157) (referring to Award, p. 202 (para. 947)); see also Award, p. 3 *et seq.* (paras. 4 and 9-16) (noting for instance that the License was extended during the course of the Arbitration and "therefore is still in force").

[365] Award, p. 189 *et seq.* (paras. 897-909) (relying on Article 2 (2) of the UK-Romania BIT and noting for instance that "this is not a case of simple commercial breach of contract, but of the State's repudiation of the very agreements themselves, which is a most fundamental failure to observe obligations", for which it quoted the Applicants' first post-hearing brief).

[366] Memorial on Annulment, p. 63 (para. 152).

[367] Award, p. 26 *et seq.* (paras. 119-149 and 946-960) (notably para. 946 where the issue under dispute is identified as "the renegotiation by the Parties of the economic terms of the Project"). The Applicants do not contest this description of the issue under dispute.

[368] Annulment Application, p. 41 *et seq.* (para. 116), Memorial on Annulment, p. 64 (paras. 157-159).

economics were established in the State's existing agreements with Gabriel".[369]

227 Second, the Applicants argue that the contracts at issue did not contain any provision to the effect that something "remained to be decided" and that "economic issues […] remained to be established."[370] This is non-sensical. When parties **re**negotiate contractual terms, including the level of royalties or shareholding, they by definition discuss issues that were previously "established".

228 Third, the Applicants disregard the Tribunal majority's description of the negotiations in 2011. The record of the Arbitration showed that the Applicants were engaged in the negotiations and did not object at the time; that conduct demonstrated the parties' understanding that the negotiations were permissible and consistent with the applicable legal regime and the contractual instruments in force.[371]

229 The Tribunal majority also considered the events that followed these negotiations, including discussions in 2013,[372] and found that the permitting for the Project had continued to progress, irrespective of the outcome of the negotiations.[373] That finding implies that, for the Tribunal majority, the contractual framework (including the Licenses and joint venture arrangement) remained operative and served as the legal basis upon which the Project continued.[374] It follows that the Tribunal majority took into consideration the content and effect of those agreements.

230 Contrary to the Applicants' argument, the Tribunal majority thus did not disregard the Applicants' contractual rights. Rather, it assessed the Respondent's conduct in light of those rights and concluded that the Project continued to advance despite the failure of the negotiations.

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[369] Annulment Application, p. 53 (para. 152).

[370] Memorial on Annulment, p. 63 *et seq.* (paras. 152, 155 and 158-159).

[371] Award, p. 26 *et seq.* (paras. 119-149); see also Award, p. 26 (para. 120, fn. 159) (noting that the royalty under the License was amended to 4% in 2009).

[372] Award, p. 32 *et seq.* (paras. 154-159, 958 second bullet, and 1098-1120).

[373] Award, p. 241 *et seq.* (paras. 990-992, 1003-1009, 1029-1031, and 1059-1065).

[374] Award, p. 305 *et seq.* (paras. 1147, 1167, 1227, and 1239). The extension of the License in 2019 would similarly have made no sense if the contractual rights had been trampled upon.

231 The Tribunal majority's decision thus far exceeds the threshold of a "plausible" or "tenable" decision in the manner it considered Romanian law and the Applicants' contractual rights. It follows that no portion of the Award stands to be annulled on this basis.

The Tribunal majority did not disregard Romanian law in relation to the EIA Process

232 The Applicants argue that the Tribunal majority failed to consider the legal requirements for the EIA Process (with regard to both the procedure and the outcome) when considering their claim that Romania "abandoned the administrative process due to political considerations lacking any basis in law."[375] They complain that the Tribunal majority did not "give effect" to Romania's obligations to carry out the EIA Process in compliance with the "law regulating the EIA process".[376] For the Applicants, this purported failure "impacted [the Tribunal majority's] resolution of all the claims in the case."[377]

233 These arguments again do not withstand the most basic scrutiny.

234 First, the Applicants acknowledge that the Tribunal majority described the EIA Process, including the applicable "specific procedures and legal requirements" that the Parties' Romanian law experts also addressed.[378]

235 The Award indeed sets out the legal framework that the Parties agreed was applicable. The EIA Process is described **over some 70 pages**, including the purpose and scope of the TAC's assessment of the Project and EIA Report, thus providing the legal framework in which the TAC met between 2010 and 2015.[379]

[375] Memorial on Annulment, p. 67 (para. 168).

[376] Memorial on Annulment, p. 71 (para. 173); see also Memorial on Annulment, p. 67 (para. 169) (alleging that the Tribunal majority preferred to address the claims considering their "proper [political] context" rather than considering "the applicable legal requirements for permitting").

[377] Memorial on Annulment, p. 67 *et seq.* (paras. 168-170 and 173).

[378] Memorial on Annulment, p. 65 *et seq.* (paras. 161-167, fns. 43 and 100) (referring to the Applicants' legal expert's two opinions on the EIA Process).

[379] Award, p. 7 *et seq.* (paras. 18-118, 961-1094, and 1227-1244).

236 The Tribunal majority also noted that:

i) The EIA Process was not confined to environmental concerns but also considered social, cultural heritage and economic aspects.[380]

ii) The scope of the EIA Process expanded when Romania acceded to the European Union in 2007. RMGC was thus required to demonstrate that the Project complied with not only Romanian law, but also EU law.[381]

237 Second, the Award describes permits and other technical requirements for an EIA assessment under Romanian law,[382] including for example:

i) **The water management permit:** as the Tribunal majority noted, this permit was required under the Romanian Water Law and the broader European Water Framework Directive.[383] The Tribunal majority assessed whether the Respondent's concerns relating to this permit were genuine or made with "the effect of derailing the environmental permitting process."[384] It found "nothing objectionable, from the perspective of international law, in relation to the proceedings or to Respondent's part with respect to the Water Framework Directive issue."[385]

ii) **The Waste Management Plan**: as the Tribunal majority noted, the Ministry of Environment and NAMR approved RMGC's updated plan.[386] For the Tribunal majority, the authorities had made reasonable requests with regard to this plan and there was no evidence of any abuse or unjustified delay on the part of Romania.[387]

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[380] Award, p. 212 *et seq.* (paras. 962-964).

[381] Award, p. 8 *et seq.* (paras. 19-20 and 783-784) (noting that "[t]he concession for the project was granted in 1998, but with Romania's accession to the EU in 2007, and while the EIA Process was ongoing, all EU legislation had to be adopted and transposed into Romanian law. This meant that the EIA Process had to be carried out not only under Romanian law, but also within a legal framework that was consistent with EU requirements and standards"), and p. 212 (paras. 962-964).

[382] Award, p. 240 *et seq.* (paras. 983 to 1094).

[383] Award, p. 243 *et seq.* (paras. 999-1015).

[384] Award, p. 250 (paras. 1011-1012).

[385] Award, p. 251 (para. 1015).

[386] Award, p. 241 (para. 991) (noting that "[b]oth NAMR and the Ministry of Environment approved the plan in April and on 7 May 2013.").

[387] Award, p. 15 *et seq.* (paras. 56-63 and 985-998, notably paras. 987 and 997).

238 Third, the Tribunal majority assessed whether the Respondent's concerns regarding other aspects of the Project were genuine and found no evidence that due process had been violated or that the Respondent had handled the EIA Process unreasonably. For instance:

i) The Tribunal majority found that discussions within the TAC about urbanism plans and certificates were not unreasonable.[388] It noted that NGOs had challenged these plans and certificates before Romanian courts, which eventually annulled them based on environmental concerns. Here again, the Tribunal majority found no evidence that the Respondent's handling of the urbanism plans and certificates was politically motivated or unduly interfered with the EIA Process.[389]

ii) The endorsement of the Project by the Ministry of Culture was a prerequisite for the environmental permit and therefore discussed in TAC meetings.[390] In its analysis of this issue, the Tribunal majority implicitly considered the applicable Romanian legal provisions, as set out in detail by the Parties and their experts. The Tribunal majority concluded that the Ministry of Culture had followed appropriate procedures, many stakeholders had raised genuine concerns at the time, and there was no misconduct related to the Ministry of Culture's approval.[391]

239 Fourth, the Applicants argue that the Tribunal majority's alleged failure to consider Romanian law – and in turn "apply the treaty standards requiring

[388] Award, p. 256 *et seq.* (para. 1036).

[389] Award, p. 256 *et seq.* (paras. 1033-1040).

[390] Award, p. 13 *et seq.* (paras. 44-47 and 1078). Another cultural heritage issue that was discussed in TAC meetings related to the archaeological discharge certificates (ADCs) that were issued by the Minister of Culture and which RMGC needed to obtain to remove the legal protections afforded to the archaeological site. Award, p. 19 *et seq.* (para. 80), see also p. 258 *et seq.* (paras. 1041-1056).

[391] Award, p. 265 (para. 1079) (quoting the Minister of Culture's point of view which refers to the applicable Romanian law provisions) and p. 267 (paras. 1083-1084). Similarly, it is implicit from the Award that the Tribunal majority considered Romanian law in relation to the ADCs. Award, p. 19 *et seq.* (paras. 80-113) (setting out the archaeological research and studies RMGC was required to carry out under the License, the procedure prescribed by Romanian law to obtain ADCs, and their legal nature and effects, with references to the Applicants' Romanian law expert reports and witness evidence).

that analysis" – was "evident at every stage of the majority's analysis."[392] However, the Tribunal majority considered "whether the allegedly politicized treatment of RMGC's application for permitting [of the Project] was a measure that resulted in breaches of the […] BITs."[393] To do so, it first established the factual basis of the Respondent's actions, including the relevant Romanian legal framework governing the EIA Process.[394] It then assessed whether the process had been subject to undue political influence. It follows that even though the Tribunal majority may not have explicitly named each relevant Romanian legal provision, it considered the Romanian legal framework.

240 Fifth, the Applicants argue that the Tribunal majority did not assess "the relevance to the process of the fact that the environmental permitting procedure was never completed and no decision was ever issued."[395]

241 However, for the Tribunal majority, a key question was whether the TAC procedure "was conducted professionally and in a manner that took into account the scale, complexity, gravity, and sensitivity of the Project and without evidence of egregious delay or negligence such that the derailment of the process would be inevitable, whether intentional or not."[396]

242 The Tribunal majority furthermore concluded that there was no evidence that all "matters were resolved" such that "Romania should have issued the Environmental Permit but did not".[397]

[392] Memorial on Annulment, p. 68 *et seq.* (para. 170(a)-(c)).

[393] Award, p. 155 (paras. 767).

[394] See, *e.g.*, Award, p. 158 (para. 783 and fn. 43) (referring to the Applicants' Romanian law expert opinions).

[395] Memorial on Annulment, p. 70 (para. 171).

[396] Award, p. 238 *et seq.* (para. 978).

[397] Award, p. 239 *et seq.* (para. 981) ("noting that "based on the record before it, the Tribunal cannot conclude that the 29 November 2011 meeting was the last TAC meeting, that matters were resolved at that time, and that Romania should have issued the Environmental Permit but did not. Nor can it point to any impropriety, intentional or otherwise, on the part of the State during this and the subsequent meetings."); see also Award, p. 328 (para. 1235) (noting that "certain issues remained unresolved" at the time of the 2014-2015 TAC meetings).

243 Sixth, the Applicants are not complaining about the non-application of the applicable law but what they consider is an erroneous application of Romanian law, which is disputed and not a ground for annulment.[398]

244 To conclude, the Tribunal majority considered the Romanian laws governing an EIA Process and their decision in this respect far exceeds the threshold of a "plausible" or "tenable" decision. No portion of the Award thus stands to be annulled on this basis.

The Tribunal majority did not disregard Romanian law in relation to the Bucium Applications

245 The Applicants point to the alleged absence of (i) "reference to the law that governed the Bucium license application procedure or indeed to any law" in the Award and of (ii) "legal basis for the lack of a decision by NAMR."[399] They argue that the Tribunal majority did not "consider the law that established the conditions" nor the "applicable process" "pursuant to which [NAMR] was to act" on these applications.[400] These arguments do not withstand scrutiny.

246 First, contrary to the Applicants' allegations, the Bucium Applications were not only addressed in "three short paragraphs and a conclusion" in the Award, but also in the description of the facts of the case.[401]

247 Second, the Applicants do not identify in the Memorial any statutory provision that the Tribunal majority allegedly disregarded in its analysis of the Bucium Applications.

[398] *E.g.*, Memorial on Annulment, p. 69 (para. 170(b)) (arguing that the Tribunal majority did not address the question whether the alleged "deferral" of the decision-making to Parliament in 2013 "was reconcilable with the law applicable to the permitting process").

[399] Memorial on Annulment, p. 72 (para. 176).

[400] Memorial on Annulment, p. 71 *et seq.* (paras. 175-176).

[401] Award, p. 6 *et seq.* (paras. 17, 195-198, and 1150-1160). The Bucium Applications are also addressed in the Tribunal majority's analysis of the applicable law to the principal claim. Award, p. 106 *et seq.* (sections B.II and B.IV.3.c. and paras. 805-938).

248 Third, the Tribunal majority concluded that it "[could] not find that the Bucium Applications were mishandled by Respondent as a result of the alleged political blocking of the Roşia Montană Project."[402]

249 The Tribunal majority more broadly assessed whether "Romania has in any way mishandled the Bucium Applications" and in doing so implicitly considered compliance with Romanian law and the Bucium Exploration License.[403] It noted that there was no evidence of "any delay or misconduct" or of "any wrongdoing" by NAMR.[404]

250 The Tribunal majority thus considered Romanian law with regard to the claims arising out of the Bucium Applications and the Award far exceeds the threshold of a "plausible" or "tenable" decision in that regard. No portion of the Award thus stands to be annulled on this basis.

The Tribunal majority did not disregard Romanian law when assessing the impact of the UNESCO designation

251 In the Annulment Application, the Applicants asserted that the Tribunal majority "manifestly disregarded the law" when assessing the legal impact of the UNESCO designation of Roșia Montană on the Project.[405] Even though the Applicants do not pursue these arguments in the Memorial (which are thus understood to have been dropped), the Respondent nevertheless addresses them for the sake of completeness.

252 The Applicants had relied on the UNESCO designation of Roşia Montană in support of their second alternative claim – *i.e.*, that Romania's request to list Roşia Montană as a UNESCO World Heritage Site was purportedly politically motivated and amounted to a breach of the BITs. The Tribunal majority found this was not the case.[406]

[402] Award, p. 307 (para. 1162).

[403] Award, p. 6 (para. 17, fn. 36) (and evidence cited therein).

[404] Award, p. 308 (para. 1163).

[405] Annulment Application, p. 44 *et seq.* (paras. 121-124).

[406] Award, p. 344 *et seq.* (paras. 1294-1304) (referencing paras. 1135-1148 and exhibits on the record, including Romanian legislation, and one of the Applicants' Romanian law expert's opinion).

253 The Applicants selectively refer to only a few paragraphs of the Award and mischaracterize isolated findings,[407] while ignoring the Tribunal majority's detailed analysis of the Romanian cultural heritage protection regime, including the legal framework governing both UNESCO-listed sites and the process for lifting heritage protections to allow mining.[408]

254 The Applicants fail to identify any provision of Romanian law that the Tribunal majority allegedly disregarded when assessing the legal impact of the UNESCO designation of Roșia Montană on the Project.

255 Furthermore, as the Tribunal majority noted, the Applicants failed to provide any legal analysis and cite to any authority supporting the claim that the Project implementation became legally impossible as a result of the UNESCO designation.[409]

256 The Tribunal majority thus considered Romanian law with regard to the UNESCO designation of the Roșia Montană site and its decision in that regard far exceeds the threshold of a "plausible" or "tenable" decision. No portion of the Award stands to be annulled on this basis.

5.1.4.2 The Tribunal majority's assessment of liability took into account the applicable international law

257 The Applicants argue that the Tribunal majority "acknowledged but failed to apply the BIT standards in several other respects" when it allegedly failed to apply the so-called "rules" that (i) "omissions may breach the Treaty standards", (ii) "requir[e] consideration of the cumulative effect of acts and omissions", and (iii) "intent is not required to establish a Treaty

[407] Annulment Application, p. 44 *et seq.* (paras. 121-124).

[408] See, *e.g.*, Award, p. 19 *et seq.* (paras. 80-82, 182-188, and 1287-1293 and 1296-1302) (referring *inter alia* to the Romanian law applicable to historical monuments included in the UNESCO World Heritage List, the Applicants' submissions and one of their Romanian law expert's opinion). In addition, the Applicants were aware they could not proceed with the Project without first removing the existing legal protections for cultural heritage in the area, for which they needed to carry out archaeological research. Award, p. 20 *et seq.* (paras. 82 and 1278) (noting the Applicants' awareness that archaeological research was required in "order to develop the project").

[409] Award, p. 345 *et seq.* (paras. 1298 and 1301).

breach".[410] The Applicants misleadingly quote from a few paragraphs of the Award and fail to consider the Tribunal majority's explanations in their entirety. Each of these three "rules" are addressed in turn.

258 First, the Applicants allege that the Tribunal majority recognized that **omissions** can constitute a treaty breach (which is not disputed) but disregarded the "central omission" in this case, namely Romania's alleged failure to "make any decision on the Roșia Montană environmental permit or on the Bucium Applications".[411]

259 The Applicants' position is untenable. It wrongly presupposes that the factual record supports the conclusion that the permitting process was ripe for a decision to be taken (either granting or rejecting the applications).

260 As noted above, the Tribunal found, however, that the record did not support this conclusion:

i) For Roșia Montană, the Tribunal reviewed the Parties' pleadings and the factual record and found that "based on the record before it, the Tribunal cannot conclude that […] Romania should have issued the Environmental Permit but did not."[412]

ii) For Bucium, the Tribunal also referenced the Parties' pleadings and the factual record, noting RMGC's own delays and failure to pursue the Bucium Applications and NAMR's support of RMGC.[413] It concluded

[410] Memorial on Annulment, p. 72 *et seq.* (paras. 177-185) (headings i, ii, and iii). The Applicants (rightly) no longer argue in the Memorial that the Tribunal ruled "in manifest disregard of the law" by relying "in pivotal respects on Gabriel's alleged non-contemporaneous objection to Romania's denial of its legal rights". Annulment Application, p. 47 (para. 129). The Tribunal did not rely "in pivotal respects", nor even at all, on the lack of contemporaneous objection. Rather, it "also note[d] th[is] fact", after having reached the conclusion that there was no breach of the BITs. Award, p. 310 (para. 1167); see also Award, p. 328 (para. 1236) (finding the lack of objection "instructive" but also noting that the Applicants do not "argue in their submissions that they were denied due process when it occurred.").

[411] Memorial on Annulment, p. 72 (para. 178).

[412] Award, p. 239 *et seq.* (paras. 981 and 1094) ("the Tribunal concludes that Romania's treatment of the technical and/or other elements as part of the environmental permitting process was not wrongful."); see paras. 25-28 and 235-238 above.

[413] Award, p. 307 *et seq.* (paras. 1158 and 1163) (referring to the homologation process pending in 2011 and RMGC's submission of documents in 2015 "in accordance with an intervening legislative modification"); see paras. 29 and 248 above.

that "there was no evidence of any delay or misconduct on the part of NAMR".[414]

261 In sum, the Tribunal considered the reasons why no decision was issued with regard to (i) RMGC's application for an environmental permit in connection with Roșia Montană or (ii) the Bucium Applications.

262 Second, the Applicants argue that the Tribunal majority failed to consider the cumulative effect of a series of acts and omissions.[415] They admit that the Tribunal majority acknowledged that a composite act could englobe a series of acts which do not constitute a breach when considered individually but do so "when considered together or cumulatively".[416] The Applicants, however, argue that the Tribunal majority nevertheless "focused on whether there was a series of individually wrongful acts."[417] In support, they quote out of context the Tribunal majority's statement that "it cannot conclude that there was a series of wrongful acts or omissions that might constitute a composite act."[418]

263 However, this sentence of the Award follows the Tribunal majority's conclusion that it "cannot discern a clearly cohesive pattern or purpose on the part of Respondent to politicise the permitting process and/or to terminate the Project and drive away [Applicants'] investment."[419] The Tribunal majority is addressing the notion of a "pattern or purpose" that would constitute "a clear link between these series of events", which the Tribunal majority had identified as the relevant approach to consider a

[414] Award, p. 307 *et seq.* (paras. 1162-1163) (also finding "there is no evidence of an abuse of power in the way the Respondent handled the permitting process and the Project").

[415] Memorial on Annulment, p. 73 *et seq.* (para. 180-182).

[416] Memorial on Annulment, p. 73 (para. 180) (referring to Award, p. 172 *et seq.* (paras. 826, 861, 877, 896, 933, and 936-937)).

[417] Memorial on Annulment, p. 73 (para. 181).

[418] Memorial on Annulment, p. 73 (para. 180) (quoting Award, p. 309 *et seq.* (para. 1166)). The Applicants had previously even emphasized the terms "wrongful acts or omissions" in this sentence. Annulment Application, p. 46 (para. 127).

[419] Award, p. 309 *et seq.* (para. 1166).

composite act.[420] The Tribunal majority did not find such a pattern and thus dismissed the claim.[421]

264 In sum, the Tribunal majority's decision was not based on any alleged failure to apply a so-called "rule requiring consideration of the cumulative effect of acts and omissions", as the Applicants would have it, but on a separate line of reasoning which is set out in detail in the Award.

265 Third, the Applicants argue that while the Tribunal majority acknowledged that the BIT standards did not require "a showing of **intent**", the Tribunal nevertheless "rejected the claims presented based on what it considered to be a lack of intention to harm the investment".[422] The Applicants misleadingly seek to conflate the notions of "intent to harm" (which is not required) and "pattern or purpose", which is required when considering a claim that a composite act was wrongful and amounted to a breach of an investment treaty.[423]

266 When assessing the elements required to find a breach consisting of a composite act, the Tribunal majority reviewed the commentary to Article 15 of the ILC Articles, leading scholarship, and case law presented by the Parties – on the basis of which it concluded that "some sort of proof of motive or purpose is called for".[424]

267 In sum, the Tribunal did not fail to apply the so-called rule that "intent is not required". The Applicants' argument to the contrary is baseless and cannot be characterized as a failure to apply the applicable law.

268 As a final point, the Respondent stresses the difference between the present case, where the Applicants take issue with the outcome of the Tribunal majority's application of the law, and the few cases where awards were annulled because of a failure to apply the law altogether.[425] For instance, in *Sempra v. Argentina*, the committee explained why it found that the

[420] Award, p. 173 (para. 827).

[421] Award, p. 309 (para. 1166).

[422] Memorial on Annulment, p. 74 (paras. 183-185).

[423] See *e.g.* the list of references in Memorial on Annulment, p. 74 (fn. 242).

[424] Award, p. 172 *et seq.* (paras. 819-828) (referring to pleadings and legal authorities).

[425] See BIICL Baker Botts Report, at **RAL-27**, p. 28 *et seq.* (noting six instances of annulment on this basis).

tribunal wrongly "did not deem itself to be required – or even entitled – to consider the applicability of Article XI [of the applicable investment treaty]" thereby failing to apply the applicable law.[426]

269 In sum, for the reasons explained above, the Committee should dismiss the Applicants' request to annul portions of the Award under Article 52(1)(b).

5.2 The Applicants Were Given Multiple Opportunities to Present their Claims and Evidence and there Was No Due Process Violation

270 The Applicants rely on Article 52(1)(d) of the ICSID Convention to argue that the Tribunal majority failed to provide "each party the right to be heard" and to treat the parties equally and that the Award must accordingly be partially annulled.[427] They refer to the alleged failure i) to "address" and "engage" with the Applicants' claims, evidence and arguments, and ii) to afford the Applicants a fair opportunity to confront the evidence proffered by the Respondent.[428]

271 As a preliminary point regarding the Tribunal majority's alleged failure to address "the claims presented by [Applicants]", the Respondent notes the Applicants' complaint in the Application (which they no longer make in the Memorial) that the Tribunal majority had not "rule[d] on the claim[s] presented, but rather recast the claim[s] as a strawman complaint".[429] The Applicants only have themselves to blame for the unclear manner in which they presented their claims[430] – the Tribunal gave them many opportunities

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[426] *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award dated 29 June 2010, at **AL-9**, p. 41 *et seq.* (paras. 196-209) (also specifically noting at para. 196 "both because this provision did not deal with the legal elements necessary for the legitimate invocation of a state of necessity and because the Tribunal found that the Argentine economic crisis did not meet the customary international law requirements as set out in Article 25 of the ILC Articles."); see also Memorial on Annulment, p. 54 (para. 133).

[427] Memorial on Annulment, p. 76 *et seq.* (paras. 189-220).

[428] Memorial on Annulment, p. 76 (paras. 189-190 and 194).

[429] Annulment Application, p. 49 (para. 138).

[430] See, *e.g.*, Award, p. 155 (para. 771) (noting the formulation of the claims as per the Applicants' post-hearing submissions), p. 312 *et seq.* (paras. 1180-1181) (noting that the presentation of the first alternative claim, first made after the first hearing on the merits, was

to clarify and present them.[431] If any Party was prejudiced in the process, it was the Respondent, as it noted repeatedly.[432]

272 The Respondent will address the legal standard under Article 52(1)(d) (**Section 5.2.1**) and then demonstrate that the Tribunal dealt with all of the relevant claims as well as documentary and witness evidence presented by the Parties, such that there was no departure from a fundamental rule of procedure, let alone a serious one (**Section 5.2.2**).

"not clear"), and p. 322 *et seq.* (paras. 1222-1225) (admitting the second alternative claim even though it was belated and "brief, if not incomplete").

[431] See *e.g.* Procedural Order No. 27 dated 10 March 2020, at **RA-23**, p. 2 *et seq.* (para. 9) (listing questions to the Parties, including: "For each of [Applicants'] BIT claims, at what exact point in time was the breach consummated? What precise measure attributable to Respondent resulted in the alleged breach for each claim?", "Do [Applicants] maintain that there was a breach of the relevant BIT after the rejection of the draft law by Parliament by reference to acts of Respondent occurring solely during the period after that rejection (i.e., independently of any acts leading up to that rejection)? If so, what precise act/s are said to constitute the breach?"); Letter from Tribunal to Parties dated 12 April 2022, at **RA-71**, p. 2 ("How should the Tribunal consider post-2013 events in evaluating [Applicants'] principal claim […] and first alternative claim […]", "What are the specific positions and/or claims of the Parties related to the post-2013 events as presented in [Applicants'] second alternative claim […]?", "What is the [Applicants'] position on when a breach of the BITs occurred in respect of their second alternative claim?").

[432] See, *e.g.*, Letter from Respondent to Tribunal dated 1 October 2020, at **RA-63** (requesting that the new claim (a new valuation date) put forward by the Applicants in their opening statements at the second hearing on the merits in September 2020 be found inadmissible, and noting that allowing it would cause fundamental prejudice to the Respondent and amount to a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d)); see also Letter from Respondent to Tribunal dated 4 October 2020, at **RA-64**, p. 7. Notwithstanding the Respondent's complaints, the Tribunal admitted the "new arguments concerning the valuation date." Procedural Order No. 34 dated 22 October 2020, at **RA-69**, p. 5 (para. 31) and p. 9 *et seq.* (paras. 52-64 and Order). The Respondent expressed its disagreement and reserved its rights in connection with the Tribunal's determination "that the [Applicants] have not introduced a new claim" but "new arguments" relating to the valuation date. Letter from Respondent to Tribunal dated 30 October 2020, at **RA-65**; see also Award, p. 87 *et seq.* (paras. 492-505).

5.2.1 It is a high bar to show a serious departure from a fundamental rule of procedure

273 The threshold to succeed on a claim under Article 52(1)(d) is high.[433] As the *Occidental v. Ecuador* annulment committee noted:

> "Serious departure from a fundamental rule of procedure is frequently invoked by applicants, normally in conjunction with other grounds. But the **hurdles for the acceptance of this ground are high**: in only a few cases has it led to the annulment of ICSID awards."[434]

274 As set out in Section 4.2 above, the Applicants need to show that (i) the procedural rule at issue is fundamental, that (ii) the Tribunal departed from it, and that (iii) the departure is serious.

275 As regards the first two prongs, the Applicants rely on the right to be heard and the principle of equal treatment of the parties, both of which constitute fundamental rules of procedure within the scope of Article 52(1)(d).[435]

276 They describe these rights as including "the right for each party's claim and evidence to be addressed and to confront the evidence presented by the other party".[436] *Ad hoc* committees have found that this right does not extend to "any particular item of evidence" which a tribunal is not required

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[433] *Ioan Micula, Viorel Micula et al. v. Romania*, Decision on Annulment, ICSID Case No. ARB/05/20, 26 February 2016, at **RAL-37**, p. 77 (para. 268) (noting that this is found "in exceptional circumstances").

[434] *Occidental v. Ecuador (II)*, Decision on Annulment dated 2 November 2015, at **AL-77**, p. 27 *et seq.* (para. 61) (emphasis added); see also *Tenaris S.A. and Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment of Dec. 28, 2018, at **AL-75**, p. 25 *et seq.* (para. 97); C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 54 (p. 1319 of the original) (para. 360) ("[…] **partiality and unequal treatment will not be assumed lightly by an *ad hoc* committee**. In particular, language that is critical of one of the parties, or unequal space devoted to the parties' respective arguments, will not suffice as a proof of bias. Also, comparisons of the tribunal's conclusions drawn from different sets of evidence will not be a successful basis for inferring a lack of objectivity.") (emphasis added).

[435] Memorial on Annulment, p. 77 (para. 194); see paras. 175-176 above.

[436] Memorial on Annulment, p. 77 (para. 194).

to discuss "in detail, or at all, where it is not necessary to do so in order to decide the questions before it."[437]

277 As the Applicants rightly acknowledge, the relevant evidence is the one that has "the potential to have an impact on the outcome of the Award", the "key" or "essential" issues, and the "substantial questions".[438]

278 The analysis in the *Tulip v. Turkey* annulment decision is instructive:

> "the fact that an award does not explicitly mention an argument or piece of evidence does not allow the conclusion that a tribunal has not listened to the argument or evidence in question. A refusal to listen, amounting to a violation of the right to be heard, can only exist where a tribunal has refused to allow the presentation of an argument or a piece of evidence. Therefore, **absence in an award of a discussion of an argument or piece of evidence put forward by a party does not mean that a tribunal has violated the right to be heard**."[439]

279 Under ICSID Arbitration Rule 34(1), a tribunal has discretion to form an opinion on the relevance and materiality of the evidence provided, including its admissibility, weight, and credibility. *Ad hoc* annulment committees cannot in turn venture beyond the limited duty to confirm the existence of reasons (as discussed in Section 5.3 below) and cannot start evaluating the probative value of the evidence to determine whether it was properly considered,[440] as the *Tulip v. Turkey* committee explained:

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[437] *EDF et al. v. Argentina,* Annulment Decision dated 5 February 2016, at **AL-12**, p. 131 (para. 350) (further noting that "Article 52(1)(d) […] cannot be used to impose a duty to give reasons which goes beyond the duty already set out in Article 48(3) and given effect, in the context of annulment, by Article 52(1)(e)").

[438] Memorial on Annulment, p. 77 *et seq.* (paras. 195-196).

[439] *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 25 (para. 82) (emphasis added); see also *Helnan International Hotels A/S v. Arab Republic of Egypt*, Decision of the Ad hoc Committee, ICSID Case No. ARB/05/19, 14 June 2010, at **RAL-38**, p. 14 (para. 38) ("The right to be heard does not require a tribunal to consider *seriatim* and evaluate expressly in its award every argument raised by each party.").

[440] *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 26 (para. 84).

> "an applicant's dissatisfaction with the way a tribunal has exercised its **discretion in evaluating evidence cannot be a basis for a finding that there has been unequal treatment** and hence a serious violation of a fundamental rule of procedure necessitating annulment."[441]

280 Furthermore, the mere admission of a witness statement, even in the absence of cross-examination of that witness, does not in and of itself constitute a breach of due process.[442]

281 The Applicants argue that the standard does not require a showing that the "outcome of the case would have been different", had the departure from the rule of procedure not occurred.[443] However, the case law – including the authorities on which the Applicants rely – makes clear that the departure must be shown to have the potential of causing the Tribunal to "reach a result **substantially** different from what it would have awarded had such a rule been observed".[444] The Applicants acknowledge that the

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[441] *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 26 (para. 85) (emphasis added); *Impregilo S.p.A. v. Argentine Republic,* Decision on Annulment, ICSID Case No. ARB/07/17, 24 January 2014, at **RAL-39**, p. 49 (para. 176) ("There is **no requirement whatsoever for arbitral tribunals to indicate in an award the reasons why some types of evidence are more credible than others**. Discretionary authority that is reasonable and reasoned is the rule in this regard, and it is clearly not within the purview of Annulment Committees, which do not have direct and immediate access to the evidence submitted by both parties, to determine whether the determinations made in an award were correct. Attempting to do so would involve a subsequent assessment of the conclusions of arbitral tribunals, which would destroy the basic principles of the institution of arbitration and outside the power of ad hoc Committees.") (emphasis added).

[442] *Victor Pey Casado v. Chile (I),* Decision on Annulment dated 18 December 2012, at **AL-11**, p. 150 (para. 307) ("In the Committee's opinion, Mr. Pey Casado's statements were not determinative of the Tribunal's conclusion. Therefore, even if it could be considered that Chile was entitled to cross-examine Mr. Pey Casado, the departure from that rule of procedure is not serious as the failure to allow his cross-examination does not lead the Committee to conclude that if Chile had been allowed to cross-examine him, the Tribunal's decision may have been different").

[443] Memorial on Annulment, p. 77 (para. 193) (referring among others to *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**).

[444] *Wena Hotels v. Egypt,* Decision on Annulment dated 5 February 2002, at **AL-72**, p. 16 (para. 58) (emphasis added); *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 24 (para. 78); *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 23 (para. 71).

analysis requires showing "a distinct possibility that it may have made a difference on a critical issue."[445]

282 For there to be a serious departure from the rule that the parties have the right to be heard, an applicant must prove that a tribunal did not consider evidence that would have been outcome-determinative.[446] However, if it can be reasonably inferred that certain evidence was considered, then there are no grounds for annulment:

> "It can rather be reasonably **inferred** from the Tribunal's reasoning that it did consider the evidence before it and reached its conclusions on that evidentiary basis, albeit **without discussing in detail any particular item** filed by either Party."[447]

5.2.2 The Award properly considered the claims, evidence and testimony presented by the Parties

283 The Applicants argue that the Tribunal seriously departed from fundamental rules of procedure by failing to address parts of their claims and evidence and to give effect to their right to confront evidence, notably by denying them the opportunity to cross-examine Mr. Ponta.[448] These arguments are void of any merit, as shown below.

The Tribunal did not fail to address "essential components" of the Applicants' claims

284 According to the Applicants, the Tribunal majority failed to address the fact that no decision was taken in the context of the Roșia Montană

[445] Memorial on Annulment, p. 77 (para. 193).

[446] *Malicorp Limited v. Arab Republic of Egypt,* Decision on the Application for Annulment, ICSID Case No. ARB/08/18, 3 July 2013, at **RAL-40**, p. 42 (para. 128).

[447] *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 84 *et seq.* (para. 300) (emphasis added) (rejecting annulment application *inter alia* on grounds that "Tribunal made its own assessment of the evidence put before it, which is not to be re-evaluated by this Committee, and applied the legal requirements […] to the facts as found by it").

[448] Memorial on Annulment, p. 76 (para. 190).

permitting process and Bucium Applications, whether as part of the principal, first alternative claim, or second alternative claim.[449]

285 This purported failure would amount to a departure from the right to be heard and the right to equal treatment.[450] As shown below, there was no such departure, let alone a serious one.

286 **In relation to the principal and second alternative claims**, the Applicants' position is based on the premise that the EIA Process was ripe for a decision (in 2012 or 2015), but the Government nevertheless "abandon[ned]" the permitting process by failing to issue any decision, which led to a "*de facto* termination" of the Project.[451]

287 However, the premise is wrong[452] and it is equally wrong to portray the absence of decision on the environmental permit as an "abandonment of the permitting process". As explained in paragraphs 232-242 above, the Tribunal majority considered the EIA Process in detail, as a matter of fact and as a matter of law (Romanian and international law), and concluded that there was no evidence that all "matters were resolved" such that "Romania should have issued the Environmental Permit but did not".[453] While the Applicants may be dissatisfied with the Tribunal majority's conclusions, they cannot allege that the Tribunal majority failed to address this "essential component" of their claims.

288 Another "essential component" of the claims that the Tribunal majority allegedly failed to consider was the alleged "failure to act on RMGC's Bucium Applications".[454] However, as the Award shows, the Tribunal majority considered the submissions as well as the documentary and expert

[449] Memorial on Annulment, p. 79 *et seq.* (paras. 199-204, 205-206, and 207-209, respectively).

[450] Memorial on Annulment, p. 79 (para. 198); Annulment Application, p. 49 (paras. 136-138).

[451] Memorial on Annulment, p. 80 *et seq.* (paras. 201 and 208).

[452] See, *e.g.*, Award, p. 160 (paras. 789 and 800).

[453] Award, p. 213 *et seq.* (paras. 965 and 981), see also p. 328 (para. 1235) (noting that "certain issues remained unsolved" at the time of the 2014-2015 TAC meetings).

[454] Memorial on Annulment, p. 81 (para. 204).

witness evidence that the Applicants put forward (in addition to that of the Respondent).[455]

289 The Applicants argue that the Tribunal majority disregarded the fact that the Respondent did not take "any decision" on the Bucium Applications. However, as noted above in paragraphs 248-249, after reviewing the record, the Tribunal majority did not find any evidence that the Bucium Applications had been mishandled, nor did they see evidence "of any delay or misconduct on the part of NAMR".[456]

290 The Applicants refer to Prof. Grigera Naón's dissent to argue that disregarding "[f]acts and conduct concerning the granting or not of the environmental permit" "would constitute a due process breach".[457] However, this paragraph of the dissent refers to "facts and conduct" that are part "of the existing record", which the Tribunal majority assessed, as shown in the following paragraphs.[458]

291 The Tribunal majority held that what it must consider is not necessarily:

> "whether the prerequisites for obtaining the Environmental Permit were met at different points in time such that the non-issuance would expose Romania to international liability. Instead, the **Tribunal must focus on whether the process met the minimum standards under international law as set out in the aforementioned treaty provisions.**"[459]

292 The Tribunal majority did not ignore the facts (and evidence) surrounding the non-issuance of the environmental permit, as the Applicants try to show by quoting from the dissenting opinion.[460] As explained above, the Tribunal majority examined the permitting process, including the

[455] See, *e.g.*, Award, p. 72 (para. 412) (noting the examination of the legal experts at the first hearing on the merits), see also p. 17 *et seq.* (paras. 73-76) (regarding surface rights and zoning/urbanism plans).

[456] Award, p. 307 (paras. 1162-1163).

[457] Memorial on Annulment, p. 80 (para. 202).

[458] See also paras. 25 and 235-238 above.

[459] Award, p. 213 (para. 965) (emphasis added).

[460] Memorial on Annulment, p. 80 (para. 202)

chronology of administrative steps,[461] the TAC meetings and the technical and other elements.[462] The majority acknowledged the Ministry of Environment's role and evaluated whether the permitting process was unjustifiably delayed, politically obstructed, or otherwise amounted to a treaty breach. It concluded that the evidence did not support such a finding.[463]

293 **In relation to the first alternative claim**, the Applicants state that the Tribunal majority found that the rejection of the Draft Law in 2013 "demonstrated" the taking of their investment, but that it did not consider the "significance of [] subsequent events".[464]

294 However, as the Award notes, the Applicants had clarified that the post-2013 events were not "part of the alleged 'breach'" but "only confirm the violation" that had taken place, in their view, "as of 9 September 2013".[465] The Tribunal majority referred to its findings that there was no violation in September 2013 and found no evidence "of a connection" between post-2013 events and the rejection of the Draft Law.[466]

295 To conclude, the Applicants' arguments that the Tribunal majority failed to address essential components of the Applicants' claims have no merit.

The Tribunal did not fail to address key evidence underlying the claims

296 In support of the claim that the Tribunal majority seriously departed from fundamental rules of procedure, the Applicants argue that the Tribunal majority did not consider "key evidence", specifically, "the principal testimonial and contemporaneous email evidence" they had relied on.[467]

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[461] Award, p. 8-26 (paras. 18-118); see also paras. 25 and 235-238 above.

[462] Award, p. 212 *et seq.* (paras. 961-1094 and 1227-1238); see also para. 26 above.

[463] Award, p. 240 (paras. 982 and 1092-1094).

[464] Memorial on Annulment, p. 81 (para. 206) (referring to Award, p. 312 *et seq.* (para. 1181)).

[465] Award, p. 312 (paras. 1180-1181) (referring to the Applicants' presentation of the first alternative claim).

[466] Award, p. 315 *et seq.* (paras. 1191-1198).

[467] Memorial on Annulment, p. 83 *et seq.* (paras. 210-214); Annulment Application, p. 49 (paras. 139-143).

297 First, the Applicants complain that the Tribunal majority referred to public statements of 2011 and concluded that there was "'no evidence' linking permitting decisions to economic demands," purportedly without considering "the principal testimonial and contemporaneous email evidence" that the Applicants had produced and which also spanned 2012-2013.[468]

298 This is a gross misrepresentation of the Award. The Applicants omit to mention the Tribunal majority's detailed description (over ten pages) of the facts relating to the economic negotiations in 2011 and beyond, in which it explicitly engaged with the Applicants' documentary and witness evidence.[469] The majority concluded that the record did not support the Applicants' assertion that there had been coercion on the part of the Respondent, nor did it find an improper linkage between the permitting process and a possible economic renegotiation of the License.[470]

299 Second, the Applicants complain that the Tribunal majority "did not address or even acknowledge" statements by Mr. Ponta on national television, which they describe as an "admission of liability".[471] However, the Tribunal majority referred twice to this video-recording, even reproducing *verbatim* a portion of the quote on which the Applicants rely.[472]

300 In any event, as noted above and as stated by the *Tulip v. Turkey ad hoc* committee, a tribunal does not violate a party's right to be heard merely by omitting in the award "a discussion of an argument or piece of evidence put forward by a party".[473] This will *a fortiori* be the case when the said piece of evidence is referred to in the award.

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[468] Memorial on Annulment, p. 83 (paras. 211-212).

[469] Award, p. 201 *et seq.* (paras. 946-960, notably fn. 597) (referring to witness testimony in relation to 2011 events and analyzing internal and external email communications), p. 274 *et seq.* (paras. 1100 and 1102, notably fns. 763 and 767) (referring to witness testimony in relation to 2013 events).

[470] Award, p. 212 (para. 960).

[471] Memorial on Annulment, p. 83 *et seq.* (para. 213).

[472] Award, p. 292 (para. 1126) (as part of chronology of the facts leading up to the rejection of the Draft Law) and p. 302 (para. 1135) (as part of the Tribunal majority's analysis of the claim).

[473] See para. 278 above.

The Tribunal did not deny the Applicants' right "to confront material adverse testimony in cross-examination"

301 The Applicants complain that the Tribunal majority "failed to exclude" the witness testimony of Mr. Ponta and that they allegedly "were denied any opportunity to confront" the evidence of this "central figure". They wrongly argue that the admission of Mr. Ponta's evidence represented a serious departure from fundamental rules of procedure.[474]

302 The Applicants misrepresent the course of events that led to the admission of Mr. Ponta's witness statement into the record of the Arbitration, which was as follows:

i) With its Rejoinder, the Respondent produced a declaration by Mr. Ponta dated 1 May 2019, which indicated that he would be unavailable to appear at the hearing for personal reasons.[475]

ii) Following a request by the Applicants to exclude that declaration from the record, the Tribunal, by decision dated 6 September 2019, requested that the declaration be resubmitted as a witness statement.[476] The Tribunal noted that should Mr. Ponta remain unavailable, it would assess the admissibility and weight of the statement.[477]

iii) On 20 September 2019, the Respondent submitted the witness statement of Mr. Ponta dated 16 September 2019 and noted that this statement replaced the declaration of Mr. Ponta.[478]

iv) Noting Mr. Ponta's indication in his witness statement that he was still unavailable to appear before the Tribunal, the Applicants reiterated their request that the Tribunal exclude this statement from the record.[479]

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[474] Memorial on Annulment, p. 84 *et seq.* (paras. 215-217 and 219); Annulment Application, p. 48 *et seq.* (paras. 134 and 144-147).

[475] See Award, p. 56 (para. 333); see also Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 8 *et seq.* (paras. 36 and 43).

[476] Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 10 (paras. 45-46); see Award, p. 56 *et seq.* (paras. 335 and 338).

[477] Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 9 (para. 44); see Award, p. 57 (para. 338).

[478] See Award, p. 59 (para. 343).

[479] See Award, p. 59 (para. 344).

v) On 24 September 2019, the Tribunal admitted the statement and indicated "that it would need to assess the evidentiary value of this statement at a later stage in the proceedings and in light of the entire record."[480] The Tribunal noted that "there [wa]s no reason to refuse the admissibility of Mr. Ponta's witness statement" under Procedural Order Nos. 1 and 23[481] and ICSID Rule 34(1).

vi) In the Award, the Tribunal recalled this course of events but did not otherwise refer to Mr. Ponta's witness statement.[482]

303 The Applicants' arguments are thus unfounded, also for the following reasons.

304 First, the Tribunal admitted the witness statement of Mr. Ponta in accordance with the procedural rules, which did not require that a witness statement be excluded from the record if the witness failed to appear at the hearing.[483]

305 Second, the Applicants do not deny that the Tribunal majority did not rely on the witness statement of Mr. Ponta in the Award.[484] (The dissent also did not refer to Mr. Ponta's witness statement; thus, even the dissenting arbitrator did not deem it necessary to refer to the statement.)

306 Third, the Applicants are reiterating arguments already made in the Arbitration and addressed by the Tribunal.[485]

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[480] See Award, p. 59 (para. 345) (referring to Letter from Tribunal to Parties dated 24 September 2019, at **RA-72**).

[481] Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 8 (para. 32) (quoting Art. 18.6 of the Procedural Order No. 1: "Witnesses and experts shall be made available for examination during the oral hearing. If a witness or expert whose appearance has been requested pursuant to §18.2 fails without a valid reason to appear at the hearing, the Tribunal may exclude any statement(s) or report(s) of such witness or expert from the record, and/or accord such weight, if any, to the written testimony as it deems appropriate. Further, a party may request and the Tribunal may draw such adverse inference(s) as it deems appropriate.")

[482] Award, p. 56 *et seq.* (paras. 333-348).

[483] Award, p. 59 (para. 345).

[484] See Memorial on Annulment, p. 85 (para. 218).

[485] Letter from Claimants to Tribunal dated 19 July 2019, at **RA-73**; See Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 7 *et seq.* (paras. 32, 33 and 35); Letter from Tribunal

307 The Applicants refer to their purportedly "severely limited" "opportunity to submit rebuttal evidence" to respond to Mr. Ponta's evidence.[486] This is false. The course of events was the following:

i) The Applicants obtained leave to submit rebuttal evidence in response to the Respondent's Rejoinder, with the Tribunal noting that the "[Applicants] should have an opportunity to respond to the new witness statements and expert reports submitted by Respondent in its Rejoinder."[487]

ii) The Applicants subsequently i) filed 41 rebuttal documents (but chose not to produce any in response to the statement of Mr. Ponta) and ii) indicated the topics of rebuttal testimony that they wished to address on direct examination at the hearing, including in response to the statement of Mr. Ponta.[488] They were afforded the opportunity to do so.

308 In sum, the Applicants disregard the distinction between the admissibility of evidence and its probative value. Although Mr. Ponta's witness statement was admitted into the record, the Applicants had the opportunity to submit rebuttal evidence in response and, in any event, the Tribunal majority did not rely on Mr. Ponta's witness statement in reaching its conclusions.

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309 To conclude, the Committee can swiftly dismiss the Applicants' arguments under Article 52(1)(d) considering their failure to establish any departure, let alone a serious one, from any fundamental rule of procedure.

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to Parties dated 24 September 2019, at **RA-72**; see also Letter from Respondent to Tribunal dated 9 August 2019, at **RA-74**, p. 5 (para. 17) (stating that "the Tribunal should not exclude Mr. Ponta's evidence from the record, but rather, and in accordance with paragraph 18.6 of PO 1, accord the weight it deems appropriate to his declaration in light of the record as a whole").

[486] Memorial on Annulment, p. 85 (para. 219).

[487] Procedural Order No. 23 dated 6 September 2019, at **A-167**, p. 20 (para. 93 *et seq*); see also Award, p. 57 (para. 338).

[488] Letter from Claimants to Tribunal dated 11 October 2019, at **RA-75**; Procedural Order No. 24 dated 22 October 2019, at **RA-76**, p. 14 (Section VII) (admitting the Applicants' rebuttal documents); see also Award, p. 63, para. 364.

5.3 The Tribunal Majority Adequately Stated the Reasons for the Award

310 The Applicants request the annulment of portions of the Award pursuant to Article 52(1)(e) of the ICSID Convention on the basis that the Tribunal majority purportedly failed to state the reasons "supporting its outcome-determinative conclusions and important decisions on matters of due process."[489] As explained in this Section, this request is baseless and stands to be rejected.

5.3.1 The legal standard for "failure to state reasons" cannot serve as a disguise to appeal an award

311 Article 52(1)(e) does not specify the manner in which a tribunal should have stated reasons to avoid the annulment of an award on this basis. The standard is, however, high and it falls on the applicant to discharge the burden of proving it is met.[490] This annulment ground has been described as a "minimum requirement"[491] and *ad hoc* committees have consistently confirmed the limited power of review under Article 52(1)(e).[492]

312 The purpose behind the requirement to state reasons, as the Applicants note, is to explain "how and why the tribunal came to its decision in light of the facts and applicable law".[493] The reasons should "connect the facts or law of the case to the conclusions."[494] The following test has been widely followed:

> "[t]he requirement to state reasons is satisfied as long as the award enables one to follow **how the tribunal proceeded from Point A.**

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[489] Memorial on Annulment, p. 86 (para. 221).

[490] See, *e.g.*, *Micula v. Romania*, Decision on Annulment, dated 26 February 2016, at **RAL-37**, p. 37 (para. 139).

[491] *MINE v. Guinea*, Decision on Partial Annulment dated 6 January 1988, at **AL-1**, p. 105 (para. 5.09).

[492] See C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 69 *et seq.* (p. 1348 *et seq.* of the original) (paras. 472 and 484).

[493] Memorial on Annulment, p. 86 (para. 222); see also p. 88 (para. 225) (referring to the requirement that reasons be "capable of leading to the conclusions").

[494] See *Micula v. Romania*, Decision on Annulment, dated 26 February 2016, at **RAL-37**, p. 84 *et seq.* (para. 302) and p. 35 (para. 136) respectively.

> **to Point B. and eventually to its conclusion**, even if it made an error of fact or of law."[495]

313 Moreover, Article 52(1)(e) does not permit an inquiry into "the quality or the persuasiveness" of the tribunal's reasons.[496] As other authorities on which the Applicants rely confirm, it is irrelevant whether the parties (in particular the losing party)[497] or the committee consider such reasons to be "correct or convincing".[498] Prof. Schreuer has noted that "[q]uality control over the reasoning of tribunals is not one of the functions of annulment."[499]

314 In addressing the legal standard under Article 52(1)(e), the Applicants refer to awards that were annulled where the reasoning presented "some defects", was "not evident", or "contradictory".[500] These references wrongly suggest a lower threshold than what *ad hoc* committees have applied, as explained below.

315 First, the Applicants refer to the partial annulment of the *TECO v. Guatemala* award because the reasoning was "not evident" where the tribunal had not addressed evidence "upon which the Parties ha[d] placed significant emphasis".[501] However, that *ad hoc* committee had found a

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[495] *MINE v. Guinea*, Decision on Partial Annulment dated 6 January 1988, at **AL-1**, p. 105 (para. 5.09) (emphasis added), confirmed by various other *ad hoc* committees, including recently by *Hydro Energy 1 and Hydroxana v. Spain*, Decision on Application for Annulment dated 20 March 2023, at **AL-68**, p. 148 (para. 400).

[496] *Caratube v. Kazakhstan,* Decision on Annulment dated 21 February 2014, at **AL-67**, p. 35 (para. 185).

[497] C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 66 *et seq.* (p. 1343 *et seq.* of the original) (para. 457) ("It cannot be expected, however, that reasons must go to such lengths as to persuade a disgruntled party why it has lost").

[498] *Perenco v. Ecuador,* Decision on Annulment dated 28 May 2021, at **AL-58**, p. 36 *et seq.* (para. 164); *Wena Hotels v. Egypt,* Decision on Annulment dated 5 February 2002, at **AL-72**, p. 20 (para. 79).

[499] C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 45 (p. 1300 of the original) (para. 282).

[500] Memorial on Annulment, p. 86 *et seq.* (paras. 223-225).

[501] Memorial on Annulment, p. 87 (para. 224).

failure to state reasons on the basis of the "**complete absence**" of any discussion of the parties' expert reports.[502] Moreover, it specified it was

> "making no finding or observation with regard to the Tribunal's assessment of the expert testimony. It was within the Tribunal's discretion to assess whether that testimony was relevant or not, material or not, and that view is not censorable on annulment."[503]

316 Second, the Applicants rely on *Soufraki v. UAE* when stating that "some defects in the statement of reasons could give rise to annulment".[504] However, the Applicants do not refer to the sentence that immediately follows that it is "insufficient or inadequate" or "contradictory" reasons that "can spur an annulment".[505]

317 *Ad hoc* committees have also found that reasons need not be exhaustive.[506] Even "laconic" reasons that were "not totally clear" did not give rise to annulment.[507] Furthermore, as the Applicants' legal authorities confirm,

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[502] *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 35 *et seq.* (paras. 128-131) (emphasis added) (the *ad hoc* committee noted that while one of the quantum issues had been discussed in the expert reports, the tribunal neither referred to this evidence nor explained why it would be insufficient.); see also *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 43 (para. 162) (noting that *TECO* was an "exceptional case in which **a total failure** to address '*highly relevant*' evidence amounted to a failure to state reasons under Article 52(1)(e)") (emphasis in original and added)).

[503] *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 36 (para. 131); see also *Teinver S.A. et al. v. Argentine Republic*, Decision on Argentina's Application for Annulment, ICSID Case No. ARB/09/1, 29 May 2019, at **RAL-41**, p. 76 *et seq.* (para. 249) ("As (…) long as the award allows understanding the basis for the tribunal's findings (which it does), a tribunal has no duty to comment on the details of all the evidence produced by the parties. A failure by the Tribunal to comment on certain portions of an expert report produced by a party, which the Tribunal may have found to be irrelevant, is therefore not such as to entail the annulment of the Award."); *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16**, p. 42 (para. 160).

[504] Memorial on Annulment, p. 86 (para. 223, see also para. 226).

[505] *Soufraki v. UAE,* Decision on Annulment dated 5 June 2007, at **AL-60**, p. 56 (para. 122) (noting at para. 123 that "[i]nsufficient or inadequate reasons [are] to be distinguished from *wrong or unconvincing reasons*.") (emphasis in original).

[506] *Micula v. Romania*, Decision on Annulment, dated 26 February 2016, at **RAL-37**, p. 35 (para. 135).

[507] *Amco Asia Corporation et al. v. Republic of Indonesia*, Decision on Annulment Applications, ICSID Case No. ARB/81/1, 17 December 1992, at **RAL-42**, p. 48 (para. 7.56).

tribunals enjoy a degree of discretion in deciding how to express reasons.[508] For instance, the *Vivendi ad hoc* committee stated:

> "Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, **reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons**. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning."[509]

318 Third, "contradictory reasons" means reasons "incapable of standing together on any reasonable reading of the decision."[510] The *TECO ad hoc* committee noted:

> "[O]ne must not be quick to assume that a tribunal's reasons are truly contradictory: 'It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.'"[511]

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[508] See *Enron v. Argentina,* Decision on the Application for Annulment dated 30 July 2010, at **AL-66**, p. 24 (para. 76); *Soufraki v. UAE,* Decision on Annulment dated 5 June 2007, at **AL-60**, p. 57 (para. 124).

[509] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of July 3, 2002, at **AL-78**, p. 118 (para. 64) (emphasis added).

[510] *Continental Casualty Company v. Argentine Republic*, Decision on Annulment Applications, ICSID Case No. ARB/03/9, 16 September 2011, at **RAL-43**, p. 34 (para. 103) ("An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the *non-existence* of fact A. In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument") (emphasis in original).

[511] *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 23 (para. 90); see also C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 72 (p. 1354 *et seq.* of the original) (para. 498) ("In assessing the evidence before it,

319 Contradictory reasons only warrant annulment for failure to state reasons, where "such failure [is] critical to the [t]ribunal's decision"[512] and caused "harm to the party seeking annulment (*cf*. the principle 'no annulment without grievance')" which in turn raises the question "whether the award is not sufficiently well founded by other reasons stated in the award".[513]

320 Fourth, the Applicants note that "one should not have to speculate about the reasons" and one can expect an "express rationale".[514] However, ICSID awards are to be analyzed in their entirety.[515] As one *ad hoc* committee explained:

> "In determining whether the reasons given for a conclusion on a particular question are sufficient, is it [sic] necessary not to look in isolation at the particular paragraphs of the award dealing specifically with that question. Those paragraphs must always be read together **with the award as a whole**."[516]

321 Accordingly, a tribunal's reasons may be **inferred** from their context and "the developments that follow".[517] A tribunal may give reasons "without elaborating the factual or legal bases of such reasons" or providing

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a tribunal might identify various factors, which appear to support different inferences to be drawn from the evidence before it. The tribunal's analysis of the evidence, and its eventual choice between one or the other of such possible inferences or findings, does not render the tribunal's reasoning contradictory").

[512] *Perenco v. Ecuador,* Decision on Annulment dated 28 May 2021, at **AL-58**, p. 38 (para. 169).

[513] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment of May 3, 1985, at **AL-63**, p. 125 (para. 116).

[514] Memorial on Annulment, p. 88 (para. 227).

[515] *Victor Pey Casado and Foundation President Allende v. Republic of Chile*, Decision on Annulment, ICSID Case No. ARB/98/2, 8 January 2020, at **RAL-44**, p. 174 (para. 651).

[516] *Continental Casualty v. Argentina*, Decision on Annulment, dated 16 September 2011, at **RAL-43**, p. 106 (para. 261) (emphasis added).

[517] *Amco v. Indonesia*, Decision on Annulment Applications, dated 17 December 1992, at **RAL-42**, p. 49 (para. 7.57); *ConocoPhillips v. Venezuela,* Annulment Decision dated 22 January 2025, at **AL-51**, p. 47 (para. 203) ("An ad hoc committee is not required to assiduously comb the award for Article 52(1)(e) purposes. Rather, an award should be read generously. If the motivation can be discerned or inferred from the context, there is no failure to state reasons"); *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 34 (para. 108); see also *Suez et al. v. Argentina*, Decision on Annulment dated 5 May 2017, at **AL-16,** p. 83 (para. 292).

citations, notably "where such documentation is provided by the parties to the case in their [submissions] and relate to well-known propositions."[518]

5.3.2 The Tribunal stated the reasons for its findings and decisions in the Award

322 The Applicants argue that the Tribunal majority failed to state reasons:

i) "supporting its decision regarding the Government's demands for revised economics",

ii) "about the lack of any decision on the environmental permit or end to the EIA process",

iii) "about the lack of any decision on the Bucium Applications",

iv) "for its conclusion regarding the impact of the UNESCO inscription on the ability to implement the Roșia Montană Project",

v) "for its conclusions that the State's conduct did not breach the BITs",

vi) and "for important decisions that deprived [Applicants] of due process".

323 The Applicants essentially raise the same arguments as those raised in connection with Article 52(1)(d), addressed in Section 5.1.4 above. These arguments fail here as well, as discussed in the following subsections.

324 As an overarching point, the Respondent recalls that the Tribunal "extensively reviewed and discussed all submissions and all documents on the record," but did not reference each one in the Award.[519] The Tribunal also stated that "many issues come down to a decision on the interpretation of the […] documents", which it endeavoured to do with objectivity, impartiality, and strict adherence to the law.[520]

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[518] *Soufraki v. UAE,* Decision on Annulment dated 5 June 2007, at **AL-60**, p. 58 (para. 128).

[519] Award, p. 106 (para. 561) ("the Tribunal does not consider it necessary to repeat [all arguments and evidence presented by the Parties] in the Award. In its reasoning, the Tribunal will address only the decisive factors necessary to rule on the Parties' claims.").

[520] Award, p. 156 (para. 775).

The Tribunal majority did not fail to state reasons "supporting its decision regarding the Government's demands for revised economics"

325 The Applicants allege that the Tribunal majority failed to state reasons by "not explain[ing] its conclusion that there was no coercion" and "no link" between the License negotiations and the permitting process.[521] Although they first argued in the Application that the reasoning was "inadequate" and "contradictory, in the Memorial, they attack the Tribunal majority's alleged failure to provide "explanations" in this regard.[522]

326 It is, however, clear from the Award how the Tribunal majority proceeded from the Applicants' claim that the "State's demands for revised Project economics on condition of not permitting the Project was coercive"[523] (**Point A**) to the conclusion that there was no "coercion" nor "improper linking of the permitting process with the renegotiation of the economics of the Project"[524] (**Point B**) and thus no breach of the BITs:

i) The Award sets out the reasons for the Tribunal majority's conclusion that there was no improper link between the economic aspects of the Project and the financial negotiations.[525]

ii) It sets out two detailed chronologies of the facts relating to the License negotiations in 2011, including the "discussions on and statements surrounding the economic terms of the Project".[526] It also goes through the events of 2012-2013 when the parties were further negotiating and discussing points to submit to Parliament as part of the Draft Law.[527]

[521] Memorial on Annulment, p. 88 *et seq.* (paras. 228-232).

[522] Annulment Application, p. 52 *et seq.* (paras. 151-152); Memorial on Annulment, p. 88 *et seq.* (paras. 228 and 230-231).

[523] As the Applicants themselves describe, Memorial on Annulment, p. 90 (para. 232); see also Award, p. 201 (para. 946).

[524] Award, p. 210 *et seq.* (paras. 958 and 960).

[525] Award, p. 201 *et seq.* (paras. 946-960).

[526] Award, p. 26 *et seq.* (paras. 119-149 and 947).

[527] Award, p. 269 *et seq.* (paras. 1097-1120).

iii) The Tribunal majority references not only the public statements on the record (as the Applicants note) but also witness testimony.[528]

327 In any event, the Tribunal majority had discretion to assess the weight and relevance to afford the evidence and related arguments, which it did not need to spell out in more detail than it did. As noted above, tribunals are not expected to refer to every single piece of evidence or arguments raised by the parties. References in the Award to portions of evidence thus reflect the Tribunal's exercise of discretion when assessing evidence, not a failure to consider evidence or set out reasons. The Tribunal majority did precisely that when it assessed the public statements made at the time of the negotiations, looking first at the "wider discussion" in which they were made, then at their timing and content, before noting what it considered to be "the most that can be demonstrated by reference to these statements".[529]

328 When read in **context**, the few quotes of the Award on which the Applicants selectively rely do not establish any failure to state reasons.

329 First, the Applicants complain that the Tribunal majority proceeded from the "unexplained starting point" that the State "needed to revisit" the economic terms of the Project.[530] This was not the "starting point" of the Tribunal majority's analysis but one of the observations (actually the fifth of nine) that it made as part of its analysis.[531]

330 Second, the Applicants complain that the Tribunal majority did not explain the "basis" for considering the contractual economic terms to be unresolved ("open" or "outstanding").[532] However, the majority was here recording the views of some of the ministers who considered that some

[528] Award, p. 211 (para. 958, fn. 597) (referencing numerous factual exhibits concerning communications and in person discussions in 2011 and 2012, and the witness statements of Messrs Tănase, Henry, and Ariton).

[529] Award, p. 208 *et seq.* (paras. 950, 951, 954 and 955).

[530] Memorial on Annulment, p. 88 (para. 228).

[531] Award, p. 209 (para. 954).

[532] Memorial on Annulment, p. 88 (para. 228).

issues relating to the Project (principally the environmental issues and the economic issues) needed to be addressed.[533]

331 Third, the Applicants complain that these statements demonstrate that the Government linked the economics of the Project (namely, the financial benefits for the State) to the permitting process, but that the Tribunal majority nevertheless concluded otherwise.[534] The Applicants cannot, however, challenge the Tribunal majority's assessment of the evidence.

332 The Applicants disregard the explanations in the Award that by 2011, when the Government resumed its assessment of the Project, there had been a significant rise in the price of gold, which materially altered the economic context compared to the one existing at the time the License was signed. The State was looking for revenue sources to deal with the devastating consequences in Romania of the economic crisis of 2008.[535] It is in that context that public statements were made regarding the "need[] to revisit the issue" of the economic terms of the Project.

333 The Tribunal majority thus concluded from the content and context of contemporaneous "public statements from the government side"[536] that the State considered it necessary to re-examine certain economic aspects in light of evolving circumstances.[537]

334 The last point raised by the Applicants relates to the Tribunal majority's finding that "economics and permitting" were two issues which "could also affect [each] other", without explaining how this could be done without "unlawfully holding up the EIA process […] until it extracted a better economic deal".[538]

335 However, the Tribunal majority expressly concluded from the record that "the Government distinguished the permitting process under the law from the negotiation of the commercial terms" and that "the environmental and

[533] Award, p. 209 *et seq.* (paras. 954-955) (referring to "the Minister of Culture and Minister of Environment in particular").
[534] Memorial on Annulment, p. 89 (para. 230).
[535] Award, p. 209 (paras. 953-954).
[536] Award, p. 202 (para. 947).
[537] Award, p. 208 (paras. 951 and 954-955).
[538] Memorial on Annulment, p. 90 (para. 231).

financial aspects of the Project […] were separately addressed".[539] As a result, contrary to the Applicants' allegations, the Tribunal considered the facts concerning the renegotiation of the economic terms of the Project[540] and the majority found that they did **not** affect the permitting procedure.[541]

336 Accordingly, the Tribunal majority did not fail to state reasons "supporting its decision regarding the Government's demands for revised economics".

The Tribunal majority did not fail to state reasons "about the lack of any decision on the environmental permit or end to the EIA process"

337 The Applicants raised three arguments in support of their claim that the Tribunal majority "failed to state reasons about the lack of any decision on the environmental permit or end to the EIA process".[542]

338 They argue first that the Tribunal majority "failed to address the fundamental and undisputed fact" that no decision was issued on the Roșia Montană environmental permit, although this was "a central aspect of [Applicants'] claim", which was "a serious departure from a fundamental rule of procedure"[543] and "a complete absence of reasoning that requires annulment".[544] Second, the Tribunal majority "said nothing at all" about the permitting process after April 2015 and "did not address what, if anything, remained to be done," such that in their view there is a "complete absence of reasoning" regarding the "abandon[ment]" of the permitting process.[545]

339 These two arguments have no basis. The Applicants acknowledge elsewhere that the Tribunal majority's mandate was not "to review the

[539] Award, p. 209 *et seq.* (paras. 953 and 959).

[540] See Award, p. 201 (para. 946).

[541] Award, p. 211 (para. 959) ("Thus, the Tribunal cannot conclude on the basis of this evidence that there was an inappropriate link between the environmental and financial aspects of the Project.).

[542] Memorial on Annulment, p. 90 (heading III.D.3).

[543] This claim is addressed in paras. 284 *et seq.* above.

[544] Memorial on Annulment, p. 90 *et seq.* (paras. 233-234).

[545] Memorial on Annulment, p. 91 (para. 235).

merits of the State's decision," but rather to assess "whether the State's [alleged] failure to take any decision on the environmental permit was consistent with the applicable investment treaty standards".[546]

340 This is in line with the Tribunal majority's finding that the key legal question "is not the outcome, *i.e.*, whether or not the Permit should have been granted" but rather the integrity and fairness of the "process itself" under international law.[547] The Applicants, however, argue that the Tribunal majority should have "reviewed the merits of the State's decision" by assessing whether the permitting requirements were met.[548] However, the Tribunal concluded:

> "what the Tribunal must consider is not necessarily whether certain prerequisites were relevant to the Construction Permit as opposed to the Environmental Permit, nor whether the prerequisites for obtaining the Environmental Permit were met at different points in time such that the non-issuance would expose Romania to international liability. Instead the Tribunal must focus on whether the process met the minimum standards under international law as set out in the aforementioned treaty provisions."[549]

341 Contrary to the Applicants' allegations, the Tribunal majority addressed in depth the issue:

i) The Tribunal majority acknowledged that in undertaking this Project, the Applicants were entitled to expect that the administrative and regulatory permitting processes would be conducted fairly, transparently, and in compliance with the domestic and international legal framework.[550]

ii) The Tribunal majority found that the TAC meeting held on 29 November 2011 could not be considered as the final session of the

[546] Memorial on Annulment, p. 70 (para. 172).

[547] Award, p. 201 (paras. 944-945), p. 199 (para. 937) (principal claim), p. 313 *et seq.* (para. 1186) (first alternative claim), and p. 321 (para. 1218) (second alternative claim).

[548] Memorial on Annulment, p. 70 *et seq.* (paras. 171-172).

[549] Award, p. 213 (para. 965).

[550] Award, p. 201 (para. 944).

permitting process as there was no evidence that all material issues had been resolved at that time;[551]

iii) Regarding the technical issues raised during the TAC meetings – such as the requirements pertaining to the waste management plan, the Water Law and Water Framework Directive, the status of the zoning and urbanism certificates, and matters related to the cultural heritage – the Tribunal majority found nothing objectionable in relation to the proceedings regarding these elements, regardless of whether they were legally mandatory or merely advisable.[552]

iv) The Tribunal majority found that the 2014 and 2015 TAC meetings evidenced "a genuine and *bona fide* regulatory process".[553]

v) On the basis of the record in the Arbitration, the Tribunal majority could not conclude that the Respondent should have issued the environmental permit.[554]

342 The Tribunal majority's comprehensive examination of the record transpires from the numerous references to factual exhibits and witness testimony, which amounted to thousands of pages of documents.[555]

343 The third argument raised by the Applicants does not further assist them. They complain that the Tribunal majority noted "in its 'causation considerations'" that the project's complexity and various stakeholder interests "explained how things turned out, for better or worse" – a conclusion that the Applicants allege is "not explained".[556]

344 However, as noted above, the Tribunal majority found that there was no breach of the BITs. There was thus no need to further decide the issues of causation and quantum. The explanations provided as "causation considerations" are not part of the Tribunal majority's decision on liability.

[551] Award, p. 239-240 (paras. 981-982).

[552] Award, p. 242 *et seq.* (paras. 998, 1015, 1040, 1084, and 1090-1091).

[553] Award, p. 332 (para. 1243).

[554] Award, p. 239-240 (paras. 981-982).

[555] Award, p. 7 *et seq.* (18-118, 189-192, 961-1094, and 1227-1244).

[556] Memorial on Annulment, p. 91 (para. 236).

345 Accordingly, the Tribunal majority did not fail to state reasons "about the lack of any decision on the environmental permit or end to the EIA process".

The Tribunal majority did not fail to state reasons "about the lack of any decision on the Bucium Applications"

346 The Applicants complain about the reasons provided by the Tribunal majority in relation to the Bucium permitting process.[557] They notably complain that the Tribunal majority did not "consider the legal rules applicable to NAMR,"[558] but the Respondent has shown in Section 5.1 above that the Tribunal majority did not fail to apply Romanian law in this regard.[559]

347 The Applicants also argue that the Tribunal majority (i) did not consider "the evidence relating to NAMR's decision-making" and (ii) failed to address "why the Bucium Applications remained perpetually pending".[560] These allegations are inaccurate.

348 First, the Applicants attempt to isolate the Tribunal majority's findings on the Bucium Applications,[561] from the rest of the Tribunal majority's analysis of the principle claim. However, the paragraphs invoked by the Applicants must be read together with the Award as a whole, including the extensive analysis (over 30 pages) of the applicable law and facts, that encompass the Applicants' arguments in relation to the Bucium and Roșia Montană permitting processes.[562]

349 Second, the Tribunal majority sets out in the Award the reasons for its **conclusion** that Romania did not mishandle the Bucium Applications in breach of international standards:

[557] Memorial on Annulment, p. 92 *et seq.* (paras. 237-241).

[558] Memorial on Annulment, p. 92 (para. 239), see also p. 93 (para. 241).

[559] See paras. 245-250 above.

[560] Memorial on Annulment, p. 92 (para. 239).

[561] Award, p. 307 *et seq.* (paras. 1161-1164).

[562] See, *e.g.*, Award, p. 166 (paras. 805-942).

i) The Tribunal majority started its analysis of the principal claim by enquiring whether there was a composite act, which as noted encompassed the handling of the Bucium Applications (**Point A**);

ii) The Tribunal majority reviewed the law applicable to the principle claim,[563] detailed the relevant facts of the case (including documentary and witness evidence),[564] on which it developed its assessment;[565]

iii) The Tribunal majority considered whether "Romania's acts or omissions", including in connection with the Bucium Applications, were related and connected by "an underlying pattern" such that they formed a composite act; and, if such was found to be the case, whether they would violate the applicable investment treaties.[566]

iv) The Tribunal majority considered the actions taken by RMGC and NAMR at the relevant points in time, finding "no evidence of any wrongdoing by NAMR" (**Point B**).[567]

350 Third, as noted, the Tribunal majority considered the voluminous factual and legal record of the case. It enjoyed discretion in the manner in which it presented its assessment thereof and was under no obligation to "elaborat[e] the factual and legal base" of its reasons.

351 Accordingly, the Tribunal majority did not fail to state reasons "about the lack of any decision on the Bucium Applications."

The Tribunal majority did not fail to state reasons "for its conclusion regarding the impact of the UNESCO inscription on the ability to implement the Roșia Montană Project"

352 The Applicants argue that the Tribunal majority failed to state reasons regarding the impact of the Roșia Montană UNESCO inscription on the

[563] Award, p. 166 *et seq.* (paras. 806-938).

[564] Award, p. 200 *et seq.* (paras. 939-942) (referring to the facts that the Tribunal has already set out) and p. 306 *et seq.* (para. 1150-1160). This would include notably portions of section II.A of the Award ("Overview of the Facts"), the legal opinion of Prof. Bîrsan; the Witness Statement of Ms Szentesy.

[565] Award, p. 201 *et seq.* (paras. 943-945 and 1161-1169).

[566] Award, p. 201 (para. 943).

[567] Award, p. 308 (para. 1163).

implementation of the Project.[568] Specifically, they contend that the Tribunal majority failed to engage with the Applicants' submissions[569] and supporting evidence[570] purporting to show that the UNESCO inscription imposed additional layers of cultural heritage protection beyond those already in place,[571] and that such protections would have legally precluded the issuance of a construction permit for the Project.[572] On this basis, the Applicants assert that the Tribunal majority's reasoning was "illogical" and "incapable of supporting its conclusion".[573]

353 The Applicants' arguments rely on a selective reading of the Award, isolating passages from their context while disregarding the Tribunal majority's reasoning as a whole. Their claim that the majority ignored their pleadings and evidence is unfounded; the Award reflects a clear and structured engagement with both.

354 First, the Tribunal majority fully engaged with the submissions and evidence filed by the Applicants in support of the second alternative claim (*i.e.*, that Romania's request to list Roşia Montană as a UNESCO World Heritage Site was politically motivated to frustrate the Project). The Award reflects a structured and thorough treatment of the Applicants' position, beginning with the summary of their case,[574] continuing with the identification of the applicable legal framework[575] and relevant facts,[576]

[568] Memorial on Annulment, p. 93 *et seq.* (paras. 242-251); Annulment Application, p. 55 (para. 156).

[569] Memorial on Annulment, p. 94 (para. 244).

[570] Memorial on Annulment, p. 96 *et seq.* (para. 250).

[571] Memorial on Annulment, p. 95 *et seq.* (paras. 247-250).

[572] Memorial on Annulment, p. 94 *et seq.* (paras. 244-245).

[573] Memorial on Annulment, p. 97 (para. 251).

[574] Award, p. 318 *et seq.* (paras. 1204-1206) (with direct reference to the relevant submissions – including specific paragraphs which the Applicants, in their Memorial, erroneously claim were disregarded; see Memorial on Annulment, p. 94 (fn. 325)).

[575] Award, p. 321 *et seq.* (paras. 1217-1218) (referring to p. 166 *et seq.*).

[576] Award, p. 340 *et seq.* (paras. 1283-1293) (with direct reference to the Applicants' submissions and evidence – including specific paragraphs of these submissions and evidence which the Applicants, in their Memorial, erroneously claim were disregarded; see Memorial on Annulment, p. 94 *et seq.* (fns. 325 and 336)).

followed by a reasoned analysis of the evidence in light of that framework.[577]

355 Second, the majority considered the Applicants' legal theory, including the legal opinion of their expert, Prof. Podaru, and addressed both the domestic and international legal frameworks.[578]

356 The Tribunal majority acknowledged that UNESCO sites are subject to the requirement of a government-approved management and protection program under Romanian law,[579] but found that the Applicants had failed to demonstrate how this program, when and if adopted, would legally be incompatible with RMGC's License or the applicable permitting framework. The Award further explains that:

i) the subject of Romania's application to UNESCO reflected the footprint already protected as a historical monument under national law through inscription on the national List of Historical Monuments;[580]

ii) there is "no evidence to support [the Applicants'] assertion that the UNESCO listing created impediments that were fatal to the continuation of the Project".[581]

iii) no urbanism plans reflecting the UNESCO listing had been prepared or submitted to State authorities by the time of the Award;[582]

[577] Award, p. 344 *et seq.* (paras. 1294-1303).

[578] Award, p. 345 *et seq.* (paras. 1297-1301) (citing *inter alia* the expert legal opinion).

[579] Award, p. 342 (para. 1287).

[580] Award, p. 342 (para. 1287) (citing documentary evidence and the Applicants' pleadings in the Arbitration. The Tribunal majority had already addressed earlier in the Award the cultural heritage protection regime applicable to Roșia Montană and the steps required to lift such protections in order to proceed with mining (see, *e.g.*, Award, p. 19 *et seq.* (paras. 80-82, 84 and 105)), of which the Applicants were always aware (see, *e.g.*, Award, p. 339 (para. 1278)).

[581] Award, p. 346 *et seq.* (paras. 1301-1302) (referring *inter alia* to the absence of additional obligations for States arising under the UNESCO Convention compared to those existing under domestic law, noting that UNESCO had been informed of the extension of the License and the possibility that the Applicants "may still meet the requirements under Romanian law to obtain the environmental permit", and observing that the urban plans for the UNESCO site would have to take into account the Applicants' rights under the License, as well as any ADCs already obtained).

[582] Award, p. 346 *et seq.* (para. 1301).

iv) the Applicants continued to hold valid ADCs, which were not affected by the UNESCO inscription. Moreover, nothing prevented them from applying for the remaining ADCs necessary to lift the heritage protection of the site and allow the Project to proceed in accordance with Romanian law. Yet, there was no evidence that the Applicants took such steps.[583]

357 On this basis, the Tribunal majority concluded that the Applicants had failed to establish that the UNESCO designation constituted a legal impediment to the implementation of the Project.

358 Far from being "illogical", the Tribunal majority's reasoning reflects a methodical approach: it reviewed the factual and legal record concerning the UNESCO listing; assessed the domestic and international legal effects of the inscription; examined the Applicants' legal theory and expert report; found that no legal act had occurred that rendered the Project's implementation impossible and that the Applicants' argument lacked evidentiary and legal foundation.

359 Accordingly, the Tribunal majority did not fail to state reasons "for its conclusion regarding the impact of the UNESCO inscription on the ability to implement the Roșia Montană Project".

The Tribunal majority did not fail to state reasons "for its conclusions that the State's conduct did not breach the BITs"

360 After noting that the Tribunal majority "set out certain findings of fact and then referred in a cursory manner to the treaty standards", the Applicants allege that the Tribunal majority's "brief conclusory statements fall far short of the reasoning required to support the majority's liability decision."[584] They raise three points, which can all be swiftly dismissed.

361 First, the Applicants expressly point to **eight** paragraphs of the Award.[585] However, the Award is made of **1358** paragraphs, setting out relevant facts in at least **355** paragraphs (approx. 25% of the Award) and the treaty

[583] Award, p. 346 *et seq.* (para. 1301).

[584] Memorial on Annulment, p. 97 (paras. 252).

[585] Memorial on Annulment, p. 97 (para. 252) (referring to Award, p. 309 *et seq.* (paras. 1166, 1198-1200, 1208, and 1306-1307).

standards in at least **145** (more than 10%).[586] The reasoning leading to the Tribunal majority's decision on liability is not limited to eight paragraphs but covers **131** paragraphs.[587]

362 Second, the Applicants refer to three treaty standards (FET, umbrella clause and expropriation) and note that the Tribunal majority accepted specific elements of those standards[588] but did not assess them in the present case and thus failed to "state reasons" when dismissing the claims.[589]

363 The arguments which the Applicants invoke in support are the same ones they raised in connection with Article 52(1)(b). As the Respondent explained in Section 5.1.4.1 above, those arguments are baseless and the Tribunal majority did set out in detail the reasons that led it to go from the claims and facts presented in the Arbitration to its conclusions.[590]

364 Third and finally, the Applicants claim that the Tribunal majority's "reasoning was also contradictory" because it allegedly did not consider the State's "omission" to issue any decision relating to Roșia Montană and Bucium and relied on the absence of an intention to harm, although these were acknowledged elements of the BIT standards.[591] The Respondent

[586] Respectively at Award, p. 3 *et seq.* (paras. **6-204**, 777-784, 939-942, 947, 967-972, 986-992, 1000-1009, 1017-1031, 1044-1073, 1096-1133, 1150-1160, 1213-1215, 1228-1233, 1246-1267, and 1283-1293) and p. 96 *et seq.* (paras. **550-552, 560-569**, 806-938, 1186-1187, and 1217-1218). The bolded paragraphs are set out in portions of the Award that fall outside the scope of the Applicants' annulment request.

[587] Award, p. 208 *et seq.* (paras. 948-960, 973-982, 993-998, 1010-1015, 1032-1040, 1074-1092, 1134-1148, 1161-1164, 1178-1201, 1234-1244, 1268-1281, and 1294-1304).

[588] Memorial on Annulment, p. 97 (para. 253) ("the majority accepted that [FET] required a lack of arbitrariness"), p. 98 (para. 254) ("The majority also accepted that Claimant' 'umbrella' clause claim […] apply where the conduct of the State interferes with any obligations entered into between State organs and private parties."), and p. 98 (para. 255) ("the majority accepted that it is 'the effect' of a State's measures that determines whether 'the interference' with an investment rises to the level of an expropriation.").

[589] Memorial on Annulment, p. 97 *et seq.* (paras. 253-255).

[590] See specifically paras. 232-250 (regarding the permitting procedures for Roșia Montană and Bucium) and paras. 222 (regarding contract rights) above.

[591] Memorial on Annulment, p. 98 (para. 256).

addressed above how these arguments were addressed, with reasoning, in the Award,[592] such that the Applicants' complaints are baseless.

365 Accordingly, the Tribunal majority did not fail to state reasons "for its conclusions that the State's conduct did not breach the BITs".

The Tribunal majority did not fail to state reasons "for important decisions that deprived [Applicants] of due process"

366 According to the Applicants, the Tribunal majority failed to state reasons regarding two "important decisions that impaired [the Applicants'] due process rights".[593]

367 First, the Applicants claim that the Tribunal majority did not state the reasons why it allegedly did not consider "key evidence" (factual exhibits that the Applicants had presented in relation to the License renegotiations) or why it considered such evidence to be "unpersuasive or insufficient".[594] As shown above, the Tribunal majority did consider this evidence.[595]

368 Second, the Applicants complain that the Tribunal majority did not indicate in the Award "how it assessed the evidentiary value of Mr. Ponta's unexamined witness testimony."[596] The Respondent also explained above the manner in which Mr. Ponta's witness statement was admitted to the record and the Tribunal's indication at the time that it would assess the weight to be given to that statement should Mr. Ponta not appear at the hearing.[597] The Applicants do not deny that the Award makes no reference to the content of that witness statement. Had the Tribunal wished to rely on it, it would have had to explain why the statement could be given weight despite the circumstances in which it was produced. As it did not, there was no reason for the Tribunal to provide any reasons.

[592] See paras. 258-261 (on omissions) and paras. 265-267 (on intention to harm) above.

[593] Memorial on Annulment, p. 99 (paras. 257-260).

[594] Memorial on Annulment, p. 99 (paras. 257-258).

[595] See paras. 296-300 above.

[596] Memorial on Annulment, p. 99 (para. 259).

[597] See para. 302 above.

369 Accordingly, the Tribunal majority did not fail to state reasons "for important decisions that deprived [the Applicants] of due process".

6 THE APPLICANTS SHOULD BE ORDERED TO COVER THE COSTS OF THESE ANNULMENT PROCEEDINGS

370 In line with the extraordinary nature of annulment proceedings and to deter unmeritorious annulment applications, advances on costs are covered exclusively by applicants (whereas parties pay in equal shares the advances on costs in arbitration proceedings).[598] This is without prejudice to *ad hoc* committees' decision as to how and by whom the expenses incurred in the annulment proceeding are to be borne under Article 61(2) of the ICSID Convention.[599]

371 When *ad hoc* committees reject annulment applications, they have increasingly also ordered the unsuccessful applicant to bear all the costs.[600] The *Tulip v. Turkey* committee thus approvingly quoted another committee stating:

> "[a] consequence of this rule [Regulation 14(3)(e)], which imposes on the party who applies for annulment the financial burden of

[598] ICSID Administrative and Financial Regulation 14(3)(e): "[when] an application for annulment of an award is registered […] the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee […]."

[599] ICSID Convention Article 61(2) (which as per Article 52(4) applies *mutatis mutandis* to annulment proceedings): "[…] the Tribunal shall […] 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."

[600] See ICSID Background Paper on Annulment 2024, at **AL-21**, p. 31 *et seq.* (para. 72) ("There is a continuing trend of *ad hoc* Committees deciding that the Applicant should bear all or a majority of the Costs of Proceeding when the application for annulment was unsuccessful. Some *ad hoc* Committees have also ruled that the losing party should bear the legal fees and expenses of the successful party."). For a recent example, see, *e.g.*, *Rasia v. Armenia*, Decision on Annulment, dated 5 November 2024, at **RAL-35**, p. 82 *et seq.* (paras. 266 and 269). However, in the case of successful annulment applications, letting costs lie where they fall is more appropriate. *TECO v. Guatemala*, Decision on Annulment dated 5 April 2016, at **AL-65**, p. 112 (para. 377) (recalling that "the errors which led to the partial annulment of the Award were not made by Guatemala, but by the Tribunal. Considering that both Parties participated equally in the appointment of the Arbitral Tribunal, the Committee considers that the burden of the Tribunal having committed annullable errors should be borne by the Parties equally.").

advancing the costs, should normally be that the Applicant, when annulment is refused, remains responsible for these costs."[601]

372 This approach is all the more appropriate where the annulment application was found to be "fundamentally lacking merit".[602]

373 So too here, the Application and related arguments in the Memorial fundamentally lack merit. All should be dismissed.

374 In addition, the Applicants' conduct in these annulment proceedings – including their procedural motions and "kitchen sink approach" to the Application and Memorial – has caused the Respondent to bear additional costs at every possible juncture. This raises serious concerns for the Respondent where the Applicants continue to refuse to comply with the (binding and enforceable) Award, and their periodic financial disclosures underline the uncertainty of their future financial prospects.[603] The Committee should consider this conduct when exercising its discretion to allocate costs under Article 61(2).

375 The Respondent seeks the application of a compound commercial interest rate from the date of the Committee's decision and until full payment.[604] At the least, the Committee should order the application of the same interest rate applied under the Award, where the Applicants were ordered to pay "simple interest at a risk-free rate as represented by the rate of interest on a three-month US Treasury bill as from the date of this Award and until full payment."[605]

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[601] *Tulip Real Estate v. Turkey,* Decision on Annulment dated 30 December 2015, at **AL-59**, p. 73 (para. 230).

[602] C. Schreuer *et al.*, Schreuer's Commentary on the ICSID Convention, 2022, at **AL-62**, p. 23 (p. 1256 *et seq.* of the original) (para. 111) (referring notably to the annulment decision in *CDC v. Seychelles*).

[603] See, *e.g.*, Comments on Stay, p. 6 *et seq.* (paras. 21-23); Rejoinder on Stay, p. 1 *et seq.* (paras. 3 and 15).

[604] *Rasia v. Armenia*, Decision on Annulment, dated 5 November 2024, at **RAL-35**, p. 83 (para. 271) (where the respondent on annulment claimed interest without specifying the rate, the committee found "it reasonable in the circumstances of this case to employ the USD Prime rate to the Respondent's costs.").

[605] Award, p. 360 (para. 1358(2)(c)).

376 In sum, the Applicants should remain responsible for the costs of the proceedings and be ordered to reimburse the Respondent's legal fees and costs incurred to defend against this application, including interest at the appropriate rate.

7 PRAYERS FOR RELIEF

377 Based on the above, Romania respectfully asks the Committee to:

a) Reject the Applicants' request to annul the Award,

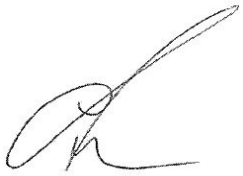
b) Order the Applicants to bear jointly and severally all the costs arising from these annulment proceedings, including all costs and fees of the Committee and ICSID and the Respondent's costs of the annulment proceedings, including attorneys' fees and expenses and all other expenses incurred in participating in the annulment proceedings, including internal costs, together with interest until full payment.

Respectfully submitted,

7 July 2025

For and on behalf of Romania,

Counsel for the Respondent



Matthias Scherer
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Puloma Mukherjee

Crenguța Leaua
Andreea Simulescu
Liliana Deaconescu
Corina Tănase
Andra Soare-Filatov

LIST OF RESPONDENT'S FACT EXHIBITS

RA-1	Resolution No. 3442 of the Trade Registry Office attached to the Alba County Court dated 1 April 2024
RA-2	Excerpt from website of Alba County Court re Case 1706/107/2024 dated 8 October 2024
RA-3	Bucharest Court of Appeal Decision No. 1237 dated 11 July 2024, in Case File No. 3212/2/2024
RA-4	Article 723 of the Romanian Code of Civil Procedure
RA-5	Dr. Leaua's LinkedIn post dated 8 June 2023
RA-6	Prof. Dr. Scherer's LinkedIn post dated 30 August 2024
RA-7	Ms. Athanasiou's comment on Prof. Dr. Scherer's LinkedIn post dated 31 August 2024
RA-8	LinkedIn Comments of Ms. Athanasiou and Ms. Bassiri dated 2 September 2024
RA-9	Gabriel Canada MD&A, Third Quarter 2024
RA-10	Junior Mining Network, Gabriel Resources: US$1.5 Million Loan dated 29 November 2024
RA-11	Romanian Code of Fiscal Procedure (extracts)
RA-12	Romanian Company Law No 31/1990 (extracts)
RA-13	Romanian Code of Civil Procedure (extracts)
RA-14	RMGC Financial Indicators 2021
RA-15	RMGC Financial Indicators 2022
RA-16	RMGC Financial Indicators 2023
RA-17	Romanian Insolvency Law No. 85/2014 (extracts)
RA-18	Romanian Company Law No 31/1990 (extracts)

RA-19	Letter from Respondent to ICSID dated 5 March 2018
RA-20	Email from Respondent to ICSID dated 16 March 2018
RA-21	Letter from Respondent to ICSID dated 19 March 2018
RA-22	Letter from Respondent to ICSID dated 29 March 2018
RA-23	Procedural Order No. 27 dated 10 March 2020
RA-24	Letter from Respondent to Tribunal dated 20 April 2022
RA-25	Letter from ICSID to Parties (enclosing statement and Prof. Grigera Naón's CV) dated 3 December 2015
RA-26	GOV.UK, Friends of the Earth Limited Overview
RA-27	Friends of the Earth International, Organisation
RA-28	Friends of the Earth International, What we do
RA-29	Friends of the Earth, About us
RA-30	Seabed Mining Moratorium Is Legally Required by U.N. Treaty, Legal Experts Find, The Pew Charitable Trusts dated 26 September 2023
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