INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

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

Applicants

V.

ROMANIA

Respondent

ICSID CASE NO. ARB/15/31

MEMORIAL ON ANNULMENT

April 3, 2025

WHITE & CASE LLP

Counsel for Applicants

MEMORIAL ON ANNULMENT

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1. Gabriel Resources Ltd. ("Gabriel Canada") and Gabriel Resources (Jersey) Ltd. ("Gabriel Jersey") (together "Gabriel," "Claimants," or "Applicants") submit this Memorial on Annulment of the Award issued on March 8, 2024 in ICSID Case No. ARB/15/31 (the "Award").[1]

I. INTRODUCTION

2. Gabriel commenced the arbitration following the frustration and effective taking of its investment in Roşia Montană Gold Corporation S.A. ("RMGC"), a company established in joint venture with the Romanian State for the purpose of developing mining projects in the areas of Roşia Montană and Bucium in Romania, in support of which Gabriel invested over US$ 760 million.

3. Gabriel's claims were brought under the Agreement between the Government of the United Kingdom and Northern Ireland and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "UK BIT") and the Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (the "Canada BIT") (together the "BITs").

4. The Tribunal concluded unanimously that it had jurisdiction over Claimants' claims and that the claims were admissible.[2] By majority, the Award rejected Gabriel's claims on the merits[3] and on that basis awarded approximately US$ 10 million in costs to Respondent.[4] It did so over a vigorous 37-page Note of Dissent by Prof. Horacio Grigera Naón.

5. The Application for Annulment details many grounds that support annulment of the Award, as the Award is seriously defective in multiple respects. In the interest of efficiency, this Memorial focuses on the most critical of those defects.

6. As detailed in Section II below, the Award must be annulled in its entirety on the grounds set forth in Article 52(1)(a) and Article 52(1)(d). Specifically, the Tribunal was not

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1 Abbreviations and terms used in the Application for Annulment have the same meaning in this Memorial.

2 Award ¶¶ 765, 829, 1183-1185, 1358(1).

3 Award ¶¶ 768, 1321, 1358(2)(a).

4 Award ¶¶ 1323-1357, 1358(2)(b)-(c).

properly constituted due to Prof. Zachary Douglas' undisclosed client work undertaken during the arbitration and other undisclosed factors undermining his appearance of independence and impartiality. In addition, the factors undermining Prof. Douglas's independence and impartiality resulted in serious departures from fundamental rules of procedure that undermined the integrity of the proceedings.

7. Alternatively, as detailed in Section III below, the part of the Award consisting of the majority's liability decision must be annulled on the grounds set forth in Article 52(1)(b), Article 52(1)(d), and Article 52(1)(e). Specifically, the majority manifestly exceeded its powers by failing to apply or even consider the applicable law in multiple significant respects (III.B); seriously departed from fundamental rules of procedure that guarantee the Parties the rights to be heard and to equal treatment when it failed to address essential aspects of the claims presented, failed to consider key evidence underpinning Claimants' claims, and deprived Claimants the opportunity to confront testimonial evidence of a witness who was central to the case (III.C); and failed to state reasons for outcome-determinative conclusions and important decisions on matters of due process (III.D).

II. THE ENTIRE AWARD MUST BE ANNULLED ON THE GROUNDS OF ICSID CONVENTION ARTICLES 52(1)(A) AND 52(1)(D)

8. Following issuance of the Award, Claimants learned that, while sitting on the Tribunal, Prof. Douglas had taken on Friends of the Earth as a client. Since 2002, Friends of the Earth was among several NGOs that engaged in sustained public activism against the Roşia Montană Project and, following the commencement of the arbitration, against Gabriel's claims in the arbitration. The nature and extent of public activism against the Roşia Montană Project, including by Friends of the Earth, was a significant issue relied upon by Respondent in support of its arbitration defense and by the Tribunal majority in its decision on liability. Prof. Douglas' undisclosed client work for Friends of the Earth in these circumstances creates the appearance for any reasonable third party that he lacked the independence and impartiality required by the ICSID Convention for a member of the Tribunal. Indeed, taking on as a client an organization engaged in public advocacy against the subject of the arbitration and specifically against the Claimants' case was irreconcilable

with the role of independent and impartial arbitrator and thus seriously undermined the legitimacy and integrity of the proceedings.

9. Claimants also learned following the issuance of the Award that Prof. Douglas also failed to disclose that his Matrix Chambers colleagues who were working as counsel with him on his Friends of the Earth matter took on as a client ClientEarth, one of the entities that intervened in this arbitration, in another matter where Prof. Douglas' client Friends of the Earth was co-plaintiff. ClientEarth is another organization that, like (and often together with) Friends of the Earth, had been an active public opponent of the Roşia Montană Project and, following commencement of the arbitration, of Gabriel's claims. ClientEarth, however, also intervened in the arbitration and urged the dismissal of Claimants' claims in a lengthy Non-Disputing Parties' Submission that the Tribunal admitted over Claimants' objections. The undisclosed representation of ClientEarth along with Friends of the Earth by Prof. Douglas' Matrix Chambers colleagues, and moreover by the same Matrix team leader who worked with Prof. Douglas in representing Friends of the Earth as his client, further contributed to the appearance, for any reasonable third party, that Prof. Douglas lacked independence and impartiality, particularly in view of the team-based approach to client work that Matrix Chambers publicly emphasizes is among its core values.

10. Two other factors came to light following the issuance of the Award that further undermined the appearance of independence and impartiality of Prof. Douglas as a member of the Tribunal. The first is that Prof. Douglas, who is the Program Director and a member of the leadership council and governance committee of the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program, failed to disclose the financial and material support provided by Respondent's arbitration counsel LALIVE to the program, the nature and extent of which was not readily discoverable when Prof. Douglas was appointed in the case.

11. The second is that Prof. Douglas failed to disclose that he applied for and acquired Swiss nationality during the arbitration. This latter fact undermined the neutrality of the Tribunal, which was already a material concern raised by Claimants in 2018 when they objected to the appointment of Prof. Pierre Tercier as President of the Tribunal due, *inter alia*, to his

numerous one-sided connections with Prof. Douglas and with Respondent's Geneva-based counsel team. Had Prof. Douglas disclosed his application or intention to apply to become a Swiss national in 2018, ICSID's Secretary-General undoubtedly would not have selected Prof. Tercier, a Swiss national, to be appointed as President in the absence of party agreement. In any event, Prof. Douglas' application for and acquisition of Swiss nationality during the arbitration was material and required disclosure.

12. Given these facts, and considering the cumulative effect of Prof. Douglas' repeated failures to make required disclosures to Claimants, any reasonable and informed third party justifiably would doubt Prof. Douglas' independence and impartiality and thus would doubt that the Tribunal could fairly and impartially resolve the Parties' dispute. The Tribunal thus was not properly constituted and there were serious departures from fundamental rules of procedure guaranteeing each party equal treatment and the right to be heard by an impartial and independent tribunal.

13. The resulting Award is fatally defective for these reasons and must be annulled in its entirety on two grounds:

a. the Tribunal was not properly constituted (ICSID Convention Article 52(1)(a));[5] and

b. there have been serious departures from fundamental rules of procedure (ICSID Convention Article 52(1)(d)).[6]

A. The Tribunal Was Not Properly Constituted and the Award Therefore Must Be Annulled Because Any Reasonable and Informed Third Party Justifiably Would Doubt That the Tribunal Could Fairly and Impartially Resolve the Parties' Dispute

1. A Tribunal Is Not Properly Constituted Where a Reasonable Third Party Would Doubt an Arbitrator's Impartiality or Independence at Any Point During the Arbitration

[5] Annulment Application ¶¶ 42-97.

[6] Annulment Application ¶¶ 42-43, 98-105.

14. "[T]here can be no greater threat to the legitimacy and integrity of the proceedings or of the award than the lack of impartiality or independence of one or more of the arbitrators."[7] Indeed, "the parties' confidence in the independence and impartiality of the arbitrators deciding their case is essential for ensuring the integrity of the proceedings and the dispute resolution mechanism as such."[8]

15. For that reason, if there is "reasonable doubt" that an arbitrator possessed the required qualities set out in ICSID Convention Article 14(1), the Award must be annulled to preserve the integrity of the process on the basis that the Tribunal was not properly constituted under ICSID Convention Article 52(1)(a).[9]

16. ICSID Convention Article 14(1) provides that an arbitrator must be one "who may be relied upon to exercise independent judgment." As the English version of Article 14(1) refers to "independent judgment," and the Spanish version requires "*imparcialidad de juicio*" (impartiality of judgment), arbitrators must be both impartial and independent.[10] Impartiality refers to "the absence of bias or predisposition towards a party," while independence relates to "the absence of external control," particularly of relationships with a party that might influence an arbitrator's decision.[11]

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7 *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶ 175.

8 *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment of May 5, 2017 (**AL-16**) ¶ 77.

9 *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 125. *See also, e.g.*, ICSID Background Paper on Annulment (2024) (**AL-21**) ¶ 83; *Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment of May 5, 2017 (**AL-16**) ¶ 77. ICSID Convention Article 14(1) sets forth the requirements for arbitrators appointed from the ICSID Panel of Arbitrators. ICSID Convention Article 40(2) in turn requires that "arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14."

10 *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 108.

11 *Blue Bank v. Venezuela*, ICSID Case No. ARB/12/20, Disqualification Decision of Nov. 12, 2013 (**AL-14**) ¶ 59. *See also ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025 (**AL-51**) ¶ 186 ("Independence and impartiality . . . are quintessential to dispensing of justice, in arbitration, and are regarded as prerequisites for a valid award under Article 52(1)(a).").

17. An ICSID *ad hoc* committee must consider "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."[12] In other words, the test is objective and requires the perspective of a reasonable third party.

18. Thus, the standard is breached when to a reasonable observer there is an appearance of dependence or bias.[13]

19. This requirement applies throughout the proceeding. "A tribunal cannot be held to be 'properly constituted' under Article 52(1)(a) where an arbitrator, whose ability to exercise independent judgment is in doubt, is either appointed to, or continues to be a member of, a tribunal."[14] The *Eiser v. Spain* committee recognized that "the Tribunal must have not only been correctly formed, initially, but must have also continued to remain so for the duration of its existence," and that "review under Article 52(1)(a) extends to situations where an arbitrator is alleged to have lacked impartiality and independence at any time during the arbitration."[15]

20. Thus "changes in the circumstances of an arbitrator may mean that a tribunal which was properly constituted at the outset may cease to be so during the course of the proceedings."[16]

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[12] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶¶ 109, 111. *See also Suez et al. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Argentina's Application for Annulment of May 5, 2017 (**AL-16**) ¶ 78; *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No. ARB/05/24, Ruling regarding participation of David Mildon QC of May 6, 2008 (**AL-7**) ¶ 30; *İmeks İnşaat v. Turkmenistan*, ICSID Case No. ARB/21/23, Disqualification Decision of Oct. 31, 2023 (**AL-49**) ¶ 73 (*quoting Blue Bank v. Venezuela* (**AL-14**) ¶¶ 59-60).

[13] *See Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Disqualification Decision of Dec. 13, 2013 (**AL-15**) ¶ 66; *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 109; *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022 (**AL-52**) ¶ 41.

[14] *Eiser Infrastructure v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶ 167.

[15] *Eiser Infrastructure v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶¶ 158, 178.

[16] *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 125.

21. The IBA Guidelines on Conflicts of Interest in International Arbitration for that reason emphasize that, "Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated."[17] The IBA Guidelines also require an arbitrator to refuse to continue to act as an arbitrator "if facts or circumstances exist, or have arisen since the appointment, which, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances, would give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard 4."[18]

22. The UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution similarly addresses "the concerns identified about the perceived or apparent lack of independence and impartiality of some adjudicators, which often gave rise to criticism about the legitimacy of the investor-State dispute settlement system,"[19] and emphasizes that "[t]he obligation of independence and impartiality begins when an individual becomes an Arbitrator and continues until the Arbitrator ceases to exercise his or her functions."[20]

23. Accordingly, where the facts and circumstances would cause a reasonable third party to doubt an arbitrator's impartiality or independence, the inexorable conclusion must be that

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[17] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 6 (explanation to General Standard 1 stating, "A fundamental principle underlying these Guidelines is that each arbitrator must be impartial and independent of the parties at the time the arbitrator accepts an appointment to act as arbitrator and must remain so during the entire course of the proceeding….").

[18] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 6-7 (General Standard 2(b) and explanation).

[19] UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) Preamble at *v*.

[20] UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) at 2, 15 (Article 3 and commentary at ¶ 19). *See also id.* at 17 (commentary to Article 3(2)(f) at ¶ 28 emphasizing "that an Arbitrator must remain vigilant and be proactive in ensuring that he or she does not create an impression of bias," and "that an action taken or an omission by an Arbitrator, which creates the appearance of a lack of independence or impartiality, may result in a breach of the obligation in paragraph 1 to be independent and impartial").

the Tribunal was not properly constituted and the Award must be annulled under ICSID Convention Article 52(1).

2. Prof. Douglas's Undisclosed Client Work for a Long-Standing Public Opponent of the Roşia Montană Project and of Gabriel's Arbitration Claims Would Make a Reasonable Third Party Doubt His Independence and Impartiality

24. While he sat on the Tribunal in this arbitration, Prof. Douglas took on as a client Friends of the Earth, an NGO that since 2002 had been a leading activist against the Roşia Montană Project, and following commencement of the arbitration, an ardent public opponent of Gabriel's claims.[21]

25. In addition, at the same time, Prof. Douglas' Matrix Chambers colleagues and co-counsel took on client work for Friends of the Earth alongside ClientEarth, which intervened in this arbitration to make a Non-Disputing Parties' Submission that urged dismissal of Gabriel's claims.[22]

26. These material undisclosed representations by Prof. Douglas and by his Matrix Chambers colleagues would lead any reasonable third party to doubt Prof. Douglas' independence and impartiality. In these circumstances, the Tribunal was not properly constituted.

a. Prof. Douglas took on as a client Friends of the Earth, a long-standing public opponent of the Roşia Montană Project and of Gabriel's arbitration claims

27. After receiving the Award, Claimants learned that Prof. Douglas did undisclosed client work for Friends of the Earth during the arbitration as follows.

a. While this arbitration was ongoing, in 2022, Prof. Douglas took on Friends of the Earth as a client in litigation to block the UK Government from financing a liquified

[21] Application for Annulment ¶¶ 70-78.

[22] Application for Annulment ¶ 74(g).

natural gas project, working as co-counsel with colleagues from Matrix Chambers.[23]

b. Reflecting the significance of this representation, Prof. Douglas includes his work for Friends of the Earth on his online biographical list of public and private international law cases where he has acted as "[l]ead counsel."[24]

28. Prof. Douglas never disclosed that he had taken on Friends of the Earth as a client and that he was acting as lead counsel for the NGO during this arbitration.

29. Prof. Douglas' undisclosed material client work for Friends of the Earth while he sat as an arbitrator in this case would raise justifiable doubts about his independence and impartiality to any objective observer. As detailed below and in the enclosed Annex 1, 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.

30. In addition, the Center for International Environmental Law (CIEL), an NGO that obtained leave from the Tribunal to present a Non-Disputing Parties' Submission advocating against Gabriel's claims in the case, also intervened in the litigation against the UK Government to support Prof. Douglas' client Friends of the Earth in that matter.[25] The timing of CIEL's

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[23] *See Friends of the Earth v. Secretary of State for UKEF and Chancellor of Exchequer*, [2022] EWHC 568 (Admin), Appellant's Supplementary Skeleton Argument dated Nov. 8, 2022 (**A-67**) at 24 (listing counsel as Jessica Simor KC and Kate Cook from Matrix Chambers, Prof. Zachary Douglas KC then from 3 Verulam Buildings, and Gayatri Sarathy from Blackstone Chambers); Friends of the Earth X Post dated Dec. 7, 2022 (**A-54**) ("Huge thanks to our legal team Jessica Simor KC @JMPSimor, Prof. Zachary Douglas KC, Kate Cook & Gayatri Sarathy."); *Friends of the Earth v. UKEF*, Court of Appeal Judgment dated Jan. 13, 2023 (**A-55**) at 1 (listing counsel as "Jessica Simor KC, Zachary Douglas KC, Kate Cook, and Gayatri Sarathy (instructed by Leigh Day) for the Claimant/Appellant (Friends of the Earth)"); *Friends of the Earth v. UKEF*, Information about the Decision Being Appealed and Proposed Grounds of Appeal dated Feb. 20, 2023 (**A-115**) at 20 (listing Jessica Simor KC, Zachary Douglas KC, Kate Cook, and Gayatri Sarathy as counsel). Prof. Douglas was a member of Matrix Chambers from 2006-2022. *See* Letter from ICSID to the Parties dated Nov. 20, 2015 enclosing statement and Prof. Douglas CV (**A-62**); *Senior arbitration talent departs Matrix Chambers for 3 Verulam Buildings in London*, Global Legal Post, Nov. 2, 2022 (**A-68**).

[24] Prof. Zachary Douglas KC 3VB Biography (**A-57**) at 5.

[25] *See 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 Nov. 10, 2022 (**A-155**).

intervention in that litigation, filed two days after Prof. Douglas submitted an appellate pleading on behalf of Friends of the Earth in the same proceeding, reflects the close alignment of interests and coordination between Friends of the Earth and the NGOs that intervened to make a Non-Disputing Parties' Submission in this arbitration.

31. In the arbitration, Respondent relied on the public opposition campaign against the Project led by NGOs, including these entities, by arguing that Gabriel allegedly failed to obtain a "social license," as purportedly evidenced through entrenched NGO opposition starting in 2002.[26] Respondent's expert reports and exhibits in the arbitration featured Friends of the Earth among the principal organizations at the heart of that opposition.[27]

32. Prof. Douglas could not have failed to see that expert evidence. Reflecting the centrality of this issue to the decision on liability in this case, the Tribunal majority referred dozens of times in the Award to NGO legal challenges and to other NGO opposition activities[28]

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[26] *See, e.g.*, Respondent's Counter-Memorial (Feb. 22, 2018) ("Counter-Memorial") §§ 2.3.1, 2.3.7, 3.2, 3.4, 4.2, 4.5, 5; Respondent's Rejoinder (May 24, 2019) ("Rejoinder") § 8.2. *See also* Thomson Expert Opinion (Feb. 19, 2018) ¶ 109 (Respondent's expert Dr. Ian Thomson opining that, "With the rise of an organized opposition in 2002 and attacks on RMGC's credibility, question of social license shifted from that of the perceptions and opinions of the local population to the perceptions and opinions of stakeholders at the national and international level.").

[27] *See, e.g.*, Stephanie Roth and Jürgen Maier, "Silence is Golden" (**Pop-29**) at 3 (recounting how 40 mainly environmental NGOs met with locals in July 2002 and together "formed an initiative known as Save Rosia Montana!," and that one of their earliest actions was in autumn 2002 when "Alburnus Maior and groups such as **Friends of the Earth** International, BothEnds, Urgewald and Bank Watch CEE convinced the World Bank's IFC or lender of last resort to keep away from Gabriel Resources' murky venture"); "Romanian Gold-Mine Loan Blocked by World Bank Chief," The Wall Street Journal, Oct. 11, 2002 (**R-137**) at 1 (reporting that "World Bank President James Wolfensohn has killed agency participation in a $250 million loan for a Canadian gold-mining investment in Romania that drew fire from environmental groups," and that, "Carol Welch, deputy international director at the environmental group **Friends of the Earth**, said the decision is 'definitely a victory,' but added that it also shows how much pressure the bank faces to stay out of big mining projects") ; "Anticipating Surprise – Assessing Risk: Investors Guide to Gabriel Resources Rosia Montana Mine Proposal," Oct. 2004 (**R-597**) at cover page, 3, 14 (prepared in association with the **Friends of the Earth** network and focusing on opposition to the Project); NGO Statement dated Jan. 2007 (**Pop-15**) (**Friends of the Earth** announcement on opposition to the Project). *See also* Pop Expert Opinion (May 17, 2019) ¶ 47 (stating that "action against RMGC" included "the participation of international organizations such as Greenpeace, Friends of the Earth, Mining Watch Canada, etc."); Thomson Second Expert Opinion (May 6, 2019) ¶ 70 (referring to an interviewee who stated in 2007 that an anti-Project activist "buil[t] the team" and "contacted Greenpeace, World Wildlife Federation, Friends of the Earth")..

[28] *See, e.g.*, Award ¶¶ 26, 92, 99, 100, 103, 109, 176, 178, 783, 947, 1004, 1018, 1022, 1024, 1025, 1027, 1035, 1038, 1045, 1052, 1055, 1069, 1077, 1080, 1086, 1087, 1088, 1100, 1249, 1255, 1256, 1262, 1264, 1269, 1271, 1301.

The majority also emphasized that its assessment of Claimants' claims turned on factors that included the influence of "many internal and external stakeholders" and "the negative ***public perception*** of the Project."[29]

33. Prof. Douglas' client Friends of the Earth was one of the most prominent NGOs in the activist campaign to undermine public perception, investor financing, and Romanian and Hungarian Government support for Gabriel and the Roşia Montană Project. Throughout this arbitration, Friends of the Earth also advocated publicly against Gabriel's arbitration claims and lobbied Government officials in Canada and in the United Kingdom to withdraw support for Gabriel and to intervene in the arbitration to oppose its claims.

34. The summary below shows Prof. Douglas indisputably must have known about his client's public activism against the Roşia Montană Project and Gabriel's arbitration claims.

    a. In 2002, Friends of the Earth and other international NGOs joined with local groups including Alburnus Maior, a Non-Disputing Party in this arbitration, to form an initiative against the Roşia Montană Project that became known as "Save Roşia Montană."[30] Friends of the Earth, together with another Non-Disputing Party in the arbitration, Greenpeace, lobbied Hungary's Ministry of Environment to raise objections to the Romanian Government under the Espoo Convention about the alleged transboundary effects of the Roşia Montană Project.[31] Friends of the Earth also issued a public statement purportedly on behalf of "an international coalition of NGOs" that objected to alleged "flaws in the project proposal and concerns about Gabriel Resources, the project sponsor."[32]

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29 Award ¶ 783 (emphasis in original). *See also, e.g.*, Award ¶¶ 856, 979, 980, 1141, 1312.

30 *See* Stephanie Roth and Jürgen Maier, "Silence is Golden" (**Pop-29**) at 3.

31 *See* Mining Watch Romania Press Release dated June 17, 2015 (**A-152**) at 1 ("The National Society of Conservation – Friends of the Earth Hungary together with Greenpeace Hungary ask the Hungarian Ministry of the Environment to initiate this procedure under the Espoo convention adopted in 1991. The same organizations successfully demanded in 2002 their government that the same mechanism is initiated for the Rosia Montana mining project.").

32 Alburnus Maior, CEE Bankwatch Network, Friends of the Earth International, Greenpeace CEE, Mineral Policy Center, MiningWatch Canada Press Release dated Oct. 10, 2002 (**A-116**).

b. That year, in its annual report, Friends of the Earth boasted that a "success story" was that it "worked with Romanian activists fighting what would be Europe's largest surface goldmine – the Rosia Montana Gold Mine project. Friends of the Earth International brought the activists to Washington, D.C., to ask World Bank President James Wolfensohn to stop funding the controversial project. Just days later the Bank announced it would not support the project. According to a Bank source, Wolfensohn personally pulled the plug on the project after speaking with the activists and reviewing the project."[33] Respondent featured this issue in its Counter-Memorial.[34]

c. In 2003, Friends of the Earth co-signed a widely publicized open letter urging Gabriel's investors "to ask Gabriel to withdraw from the Rosia Montana gold project…."[35]

d. In 2004, Friends of the Earth prepared a document called "Anticipating Surprise – Assessing Risk: Investors Guide to Gabriel Resources Rosia Montana Mine Proposal," which Respondent presented as exhibit R-597 in the arbitration. It states that "[t]he campaign to save Rosia Montana has given rise to the largest civil society movement in modern-day Romania," and that "[o]n the international front the campaign is supported by eminent environmental NGOs, including Friends of the Earth, Greenpeace, Earthworks, Bankwatch CEE and MiningWatch Canada."[36]

e. In 2007, Friends of the Earth announced to the media that it "released a statement today highlighting the local, national, and international opposition to the Rosia

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33 Friends of the Earth 2002 Annual Report (**A-117**) at 9.

34 *See* Counter-Memorial ¶ 106 (describing that 2002 opposition to the Project presented to the World Bank).

35 Letter from Alburnus Maior, Terra Mileniul III, PATRIR, NGO Working Group on Export Development Canada, Mineral Policy Centre, Mining Watch Canada, and Friends of the Earth Canada to Fund Manager dated June 10, 2003 (**A-118**).

36 "Anticipating Surprise – Assessing Risk: Investors Guide to Gabriel Resources Rosia Montana Mine Proposal," Oct. 2004 (**R-597**) at 14; *id.* at cover page, 3 (showing it was prepared in association with NGOs including the National Society of Conversations Hungary, listed as having its contact through Friends of the Earth Hungary and described as "a member of Friends of the Earth, the World Conservative Union, Environmental Liaison Centre International, the Central-Eastern European Working Group on Biodiversity, and is a corresponding member of the European Environmental Bureau").

Montana cyanide open pit gold mine project in Romania…."[37] Respondent's social license expert Dr. Alina Pop submitted that statement as exhibit Pop-15 in the arbitration. It states, "From the outset, the proposed Rosia Montana gold mine project in Romania has been beleaguered by scandals, operational problems, and vehement local, national, and international opposition. If constructed by Toronto-based Gabriel Resources, Rosia Montana would become Europe's largest open-pit gold mine operation and transform the densely inhabited Rosia Montana valley into four open-pit mines. Just a few kilometers south of Rosia Montana, Gabriel Resources owns an even larger concession in Bucium."[38]

f. In 2008, Friends of the Earth and "a group of civil society organizations and funders involved in environmental and social justice work around the world" sent a letter to Gabriel shareholder Thomas Kaplan "to voice our opposition to your decision to purchase 14.4 percent of Gabriel Resources (TSX.GBU) via 'Electrum Strategic Holdings', one of your companies."[39] Friends of the Earth asserted that "[t]here is huge local, national and international opposition" to the Roşia Montană Project, and that "financial support for a project such as Roşia Montană is clearly incompatible with [] an environmental agenda. We urge you to disassociate yourself with a project that clearly stands contrary to environmental and social principles, by selling your stake in Gabriel Resources."[40]

g. In 2012, Friends of the Earth issued a press release stating that "local campaign groups" were challenging Gabriel's plans to develop the Roşia Montană Project "with the support of the Friends of the Earth Europe network."[41] Friends of the Earth "raised serious concerns around corruption in this case," without providing any evidence, and declared that Friends of the Earth "will continue to pressure" the

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[37] Alburnus Maior, Earthworks, Friends of the Earth, Greenpeace in Romania, MiningWatch Canada Press Release dated Jan. 23, 2007 (**A-119**).

[38] NGO Statement dated Jan. 2007 (**Pop-15**).

[39] Letter from Friends of the Earth and others to Thomas Kaplan dated July 29, 2008 (**A-156**) at 1.

[40] Letter from Friends of the Earth and others to Thomas Kaplan dated July 29, 2008 (**A-156**) at 2, 3.

[41] Friends of the Earth Press Release dated Feb. 23, 2012 (**A-59**) at 2.

leaders of the Romanian Government coalition political party Democratic Union of Hungarians in Romania, which at that time included both the Minister of Environment and the Minister of Culture, "calling on them to put their public image, and the environment before the interests and profits of Gabriel Resources."[42]

h. In 2013, Friends of the Earth published on its website an open letter from Friends of the Earth and from organizations that included two Non-Disputing Parties in this arbitration, Alburnus Maior and Greenpeace, to Canada's Minister of Foreign Affairs, John Baird, copied to every member of the Canadian Parliament. In that open letter, Friends of the Earth called on Canada's Government to introduce legislation to make Canadian corporations in the extractive industry accountable for projects and operations abroad and to "[w]ithdraw Canadian government support for Gabriel Resources' mining project in Romania at Rosia Montana."[43] Friends of the Earth accused Canadian companies operating abroad of "egregious human rights and environmental abuses," asserting that "[o]ur case in point is the Rosia Montana gold mine in Romania, a project that poses unacceptable environmental, social and financial risks, proposed by junior mining company Gabriel Resources that has no track record with mining, and a suspect legal and financial past."[44] Friends of the Earth accused Gabriel of "a number of illegalities," without providing any evidence, and stated that "[w]e are deeply disturbed by the ill-considered support of the Canadian government to this project, which has more than serious environmental, judicial and economic flaws."[45]

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42 Friends of the Earth Press Release dated Feb. 23, 2012 (**A-59**) at 2.

43 Open Letter from Friends of the Earth and others to Canada's Minister of Foreign Affairs dated Dec. 5, 2013 (**A-120**) at 1, 4 (signed by Friends of the Earth). *See also* NGO Press Release dated Dec. 5, 2013 (**A-121**).

44 Open Letter from Friends of the Earth and others to Canada's Minister of Foreign Affairs dated Dec. 5, 2013 (**A-120**) at 1.

45 Open Letter from Friends of the Earth and others to Canada's Minister of Foreign Affairs dated Dec. 5, 2013 (**A-120**) at 2, 3.

i. In 2015, after Gabriel announced that it had provided notice to Romania about its intention to commence this arbitration,[46] Friends of the Earth republished on its website the open letter to Canada's Minister of Foreign Affairs and Parliament.[47]

j. Also in 2015, Friends of the Earth signed a statement called "Stop TTIP!" calling on the European Parliament "to prevent the conclusion of TTIP and CETA, as they include several critical points, such as the investor-state dispute settlement and provisions concerning cooperation on regulatory matters, which represent a threat to democracy and the rule of law."[48]

k. One month after Claimants commenced this arbitration, Friends of the Earth signed a public letter to UK Prime Minister David Cameron requesting "intervention to prevent a Canadian company using British investment treaty to sue Romania," raising purported concerns "that Gabriel Resources (Jersey) does not represent a significant or genuine business interest in the UK, and therefore that any claim launched by that entity should be discounted," and calling on the Prime Minister "to (a) investigate this situation, and if you find evidence that Gabriel Resources (Jersey) has no real business activities, (b) present evidence to ICSID that, in your opinion, they should not be covered by the provisions of the UK-Romania agreement."[49]

l. During this arbitration, in 2017, Friends of the Earth accused Romania's outgoing Prime Minister Dacian Ciolos of breaking his "promises" to apply to make Roşia Montană a UNESCO World Heritage site, claiming he "put the interests of the

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[46] Notice of Dispute Requesting Consultation dated Jan. 20, 2015 (**C-8**); Notice Requesting Consultation dated Apr. 22, 2015 (**C-9**). *See also* Gabriel Canada MD&A, First Quarter 2015 dated May 13, 2015 (**R-25**) at 2 (describing public announcement of the Notice in January 2015).

[47] Friends of the Earth Republication of Open Letter to Canada's Minister of Foreign Affairs dated May 5, 2015 (**A-122**).

[48] Letter from Stop TTIP! to European Parliament dated July 5, 2015 (**C-2889**).

[49] Tax Justice Network Post dated Aug. 14, 2015 with full text of Letter to UK Prime Minister David Cameron and signatories (**A-123**) (signed by Friends of the Earth).

mining company before the public interest."[50] Four days later, Friends of the Earth celebrated that "[a]t the last minute" the outgoing Government submitted the application file to UNESCO, speculating that Prime Minister Ciolos "[l]ikely" reacted to "the international outrage that followed" his inaction, and that "hopefully this step will mean that Roşia Montană will be saved, and the cyanide gold mine cannot be built. The world has changed a lot in a few days."[51]

m. In 2018, Friends of the Earth organized a conference in Northern Ireland "to speak about #Save Rosia Montana campaign and show solidarity with local communities from all over the world, fighting against destructive mining and extractivism."[52]

n. In 2019, Respondent submitted with its Rejoinder expert reports of Dr. Pop and Dr. Ian Thomson, both of whom gave evidence about opposition activities of NGOs that included Friends of the Earth.[53]

o. One month after the submission of those expert reports, Friends of the Earth published a 75-page pamphlet that highlighted Gabriel's case against Romania as its first story "of how the rich and powerful hijacked justice" using investor-State arbitration. The pamphlet relied on the Non-Disputing Parties' Submission in this arbitration and stated, "In November 2018, the Rosia Montana community, together with environmental groups opposing the mine, wrote to the three private lawyers who will decide Gabriel Resources' ISDS case. They explained how the company had violated its obligations under Romanian, EU and international environmental and human rights law, and should therefore not be protected through special rights

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50 Friends of the Earth Press Release dated Jan. 1, 2017 (**A-157**) at 1. Friends of the Earth quoted a lawyer for ClientEarth, which at that time was seeking to intervene and later did intervene as a Non-Disputing Party in the arbitration, evidencing the close cooperation of those two entities. *Id.* at 2.

51 Friends of the Earth Press Release dated Jan. 5, 2017 (**A-158**).

52 Environmental & Social Change Post on Facebook dated Apr. 16, 2018 (**A-153**) (thanking Friends of the Earth "for the invitation" to the "beautifully organised" conference, encouraging Friends of the Earth to "keep up with the great work in supporting grassroots communities saying NO TO mining!," and tagging among others "Salvati Rosia Montana!!! Alburnus Maior Rosia Montana in UNESCO World Heritage Save Rosia Montana UK").

53 Pop Expert Opinion (May 17, 2019) ¶ 47; Thomson Second Expert Opinion (May 6, 2019) ¶ 70.

for foreign investors."[54] Prof. Douglas' longtime MIDS colleague and collaborator Prof. Joost Pauwelyn featured Friends of the Earth's pamphlet about the Gabriel arbitration in the curriculum for a course he taught the next year at the MIDS program he and Prof. Douglas jointly administer.[55]

p. In 2021, Friends of the Earth immediately reposted UNESCO's announcement that it had inscribed the Roşia Montană Mining Landscape as a World Heritage site and on its Danger List, emphasizing, "#Breaking: Rosia Montana officially on the #UNESCO #World Heritage List!"[56] In an interview with Hungarian media, a representative of Friends of the Earth "highlighted that UNESCO not only decided that Verespatak [the Hungarian name for Roşia Montană] was worthy of World Heritage classification, but also that it was given the endangered World Heritage category, which also indicates that any further mining investment could endanger the World Heritage site," and added that Gabriel through the arbitration was "actually trying to squeeze money out of Romanian taxpayers for its alleged damage, which is why civilians must remain vigilant, even though now is the time to celebrate."[57]

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54 Friends of the Earth, Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice, June 2019 (**A-60**) at 14-19 ("Suing to Force Through a Toxic Goldmine: Gabriel Resources vs Romania").

55 Geneva Graduate Institute of International and Development Studies, Prof. Joost Pauwelyn, Course Description for International Investment Law in Academic year 2020-2021 (**A-154**) at 5 (curriculum materials include "ISDS Stories: Save Rosia Montana, Friends of the Earth Europe, 2019 (concerns *Gabriel Resources v. Romania*)"). Prof. Pauwelyn and Prof. Douglas are both members of the CIDS Council, the overarching body supervising CIDS and MIDS, they are two of the four members of the MIDS Governance Committee; they recently were both members of the MIDS Program Committee; and they co-edited a book on international investment law. CIDS The Center (**A-76**) (Prof. Douglas and Prof. Pauwelyn are members of the CIDS Council); CIDS Governance (**A-77**) (Prof. Douglas and Prof. Pauwelyn are members of the Governance Committee); MIDS 2023-2024 Program Brochure (**A-80**) at 3 (Prof. Douglas and Prof. Pauwelyn were members of the MIDS Program Committee); The Foundations of International Investment Law: Bringing Theory into Practice (eds. Zachary Douglas, Joost Pauwelyn, Jorge E. Viñuales), 2014 (**A-146**).

56 Friends of the Earth Post on X dated July 27, 2021 (**A-159**).

57 "The queen has stood still – no multinational can exploit Verespatak anymore," Pesti Srácok.hu dated Aug. 19, 2021 (**A-160**) at 4, 5.

q. In 2022, while this arbitration was ongoing, Friends of the Earth publicly called for "immediate action" to "urgently get rid of the ISDS system."[58]

r. In 2024, upon issuance of the Award, Friends of the Earth celebrated the dismissal of Gabriel's claims in a social media post that described the Award as "Great news!" and a "triumph[] against a destructive multi-billion dollar gold mining project" in "an #ISDS arbitration trial against project owner Gabriel Resources, which sought massive compensation for lost profits."[59]

35. Thus, for over two decades, Friends of the Earth engaged in a sustained and active public campaign to obstruct the Roşia Montană Project and later Gabriel's claims in this arbitration. This included petitioning Government officials in Romania, Hungary, Canada, and the United Kingdom, and making repeated public accusations against Gabriel.

36. It is inconceivable that Prof. Douglas remained unaware of his client's well-documented and vehement opposition to the Roşia Montană Project and Gabriel's arbitration claims when he began working as Friends of the Earth's lead counsel in 2022. Beyond the evidence that Respondent's experts submitted in this arbitration regarding Friends of the Earth,[60] the screenshots below show a simple internet search would have unequivocally revealed the irreconcilable conflict between Prof. Douglas' client work for Friends of the Earth and an independent and impartial role as an arbitrator in this case.[61]

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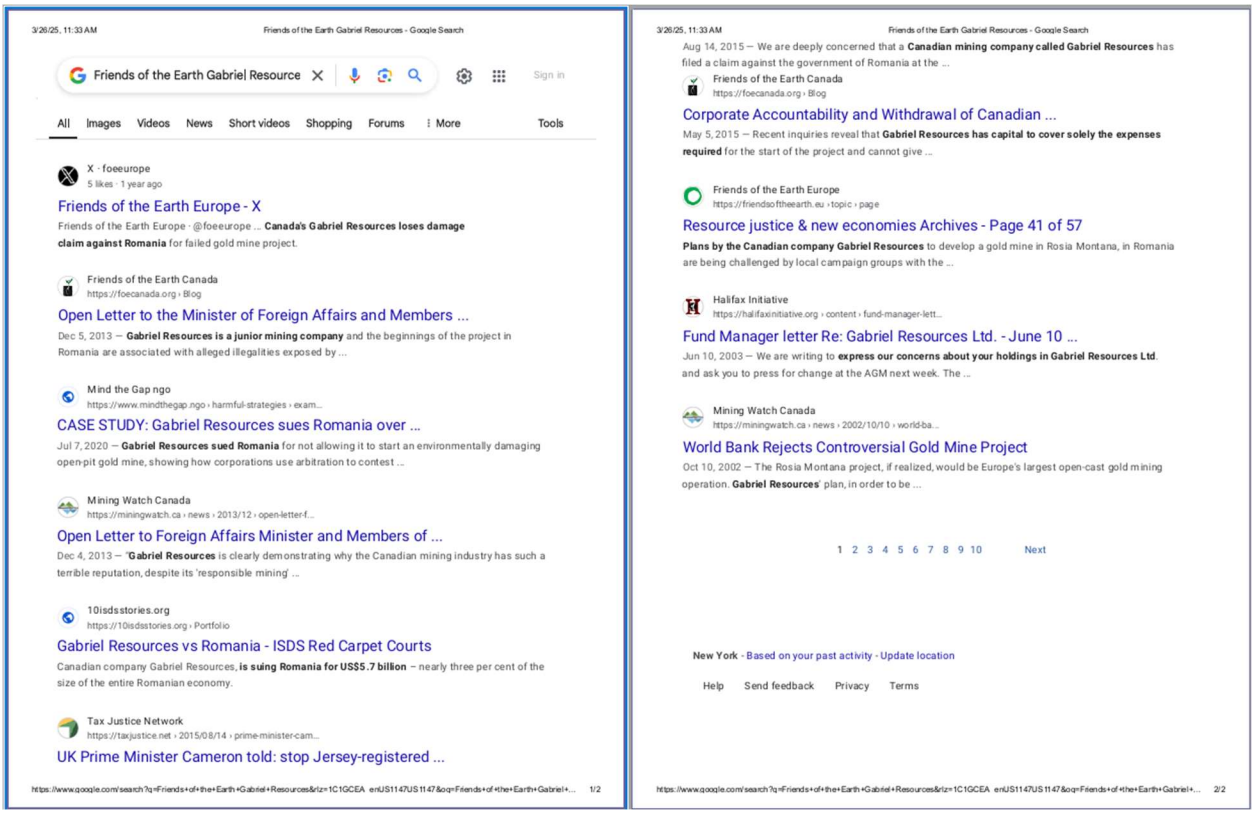
58 Global Statement on ISDS and climate, 2022 (**A-61**) (signed by, *inter alia*, CIEL, ClientEarth, and 15 affiliated "Friends of the Earth" entities).

59 Friends of the Earth Post on X dated Mar. 11, 2024 (**A-56**).

60 *See, e.g.*, Pop ¶ 47; Thomson II ¶ 70; "Romanian Gold-Mine Loan Blocked by World Bank Chief," The Wall Street Journal, Oct. 11, 2002 (**R-137**) at 1; "Anticipating Surprise – Assessing Risk: Investors Guide to Gabriel Resources Rosia Montana Mine Proposal," Oct. 2004 (**R-597**) at cover page, 3, 14; NGO Statement dated Jan. 2007 (**Pop-15**); Stephanie Roth and Jürgen Maier, "Silence is Golden" (**Pop-29**) at 3.

61 Screenshots of Google Search for Friends of the Earth and Gabriel Resources (**A-151**).



37. In these circumstances, as further elaborated below, Prof. Douglas' undisclosed client work for Friends of the Earth while he sat as an arbitrator in this case would cause any reasonable third party to question his independence and impartiality.

b. Concurrently with Prof. Douglas' undisclosed work for Friends of the Earth, Prof. Douglas' Matrix Chambers co-counsel took on Friends of the Earth and ClientEarth in a joint representation

38. While Prof. Douglas was sitting as an arbitrator in this case, Prof. Douglas' Matrix Chambers colleagues and co-counsel in his work for Friends of the Earth simultaneously represented ClientEarth, an NGO that intervened to present a Non-Disputing Parties' Submission in this arbitration, in a joint representation with Friends of the Earth as co-plaintiff in another case against the UK Government.

a. While this arbitration was ongoing, in 2022, while Prof. Douglas was still a member of Matrix Chambers, Prof. Douglas's Matrix Chambers colleagues began representing ClientEarth, an NGO that made a Non-Disputing Parties' Submission

in this arbitration, in a joint representation with Friends of the Earth, in litigation challenging the UK Government's climate strategies.[62] Matrix Chambers' joint representation of ClientEarth and Friends of the Earth continued after and concurrently with Prof. Douglas' own work for Friends of the Earth described above.

b. Thus, while Prof. Douglas sat as arbitrator in this arbitration, Matrix Chambers' founding member Ms. Jessica Simor and a Matrix team worked with Prof. Douglas to represent Friends of the Earth in one matter, and at the same time Ms. Simor and other Matrix colleagues represented Friends of the Earth in a joint representation with ClientEarth, an entity that intervened in this arbitration, in another similar matter.

c. Prof. Douglas did not disclose that ClientEarth, an entity the Tribunal allowed to make a Non-Disputing Parties' Submission in the arbitration, was a client of his Matrix Chambers colleagues.

39. Prof. Douglas clearly knew about Matrix Chambers' work for ClientEarth.

a. Matrix Chambers emphasizes on its website that its "core values" include a "**democratic structure**" where "[a]ll Members of Matrix have an equal say in the running of the organisation," and "**Working together**," which means that "[a]lthough our lawyers are individual practitioners, they are committed to

[62] *See, e.g.*, ClientEarth Press Release dated May 3, 2024 (**A-70**) (stating that "in March 2022, we teamed up with Friends of the Earth and Good Law Project" to challenge the UK Government's net zero strategy, obtained a favorable court ruling in July 2022, and "in February 2024 we went back to court, alongside our partners Friends of the Earth and Good Law Project"); *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 July 18, 2022 (**A-72**) at 1 (listing counsel including David Wolfe QC, Catherine Dobson and Nina Pindham, instructed by Leigh Day for Friends of the Earth, and Jessica Simor QC and Emma Foubister, instructed by ClientEarth); Client Earth Second Press Release dated May 3, 2024 (**A-71**) ("Friends of the Earth was represented in this case by David Wolfe KC of Matrix Chambers," Catherine Dobson, Nina Pindham, "and by Rowan Smith and Julia Eriksen at the law firm Leigh Day," and "Client Earth was represented in this case by Jessica Simor KC and Emma Foubister of Matrix Chambers"). *See also* Matrix Chambers - David Wolfe KC (**A-73**); Matrix Chambers - Emma Foubister (**A-74**).

teamwork and co-operation in delivering legal services, including through sharing legal knowledge and experience."[63]

b. Consistent with those values, Prof. Douglas worked for Friends of the Earth as co-counsel with Ms. Simor while she simultaneously led Matrix's joint representation of ClientEarth together with Friends of the Earth.

c. At the same time, while this arbitration was ongoing, Prof. Douglas provided an expert opinion calling for a moratorium on deep-sea mining working with Toby Fisher,[64] a member of Matrix Chambers who is the spouse of ClientEarth's CEO.[65]

d. Prof. Douglas therefore maintained a direct professional relationship with the spouse of ClientEarth's CEO, yet failed to disclose that members of his chambers, including his co-counsel in his concurrent matter for Friends of the Earth, were simultaneously providing client advocacy for ClientEarth during this arbitration.

40. The undisclosed client relationship that members of Prof. Douglas' chambers had with ClientEarth, which included joint representations with Prof. Douglas' client Friends of the

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[63] Maxtrix Chambers - Core Values (**A-69**) (emphasis in original). Matrix's cooperation and structure provide a basis for finding that Prof. Douglas should be identified with the work Matrix did on behalf of the Non-Disputing Party ClientEarth during this arbitration. *See* IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 10 (General Standard 6(a) stating, "The arbitrator is in principle considered to bear the identity of the arbitrator's law firm or employer, but when considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists, or whether disclosure should be made, the activities of an arbitrator's law firm or employer, if any, the law firm's organisational structure and mode of practice, and the relationship of the arbitrator with the law firm or employer, should be considered in each individual case," and that "[a]s a general proposition, a law firm for these purposes is any firm in which the arbitrator is a partner or with which the arbitrator is formally associated, including in the capacity of an employee of any designation, as counsel, or of counsel"); IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 11 (explanation to General Standard 6(a) stating that "although barristers' chambers should not be equated with law firms for the purposes of conflicts, disclosure may be warranted in view of the relationship between and among barristers, parties, and/or counsel").

[64] *See In the Matter of a Proposed Moratorium or Precautionary Pause on Deep-Sea Mining Beyond National Jurisdiction*, Opinion dated Feb. 10, 2023 (**A-102**) (co-authored by Prof. Douglas, by two Matrix members including Toby Fisher and Jessica Jones, and by one other lawyer); Toby Fisher LinkedIn Post (**A-103**) (linking the opinion "with Prof Zachary Douglas KC, Brenda Heather-Latu and Jessica Jones" and stating "We'll be speaking to the opinion in a number of fora in coming days and weeks" and "see other posts for registration details"); Toby Fisher LinkedIn Post (**A-104**) (thanking Prof. Douglas for organizing an event on the topic with the Geneva Graduate Institute and posting registration details). *See also* Matrix Chambers - Toby Fisher (**A-89**) (experience includes "ongoing litigation" for Friends of the Earth).

[65] Toby Fisher LinkedIn Post (**A-101**) (posting that his wife Laura Clarke OBE is ClientEarth's CEO).

Earth, raise justifiable doubts about Prof. Douglas' independence and impartiality from the perspective of a reasonable third party given the evident alignment of interests between Friends of the Earth and ClientEarth, the close working relationship among the members of Matrix Chambers representing those interests, and the fact that ClientEarth intervened to make a Non-Disputing Parties' Submission urging the Tribunal to dismiss Gabriel's claims.

41. The fact that ClientEarth's participation in this arbitration was substantial and in strong opposition to Gabriel's claims underscores that Prof. Douglas had a duty to disclose when his Matrix Chambers colleagues took on ClientEarth as a client.

42. ClientEarth's interest in seeking to intervene in this arbitration and the nature of the submission sought to be made were evident from the outset of the case.

    a. As far back as 2016, before the First Session, the Tribunal notified the Parties that it had received a letter from CIEL,[66] ClientEarth, and the European Center for Constitutional and Human Rights (ECCHR), on behalf of Alburnus Maior, Greenpeace CEE Romania, and the Independent Centre for the Development of Environmental Resources (ICDER), expressing "their interest in exploring *amicus curiae* participation in the *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania* arbitration."[67]

    b. In that letter to the Tribunal, ClientEarth asserted that "there was and continues to be a strong and widespread civil society movement in and outside Romania concerned with the potentially negative effects of the commercial activities of Gabriel Resources Ltd. and Gabriel Resources (Jersey) in relation to the Rosia

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66 As described above, CIEL intervened within two days to support the submission that Prof. Douglas made on behalf of Friends of the Earth in the litigation against the UK Government.

67 Letter from CIEL, ClientEarth, and ECCHR to Tribunal President dated July 15, 2016 (**A-124**) at 1; Email from ICSID to the Parties dated July 18, 2016 (**A-125**) (attaching "a letter received today from Marcos Orellana, from the Center for International Environmental Law; Karla Hill, from Client Earth; and Wolfgang Kaleck, from the European Center for Constitutional and Human Rights, on behalf of Alburnos [*sic*] Maior, Greenpeace CEE Romania and Independent Centre for the Development of Environmental Resources").

Montana gold mine and the lasting interest of the Romanian and European society in the outcome of the dispute between the company and the state of Romania."[68]

43. The Tribunal communicated with the Parties and with ClientEarth directly and repeatedly for several years regarding the transparency procedures in the arbitration.

a. The Tribunal notified the Parties that CIEL, ClientEarth, and ECCHR "expressed their interest in exploring *amicus curiae* participation," and invited the Parties to comment on their requests for access to documents and to schedule applications for *amicus curiae* submissions.[69]

b. The Parties addressed CIEL, ClientEarth, and ECCHR's requests,[70] and Claimants observed at the First Session "that it is perfectly evidenced from the initial request made, that the request to make Amicus submissions in this case will be from those who are ideologically opposed to the Claimants, to their investments, to mining, to the notion that a state might ever be held liable under an investment treaty, and they will generally be eager to support the Respondent's position on the merits of this case. The proposed Amici are not strangers to the subject of this arbitration, nor to investment treaty arbitrations generally. They have repeatedly made their views plain, public, and well-known."[71]

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68 Letter from CIEL, ClientEarth, and ECCHR to Tribunal President dated July 15, 2016 (**A-124**) at 2.

69 Letter from the Tribunal to the Parties dated July 22, 2016 (**A-126**).

70 Letter from Claimants to the Tribunal dated Aug. 5, 2016 (**A-127**); Letter from Respondent to the Tribunal dated Aug. 5, 2016 (**A-128**); Transcript of First Session with the Tribunal dated Aug. 12, 2016 (**A-129**) at 18-20. Claimants prepared this transcript based on the audio recording of the First Session received from ICSID.

71 Transcript of First Session with the Tribunal dated Aug. 12, 2016 (**A-129**) at 18-19 (Claimants further observing that the amicus submissions "should not and must not unduly burden the arbitration or unduly lengthen the procedure and they cannot be permitted to cause prejudiced or unequal treatment of the parties," that "[t]here's no doubting that the Amici will be opposed to the Claimants' case and will seek to support the Respondent's position," and that Claimants' proposed schedule was "designed to appreciate that it is certainly going to fall on the Claimants to have to respond to those submissions").

c. The Tribunal sent multiple letters to CIEL, ClientEarth, and to ECCHR after the First Session describing the applicable procedures and the timing to apply to file non-disputing party submissions.[72]

d. CIEL, ClientEarth, and ECCHR objected to the applicable procedures, including the Tribunal's decision not to publish witness statements or expert reports.[73]

e. The Tribunal invited the Parties to comment on that objection;[74] both Parties did so;[75] and the Tribunal transmitted its decision on the matter directly to CIEL, ClientEarth, and ECCHR.[76]

f. In 2018, CIEL, ClientEarth, and ECCHR requested that the Tribunal extend the deadline for applications to file non-disputing party submissions.[77]

g. The Tribunal replied directly to CIEL, ClientEarth, and ECCHR through two more letters about the revised procedural timetable for such applications.[78]

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[72] Letter from the Tribunal to CIEL, ClientEarth, and ECCHR dated Nov. 28, 2016 (**A-130**) ("The Tribunal will inform the Prospective *Amici* as soon as this deadline is determined by the Tribunal in consultation with the Parties."); Email from ICSID to the Parties dated Jan. 11, 2017 attaching Letter from the Tribunal to CIEL, ClientEarth, and ECCHR dated Jan. 11, 2017 (**A-131**) (providing notice of the established deadline).

[73] Letter from CIEL, ClientEarth, and ECCHR to the Tribunal dated Mar. 13, 2017 (**A-132**).

[74] Email from ICSID to the Parties dated Mar. 29, 2017 (**A-133**).

[75] Letter from Claimants to the Tribunal dated Apr. 5, 2017 (**A-134**); Letter from Respondent to the Tribunal dated Apr. 5, 2017 (**A-135**).

[76] Procedural Order No. 5 dated June 16, 2017 (**A-136**); Email from ICSID to the Parties dated June 16, 2017 (**A-137**); Letter from the Tribunal to CIEL, ClientEarth, and ECCHR dated June 16, 2017 (**A-138**) (providing notice of the decision in Procedural Order No. 5).

[77] Letter from CIEL, ClientEarth, and ECCHR to the Tribunal dated Apr. 20, 2018 (**A-139**).

[78] Letter from the Tribunal to CIEL, ClientEarth, and ECCHR dated Apr. 24, 2018 (**A-140**) ("As soon as a new schedule is adopted, the Arbitral Tribunal will inform all relevant entities accordingly."); Email from ICSID to the Parties dated Apr. 24, 2018 (**A-141**) (advising of the "letter sent today to the prospective non-disputing parties following instructions from the President of the Tribunal"); Procedural Order No. 9 dated June 5, 2018 (**A-142**); Letter from the Tribunal to CIEL, ClientEarth, and ECCHR dated June 5, 2018 (**A-143**) (notifying the new timetable set out in Procedural Order No. 9); Letter from the Tribunal to the Parties dated June 5, 2018 (**A-144**) at 2 ("You will find enclosed the letter sent to the potential non-disputing parties who have been in contact with the Arbitral Tribunal; this letter provides information on the new Procedural Calendar with dates for a potential application.").

44. The submissions presented by ClientEarth and the other NGOs sought to take a position on the merits of Gabriel's claims in the case and to publicize their advocacy against Gabriel.

a. ClientEarth emphasized in a press release in 2018 that "ISDS is not only an unwelcome tool that allows multinationals to put pressure on public interest decision-making, it is also incompatible with EU law."[79]

b. Later in 2018, CIEL, ClientEarth, and ECCHR filed an application to submit an "*amicus curiae* brief" on behalf of Alburnus Maior, Greenpeace CEE Romania, and ICDER, purportedly "to assist the Tribunal in its decision-making by providing greater detail about the potential impacts of the Project, and about the domestic legal challenges that have shown the Project to be non-compliant with EU and domestic law."[80] ClientEarth, CIEL, and ECCHR stated that their legal counsels prepared the application and the "*amicus* submission," and that "ClientEarth, CIEL, and ECCHR have a long history of supporting communities in various legal forums, including in supporting groups submitting *amicus* briefs in similar arbitration proceedings."[81] In the Non-Disputing Parties' Submission attached to that application, ClientEarth, CIEL, and ECCHR argued that the Tribunal lacked jurisdiction and that Gabriel's alleged "failure to comply with applicable domestic and EU law, as well as investor responsibilities under international law, necessitates a rejection of the claims."[82]

c. ClientEarth issued a press release upon filing the Non-Disputing Parties' Submission stating, "The fate of the local community is in the hands of an arbitration tribunal which, despite sitting outside the European Union system, will decide on a dispute involving questions of domestic and EU law. Such questions

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79 ClientEarth Press Release dated Sept 27, 2018 (**C-2867**).

80 Application and Amicus Curiae Submission from CIEL, ClientEarth, and ECCHR to Tribunal President dated Nov. 2, 2018 (**A-145**) at 5. *See also id.* at 2 (asserting that "groups, including *amici*, have raised concerns" about the Project "from the time it was proposed").

81 Application and Amicus Curiae Submission from CIEL, ClientEarth, and ECCHR to Tribunal President dated Nov. 2, 2018 (**A-145**) at 5.

82 Application and Amicus Curiae Submission from CIEL, ClientEarth, and ECCHR to Tribunal President dated Nov. 2, 2018 (**A-145**) at 17.

belong to the exclusive jurisdiction of the Romanian Courts, and ultimately the Court of Justice of the European Union. By using the investor-state dispute settlement mechanism, Gabriel Resources is clearly attempting to sideline the Romanian courts, in complete disregard of past rulings."[83]

45. The Tribunal decided to accept a substantial part of the Non-Disputing Parties' Submission.

a. The Tribunal granted the application of ClientEarth, CIEL, and ECCHR and admitted the Non-Disputing Parties' Submission they prepared into the record in substantial part over Claimants' objections.[84]

b. Claimants submitted a responsive pleading rebutting the Non-Disputing Parties' Submission.[85]

46. ClientEarth thus was permitted to intervene to contribute a lengthy Non-Disputing Parties' Submission in the arbitration urging the Tribunal to dismiss Claimants' claims. ClientEarth also celebrated the Tribunal's Award in this case, describing the dismissal of Gabriel's claims as "a major victory" while arguing that "the case clearly highlights the injustice of the ISDS system. It inarguably shows that in a world grappling with an environmental crisis and major corporate human rights threats, ISDS should not exist. We cannot keep letting corporations sue governments and be compensated with taxpayers' money for policies that protect people and the environment, especially when they take place in secretive, closed-door procedures that ignore the most impacted people."[86]

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83 ClientEarth Press Release dated Nov. 5, 2018 (**C-2870**) at 2.

84 Procedural Order No. 19 dated Dec. 7, 2018 (**A-147**) ¶ 75. The Tribunal acknowledged that the application was "submitted by representatives of CIEL, Client Earth and ECCHR on behalf of the Applicants and not the Applicants themselves," did "not contain any contact details of the Applicants," and that "the Submission itself [was] not signed by the Applicants." *Id.* ¶ 58 (describing "inadequacies").

85 Claimants' Comments on Non-Disputing Parties Submission (Feb. 28, 2019) (**A-161**).

86 ClientEarth Press Release, last accessed Mar. 21, 2025 (**A-148**).

47. In these circumstances, the undisclosed client advocacy for ClientEarth done by Prof. Douglas' Matrix Chambers colleagues and co-counsel would undermine for any reasonable third party the appearance of his independence and impartiality for this case.

48. Prof. Douglas' failure to disclose his connection to the ClientEarth representation through Matrix Chambers and through his own work with the spouse of ClientEarth's CEO is further aggravated by his failure to disclose the client work he had undertaken for Friends of the Earth,[87] as both matters involved common counsel (Matrix founding member Ms. Simor) and Friends of the Earth was a co-plaintiff in the matter with ClientEarth and had engaged in joint advocacy repeatedly with ClientEarth, including as Non-Disputing Parties in other investment arbitrations.[88]

49. Thus, the undisclosed representation by Prof. Douglas' Matrix Chambers colleagues of ClientEarth is an aggravating factor undermining for any reasonable third party the appearance of Prof Douglas' independence and impartiality for this case.

50. In these circumstances, Prof Douglas' appearance of independence and impartiality was severely compromised. No reasonable outside observer would conclude that Prof Douglas could be relied upon to exercise independent and impartial judgment in this arbitration.

c. The undisclosed client representations of Friends of the Earth and ClientEarth would raise justifiable doubts about Prof. Douglas' independence and impartiality for any reasonable third party

51. ICSID challenge decisions establish that advocacy on the part of a tribunal member in other cases for clients with interests at issue in the arbitration creates an impermissible conflict for continuing service on the tribunal.

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87 *See also* Annex 1- Memorial on Annulment (chronology of facts relating to these client representations).

88 *See, e.g.*, *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, Letter from ClientEarth, ECCHR, Greenpeace Netherlands, Milieudefensie (Friends of the Earth Netherlands), SOMO, and Urgenda to Tribunal dated July 19, 2021 (**A-149**). That letter contains the same structure and content, including multiple verbatim passages, as the Non-Disputing Parties' July 15, 2016 letter expressing interest in this arbitration between Gabriel and Romania. *See also* Application for Annulment ¶¶ 74(c)-(d).

52. For example, in *Grand River v. United States*, ICSID's Secretary-General notified Prof. James Anaya that representing or assisting clients in other international fora that evaluated the United States' compliance with human rights norms was incompatible with service as arbitrator in that NAFTA arbitration.[89]

53. In *RSE v. Latvia*, the challenged arbitrator, Amy Frey, had acted as counsel in other cases under the Energy Charter Treaty involving different parties and different disputed measures.[90] The PCA Secretary-General, the appointing authority in that arbitration, concluded that Ms. Frey's counsel work in those cases would "seed justifiable doubts in the mind of a reasonable and informed third person as to whether Ms. Frey'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."[91] The PCA Secretary-General therefore accepted the challenge against Ms. Frey on the ground that her "role as counsel in other arbitrations under the ECT gives rise to justifiable doubts as to her impartiality and independence in the present arbitration under Article 10(1) of the UNCITRAL Rules."[92]

54. In the *Vito Gallo v. Canada* NAFTA arbitration, arbitrator Christopher Thomas disclosed that he had done a "small amount" of legal work reviewing advice provided to Mexico on certain trade and investment matters not involving NAFTA.[93] The ICSID Deputy Secretary-General, who was the authority ruling on the challenge in that case, observed that Mr. Thomas' legal work for Mexico risked creating justifiable doubts as to his impartiality and independence as arbitrator, and that arguments to the effect that the legal work for Mexico was *de minimis* "misses the point" because "[w]here arbitral functions are concerned, any paid or *gratis* service provided to a third party with a right to intervene

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89 *Grand River Enterprises v. United States*, Letter from ICSID Secretary-General to Prof. James Anaya dated Nov. 28, 2007 (**AL-6**) (enclosing ICSID Secretary-General's letter of October 23, 2007 to Prof. Anaya).

90 *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022 (**AL-52**) ¶ 44.

91 *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022 (**AL-52**) ¶ 46.

92 *RSE Holdings AG v. Republic of Latvia*, PCA Case No. AA861 (UNCITRAL), Challenge Decision of June 24, 2022 (**AL-52**) ¶ 48.

93 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶ 11.

can create a perception of a lack of impartiality. The amount of work done makes no difference. What matters is the mere fact that work is being performed."[94] The ICSID Deputy Secretary-General noted that the arbitrator's "judgment may appear to be impaired by the potential interest of the advised … party," that if the advised party "were formally to intervene … this would necessarily lead to the reconstitution of the tribunal," and that the arbitrator's "involvement" was "problematic."[95] The ICSID Deputy Secretary-General considered that "[i]t would be next to impossible for Mr. Thomas to avoid altogether … the appearance of an inability to distance himself fully from the interests of Mexico," and that "from the point of view of a 'reasonable and informed third party' …, i.e., a 'fair minded, rational, objective observer,' … there would be justifiable doubts about Mr. Thomas' impartiality and independence" were he to continue as arbitrator while he also did legal work for Mexico.[96]

55. In that case, Mexico was not a party to the arbitration, but had a right to intervene as a non-disputing party.[97] As Mr. Thomas chose to continue providing legal advice to Mexico, following the ICSID Deputy Secretary-General's decision, Mr. Thomas concluded that he "must resign from the Tribunal."[98]

56. By contrast, in this case, Prof. Douglas failed to disclose his representation of Friends of the Earth or the work his co-counsel and other members of his chambers did for ClientEarth. Thus, as discussed below, Prof. Douglas breached his disclosure obligations and deprived Claimants and the other Tribunal members of the knowledge and the opportunity to address these issues *before* he and his colleagues took on client

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94 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶ 32.

95 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶ 33.

96 *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶¶ 35-36.

97 *See Vito G. Gallo v. Canada*, UNCITRAL, Award dated Sept. 15, 2011 (**AL-54**) ¶¶ 1-118 (setting out the procedural history of the arbitration).

98 Arbitrator Thomas' Resignation Letter in *Vito G. Gallo v. Canada* dated Oct. 21, 2009 (**AL-55**) (submitting his resignation to ICSID's Deputy Secretary-General "in response to your decision, dated 14 October 2009, in which you request that I choose between providing any legal advice to the third NAFTA Party during the pendency of the arbitration or continue to serve as an arbitrator in this case").

representations that gave rise to a duty of loyalty to those clients that thus compromised his impartiality and independence to sit as arbitrator in this case.

57. Doubts about an arbitrator's independence and impartiality arise where an arbitrator or their law firm – or in this case Chambers whose members are "committed to teamwork and co-operation in delivering legal services" – acts as counsel or as an expert for a client that is engaged in public activism against one of the disputing parties in the arbitration and specifically against the claims in the arbitration.

58. The fact that Prof. Douglas took on the role of lead counsel for Friends of the Earth in litigation where it received active support from CIEL, at the same time that his co-counsel and Matrix Chambers colleagues took on work for Friends of the Earth in joint representation with ClientEarth, after the Tribunal granted ClientEarth and CIEL leave to submit a Non-Disputing Parties' Submission urging the dismissal of Gabriel's claims in this case, further aggravated the appearance to any reasonable third party of Prof. Douglas' lack of independence and impartiality in relation to Gabriel's claims in the case.

d. Prof. Douglas breached his disclosure obligations and deprived Claimants and the other Tribunal members of the opportunity to address the client representations before they compromised his impartiality and independence

59. Prof. Douglas breached his continuing disclosure obligations under ICSID Arbitration Rule 6(2) when he failed to disclose the client advocacy he and his colleagues undertook for Friends of the Earth and ClientEarth.

60. ICSID Arbitration Rule 6(2) (2006) requires an arbitrator to "assume a continuing obligation promptly" to disclose any past and present professional, business, and other relationships with the parties, and any other circumstance that might cause their reliability for independent or impartial judgment to be questioned by a party.[99] The duty of disclosure

[99] All the Tribunal members in this case accepted that obligation in declarations made pursuant to ICSID Arbitration Rule 6(2). *See, e.g.*, Letter from ICSID to the Parties dated Nov. 20, 2015 (**A-62**) (Prof. Douglas).

is "construed narrowly," such that doubts about disclosure must be resolved in favor of disclosure.[100]

61. Similarly, the IBA Guidelines make clear that arbitrators have a continuous obligation of broad disclosure to avoid potential conflicts that might give rise to justifiable doubts in the eyes of a party and should disclose circumstances "as soon as the arbitrator learns of them."[101] The duty of disclosure "rests on the principle that the parties have an interest in being fully informed of any facts or circumstances that may be relevant in their view,"[102] and so "[a]ny doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure."[103] The IBA Guidelines explain that "[t]he purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively – that is, from the point of view of a reasonable third person having knowledge of the relevant facts and circumstances – there are justifiable doubts as to the arbitrator's impartiality or independence."[104]

62. The UNCITRAL Code of Conduct likewise confirms that an arbitrator has a continuing obligation to disclose "any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality;"[105] the scope of disclosure "is broad and covers any circumstances, including any interest, relationship or other matters likely to give rise to justifiable doubts as to the independence or impartiality;" and includes "any publications and presentations that he or she has made as well as any activities of his or her law firm or

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100 *See Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (**AL-18**) ¶ 223.

101 IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 7 (General Standard 3(a)).

102 IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 8 (commentary to General Standard 3(a)).

103 IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 7 (General Standard 3(d)). *Id.* at 8 (commentary to General Standard 3(d)).

104 IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 14-15.

105 UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) at 5 (Article 11(1)).

organization, which are likely to give rise to justifiable doubts about his or her independence or impartiality."[106]

63. In addition, ICSID arbitrators have a continuous duty to investigate their professional, business, and other relationships as necessary to fulfill their continuous disclosure obligations. The *ad hoc* committee in *Vivendi v. Argentina* observed on that basis that the arbitrator has "a continuous duty of investigation" to evaluate disclosable circumstances.[107]

64. The *Vivendi v. Argentina* committee explained that if an arbitrator uncovers a connection that might give rise to reasonable doubts and does not resign from the tribunal, the arbitrator must disclose the connection "to the parties through an adequate amendment of earlier declarations under Rule 6" and by circulating an updated CV "so that each party can decide for itself whether there are reasons why the [arbitrator] should no longer serve, even if any subsequent challenge is ill-founded."[108]

65. The IBA Guidelines also confirm that arbitrators have a duty of inquiry. General Standard 7(d) states, "An arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to the arbitrator's impartiality or independence. Failure to disclose a conflict is not excused by lack of knowledge if the arbitrator does not perform such reasonable enquiries."[109] Thus, "to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them."[110]

66. The UNCITRAL Code of Conduct similarly emphasizes that an arbitrator has "a continuing duty to make further disclosures based on new or newly discovered circumstances and information as soon as he or she becomes aware of such circumstances

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[106] UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) at 29-30 (commentary to Article 11(1) at ¶¶ 76-77).

[107] *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision of Aug. 10, 2010 (**AL-56**) ¶¶ 221-223.

[108] *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment Decision of Aug. 10, 2010 (**AL-56**) ¶¶ 226-227.

[109] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 12.

[110] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 13.

and information."[111] This means that an arbitrator must "make all reasonable efforts to become aware of such circumstances and information" and "err in favour of disclosure if he or she has any doubt as to whether a disclosure shall be made."[112]

67. In this case, any party in Claimants' position would consider it extremely unfair and prejudicial that one of the arbitrators had taken on client work for Friends of the Earth, a known and well-documented adversary, while his co-counsel in that matter and his other colleagues represented Friends of the Earth together with ClientEarth, an NGO that intervened with the Tribunal's permission to present a Non-Disputing Parties' Submission urging the dismissal of Claimants' claims. Prof. Douglas therefore had an obligation under ICSID Arbitration Rule 6(2) to disclose these material client relationships to the ICSID Secretary-General, to the Parties, and to the rest of the Tribunal – and he breached that obligation by failing to disclose these client relationships.

68. Accordingly, Claimants were not made aware of these circumstances. Claimants did not discover the client relationships with Friends of the Earth and ClientEarth until after the Award's notification of Prof. Douglas' undisclosed acquisition of Swiss nationality revealed that material disclosures had not been made and that additional investigation was required.[113]

69. Claimants reasonably relied on the disclosures made by Prof. Douglas and had no obligation or reason to expend resources and time investigating potential client representations or other connections and circumstances involving Prof. Douglas or the other Tribunal members throughout the arbitration.

70. In similar circumstances, in *Vito Gallo v. Canada*, the ICSID Deputy Secretary-General rejected the argument that the claimant had "constructive knowledge" of public facts as

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[111] UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) (**AL-53**) at 6 (Article 11(3)). *See also id.* at 32 (commentary to Article 11(3) at ¶ 91 stating that an arbitrator "should remain vigilant and be proactive with regard to his or her disclosure obligations during the entire course of the IID proceeding").

[112] UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2024) **AL-53**) at 6 (Articles 11(4) and 11(5)).

[113] Application for Annulment ¶ 70.

doing so would "relieve the arbitrator of the continuing duty to disclose" and "would unfairly place the burden on the Claimant to seek elsewhere the notice it should have received from the arbitrator."[114] The ICSID Deputy Secretary-General also rejected the argument that the claimant's counsel was "almost certainly aware" of the relevant facts, finding that "[s]uch speculative statements cannot replace proof of actual knowledge."[115]

71. For the same reason, the ICSID *ad hoc* committee in *Eiser v. Spain* rejected the argument that Spain knew or should have known about the arbitrator conflict in that case. The *Eiser* committee emphasized that "[t]he existence of the information in the public domain does not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts. A clear and unequivocal waiver of a right so fundamental as to challenge the impartiality and independence of an arbitrator, goes to the very root of the proper constitution of a tribunal. Such a waiver cannot be established without proof that the party concerned had actual or constructive knowledge of all the facts."[116]

72. Prof. Douglas's breach of his disclosure obligation under ICSID Arbitration Rule 6(2) thus is a further basis to conclude that the Tribunal was not properly constituted.

3. Prof. Douglas' MIDS Program Received Undisclosed Financial and Material Support from Respondent's Counsel During the Arbitration, Which Would Make a Reasonable Third Party Doubt His Independence and Impartiality

73. While sitting as arbitrator in this case, Prof. Douglas administered the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program that received undisclosed financial and material sponsorship and support from Respondent's arbitration counsel LALIVE. Even if LALIVE's financial and material sponsorship and support of the MIDS program did not involve any direct compensation for

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[114] *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶ 24.

[115] *Vito G. Gallo v. Canada*, UNCITRAL, Challenge Decision dated Oct. 14, 2009 (**AL-8**) ¶ 24. *Id.* ¶ 25 (finding that even if the claimant's counsel attended a conference where Mr. Thomas provided an updated CV listing all his client matters, it would "be unreasonable to burden a party with the expectation that its counsel will have read every line of every page of every CV provided at a conference").

[116] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶¶ 189-190.

Prof. Douglas, it contributed to the maintenance of the main platform for his academic and research activities and thus contributed a material benefit to Prof. Douglas. The undisclosed material and financial support that Respondent's counsel provided during the arbitration to the MIDS program that Prof. Douglas administers would cause any reasonable third party to doubt his independence and impartiality. For this reason as well, the Tribunal was not properly constituted.

a. Prof. Douglas administers the MIDS program that received undisclosed material and financial support during the arbitration from Respondent's arbitration counsel LALIVE

74. Since 2011 Prof. Douglas has been a full-time member of the faculty and a professor of international law for the Geneva Center for International Dispute Settlement (CIDS) Master in International Dispute Settlement (MIDS) program.[117]

75. Prof. Douglas also is the MIDS Program Director in charge of its programming,[118] is a member of the CIDS Council, "the overarching body supervising both the CIDS and the MIDS,"[119] and is a member of the MIDS Governance Committee, which "oversees all matters regarding the structure and functioning of the program."[120] The MIDS program is thus Prof. Douglas' principal platform for his research and academic activities.

76. Respondent's arbitration counsel, the Geneva-based LALIVE law firm, is a principal supporter of the MIDS program. MIDS is a Geneva-based program that is a partnership between the University of Geneva and the Graduate Institute of International and Development Studies in Geneva. Pierre Lalive, the eponymous founding partner of LALIVE, was dean of the University of Geneva and a professor at MIDS.[121]

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[117] MIDS Faculty (**A-47**) (MIDS website); Prof. Zachary Douglas KC 3VB Biography (**A-57**) at 1. *See also* MIDS Profile for Prof. Zachary Douglas KC (**A-150**).

[118] MIDS Profile for Prof. Zachary Douglas KC (**A-150**). *See also, e.g.*, MIDS 2022-2023 program brochure (**A-78**).

[119] CIDS The Center (**A-76**) (CIDS website).

[120] CIDS Governance (**A-77**) (CIDS website).

[121] LALIVE, About us - Heritage, Professor Pierre Lalive (**A-83**) (LALIVE website).

77. LALIVE provides ongoing material support to the Graduate Institute of International and Development Studies and to the MIDS program. LALIVE's support is featured on the firm's website describing its academic activities as "a vital strand of the firm's DNA and culture."[122] This includes the firm's showcase LALIVE Lecture, an annual collaboration co-organized and co-hosted with the Graduate Institute of International and Development Studies, and also includes a broader partnership between the institutions, "LALIVE and the MIDS," which LALIVE describes as "[b]uilding on our strong relationship with the Graduate Institute of International and Development Studies and the University of Geneva."[123] The partnership includes giving scholarships to MIDS, conducting seminars for MIDS students, and offering internships to MIDS students, with LALIVE noting that nine of its lawyers, including five partners, trained at the Graduate Institute.[124] Thus, LALIVE advertises on its website its association with and support of the Graduate Institute and the MIDS program as a distinguishing feature of the firm.

78. Likewise, the Graduate Institute of International and Development Studies prominently features the financial, participatory, and material support it receives from LALIVE as a material selling point of the MIDS program, which it advertises in the program's marketing brochures,[125] on its website,[126] and in the Graduate Institute's annual reports.[127] As an example, CIDS declared in a recent annual report issued during the arbitration,

> MIDS and LALIVE have been partners since the inception of the MIDS program. The partnership encompasses several critical components, including the practical training seminar on commercial arbitration organized as part of the MIDS program each year. LALIVE also commits to offering internships to approximately four or five MIDS students each year. Moreover, the law firm offers a full scholarship for one student, covering MIDS tuition fees and living expenses in Geneva for the duration

[122] LALIVE, About us - Academia (**A-84**) (LALIVE website).

[123] LALIVE, About us - Academia (**A-84**) (LALIVE website).

[124] LALIVE, About us - Academia (**A-84**) (LALIVE website). As LALIVE's website indicates there are fewer than 25 partners in the whole firm, meaning over 20% of its partners trained at the Graduate Institute.

[125] *E.g.,* 2022-2023 MIDS brochure (**A-78**) (noting "[t]hanks to a partnership with LALIVE" the program features a "LALIVE Training Seminar," a half-day training seminar "with the firm's leading lawyers.").

[126] Partnership MIDS & LALIVE (**A-85**) (CIDS website).

[127] *See, e.g.*, CIDS Annual Report 2022 (**A-86**) at 28.

> of the one-year program. Lawyers from the firm also participate as arbitrators during the Academic Retreat.[128]

79. Respondent's arbitration counsel LALIVE is thus the principal partner and financial supporter of the institution and program that is Prof. Douglas' principal platform for his research and academic activities.

80. As discussed further below, however, Prof. Douglas made only limited disclosures about the MIDS program that failed to reveal his leadership roles in the program or the material and financial support the MIDS program received during the arbitration from Respondent's arbitration counsel LALIVE.

b. Respondent's counsel's undisclosed material and financial support for Prof. Douglas' main academic and research platform would cause any reasonable third party to doubt his independence and impartiality

81. The extent of LALIVE's association with and financial and material support for the academic institution that is the longtime platform for Prof. Douglas' research and teaching activities is incompatible with an appearance to any reasonable third-party observer of Prof. Douglas' independence and impartiality for this case where LALIVE represented one of the Parties.

82. It is important to emphasize that while a law firm may support and collaborate with an academic institution, that is a significant factor for disclosure, and it is centrally relevant to the question of who may acceptably be appointed as an arbitrator in a case in the absence of informed consent regarding such collaboration and support.

83. Accordingly, the IBA Guidelines Non-Waivable Red List prohibits an arbitrator from having "a significant financial or personal interest in one of the parties,"[129] and the Waivable Red List refers to the "Arbitrator's relationship with the parties or counsel" and requires a waiver where, among other things, "The arbitrator's law firm or employer

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[128] CIDS Annual Report 2022 (**A-86**) at 28.

[129] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 15 (Non-Waivable Red List ¶ 1.3).

currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties."[130]

84. Consistent with those guidelines, analogous undisclosed commercial relationships led to the vacatur of arbitral awards. Thus, in *Vento Motorcycles v. Mexico*, Mexico's Director General of its Legal Office of International Trade (Mexico's lead counsel in that case) invited its party-appointed arbitrator to apply for appointment to its panel of arbitrators for two new treaties, and the arbitrator did so.[131] The Ontario Court of Appeal set aside the tribunal's unanimous award in that NAFTA arbitration because, "[a]though appointment to the rosters of panelists eligible to hear disputes did not involve any direct financial compensation or amount to an actual appointment to a tribunal, it was still a valuable professional opportunity that enhanced [the arbitrator's] professional reputation," and it consequently was "more likely than not" that the arbitrator, "whether consciously or unconsciously, would have a leaning, inclination[,] bent or predisposition towards Mexico, or that he could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision."[132] The Court of Appeal emphasized that the award must be set aside even though it was unanimous, because "parties to an arbitration are entitled to an independent and impartial tribunal, not simply the decision of a quorum of panel members who are unbiased."[133] The Court also rejected the argument that a party-appointed arbitrator should be held to a lesser standard:

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[130] IBA Guidelines on Conflicts of Interest in International Arbitration (2024) (**AL-19**) at 16 (Waivable Red List ¶ 2.3.6).

[131] *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶¶ 3, 10-11.

[132] *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶ 13 (brackets and international quotation marks omitted); *id.* ¶ 42.

[133] *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶ 46 ("The decision to set aside an award does not depend on a demonstration that the participation of the disqualified member affected the outcome – that the disqualified member cast the deciding vote in a split decision. On the contrary, the bias of one member taints the tribunal. The rationale is plain: it is impossible to know whether – or to what extent – the participation of a biased member affected a panel's decision. It cannot be left to conjecture, nor can it be ignored by assuming that the presumed impartiality and independence of the other two members of the panel rendered it harmless."). *See also, e.g.*, *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision of June 11, 2020 (**AL-18**) ¶ 246 (observing "it would be unsafe to hold" that one arbitrator's "views and analysis could not have had any material bearing on the opinions of his fellow arbitrators," and that "excluding this possibility from

> He did not owe a lesser obligation of impartiality because he was appointed to the Tribunal by Mexico. Arbitrators are neither representatives of the party who appointed them nor required to protect and promote that party's interest. Whether appointed independently or by a party to the arbitration, arbitrators are expected to comply with the same high standards of impartiality….[134]

85. Similarly, in this case, even if Respondent's arbitration counsel LALIVE's financial and material sponsorship and support for the MIDS program did not involve any direct financial compensation for Prof. Douglas, it was intended to facilitate the MIDS program that Prof. Douglas administers and thus contributed to the maintenance of the platform for his academic and research activities.

86. For that reason, any reasonable third party would question whether Prof. Douglas might consciously or unconsciously be predisposed to rule in Respondent's favor or be influenced by factors other than the merits of the case as presented by the Parties in reaching his decision. In other words, it would appear to any reasonable third party that Prof. Douglas lacked the requisite qualities of independence and impartiality in this case, and for that reason the Tribunal was not properly constituted and the Award must be annulled.

c. Prof. Douglas breached his obligation to disclose the material and financial support that LALIVE provided to MIDS, and he thus deprived Claimants and the other Tribunal members the opportunity to address that disqualifying conflict

87. Prof. Douglas breached his obligation to disclose the material and financial support that Respondent's arbitration counsel LALIVE provided to MIDS.

88. As summarized above, ICSID Arbitration Rule 6(2) imposes a continuing obligation of broad disclosure on arbitrators. Pursuant to the same principles, the UNCITRAL Code of Conduct provides that an arbitrator must disclose "[a]ny financial, business, professional

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consideration would go against the nature of deliberations"); *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision of Feb. 5, 2016 (**AL-12**) ¶ 135 (finding "[i]t is impossible to tell what degree of influence on one or both colleagues an arbitrator might have had in the course of what are necessarily confidential deliberations").

134 *Vento Motorcycles, Inc. v. Mexico*, 2025 ONCA 82 (CanLII), Court of Appeal for Ontario, Decision of Feb. 4, 2025 (**AL-57**) ¶ 66.

or close personal relationship in the past five years with," among others, "[a]ny disputing party" or "[t]he legal representative of a disputing party in the IID proceeding."[135] The requirement for disclosure extends to relationships with the legal representatives of the parties because an appearance of partiality towards counsel is the same as an appearance of partiality towards a party – and this can take the form of affinity between a law firm, its partners, and an arbitrator.[136]

89. Prof. Douglas disclosed in his CV submitted upon his appointment as arbitrator in 2015 that he was "an Associate Professor of International Law at the Graduate Institute of International and Development Studies in Geneva…."[137] His CV made no other reference to CIDS or to MIDS, and Prof. Douglas failed to disclose that he held multiple leadership positions as a member of the CIDS Council, as a member of the MIDS Governance Committee, and as the MIDS Program Director.

90. In 2019, Prof. Douglas disclosed that he intended to attend the LALIVE lecture and dinner, but he made a point of saying he could not confirm whether members of the LALIVE team would attend.[138] Prof. Douglas did not explain in any disclosure that the Graduate Institute was a co-organizer and co-sponsor of the annual event together with LALIVE.

91. Prof. Douglas also failed to make any subsequent disclosure in 2022 or in 2023 when he participated in the program again as the Graduate Institute's representative and introduced the program headliners together with LALIVE's representative and founding partner Michael Schneider.[139]

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135 UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023) (**AL-53**) at 5 (Article 11(2)(a)(i)-(ii)).

136 *See Burlington Resources Inc. v. Ecuador*, ICSID Case No. ARB/08/5, Decision to Disqualify Orrego Vicuña dated Dec. 13, 2013 (**AL-15**) ¶¶ 79-80 (appearance of impartiality in relation to the party's counsel extended to appearance of impartiality toward the party). *See also* Appeal no. 23-10.972 of June 19, 2024, Court of Cassation (France) (**AL-20**) (upholding decision to annul arbitral award based on impartiality demonstrated by personal friendship between arbitrator Clay and counsel Gaillard).

137 Letter from ICSID to the Parties dated Nov. 20, 2015 (**A-62**) at 3 (first page of Prof. Douglas' CV).

138 Email from Tribunal Secretary to Parties dated Apr. 30, 2019 (**A-14**).

139 Report on LALIVE Lecture of Sept. 29, 2022 (**A-87**) (describing the lecture held in 2022 at the Graduate Institute of International Studies introduced by LALIVE's Michael Schneider and by Prof. Douglas); Report on LALIVE Lecture of May 4, 2023 (**A-88**) (describing the lecture held in 2023 introduced by LALIVE's

92. In sum, none of Prof. Douglas' limited disclosures gave any indication that Respondent's arbitration counsel was a principal sponsor providing material and financial support to the MIDS program he administers. Claimants did not know that LALIVE has provided ongoing partnership and financial support since the inception of the MIDS program that is Prof. Douglas' principal platform for his research and academic activities.

93. While those facts are now public through information contained on the LALIVE, MIDS, and CIDS websites and through brochures and annual reports published starting after 2022, that information was not readily discoverable to Claimants or their counsel team when Respondent appointed Prof. Douglas to the Tribunal a decade ago.

94. Prof. Douglas's breach of his disclosure obligation under ICSID Arbitration Rule 6(2) thus is a further basis to conclude that the Tribunal was not properly constituted.

4. Prof. Douglas' Undisclosed Acquisition of Swiss Nationality Would Make a Reasonable Third Party Doubt His Independence and Impartiality

95. At the time of its reconstitution in 2018, the Tribunal included Prof. Horacio Grigera Naón, an Argentinian national, and Prof. Douglas, an Australian national, and thus the appointment of Prof. Tercier, a Swiss national, as President, appeared to be neutral as to nationality, although not in other respects.[140] As disclosed to the Parties for the first time in the Award, however, Prof. Douglas acquired Swiss nationality in August 2023.[141] Prof. Douglas failed to disclose at the time Prof. Tercier was appointed that he had applied for or was intending to apply for Swiss nationality, which must have been the case for him to become a Swiss national in 2023.[142] He also later failed to disclose that he had obtained Swiss nationality in 2023 and instead revealed that fact only in the Award.

Michael Schneider and by Prof. Douglas and noting that "Each year, the Graduate Institute of International and Development Studies (HEID) and LALIVE have organized and co-hosted the LALIVE Lecture at the HEID. The first one took place in 2007.").

140 *See* Award ¶¶ 210, 259, 553, 555.

141 Award ¶ 553.

142 Swiss nationality is not acquired overnight; it may be a lengthy process that takes over 10 years for ordinary naturalization. Switzerland State Secretary for Migration (SEM), *How do I become a Swiss citizen?* (last

96. Prof. Douglas' undisclosed application for and acquisition of Swiss nationality undermined the appearance of neutrality on the Tribunal. As a central feature of ICSID arbitration, the ICSID Convention and the ICSID Arbitration Rules place restrictions on the nationality of arbitrators and *ad hoc* committee members that may be appointed, intended to ensure neutrality in the decision-making process.[143] Thus, the ICSID Convention prohibits a majority of the members of a tribunal from having the same nationality as a party, unless the parties have agreed on the appointment of each individual member of the tribunal.[144] In addition to ensuring neutral nationalities among parties and the members of the arbitral tribunal, the ICSID Convention prohibits any *ad hoc* Committee member from being a co-national with a party or from having the same nationality as any member of the tribunal that rendered the award.[145]

97. These restrictions exist in recognition of the fact that nationality is an important feature of neutrality and thus an assurance of impartiality in the system. As the ICSID 2024 Background Paper on Annulment explains, the restrictions on nationality "serve as a crucial safeguard against potential biases and conflicts of interest" and thus maintain "the integrity and impartiality of the proceedings."[146]

98. In this case, Claimants already had objected to Prof. Tercier's appointment as Tribunal President because of his personal, professional, and institutional connections to Respondent's party-appointed arbitrator, Prof. Douglas, and to Respondent's arbitration counsel, LALIVE, which resulted in a material imbalance among the members of the Tribunal and the Parties, all to the side of the Respondent.[147] Prof. Douglas' application

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modified Jan. 31, 2024) (**A-53**) (explaining that ordinary naturalization requires living for at least 10 years in Switzerland).

143 *See, e.g.*, ICSID Convention Arts. 13(2), 38, 39, 52(3); ICSID Arbitration Rules 1(3), 3(1)(a)(i), 3(1)(b)(i); Report of the Executive Directors ¶ 36.

144 ICSID Convention Art. 39.

145 ICSID Convention Art. 52(3).

146 ICSID Background Paper on Annulment 2024 (**AL-21**) ¶ 45.

147 Letter from Claimants to ICSID Secretary-General dated Mar. 5, 2018 (**A-6**); Letter from Claimants to ICSID Secretary-General dated Mar. 16, 2018 (**A-8**). *See also* Annulment Application § III.A.1 (describing Claimants' objections to Prof. Tercier's appointment based on his connections to Respondent's party-appointed arbitrator, Prof. Douglas, and to Respondent's arbitration counsel, LALIVE, as disclosed at that

for and acquisition of Swiss nationality during the arbitration was a material fact in any event, but even more so given the significant one-sided connections among Prof. Tercier, Prof. Douglas, and Respondent's Geneva-based counsel that were the basis of earlier objections made on the record and circulated to the Tribunal.[148]

99. Prof. Douglas' acquisition of Swiss nationality was unquestionably relevant to the constitution of the Tribunal. Had Prof. Douglas been a Swiss national in 2018, there can be no doubt that the ICSID Secretary-General would not have selected Prof. Tercier, a Swiss national, to be appointed as President in the absence of party agreement. Prof. Douglas' undisclosed application for and acquisition of Swiss nationality during the arbitration thus created the appearance of an imbalance to any reasonable third party. As these facts were not disclosed, Claimants 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.

100. This factor further compels the conclusion that the Tribunal was not properly constituted in accordance with Article 52(1)(a) of the ICSID Convention and that the resulting Award must be annulled in its entirety.

5. The Cumulative Impact of Prof. Douglas' Multiple Failures to Comply with His Disclosure Obligations Would Cause a Reasonable Third Party to Doubt His Independence and Impartiality

101. As set out in detail above, Prof. Douglas repeatedly breached his continuing disclosure obligations under ICSID Arbitration Rule 6(2) when he failed to disclose during the arbitration that (i) he took on as his client Friends of the Earth, a known opponent to the Roşia Montană Project and to Gabriel's claims in this arbitration; (ii) his colleagues at Matrix Chambers took on as co-plaintiffs in another matter Friends of the Earth as well as ClientEarth, which the Tribunal allowed to make a substantial Non-Disputing Parties'

time); §§ III.A.5, III.A.6 (explaining that further investigation has revealed additional undisclosed personal, professional, financial, and institutional connections among Prof. Tercier, Prof. Douglas, and LALIVE).

[148] While Claimants withdrew their letter of March 16, 2018 from the record to avoid further prejudice after ICSID's Secretary-General notified her decision to proceed with Prof. Tercier's appointment, Claimants' letter of March 5, 2018 remained on the record and was disclosed to the Tribunal. *See* Letter from ICSID to the Parties dated Mar. 27, 2018 (**A-9**).

Submission urging the dismissal of Gabriel's claims; (iii) Respondent's arbitration counsel LALIVE provided material and financial sponsorship and support to the MIDS program that is his main academic and research platform; and (iv) he applied for and obtained Swiss nationality, thus resulting in an imbalance and lack of neutrality as to nationality on the Tribunal.

102. Prof. Douglas thus repeatedly failed to disclose facts and circumstances that might cause a party in Claimants' position to question his reliability to exercise independent and impartial judgment, breaching his disclosure obligations to Claimants. Cumulatively, Prof. Douglas' repeated disclosure breaches provide a further basis to find that he lacked the requisite impartiality and independence and that the Tribunal was not properly constituted, so that consequently the Award must be annulled.

B. The Factors Undermining Prof. Douglas' Impartiality and Independence Resulted in Serious Departures from Fundamental Rules of Procedure That Require Annulment of the Award

103. The *Eiser v. Spain ad hoc* committee emphasized:

> When one of the most basic requirements of justice, such as the right to an independent and impartial tribunal, is disregarded, an award cannot stand and must be annulled in its entirety.[149]

104. Prof. Douglas' undisclosed client work for Friends of the Earth, his association with Matrix Chambers and its representation of ClientEarth, the undisclosed financial and material support that Respondent's counsel provided to the MIDS program Prof. Douglas administers, and his undisclosed application for and acquisition of Swiss nationality during the pendency of the case all undermined the independence and impartiality of the Tribunal and thus equal treatment of the parties – resulting in serious departures from fundamental rules of procedure and providing further grounds requiring annulment of the Award in this case.

[149] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (**AL-18**) ¶ 254.

105. A departure from a fundamental rule of procedure "is serious if the Tribunal's decision would have been *potentially* different had the breach not been committed."[150] For a departure from a fundamental rule of procedure to be serious, it therefore is not necessary to establish that the outcome of the case would have been different, as such analysis would be "highly speculative"[151] and would impose an "unrealistically high burden of proof."[152] Rather, the analysis turns on "whether, if the rule had been observed, there is a distinct possibility that it may have made a difference on a critical issue."[153]

106. As to the right to an independent and impartial tribunal, the *Eiser v. Spain* committee observed:

> [I]ndependence and impartiality of an arbitrator is a fundamental rule of procedure. This means that the arbitrator has a duty not only to be impartial and independent but also to be perceived as such by an independent and objective third party observer. This duty includes the duty to disclose any circumstance that might cause his reliability for independent judgment to be reasonably questioned by a party. In this respect, this Committee subscribes to the *EDF* committee's views that "[i]t is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal." There can be no right to a fair trial or a right of fair defense without an independent and impartial tribunal.[154]

The circumstances summarized above demonstrate that a reasonable and informed third party would justifiably doubt that the Tribunal majority was independent and impartial in

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150 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021 (**AL-58**) ¶ 133 (emphasis in original).

151 *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021 (**AL-58**) ¶ 133.

152 *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 (**AL-59**) ¶ 78.

153 *Pey Casado v. Chile (I)*, ICSID Case No. ARB/98/2, Decision on Annulment of Dec. 18, 2012 (**AL-11**) ¶¶ 77-78. *See also ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025 (**AL-51**) ¶ 202 ("The Applicant is not required to demonstrate that the award would have been different, absent the departure from the procedural rule.").

154 *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (**AL-18**) ¶ 239 (quoting *EDF International S.A. et al. v. Argentina*, ICSID Case No. ARB/03/23, Annulment Decision dated Feb. 5, 2016 (**AL-12**) ¶ 123).

this case, thus constituting a serious departure from a fundamental rule of procedure requiring annulment of the Award.

107. The lack of a reliably independent and impartial Tribunal also necessarily is a serious departure from the fundamental right to be heard. The right to be heard implicates concepts of integrity, fairness, and natural justice that are not met where, as in this case, one of the arbitrators while sitting on the Tribunal took on as a client an NGO that had been engaging in long-standing public activism against the Project at issue in the case and specifically against Claimants' arbitration claims, his co-counsel and members of his chambers took on as a client an NGO that intervened in the arbitration to file a Non-Disputing Parties' Submission requesting the dismissal of Gabriel's claims, Respondent's counsel provided material and ongoing financial support to the academic program and research platform run by one of the arbitrators, and that same arbitrator during the course of the arbitration applied for and acquired the nationality of the Tribunal President, undermining the neutrality of the nationality of the Tribunal members – all of which was undisclosed.

108. These same circumstances also denied Claimants equal treatment – an essential and fundamental rule of procedure.

109. These undisclosed circumstances are serious as they undoubtedly may have had material impacts on the Award, as is perfectly clear from the fact that a Tribunal majority including Prof. Douglas decided liability over Prof. Grigera Naón's dissent.[155]

110. The serious departures from the fundamental rules of procedure that are necessary to ensure a fair process render the Award in this case fatally defective. They require that the Award be annulled in its entirety.

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[155] Even were that not the case, "unanimity does not impede annulment. This is axiomatic because it is impossible for an annulment committee to pierce the veil of a tribunal's deliberations or poll arbitrators." *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment Decision dated June 11, 2020 (**AL-18**) ¶ 246; *id.* ¶¶ 250-53 (concluding that, "in the ordinary course, the views of each arbitrator influence and are expected to influence the views of the others, during deliberations," that due to the lack of disclosure of the relationship in that case "Spain lost the possibility of a different award," and that the "undisclosed relationship could have had a material effect on the Award" and therefore was "serious and warrants annulment both under clauses (a) and (d) of paragraph (1) of Article 52").

III. ALTERNATIVELY, FATAL DEFECTS IN THE MAJORITY'S LIABILITY DECISION REQUIRE ANNULMENT OF THAT PART OF THE AWARD ON THE GROUNDS OF ICSID CONVENTION ARTICLES 52(1)(B), 52(1)(D), AND 52(1)(E)

111. If the Award is not annulled in its entirety (which it must be), it must be annulled in part. That is because 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[156] ("the majority's liability decision") – suffers from fundamental defects mandating annulment.

112. As background, Applicants summarize below the claims presented in the arbitration and the majority's defective treatment of the claims and evidence in its liability decision (§ III.A). Applicants then elaborate the grounds warranting annulment of the majority's liability decision in the sections that follow (§§ III.B, III.C, III.D).

A. Background to the Claims and the Defects in the Majority's Liability Decision

1. Claimants' Claims Were Based on the State's Frustration and *De Facto* Taking of Gabriel's Investment for Political Reasons by Abandoning Applicable Permitting Procedures

113. The facts upon which Gabriel's claims were based are summarized in the Application for Annulment.[157]

114. Claimants' claim was that the Romanian Government frustrated and carried out a *de facto* taking of Gabriel's investment in the Roşia Montană Project, a gold and silver mining project, and in the adjacent copper and gold Bucium Projects, based on political considerations, without regard to the applicable permitting and licensing procedures established in law.

115. Claimants claimed that the essential facts that gave rise to the claims were as follows:

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[156] Award ¶¶ 767-1357 and 1358.2, except for the unanimous decisions at Award paragraphs 1183-1185, 1220-1223 and 1358.1 relating to jurisdiction and admissibility.

[157] Application for Annulment dated Jul. 5, 2024 ¶¶ 16-33.

a. In the mid-1990s, the Romanian State partnered with Gabriel to establish a joint-venture company called Roşia Montană Gold Corporation S.A. ("RMGC") to develop mining projects in the areas of Roşia Montană and Bucium in Romania. The parties entered into a shareholders agreement that provided Gabriel Jersey 80.69% and the State (through Minvest Roşia Montană S.A.) 19.31% of the shares of RMGC.

b. The State issued mining licenses in the form of concession agreements pursuant to which RMGC was to develop what became known as the Roşia Montană Project (or "the Project") and the Bucium Projects (together "the Projects"); these were, respectively, the Roşia Montană License, an exploitation license, and the Bucium Exploration License.

c. As with most industrial projects, the critical permit for the Roşia Montană Project was the environmental permit. Environmental permitting decisions in Romania are made by the Ministry of Environment through an administrative process regulated by law. To make that decision, the Ministry of Environment chairs a consultative Technical Assessment Committee ("TAC") that conducts a technical review of the Project's Environmental Impact Assessment ("EIA"). The law provided that when the TAC completes its technical review, the Ministry of Environment was to recommend issuance of the environmental permit, or alternatively issue a reasoned decision denying the permit application. The Ministry of Environment would submit its recommendation for Government approval in the form of a Government Decision to be signed by the Prime Minister that would give it legal effect.

d. In 2011, with the EIA process for the Roşia Montană Project nearing completion, the Government began demanding a larger economic share of the RMGC joint venture with Gabriel and increased royalties from Project revenues as a condition for allowing the Roşia Montană Project to proceed. Romania's Minister of Environment and Minister of Culture accordingly insisted that the Government give a political "green light" to move forward with the Project after

reaching a revised agreement with Gabriel on the Project economics – approval of both those ministries were necessary for Project permitting.

e. Following a political hold on permitting pending elections at the end of 2012, Prime Minister Victor Ponta maintained the same economic demands and also "decided to submit the 'decision' on whether the Project should move forward to Parliament" because "no one wanted to take the responsibility for saying yes or no."[158] Thus, the Government submitted a Draft Law about the Project to Parliament that would determine whether the Project would be done at all.

f. Presentation of the Draft Law to Parliament gave rise to significant public protests. Those public protests led the Government coalition leaders on September 9, 2013 to call upon Parliament to reject the Draft Law, and Parliament did so. As Prime Minister Ponta described, explaining the issue on national television, "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."[159]

g. The State authorities thereafter abandoned the pending permitting procedures for the Roşia Montană Project. The Ministry of Environment never took any decision to recommend issuing or denying the environmental permit for the Roşia Montană Project.

h. This political decision carried over to Bucium, where RMGC had identified two sizable deposits that it demonstrated could be developed profitably and had applied for exploitation licenses it had a right to obtain as the holder of the Bucium Exploration License. Despite advising RMGC in 2014 and in 2015 that a decision on its applications for the Bucium exploitation licenses (the

[158] Award ¶ 1135.

[159] Claimants' Response to Questions Presented by Tribunal in PO27 (May 11, 2020) ("C-PO27") ¶¶ 50.b, 191 (*citing* **C-437**); Claimants' Post-Hearing Brief (Feb. 18, 2021) ("C-PHB") ¶ 186.

"Bucium Applications") was imminent, the mining authority ("NAMR") never acted on the applications.

i. The State thereafter also sought, and during the pendency of the arbitration obtained, UNESCO's listing of the "Roşia Montană Mining Landscape" as a World Heritage site, which was incompatible with implementing the Roşia Montană Project.[160]

116. Claimants claimed that this course of events breached Romania's obligations under the BITs, including its obligations, *inter alia*, to provide fair and equitable treatment and not to expropriate without due process and fair and adequate compensation.

117. As to timing, *i.e.*, when the State's treatment of Gabriel's investment ripened into breaches of the BITs,[161] Claimants claimed that the State's treatment was a composite act that began in 2011 and ripened into violations of the BITs on or about September 9, 2013, when the coalition Government leaders called for the rejection of the Draft Law and with it the Roşia Montană Project. Claimants claimed that conduct after September 9, 2013 continued to breach the BITs and demonstrated that development of the Projects had been rejected *de facto*, as no permitting decision was ever made for Roşia Montană and no exploitation license decision was ever made for Bucium, although the State admitted that these decisions were due, and the State sought and obtained UNESCO's listing of the Roşia Montană Mining Landscape as a projected World Heritage site, which prevented implementation of the Roşia Montană Project.[162] The majority referred to this as "the principal claim."[163]

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[160] *E.g.*, Memorial §§ VII, VIII, IX.A-B, IX.D.2; Reply §§ II, IV, V.A, V.B.7, VI; C-PO27 ¶¶ 206, 209-210, 214, 217, 219-224 ; C-PHB §§ III, IV, V, VI.A; Claimants' Observations on New Evidence (Oct. 29, 2021) § II; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events (June 14, 2022) §§ 1, 2.

[161] C-PHB § VIII (addressing timing).

[162] *E.g.*, Memorial ¶¶ 480-481, §§ IX.A-B, IX.D.2; Reply ¶¶ 206-211, §§ V.A, V.B.7; C-PO27 §§ (a), (f); C-PHB § VIII.A; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events (June 14, 2022) §§ 1, 2.

[163] Award § IV.3.

118. Claimants argued in the alternative that, if not a composite act, the State's treatment of Gabriel's investment nevertheless ripened on or about September 9, 2013 into an effective taking of Gabriel's investment in breach of the BITs, as demonstrated by the reality that the State abandoned the permitting process for Roşia Montană and the licensing procedure for Bucium, and instead sought and obtained the UNESCO listing.[164] The majority referred to this as "the first alternative claim."[165]

119. Claimants argued further in the alternative that the State's treatment of Gabriel's investment ripened into conduct that was in breach of the BITs no later than July 27, 2021, the date of the inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site.[166] The majority referred to this as "the second alternative claim."[167]

120. Thus, the cornerstone of Claimants' claims was that the Government abandoned the administrative procedures applicable to Gabriel's investment, as the Ministry of Environment never took any decision on whether to recommend granting or rejecting the environmental permit for Roşia Montană, NAMR never took any decision on whether to grant or reject exploitation licenses for Bucium, and ultimately the State pursued a UNESCO listing as an alternative to mining in the Roşia Montană Project area.[168]

2. Fatal Defects in the Majority's Liability Decision Require Annulment

121. The majority's liability decision suffers from multiple fatal defects mandating annulment summarized as follows and elaborated more fully below.

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164 C-PHB § VIII.B ; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events § 1.

165 Award § IV.4.

166 C-PHB § VIII.C; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events § 2.

167 Award § IV.5.

168 As Claimants emphasized, the Ministry of Environment's failure to issue a decision denied RMGC recourse to bring an administrative challenge. *See, e.g.*, C-PHB ¶ 196 ("Even assuming that the Ministry of Environment had identified through the EIA Process some alleged failure to meet applicable permitting requirements (which it did not as responsible officials repeatedly said all requirements were met), the law required the Ministry to issue a reasoned decision denying the EP so that RMGC could either bring an administrative challenge or seek to cure any alleged deficiency.").

a. The Majority Failed to Apply the Applicable Law

122. The majority failed to apply the applicable law when it decided Claimants' claims without considering the nature and scope of Gabriel and RMGC's contract rights and the legal requirements of the applicable permitting and licensing procedures, notwithstanding that doing so was necessary to apply the standards of treatment set forth in the BITs and thus to the Tribunal's ultimate assessment of liability.

123. The majority acknowledged but failed to apply the BIT standards in several other respects, *i.e.*, that failures to act (omissions) may violate the BIT standards, that the cumulative effect of State treatment may breach the BIT standards even if each individual instance of treatment does not, and that an intention to harm is not required to establish a breach of the BITs.

124. Rather than apply the law that the ICSID Convention and the BITs required, the majority instead decided liability based on political factors that have no basis in law. The majority thus decided *ex aqueo et bono* without the Parties ever agreeing to such a basis for decision, contrary to ICSID Convention Article 42(3).

b. The Majority Failed to Address the Claims and Evidence Presented and Denied Claimants the Opportunity to Confront Respondent's Key Witness

125. The majority failed to address the Ministry of Environment's failure to take any decision on whether to recommend granting or denying the environmental permit for Roşia Montană or the State's failure to take a decision to grant or deny the Bucium Applications. The majority also failed to explain why these failures to act, which formed the cornerstone of Claimants' case, did not breach the State's substantive obligations under the BITs.

126. The majority failed to address the principal testimonial and contemporaneous email evidence upon which Claimants relied showing that the State's demands for economic renegotiation and associated threats of non-permitting coerced Gabriel to try to agree to a revised deal with the State.

127. The majority likewise failed to address or even acknowledge the videorecorded admission by Prime Minister Ponta on national television that "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."

128. Over Claimants' objections, the Tribunal accepted into the record a 24-page witness statement of the very same former Prime Minister Ponta who had made the key admission referred to above, notwithstanding that Claimants were denied the right to cross-examine him, including about his key admission, and notwithstanding that Mr. Ponta failed to provide any reasons for refusing to be examined.

c. The Majority Failed to State the Reasons on Which Its Critical Decisions Were Based

129. The majority's liability decision is also fatally defective because the majority failed to state reasons supporting its outcome-determinative liability conclusions about: (i) the State's demands for revised economics and the linking of those demands to permitting; (ii) the Roşia Montană environmental permitting process in which no decision was ever taken; (iii) the Bucium Applications for which no decision was ever taken; (iv) the effect of listing the entire Roşia Montană Mining Landscape as a UNESCO World Heritage site; and (v) whether the State's conduct was in breach of the BIT standards.

130. The majority also failed to state reasons about whether or to what extent it considered important evidence on which Claimants relied, including Prime Minister Ponta's videorecorded admission, or whether or to what extent it considered his witness statement, which it accepted into the record over Claimants' objection without any right of cross-examination.

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131. The majority's manifest failures led Prof. Grigera Naón, after "anxious consideration" of the draft Award he received from his two colleagues, to write a vigorous 37-page Note of

Dissent.[169] The majority's liability decision should be annulled based on multiple grounds described more fully below because the majority manifestly exceeded its powers (ICSID Convention Article 52(1)(b)), seriously departed from fundamental rules of procedure (Article 52(1)(d)), and failed to state reasons (Article 52(1)(e)).

B. The Majority's Liability Decision Must Be Annulled Because the Majority Failed to Apply the Applicable Law and Thus Manifestly Exceeded Its Powers

132. The majority manifestly exceeded its powers by failing to apply the applicable law in its assessment of liability in multiple respects warranting annulment.

1. Failing to Apply the Applicable Law or Deciding *ex Aequo et Bono* Without Party Agreement Is an Excess of a Tribunal's Powers That Requires Annulment

133. An ICSID award is subject to annulment when a tribunal manifestly exceeds its powers,[170] including by failing to apply the applicable law.[171] The ICSID Convention directs in its Article 42(1) the rules of law that the Tribunal must apply to decide the dispute, and Article 42(3) does not permit the Tribunal to decide a dispute *ex aequo et bono* unless the Parties so agree. Accordingly, "[t]he relevant provisions of the applicable law are constitutive elements of the Parties' agreement to arbitrate and constitute part of the definition of the tribunal's mandate."[172] A failure to apply the applicable law therefore is

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169 Dissent ¶ 1.

170 ICSID Convention, Art. 52(1)(b).

171 *See, e.g.*, *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 (**AL-10**) ¶ 67; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on Annulment of June 29, 2010 (**AL-9**) ¶¶ 206-09 (analyzing the tribunal's failure to conduct its review on the basis of the applicable legal norm).

172 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007 (**AL-60**) ¶ 45. *See also RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment Application of June 10, 2022 (**AL-61**) ¶ 25 ("ICSID annulment is positively concerned with legitimacy of procedure, and . . . such legitimacy derives from the parties' agreement, including the law applicable to the dispute.").

a "derogation from the terms of reference within which the tribunal has been authorized to function."[173]

134. While an excess of powers must be manifest for it to give rise to annulment, it does not need to "leap out of the page on a first reading of the award."[174] Rather, "[t]he reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided."[175] Accordingly, in assessing whether the tribunal complied with its duty to apply the applicable law, the *ad hoc* committee must conduct its own substantive analysis of the tribunal's reasoning; "[t]he tribunal's own description of what it is doing cannot be the last word."[176]

135. A failure to apply the applicable law occurs not only where the tribunal completely failed to apply any law or applied a different law than the law agreed by the parties, but also where the tribunal purported to apply the applicable law but failed to do so, including when it based its decision *ex aequo et bono* on equitable, economic, or political considerations.

136. The *ad hoc* committee in *Klöckner v. Cameroon I* annulled the award for that reason, finding that the tribunal manifestly exceeded its powers by "applying concepts or principles it probably considered equitable" rather than by applying the law that was applicable in that case.[177] Similarly, the *MINE v. Guinea* and *Iberdrola v. Guatemala* committees stated that deciding based on equitable considerations rather than an application of the applicable law to the facts of the case constitutes an excess of powers.[178]

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[173] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of Jan. 6, 1988 (**AL-1**) ¶ 5.03.

[174] *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment of Feb. 5, 2016 (**AL-12**) ¶ 193.

[175] *EDF International S.A., SAUR International S.A., León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment of Feb. 5, 2016 (**AL-12**) ¶ 193.

[176] C. H. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION (3rd ed., Cambridge University Press, 2022) (**AL-62**), at 1306 ¶ 310.

[177] *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 (**AL-63**) ¶ 79.

[178] *See Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of Jan. 6, 1988 (**AL-1**) ¶ 5.03; *Iberdrola*

137. Merely identifying the applicable law is not sufficient, as the applicable law also must be applied. The *ad hoc* committee in *TECO v. Guatemala I* explained that "when determining whether a tribunal failed to apply the applicable law, an annulment committee must determine whether that tribunal correctly identified the applicable law *and whether it endeavored to apply it to the facts in dispute*."[179] Similarly, the committee in *Enron v. Argentina* annulled the award for manifest excess of powers because although the tribunal identified the principle of necessity under customary international law as the applicable law, it "did not in fact apply Article 25(2)(b) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue."[180]

138. Annulment committees also have confirmed that while a mistake in applying the applicable law is not a basis for annulment, an error of law may be so egregious that it constitutes a failure to apply the proper law warranting annulment.[181]

2. The Majority Acknowledged That Applying the BIT Standards Required an Assessment of Whether Romania's Actions were Arbitrary or Unduly Interfered with the Use and Enjoyment of Gabriel's Investment

139. An essential component of Claimants' claim was that the State disregarded the applicable environmental permitting procedure for the Roşia Montană Project in favor of political

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Energía S.A. v. Republic of Guatemala, ICSID Case No. ARB/09/5, Decision on Annulment of Jan. 13, 2015 (**AL-64**) ¶ 95.

179 *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 80 (emphasis added).

180 *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 (**AL-66**) ¶ 393.

181 *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 (**AL-67**) ¶ 81 ("[A] gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment."); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007 (**AL-60**) ¶ 86 ("Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law."); *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 (**AL-68**) ¶ 137 (stating that the "fact that no prior annulment decision to date has found that threshold to have been met due to failure to apply proper law through egregious or gross misapplication or misinterpretation, does not preclude any annulment committee from doing so").

considerations, ultimately abandoning that procedure entirely and never issuing any decision on the environmental permit. The majority accordingly described the "dispute" as "involv[ing] allegations that Romania breached its treaty obligations when it acted in a manner that prevented the implementation of the Rosia Montana Project and prevented RMGC from exercising its right to develop the Project in an arbitrary manner, without due process and without compensation."[182] The majority also recognized that the Parties' dispute concerned whether Romania's treatment of Claimants' investment "was made in accordance with the rule of law or based on political considerations and without regard to the applicable legal processes and respect for vested rights."[183]

140. As to the applicable law, the majority acknowledged that pursuant to Article 42(1) of the ICSID Convention, the Tribunal was required to decide the dispute "in accordance with such rules of laws as may be agreed by the parties" and that "[i]n the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[184]

141. The majority observed in relation to the Canada BIT and the UK BIT as follows:

> Article XIII(7) of the Canada-Romania BIT provides that "[a] tribunal established under this Article shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". Accordingly, the Tribunal will apply the Canada-Romania BIT itself and the applicable rules of international law to decide Gabriel Canada's claims in this arbitration.
>
> The UK-Romania BIT does not contain a choice of law clause. Therefore, pursuant to the second sentence of Article 42(1) of the ICSID Convention (set out in para. 563 above), in deciding Gabriel Jersey's claims in this

[182] Award ¶ 684.

[183] Award ¶ 6. *See also, e.g.*, *id.* ¶ 767 (stating the issue to be resolved for liability "is whether the allegedly politicized treatment of RMGC's application for permitting of the Roşia Montană Project was a measure that resulted in breaches of the UK-Romania and Canada-Romania BITs").

[184] Award ¶ 563.

> arbitration, the Tribunal shall apply Romanian law and such rules of international law as may be applicable.[185]

Regarding Romanian law, the majority further observed:

> Romanian law may also be considered generally to determine, where appropriate, the scope and extent of the rights and obligations of the Parties alleged to give rise to the existence of an "investment" for jurisdictional purposes, as well as those alleged to give rise to the claims on the merits.[186]

142. The majority thus accepted that its liability determination had to account for the rights and obligations that Gabriel and RMGC claimed were at issue, which included rights and obligations under certain contracts and the State's obligation to conduct the administrative procedures that applied to the issuance of the environmental permit for the Roşia Montană Project and to the Bucium Applications. It was not possible to consider whether Romania's conduct breached the treaty obligations at issue without considering the nature and scope of Gabriel and RMGC's rights and of the applicable administrative procedures. Indeed, understanding the central relevance of those issues, the Parties presented well over one thousand pages of expert legal opinions of Romanian law addressing those issues.[187]

143. The necessity of taking account the nature and scope of the rights and obligations of the parties is evident in view of the content of the relevant treaty standards. For example, with regard to Article 2(2) of the UK BIT, the majority found that "'fair' and 'equitable' refer to concepts such as justice, legitimacy, impartiality, and lack of arbitrariness, as well as

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185 Award ¶¶ 564-565 (emphasis removed).

186 Award ¶ 566.

187 *See* Bîrsan Legal Opinion dated June 30, 2017 (Claimants' expert on issues of Romanian law applicable to the rights and obligations of Gabriel and the State under the RMGC Articles of Association and the Roşia Montană and Bucium licenses); Bîrsan Supplemental Legal Opinion dated Nov. 2, 2018; Mihai Legal Opinion dated June 30, 2017 (Claimants' expert on issues of Romanian law applicable to the Environmental Permit and the EIA Process); Mihai Supplemental Legal Opinion dated Nov. 2, 2018; Schiau Legal Opinion dated June 30, 2017 (Claimants' expert on issues of Romanian law applicable to cultural heritage); Schiau Supplemental Legal Opinion dated Nov. 2, 2018; Podaru Legal Opinion dated Nov. 2, 2018 (Claimants' expert on issues of Romanian law applicable to construction permitting and zoning); Dragoş Legal Opinion dated Feb. 22, 2018 (Respondent's expert on issues of Romanian law applicable to the Environmental Permit, the EIA Process, and cultural heritage); Dragoş Supplemental Legal Opinion dated May 24, 2019; Sferdian and Bojin Legal Opinion dated May 24, 2019 (Respondent's experts on issues of Romanian law applicable to the mining licenses and expropriation procedures); Tofan Legal Opinion dated May 24, 2019 (Respondent's expert on issues of Romanian law applicable to urban planning, zoning, the EIA Process, and legal challenges to administrative acts).

treatment that is acceptable from an international perspective;"[188] that to find a breach of that provision the Tribunal had to consider whether Romania had acted "in an arbitrary, discriminatory or inconsistent manner with respect to claimants' investments;"[189] and that when considering matters falling within the jurisdiction of domestic authorities, the Tribunal, *inter alia*, had to "appl[y] the law (i.e., international law) to the facts of the case in accordance with its objective assessment of the relevant legal norms and evidence before it."[190] The majority concluded that the standard in the Canada BIT was the same.[191]

144. While the majority does not define what it means by arbitrary, it is impossible to consider whether the challenged conduct could be considered arbitrary, and thus to apply the treaty 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. That is, to apply the treaty standard in its decision, the Tribunal had to take account of Gabriel and RMGC's contract rights as well as the laws and procedures applicable to the administrative permitting and licensing procedures at issue in order to consider whether the State's conduct interfered with those rights and respected the applicable legal framework, so that the consequences of the State's conduct could be assessed in accordance with the standard of arbitrariness contained in the BITs.

145. Similarly, with regard to the treaty provisions regarding expropriation, the majority observed 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.[192] In this case, it was necessary to consider the conditions established in law under which the Claimants were entitled to use and enjoy their investments in order to be able to assess the effect of

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188 Award ¶ 852. *See also id.* ¶ 853 (observing that a relevant question in this regard is "[w]hether the State acted arbitrarily or discriminatorily or inconsistently").

189 Award ¶ 858.

190 Award ¶ 857.

191 Award ¶ 860 ("the FET standard is the same in both BITs").

192 Award ¶ 931.

the State's measures on those conditions and/or the degree of interference that the State's measures had on Claimants' use and enjoyment of their investments.

146. In his treatise on investment treaty claims, Prof. Douglas emphasizes the importance that applying the relevant municipal law can have where compliance with an investment treaty is at stake, noting that in his view "misfeasance or nonfeasance in deciding the law applicable to issues relating to the existence or scope of the bundle of rights comprising the investment inevitably leads to errors in dealing with other issues such as the host state's liability for a breach of an investment treaty obligation."[193] Referring to the investment treaty tribunal's decision in *CME v. Czech Republic*, Prof. Douglas calls out as "problematic" the tribunal's statement that it is "not [its] role to pass a decision upon the legal protection granted to the foreign investor for its investment under the Czech Civil Law."[194]

147. Prof. Douglas gives as an example in his treatise the ICSID *ad hoc* committee's decision in *MTD v. Chile* addressing Chile's argument on annulment that the tribunal had failed to apply the applicable law. Prof. Douglas specifically highlights the following passage on this point with approval:

> [T]he *lex causae* in this case based on a breach of the BIT is international law. However, it will often be necessary for BIT tribunals to apply the law of the host State, and this necessity is reinforced for ICSID tribunals by Article 42(1) of the ICSID Convention. Whether the applicable law here derived from the first or second sentence of Article 42(1) does not matter: 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. At the same time, the implications of some issue of Chilean law for a claim under the BIT were for international law to determine. In short, both laws were relevant.
>
> In considering the implications of the Foreign Investment Contracts for fair and equitable treatment, the Tribunal faced a hybrid issue. The meaning of

[193] Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2010, CUP) (**AL-69**) ¶ 113.

[194] Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2010, CUP) (**AL-69**) ¶ 114.

> a Chilean contract is a matter of Chilean law; its implications in terms of an international law claim are a matter for international law.[195]

148. The *ad hoc* committee in *Venezuela Holdings v. Venezuela* observed that the application of international law itself may entail the application of national law:

> It seems to the Committee to be obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires. The ILC, in §7 of its Commentary on draft Article 3 on State Responsibility says, "Especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. 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."[196]

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[195] Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2010, CUP) (**AL-69**) ¶ 95 (*citing MTD v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007)). *See also, e.g.*, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2010, CUP) (**AL-69**) at 1 (Rules 4, 14) (observing that "[t]he law applicable to an issue relating to the existence or scope of property rights comprising the investment is the municipal law of the host state," and that these rules are "compatible with Article 42(1) of the ICSID Convention"). *See also* Andrew Newcomb and Lluís Paradell Trius, *Applicable Substantive Law and Interpretation*, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT (2009) (**AL-70**) § 2.12 ("In addition to the existence of an investment, host state law is also relevant to a number of related threshold issues. For example, municipal law governs matters such as whether the investment is held in the territory of the host state, its validity, the nature and the scope of the rights making up the investment and whether they vest on a protected investor, the conditions imposed or assurances granted by national law for the operation of the investment, as well as the nature and scope of the government measures allegedly in breach of the IIA."); Andrea Kay Bjorklund and Luka Vanhonnaeker, *Applicable Law in International Investment Arbitration,* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (2023) (**AL-79**) § 19.2.1 ("To make its decision in the case, a tribunal might have to consider other laws, either on a subsidiary basis or as a matter of interpretation. For example, an investor might argue that it had passed all preliminary hurdles necessary to be awarded a licence to operate an airport concession but that the actual grant of the licence was unfairly withheld. The status of that licence under municipal law might well affect the outcome of the case – it could determine the extent to which the investor can claim a property interest which might then have been expropriated, or whether the investor's legitimate expectations were violated in a fair and equitable treatment case. Municipal law will thus guide the tribunal in its assessment of the nature of the property interests in issue and thus in the appropriate application of the treaty standard, but the tribunal will not grant relief based on municipal law. These legal questions can be characterized as 'incidental'; they play an essential role in the outcome of the case to determining the outcome of a dispute, but are not the basis for the decision.").

[196] *Venezuela Holdings, B.V. et al. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017) (**AL-71**) ¶ 181.

149. Yet, in this case, the majority expressly disavowed any obligation to consider Romanian law elements, emphasizing in bold that "it is adjudicating the present case ***under international law***," and, purporting to explain why it elected to disregard Romanian law aspects, echoed the tribunal in *MTD v. Chile* by stating that "its mandate is not to review the merits of a State's decision by reference to the applicable domestic law and the facts, but to determine whether the State acted in accordance with its international obligations insofar as Claimants' investments are concerned."[197]

150. The majority thus declined to consider the law applicable to several foundational aspects of any liability determination under international law in the case, including to assess and decide Claimants' claims about whether (i) the State's requirement to revise the Project economics as a condition for proceeding disregarded Gabriel and RMGC's contract rights, (ii) the State's failure to take a decision on the Roşia Montană environmental permit was grounded in the applicable administrative permitting procedure, and (iii) the State's failure to take a decision on the Bucium Applications was grounded in the applicable administrative licensing procedure.

151. The majority's failure to consider the scope of these rights and obligations made it impossible to apply the standards of treatment set out in the BITs. That is because, having failed to consider those aspects of the claims, the majority had no basis upon which to assess whether the State's conduct complied with the applicable investment treaty standards, *e.g.*, whether the State's conduct was arbitrary or whether it unduly interfered with Gabriel's use and enjoyment of its investments. The majority thus failed to apply those BIT standards and manifestly exceeded its powers.

[197] Award ¶ 945 (emphasis in original). *See also, e.g.*, *id.* ¶ 1012 (the majority stating in relation to a permitting issue that "it is not here to decide the merits of a question of Romanian or EU law. This is not its mandate.").

a. The Majority Failed to Apply the Applicable BIT Standards to an Assessment of Gabriel and RMGC's Contract Rights

152. Gabriel's principal claim was that as the environmental permitting process for the Roşia Montană Project neared completion in 2011, the Government demanded revised economic terms in favor of the State, which it repeatedly and coercively insisted was a condition for permitting and for implementing the Roşia Montană Project.

153. Specifically, Gabriel's investment in Romania was based on its shareholder agreement with the State, which was embodied in RMGC's Articles of Association, and the Roşia Montană License held by RMGC, both of which were contracts governed by Romanian law.[198]

154. Assessment of the rights conferred by those agreements was an essential step in considering whether the State's conduct interfered with those rights in a manner that breached the investment treaty standards. Prof. Douglas explains the basic point in his treatise on investment treaty claims when he observes that "[i]n a case in which complaint is made that governmental authorities have confiscated contractual property rights, the preliminary question is one of domestic law as to the rights of the claimant under a contract in the light of the domestic proper law governing the legal effect of the contract."[199]

155. In deciding liability in this case, however, the majority failed to determine the rights and obligations under those agreements relating to the Project economics.

156. With regard to the State's demands to revise the Project economics in favor of the State, the majority acknowledged that there was "a consistent line of public statements from the government side that pertained to the economic terms of the Project and the need to revisit them in light of the situation."[200] The majority further acknowledged that those statements

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198 *See* Memorial ¶ 57, 106 *et seq*. (describing RMGC's Articles of Association and the Roşia Montană License with reference to Romanian law); Bîrsan Legal Opinion §§ II.D, III, IV (Claimants' Romanian law expert discussing RMGC's Articles of Association, and the Romanian law framework applicable to the Roşia Montană License).

199 Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2010, CUP) (**AL-69**) ¶ 78.

200 Award ¶ 947.

came from Romania's heads of State and from the Minister of Environment and the Minister of Culture responsible for permitting the Project.[201]

157. The majority observed that as of August 2011, the State held 19.31% of RMGC's shares and was entitled to a royalty of 4%.[202] It then proceeded to consider the impact of the State's conduct from the unexplained starting point that the State "needed to revisit" the issue of the Project's economics, that "this was one aspect that had to be clarified,"[203] and that "outstanding issues relating to the Project" included "the economic issues."[204]

158. The majority's statements are not grounded in any analysis of the contracts at issue. Nothing in RMGC's Articles of Association indicated that Gabriel Jersey's shareholding remained to be decided, nor did the majority identify the basis for those statements. The majority did not refer to any provision of law to support its assertions that the economic issues, including the State's shareholding and the level of royalties, remained to be established.

159. The majority's point of departure in addressing Claimants' claims regarding the treatment that followed the Government's demands for revised economics failed to consider the extent to which Gabriel had established contract rights for its shareholding of RMGC, and RMGC had established contract rights for the level of royalties to be paid under the Roşia Montană License.

160. Having failed to consider Gabriel's and RMGC's rights under those agreements, the majority skipped an essential step in considering whether the State's conduct interfered with those rights in a manner that breached the investment treaty standards. The majority thus failed to apply the standards set forth in the BITs to any threshold assessment of the

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[201] Award ¶¶ 948-949 (finding these "are the statements relied on by Claimants to argue that the Government linked the issue of the economics of the Project or, in other words, the financial benefits for the State from the implementation of the Project, with the permitting process itself," and acknowledging "[t]he fact that these statements come from Ministers or State officials other than those of the Ministry of Economy (for example, the President, the Prime Minister, the Minister of Environment and the Minister of Culture)….").

[202] Award ¶ 947.

[203] Award ¶¶ 951, 954.

[204] Award ¶ 955.

nature and scope of the contract rights at issue. This failure is serious and warrants annulment because it formed the foundation of all the majority's further consideration of Claimants' claims, as the majority proceeded from the starting point that the State "had to" address the Project economics, that the matter was "open" and "outstanding" – when the majority did not assess the issue in view of the relevant contract rights.[205]

b. The Majority Failed to Apply the Applicable BIT Standards to an Assessment of the Permitting Procedure and Legal Requirements for a Decision on the Roşia Montană Environmental Permit

161. The majority observed at the outset that "[t]he main issue in this case" concerned the environmental permit for the Roşia Montană Project, including "the conditions for such Permit" and whether it "should have been issued."[206]

162. The majority accepted that the environmental permitting process "is an administrative procedure that leads to a decision on an environmental permit" where, following consultation with the TAC based on an EIA report, "[t]he Ministry of Environment proposes to the Government to grant or to reject an environmental permit for a project."[207]

163. In describing the environmental permitting process for the Roşia Montană Project, the majority recognized that it was a process that had to comply with Romanian law and EU standards: "[W]hile 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."[208]

164. The majority also acknowledged that "[i]n undertaking this Project with all its known risks, Claimants could expect that the process for such undertaking, including the issuance of the

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[205] There is also a failure to state reasons on this critical point, which provides further grounds to annul the majority's liability decision. *See infra* § III.D.

[206] Award ¶ 18.

[207] Award ¶ 19 (further observing that "[t]he environmental permit is issued by government decision which gives it legal effect").

[208] Award ¶ 783 (emphasis in original).

Environmental Permit for the Project, would be fair, just, and in accordance with the law."[209]

165. The administrative permitting process was subject to specific procedures and legal requirements.[210] The applicable legal requirements for the environmental permit did not allow consideration of economic or political factors.[211]

166. That was made clear when Tribunal President Pierre Tercier asked Respondent's Romanian law expert Prof. Dragoş whether the Environmental Permit decision could be based on "some political position, anything like that?," and Respondent's expert Prof. Dragoş acknowledged, "No … political considerations cannot, of course, be part of this – these considerations. So, evident."[212]

167. The majority observed that in July 2013, the Ministry of Environment prepared a draft decision proposing to issue the environmental permit,[213] and that in September 2013

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209 Award ¶ 944.

210 *See, e.g.*, Award ¶ 19 fn.43 (citing *inter alia* Mihai Legal Opinion § IV and Mihai Supplemental Legal Opinion); Mihai Legal Opinion § IV (Claimants' legal expert Prof. Mihai describing the EIA procedure and the applicable legal framework under Romanian law according to which the Environmental Permit "is an administrative and regulatory deed to be issued by the environment protection authorities, which establishes the measures and conditions aimed at lessening environmental impacts that must be observed when a project is developed," and "[t]he competent authority's decision to reject an application and deny issuance of an EP also is an administrative deed; the applicant's right to challenge such a decision under the Administrative Litigation Law 554/2004 is expressly provided in Article 18 of GEO 195/2005"); Dragoş Legal Opinion ¶¶ 243, 245 (Respondent's legal expert Prof. Dragoş stating, "I agree with Prof. Mihai's statement in para. 50 of his Legal Opinion according to which the Romanian legislation on environmental protection has been subject to various amendments since the commencement of the EIA Procedure for the Project in December 2004. I agree also with his list of the laws applicable to the EIA Procedure for the Project (at para. 51). … I agree with the definition of the EP made by Prof. Mihai in paras. 52 and 53 of his Legal Opinion which considers both the provisions of Law 137/1995 and GEO 195/2005.").

211 This was made clear by the Romanian law experts of both Parties. *See, e.g.*, Tr. (Dec. 11, 2019) (**A-165**) 2630:2-19 (Respondent's Romanian Law Expert Tofan responding to Tribunal Questions); Tr. (Dec. 11, 2019) (**A-165**) 2722 (Respondent's Romanian Law Expert Dragoş responding to Tribunal Questions). *See also* Award ¶ 1230 (quoting TAC President Mihai Faca, a State Secretary from the Ministry of Environment, stating that other "issues, such as contractual issues or issues related to the relationship with the Romanian State, royalties, etc. These are issues there is no point for us to discuss here in the TAC, as we only deal with the environmental protection….").

212 Tr. (Dec. 11, 2019) (**A-165**) 2722:5-20 (Respondent's Romanian Law Expert Dragoş responding to Tribunal Questions).

213 Award ¶ 55.

Romania's Prime Minister Victor Ponta acknowledged, "I was obligated, under the law, and I am trying to explain this to those who want to hear me, that under the current law I had to give approval and the Roşia Montană Project had to start. They have met all the conditions required by the law."[214] The majority also observed that Romania's Minister of Environment Rovana Plumb similarly acknowledged two days later that the Ministry of Environment had worked with Gabriel "to secure a permit that, from my point of view, as Minister of Environment, may address all requirements under the European and not only, international standards. Practically, we have taken all European environmental standards and we have observed all conditions imposed by the relevant European legislation."[215]

168. Gabriel's claim was that notwithstanding such acknowledgments, the State failed to make any decision on the environmental permit for the Roşia Montană Project and abandoned the administrative process due to political considerations lacking any basis in law.

169. The majority failed to consider the applicable legal requirements for permitting in favor of what it considered was the "proper context" for addressing the claims in the case.[216] Without any reference to the applicable permitting requirements or procedures, the majority contrived that the EIA process "was intrinsically linked to ***politics***; politics that were driven by the positions of the political representatives and their constituents…,"[217] and that "the preparation of the EIA was therefore a complex process … touching not only

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214 Award ¶ 1119.

215 Award ¶ 1120 (further quoting Minister of Environment Plumb as stating that "higher safety measures have been taken, including in case of accident; the protection of biodiversity and continuous monitoring of air, soil and water quality have also been considered; the cyanide use has been cut down to a third from the accepted limit of 10 ppm, i.e., down to a concentration of 3 ppm at the tailings pond; the newest technology in this field was brought in") (emphasis removed). *See also, e.g.*, *id.* ¶ 1132 (finding that Minister of Environment Plumb stated again that the Ministry of Environment "set the highest environmental standards to protect people, to mitigate the risks for such an investment, fully observing all the European and international criteria and standards for this type of investment that involves exploiting an ore deposit of our country").

216 Award ¶ 774.

217 Award ¶ 783 (emphasis in original).

on environmental, social and cultural issues, but also on legal, economic and political ones."[218]

170. The majority thus failed to consider or give effect to the State's obligation to conduct the permitting procedure in accordance with law or the State's obligation to take decisions grounded in the law regulating the EIA process. It accordingly failed to apply the treaty standards requiring that analysis. That failure is evident at every stage of the majority's analysis:

a. The majority acknowledged that the TAC did not hold any meetings in the 18 months between November 2011 and May 2013,[219] and also acknowledged the political cause of this holdup, finding that in 2012 "[a]n interim Government led by Victor Ponta took power and maintained the demand for renegotiation to move the Project forward, but refused to take any action before the year-end elections" which resulted in "the suspension of the [EIA] process until after the Parliamentary elections."[220] The majority, however, failed to assess these facts in relation to the applicable legal framework governing the EIA process and accordingly did not consider whether the State's decision to shut down permitting for a year and a half for purely political reasons had any basis in law. Indeed, the majority rejected reference to the applicable administrative procedure as having any relevance at all.[221]

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218 Award ¶ 784. *See also, e.g.*, *id.* ¶¶ 781-782 (emphasizing the Project's "potential social, environmental and economic impacts caused by its activities" and finding that "[t]o address these potential impacts, an EIA was required" to evaluate the Project "from social, environmental, and economic perspectives"); *id.* ¶ 856 (finding that, "in evaluating the State's actions, the Tribunal must consider certain prevailing factors. In particular, it must consider the State's right to regulate and to issue decisions to protect the public interest, as well as socioeconomic and political factors prevailing at the time.").

219 Award ¶¶ 39-49; *id.* ¶ 967.

220 Award ¶¶ 348, 351, 972, 1061, 1097.

221 *See, e.g.*, Award ¶¶ 978, 980 (stating that "one cannot limit the EIA Process to its technical aspects and conclude those matters were resolved," and "this was a massive project with much at stake, the public interest was important, and the process was therefore influenced by all sides, whether ultimately justified or not").

b. As to the events in 2013, the majority acknowledged that Prime Minister Ponta "decided to submit the 'decision' on whether the Project should move forward to Parliament" because "no one wanted to take the responsibility for saying yes or no."[222] The majority recognized that "the final vote in Parliament to reject the Draft Law was undoubtedly a political decision. All votes in a parliament are political decisions."[223] The majority concluded there was "nothing reprehensible about that – that is just how democracy works, for better or worse."[224] But that conclusion grossly distorted Claimants' claim,[225] and it disregarded that there was an applicable administrative law and procedure[226] – one that according to both Parties did not allow political decisions on permits or on whether a duly licensed project should move forward. The majority nowhere addressed whether submitting to Parliament the decision on whether the Project should move forward was reconcilable with the law applicable to the permitting process, which was a predicate for an eventual determination as to whether such an approach was consistent with the investment treaty standards.

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222 Award ¶ 1135.

223 Award ¶ 1144.

224 Award ¶ 1144.

225 The majority fundamentally mischaracterized Claimants' arguments about the Draft Law. The majority stated that "any action of the Parliament is by definition 'politically motivated' and that it therefore understands the issue to be that there was an alleged illegitimate political influence over the decisions of the Parliament," and that "[t]he relevant question was whether this final vote was the result of illegitimate government influence." Award ¶¶ 1095, 1144. Claimants' claim was *not* that the Government illegitimately influenced the political votes taken in Parliament. Rather, as the majority itself recognized, Claimants' claim was that the Government impermissibly abandoned the administrative procedure and abdicated the decision on permitting and implementing the Project to Parliament. *See* Award ¶¶ 788-798 (summarizing Claimants' claim that "the Government adopted a politicized approach to permitting" that culminated in a political repudiation of Gabriel's rights in the Project, without any formal decision or due process, when "the Government insisted that Parliament decide whether the Project would be done by means of a vote on a special law (the Roşia Montană or Draft Law)," and that "[f]ollowing the rejection of the Draft Law by Parliament and with it the repudiation of RMGC's Project rights, the State consistently and overtly acted to confirm the fact and scope of its repudiation of RMGC's Project Rights in breach of the BITs").

226 Indeed, it was undisputed that delegating the decision to Parliament as to whether to issue an environmental permit was prohibited by the Romanian Constitution. Memorial ¶ 409; Mihai Legal Opinion ¶¶ 278-280 (explaining that the separation of powers provisions found in the Romanian Constitution prohibit delegating to Parliament acts to be undertaken by the Government and its ministries).

c. The majority observed that "discussions on the Project's implementation continued" after Parliament rejected the Draft Law when the TAC met again in 2014 and in 2015.[227] While the majority considered whether these TAC meetings "were pretextual and with no true intention to continue the discussion on the implementation of the Project,"[228] the majority failed to consider whether there were any applicable legal requirements or conditions that remained to obtain the environmental permit. More fundamentally, the majority did not refer to any provision of law in assessing the consequence of the lack of any further TAC meetings after 2015 and the lack of any decision to recommend either granting or denying the environmental permit. The majority thus concluded its analysis on the EIA process without referring to the legal framework that governed that process.

171. The majority stated that "[t]he decisive factor for assessing the international liability of Respondent is not the outcome, i.e., whether or not the Permit should have been granted or whether the Project should have gone ahead, but rather the process itself."[229] But rather than consider the relevance to the process of the fact that the environmental permitting procedure was never completed and no decision was ever issued, the majority emphasized that "its mandate is not to review the merits of a State's decision by reference to the applicable domestic law and the facts."[230]

172. While the majority was not called upon to review the merits of the State's decision, its mandate was to assess whether the State's failure to take any decision on the environmental permit was consistent with the applicable investment treaty standards. Having failed to consider what the EIA process required in terms of a decision, the majority necessarily failed to determine whether there was any legal basis in the law for the lack of a decision, which was an essential step to applying the investment treaty standards and thus to

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227 Award ¶¶ 1142, 1234.

228 Award ¶ 1227.

229 Award ¶ 944.

230 Award ¶ 945.

determining liability. Thus, the majority failed to apply the applicable investment treaty standards to evaluate whether the lack of a decision on the environmental permit or any explanation for the lack of a decision in that permitting procedure must be considered arbitrary, in breach of the fair and equitable treaty standard, or an undue interference with Gabriel's use and enjoyment of its investment, in breach of the expropriation standard.

173. The majority's failure to consider the applicable legal regime for the State's conduct impacted its resolution of all the claims in the case. In this regard, the majority recalled that it "addressed certain elements in its analysis that are important to its conclusions," and "[i]n particular, both at the outset and as part of its findings on Claimants' three alternative claims, the Tribunal stated that the nature of the Project, with its social, public, political and other elements, made the case a difficult and not a simple one, and therefore brought in the interests of many stakeholders. This ultimately explains how things turned out, for better or for worse."[231] The majority's failure to apply law in this respect therefore must lead to annulment of the majority's entire liability decision.

c. The Majority Failed to Apply the BIT Standards to an Assessment of the Licensing Procedure and Legal Requirements for a Decision on the Bucium Applications

174. As to the Bucium Projects, the majority acknowledged that RMGC applied for and "submitted to NAMR the documentation necessary to obtain 2 exploitation licenses for the mineral resources evidenced within the Bucium perimeter (i.e., the Bucium Applications)."[232]

175. Claimants claimed that the State failed without basis to issue any decision on RMGC's pending Bucium Applications. In assessing that claim, the majority failed to consider the law that established the conditions pursuant to which the competent State authority (NAMR) was to act, which was a necessary element to any ruling on the merits of Claimants' investment treaty claims.

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[231] Award ¶ 1312.

[232] Award ¶¶ 1152, 1155.

176. The majority's liability analysis on the Bucium Applications consisted of three short paragraphs and a conclusion without a single reference to the law that governed the Bucium license application procedure or indeed to any law.[233] The majority did not provide any legal basis for the lack of a decision by NAMR on the Bucium Applications. The majority's failure to consider the applicable process, and whether NAMR complied with that process, meant the majority had no basis to assess whether the lack of any decision on the Bucium Applications was arbitrary or otherwise in breach of the investment treaty standards. The majority thus failed to apply the applicable investment treaty standards to any assessment of whether the State had a basis in law for its failure to take any decision on the Bucium Applications, and for that reason the majority's liability decision on Bucium must be annulled.

d. The Majority Failed to Apply the BIT Standards in Several Other Respects

177. The majority acknowledged but failed to apply the BIT standards in several other respects. This includes that failures to act (omissions) may violate the BIT standards, that the cumulative effect of State treatment may breach the BIT standards even if each individual instance of treatment does not, and that an intention to harm is not required to establish a breach of the BITs.

i. The Majority Failed to Apply the Rule That Omissions May Breach the Treaty Standards

178. Although the majority recognized the established principle of international law that not only acts, but also omissions – failures to act – may constitute conduct that violates the standards of treatment set forth in the BITs,[234] it failed to apply the law as it failed entirely to take account of the central omission in the course of conduct at issue, which was Romania's failure at any point to make any decision on the Roşia Montană environmental permit or on the Bucium Applications.

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[233] Award ¶¶ 1161-1164.

[234] Award ¶¶ 820, 826, 828, 852, 892, 929.

179. Indeed, in his Note of Dissent, Prof. Grigera Naón emphasized that the law requires that such an omission be considered, observing that "[f]acts and conduct concerning the granting or not of the environmental permit may give rise, in isolation or in tandem, to Treaty breaches."[235]

ii. The Majority Failed to Apply the Rule Requiring Consideration of the Cumulative Effect of Acts and Omissions

180. The majority also failed to consider the cumulative effect of the course of conduct at issue. In deciding what it described as Gabriel's principal claim, that Romania's treatment of Gabriel's investment was a composite act in breach of the BITs, the majority accepted that a composite act is a single act that may be comprised of a series of acts, none of which individually breaches the BIT, but that when considered together or cumulatively, constitute a breach of an international obligation.[236] In its analysis of liability, however, the majority considered whether certain acts or omissions individually were wrongful, and having decided that each was not, concluded, in manifest disregard of the law, that the conduct did not constitute "a series of wrongful acts or omissions that might constitute a composite act."[237]

181. This was not merely awkward or unclear phrasing. Rather than consider the cumulative impact of the series of acts or omissions, the majority focused on whether there was a series of individually wrongful acts. In his Note of Dissent, Prof. Grigera Naón emphasized this failure, observing that "conduct in violation of FET 'may' but not necessarily 'must' be composed of individually wrongful acts under international law…."[238]

182. To the same effect, in its assessment of what it described as Gabriel's first alternative claim, although the majority stated as a conclusion that the "culminative effect of these disparate

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[235] Dissent ¶ 6.

[236] Award ¶¶ 826, 861, 877, 896, 933, 936-37.

[237] Award ¶ 1166.

[238] Dissent ¶ 15.

acts" does not rise to the level of a breach,[239] there is no indication that the majority applied the law and considered the "culminative effect" of the acts and omissions at issue anywhere in its liability decision.[240] In particular, there is no indication that the majority considered the overall effects of the State's acts and omissions and how that led to the lack of any decision on either the Roşia Montană environmental permit or the Bucium Applications.

iii. The Majority Failed to Apply the Rule That Intent Is Not Required to Establish a Treaty Breach

183. The majority repeatedly acknowledged that the standards of treatment set forth in the BITs do not require a showing of intent.[241]

184. The majority, however, in manifest disregard of the law, repeatedly framed the issue to be decided as whether Romania's actions were taken with the intent to harm Claimants' investment, and thus, rejected the claims presented based on what it considered to be a lack of intention to harm the investment.[242]

185. In his Note of Dissent, Prof. Grigera Naón emphasized that this was a significant failure, stating that "it is not necessary to prove the existence of a conspiracy or concerted or coordinated planning by government authorities to establish a FET breach or to identify or find a governmental intention to terminate the Project."[243]

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239 Award ¶ 1198.

240 Award ¶ 1187 (stating cumulative impacts must be considered, but not doing so).

241 Award ¶¶ 852, 854 (observing that bad faith or intent not required to establish a violation of the fair and equitable treatment standard), ¶¶ 893-894 (stating that no intent is required to conclude a State's measures are discriminatory), ¶¶ 910, 931 (stating that it is the effect of a State's measure rather than its intent that determines whether interference rises to the level of an expropriation). *See also id.* ¶ 936.

242 *See, e.g.*, Award ¶ 1074 (identifying issue as whether UNESCO inscription was "designed to frustrate the Project"), ¶ 1090 (dismissing arguments regarding the 2010 LHM as not "politically motivated to frustrate the Project"), ¶ 1143 (finding a lack of "misconduct on the part of the Respondent" where "the Draft Law, whether success or not, was intended to advance the Project"), ¶ 1166 (dismissing claim because there was no pattern or purpose to politicize the permitting process and/or to terminate the Project and drive away the investment), ¶ 1245 (identifying issue as whether 2015 LHM was "part of Respondent's overall effort to terminate the Project"). *See also id.* ¶ 1238 (observing Claimants did not indicate that TAC meetings were convened in bad faith), ¶ 1269 (repeating finding that 2010 LHM was not "tainted with the purpose of terminating the Project"), ¶¶ 1319-1320 (concluding no evidence the authorities had an objective of blocking the Project). *See also infra* § III.D.

243 Dissent ¶ 15.

3. The Majority Failed to Apply the Applicable Law as It Decided Liability Based on Its Subjective Notion of Equity, Contrary to ICSID Convention Article 42(3)

186. It is evident from the majority's failure to apply the applicable law as described in the preceding sections, its framing of issues in the case to avoid addressing the claims presented,[244] and its disregard of key evidence presented as described below,[245] that the majority decided the case based on its own subjective notions of equity rather than the law. Notable indications of the majority's disregard of law in favor of equity include:

a. the majority's manifest failure to apply the applicable law as described above;

b. the majority's finding that the proper "context" for Claimants' claims included that the EIA process was "influenced by the ***negative public perception*** of the Project" and "was also marked by several changes in government and was intrinsically linked to ***politics***; politics that were driven by the positions of the political representatives and their constituents on all of the above impacts;"[246]

c. the majority's repeated conclusion that there could be no liability in this case for the non-legal reasons that supposedly Gabriel's contemporaneous public statements did not include objections to the State's conduct,[247] that State actors did not intend to harm the Roşia Montană Project,[248] and that the State did not benefit from its conduct;[249] and

d. the majority's observation on causation, repeating these same points, that "the nature of the Project, with its social, public, political and other elements, made the case a difficult and not a simple one, and therefore brought in the interest of

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244 *See infra* § III.C.2.

245 *See infra* §§ III.CB.3, B.4.

246 *E.g.*, Award ¶¶ 783-785 (emphasis in original).

247 *E.g.*, Award ¶¶ 1167, 1236-1237, 1240-1241.

248 Award ¶¶ 1074, 1090, 1143, 1166, 1238, 1245, 1269, 1319-1320.

249 Award ¶¶ 1319-1320. *See also* Award ¶ 1196.

many stakeholders," which "ultimately explains how things turned out, for better or worse."[250]

187. As the majority thus failed to apply the applicable law and instead decided based on equitable considerations, contrary to Article 42(3) of the ICSID Convention, the majority manifestly exceeded its powers.

188. For all these reasons, the majority manifestly exceeded its powers and its liability decision must be annulled.

C. The Majority Failed to Consider the Claims and Evidence Presented and Denied Claimants Due Process Requiring the Annulment of Its Liability Decision for Serious Departures from Fundamental Rules of Procedure

189. The ground for annulling an award based on a serious departure from a fundamental rule of procedure recognizes the necessity of providing each party the right to be heard, which encompasses the right for each party's evidence and argument to be considered on all issues affecting its legal position and for each party to be provided a fair opportunity to confront the evidence presented by the other party.

190. The majority's liability decision is the product of serious departures from fundamental rules of procedure warranting annulment in three principal respects: (i) the majority failed to address the claims presented by Claimants principally by not addressing the fundamental and undisputed fact that there was never any decision made on the environmental permit for Roşia Montană or on the Bucium Applications; (ii) the majority failed to engage with substantial portions of the evidentiary record relied upon by Claimants; and (iii) the majority denied Claimants the opportunity to confront a wide-ranging 24-page witness statement that Respondent submitted with its Rejoinder on behalf of former Prime Minister Ponta, a central figure in the events at issue, which the majority admitted into the record over Claimants' objection, denying Claimants the right to cross-examine him, including about his key admission that rather than grant the environmental permit for the Roşia Montană Project as the law required, the State was "nationalizing the resources."

[250] Award ¶ 1312.

191. These defects warrant annulment of the majority's liability decision.

1. Failing to Address Claims or Key Evidence and Denying an Opportunity to Confront Evidence Deprive a Party of Its Rights to Be Heard and to Equal Treatment, and Thus Are Serious Departures from Fundamental Rules of Procedure Warranting Annulment

192. An award may be annulled when a tribunal seriously departed from a fundamental rule of procedure in the arbitration.[251]

193. As described above, for a departure from a fundamental rule of procedure to be serious, it is not necessary to establish that the outcome of the case would have been different.[252] Rather, the analysis turns on "whether, if the rule had been observed, there is a distinct possibility that it may have made a difference on a critical issue."[253]

194. A rule of procedure is fundamental if it "refers to a set of minimal standards of procedure to be respected as a matter of international law."[254] Fundamental rules of procedure include most basically the right to be heard, which includes the right for each party's claim and evidence to be addressed and to confront the evidence presented by the other party.[255]

195. The right to be heard is closely related to the principle of equal treatment of the parties and includes the right for each party to have its claims considered on all key issues affecting its legal position and addressed as such in the award. That is because, as ICSID's architect and first Secretary-General Aron Broches explained, the requirement that the tribunal address the "substantial questions submitted to a tribunal and briefed and argued before it"

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251 ICSID Convention, Art. 53(1)(d).

252 *See supra* § II.B; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021 (**AL-58**) ¶ 133; *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 (**AL-59**) ¶ 78.

253 *Víctor Pey Casado v. Chile (I)*, ICSID Case No. ARB/98/2, Decision on Annulment of Dec. 18, 2012 (**AL-11**) ¶¶ 77-78. *See also ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025 (**AL-51**) ¶ 202 ("The Applicant is not required to demonstrate that the award would have been different, absent the departure from the procedural rule.").

254 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment of Feb. 5, 2002 (**AL-72**) ¶¶ 57-58.

255 ICSID Background Paper on Annulment (2024) (**AL-21**) ¶ 105 (summarizing same and providing examples).

constitutes a "fundamental procedural protection of the parties against arbitrary decisions" and a "[f]ailure of a tribunal to observe it is a serious departure from that fundamental rule of procedure which is a ground for annulment under Article 52(1)(d)."[256] Thus, as recalled by the recent decision in *Kazakhstan v. World Wide Minerals*, a failure of a tribunal to address an essential issue in the dispute between the parties will be considered a serious irregularity under the analogous standard contained in the English Arbitration Act.[257]

196. In addition, a tribunal's failure to address evidence that has "the potential to have an impact on the outcome of the Award" also warrants annulment of the award.[258]

197. Finally, "[t]he right to have an adequate opportunity to respond to the evidence produced by the other party form[s] part of [the] fundamental rules."[259] Thus, the right to be heard also encompasses the right for each party to have a fair opportunity to confront the evidence presented by the other party, failing which the award may be subject to annulment. Accordingly, where the tribunal treats evidence in a way that denies a party an opportunity to effectively confront and address it, the award is subject to annulment.[260]

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[256] Aron Broches, "On the finality of awards: A reply to Michael Reisman," 8 ICSID Review 92, 96 (1993) (**AL-73**).

[257] *Republic of Kazakhstan v. World Wide Minerals Ltd et al.*, Case No. CL-2024000236, 2025 EWHC 452 (**AL-74**) (English High Court finding that the failure of the arbitral tribunal to address an essential issue in an UNCITRAL Rules-based investor-State arbitration was a serious irregularity supporting a challenge to the award under section 68 of the Arbitration Act of 1996).

[258] *See Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment of May 5, 2017 (**AL-16**) ¶ 303 (citing *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 132-39).

[259] *Tenaris S.A. and Talta v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment of Dec. 28, 2018 (**AL-75**) ¶ 88.

[260] *See Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment of Dec. 23, 2010 (**AL-76**) ¶¶ 200-02; *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 (**AL-77**) ¶ 60.

2. The Majority Seriously Departed from Fundamental Rules of Procedure When It Failed to Address the Claims Presented and Thus Deprived Claimants of Their Rights to Be Heard and to Equal Treatment

198. The majority's liability decision must be annulled because at every stage of its decision, the majority impermissibly failed to address an essential component of the claim presented and thus denied Claimants' most basic due process rights to a decision on their claims and to equal treatment.

a. The Majority Failed to Address an Essential Component of the Principal Claim by Failing to Address the Lack of Any Decision on the Environmental Permit or the Bucium Applications

199. Claimants claimed that the EIA process advanced to the point that the Ministry of Environment should have taken a decision on the environmental permit for the Roşia Montană Project in early 2012, but the Government would not complete the administrative process established by law while its economic demands remained unmet. Following elections at the end of 2012, in addition to those economic demands, because "no one wanted to take the responsibility for saying yes or no" about the Project, the Government decided to submit the "decision" on whether the Project should move forward to Parliament by submitting a Draft Law on the Project.[261] Claimants claimed that after the rejection of the Draft Law and repeated pronouncements by Governments leaders that rejection of the Draft Law meant that the Roşia Montană Project would not be done, the Government would not allow Gabriel to proceed with its Projects, as demonstrated prominently by the

[261] Award ¶ 1135. The majority impermissibly reframed Claimants' claim about the Draft Law, stating that it "understands the issue to be that there was an alleged illegitimate political influence over the decisions of the Parliament," and "[t]he relevant question was whether this final vote was the result of illegitimate government influence." Award ¶¶ 1095, 1144. As noted above, that was not Claimants' claim. Claimants' claim was that rather than issue the environmental permit pursuant to the applicable administrative procedure, the Government submitted a Draft Law to Parliament to serve as a proxy vote as to whether the Project would be done, and upon rejection of the Draft Law, the Project was effectively terminated. *See* Award ¶¶ 788-98. The majority avoided addressing that claim as well as much of the evidence that environmental permitting did not continue and that no decision was ever taken in the permitting process, denying Claimants due process on this essential issue.

undisputed fact that there never was any decision taken on the environmental permit for the Roşia Montană Project or on the Bucium Applications.[262]

200. As summarized above, the majority acknowledged at the outset that "[t]he main issue in this case concerns the 'Environmental Permit' for the Project,"[263] and that the environmental permitting or EIA process "is an administrative procedure that leads to a decision on an environmental permit" where, following consultation with the TAC, "[t]he Ministry of Environment proposes to the Government to grant or to reject an environmental permit for a project."[264]

201. The majority's liability decision, however, is silent on the central fact that the EIA permitting process came to a halt without *any decision* being taken by the Ministry of Environment to recommend granting or rejecting the environmental permit nor with any explanation by the Ministry of Environment for the lack of such decision.[265] The majority thus never addressed Claimants' claim that there was a *de facto* termination of the Roşia Montană Project through the State's abandonment of the permitting process.

202. The dissent emphasized this material due process violation, observing that, "Facts and conduct concerning the granting or not of the environmental permit may give rise, in isolation or in tandem, to Treaty breaches. They are part and parcel of the existing record and constitute a substantial basis of Claimants' case. Not considering them would constitute a due process breach."[266]

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262 *E.g.*, Memorial §§ IX.A, IX.B.3; Reply §§ V.A, VI; C-PO27 ¶¶ 206, 209-210, 219-220; C-PHB ¶¶ 195-196, 233, 238, 240, 252; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events dated June 14, 2022 §§ 1, 2.

263 Award ¶ 18.

264 Award ¶ 19 (further observing that "[t]he environmental permit is issued by government decision which gives it legal effect").

265 As Claimants emphasized, the Ministry of Environment's failure to issue a decision with a recommendation denied RMGC recourse to bring an administrative challenge. *See, e.g.*, C-PHB ¶ 196 ("Even assuming that the Ministry of Environment had identified through the EIA Process some alleged failure to meet applicable permitting requirements (which it did not as responsible officials repeatedly said all requirements were met), the law required the Ministry to issue a reasoned decision denying the EP so that RMGC could either bring an administrative challenge or seek to cure any alleged deficiency.").

266 Dissent ¶ 6.

203. Having failed to address the main predicate of the principal claim presented, the majority denied Claimants due process and seriously departed from fundamental rules of procedure establishing the right to be heard and the right to equal treatment, which requires annulment of its liability decision.

204. The majority's decision relating to the State's failure to act on RMGC's Bucium Applications must be annulled for the same reason because it was based upon the majority's conclusion that Romania had not "mishandled" permitting of the Roşia Montană Project. As the decision regarding the Roşia Montană permitting process must be annulled due to the majority's failure to address an essential component of the claim presented,[267] the majority's decision on Bucium based on that part of the liability decision must be annulled as well. Moreover, the majority engaged in the same fundamental due process violation in relation to the claim about Bucium because the majority also failed to address the undisputed fact that the State never took *any decision* on RMGC's Bucium Applications, which was the basis for the Claimants' claim of *de facto* expropriation of Gabriel's investment in the Bucium Projects.[268]

b. The Majority Failed to Address an Essential Component of the First Alternative Claim

205. The majority's decision on what it referred to as the first alternative claim[269] also must be annulled as it is based upon the majority's defective decision on the principal claim discussed above. In its assessment of the first alternative claim, the majority referred primarily to the "three main themes" of the principal claim, as to which the majority simply restated its earlier findings.[270]

206. In discussing the first alternative claim, the majority acknowledged that Claimants argued that events subsequent to September 9, 2013, when the Government's coalition leaders

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267 Award ¶ 1162.

268 *See* Award ¶¶ 1161-63 (analyzing the Bucium claim in three paragraphs that do not address the State's failure to take any decision on the Bucium Applications).

269 Award ¶¶ 1170-1201.

270 Award ¶ 1191.

called for rejection by Parliament of the Draft Law, demonstrated that Claimants' investment in the Roşia Montană Project was effectively taken.[271] But rather than consider the significance of those subsequent events, the majority stated that it would not do so because, according to the majority, the subsequent events "post-date the rejection of the Draft Law and are therefore outside the scope of the first alternative claim."[272] The majority thus again failed to rule on an essential aspect of Claimants' claim, which was that following the rejection of the Draft Law, the Government never completed the environmental permitting process.[273]

c. The Majority Failed to Address an Essential Component of the Second Alternative Claim

207. The majority dismissed what it referred to as the second alternative claim,[274] in which it considered certain events that occurred following the rejection of the Draft Law, however, it still failed to address an essential component of the claim presented.

208. Although it discussed TAC meetings held in 2014 and 2015,[275] the majority failed to address the principal question of why the environmental permitting process for the Roşia Montană Project was not completed after those TAC meetings. There is nothing in the Award that speaks to why no further action was taken regarding the environmental permit following the last TAC meeting in April 2015. The majority never addressed why there was never any decision on the environmental permit for the Roşia Montană Project.

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271 Award ¶ 1181, page 313 2d bullet.

272 Award ¶¶ 1193, 1194.

273 *E.g.*, Memorial §§ IX.A, IX.B.3; Reply §§ V.A, VI; C-PO27 ¶¶ 206, 209-210, 219-220; C-PHB ¶¶ 195-196, 233, 238, 240, 252; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events dated June 14, 2022 §§ 1, 2.

274 Award ¶¶ 1202-1308.

275 Award ¶ 1244.

209. Moreover, the majority simply referred to its earlier findings on the Bucium Projects without further analysis.[276] The majority accordingly never addressed the claim presented that there was never any decision on the Bucium Applications.

3. The Majority Failed to Consider Key Evidence Underlying Claimants' Claims and Thus Deprived Claimants of the Rights to Be Heard and to Equal Treatment

210. In addressing the undisputed fact that the Government demanded a larger share of RMGC and higher royalties from the Roşia Montană Project beginning in 2011,[277] the majority concluded there was "no evidence" linking permitting decisions to economic demands.[278]

211. Its discussion of the evidence on this issue, however, was limited to listing public statements made in August 2011 through December 2011 by the President, the Prime Minister, the Minister of Environment, and the Minister of Culture. The majority failed to address in any way the principal testimonial and contemporaneous email evidence presented by Claimants that showed that the demands for renegotiations and associated threats of non-permitting coerced Gabriel to seek to reach agreement on revised economic terms with the State.[279] The failure to consider that evidence denied Claimants due process.

212. The majority also failed to address the evidence that the Government's demand for revised economics as a condition to allowing the Project to be implemented was not limited to several months in 2011, but continued through 2012 and 2013, ultimately including also the condition that Parliament must approve the Draft Law.[280]

213. With regard to the claim that the permitting process came to an unexplained end following the rejection of the Draft Law, Claimants submitted subtitled videorecorded evidence of

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276 Award ¶ 1215.

277 Award ¶¶ 946-960.

278 Award ¶¶ 958-959.

279 *E.g.*, Second Dragoş Tănase Witness Statement dated June 30, 2017 ¶¶ 96-105 ([redacted]).

280 *See* Memorial ¶¶ 389, 403-406; Reply ¶¶ 32, 34-35, 183-184; C-PO27 ¶¶ 29-30, 34-37, 41; C-PHB ¶¶ 165-170.

Prime Minister Victor Ponta stating on national television in September 2013, "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."[281] Claimants showcased that videorecorded admission of liability at the hearing,[282] embedded the statement along with others in their opening slides,[283] and quoted the statement repeatedly in their written submissions including five separate times in their first post-hearing brief and four separate times in a submission made directly in response to the Tribunal's questions after the hearing.[284] The majority, however, did not address or even acknowledge Prime Minister Ponta's videorecorded admission.

214. The majority thus failed to address key evidence and significant aspects of Claimants' case and its liability decision must be annulled for that reason.

4. The Majority Denied Claimants the Right to Confront Material Adverse Testimony in Cross-Examination Which Again Deprived Claimants of the Rights to Be Heard and to Equal Treatment

215. A further distinct reason the majority's liability decision must be annulled is that the majority failed to exclude a witness statement submitted on behalf of former Prime Minister Victor Ponta that Claimants were denied any opportunity to confront.

216. With its Rejoinder, Respondent submitted a 24-page witness statement from former Prime Minister Ponta, a central figure in the events that formed the basis of the claims in the case. [redacted][285] Thus, Mr. Ponta refused to

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281 Prime Minister Ponta Statements on National TV dated Sept. 11, 2013 (**C-437**) at 3, 7 (transcript of video submitted as C-437.EN.pdf), at 9:31-10:07, 25:11-26:24 (timestamps of video submitted as C-437.mp4).

282 Tr. Dec. 2, 2019 (**A-166**) 235:14-236:22 (showing videos and repeatedly emphasizing Prime Minister Ponta's statement that by not permitting the Project as the law required, the State was effectively "nationalizing the resources").

283 Claimants' Opening Slides (Dec. 2019) vol. 6 (**A-164**) at 24-26.

284 *See* C-PHB ¶¶ 10, 39, 185-186, 258. *See also, e.g.*, C-PO27 ¶¶ 5, 50.b, 58, 191.

285 Ponta Declaration (May 1, 2019) ¶ 86 ([redacted]). After the Tribunal decided in Procedural Order No. 23 to admit Mr. Ponta's "declaration" in the record in the form of a witness statement, Respondent resubmitted a witness statement on Mr. Ponta's behalf that repeated his refusal to appear for cross-examination. Ponta Witness Statement (Sept. 16, 2019) ¶ 86 ([redacted]

be cross-examined, whether by video or otherwise. This was without regard to any schedule, nor did he provide any reasons.

217. As Claimants would have no opportunity to cross-examine an important witness, Claimants requested that the witness statement be struck from the record.[286] The Tribunal took note that Mr. Ponta would not submit to examination, but saw "no reason to refuse the admissibility of Mr. Ponta's witness statement," stating that the Tribunal "would need to assess the evidentiary value of this statement at a later stage in the proceedings and in light of the entire record."[287]

218. There is no indication in the majority's liability decision, or anywhere else in the record, how the majority assessed the evidentiary value of Mr. Ponta's witness statement.

219. Thus, the Tribunal admitted a lengthy testimonial statement into the record from a central figure in the case that Respondent submitted only with the Rejoinder, when Claimants' opportunity to submit rebuttal evidence was severely limited, and moreover in circumstances that deprived Claimants of any opportunity for cross-examination, including, for example, on his videorecorded statement that rather than issue the environmental permit for the Roşia Montană Project, the State was "nationalizing the resources." Doing so was a serious departure from fundamental rules of procedure, the right to be heard and to confront adverse witness testimony through cross-examination and the right to equal treatment of the Parties.

220. Given the centrality of Mr. Ponta's role in the events forming the basis for the claims in this case and the wide-ranging 24-page witness statement that was admitted into the record

[redacted] At that time, Mr. Ponta was a sitting member of Romania's Parliament.

[286] Claimants' Letters to the Tribunal dated July 19, 2019 and Aug. 20, 2019 (**A-162**); Procedural Order No. 23 (**A-167**) ¶¶ 42-46, § VII.1; Claimants' Letters to the Tribunal dated Sept. 19, 2019 and Sept. 23, 2019 (**A-163**); Award ¶¶ 333, 335-338, 343-344.

[287] Award ¶ 345; Letter from the Tribunal to the Parties dated Sept. 24, 2019. The Tribunal also admitted into the record an expert report of Respondent's expert, Ms. Cathy Reichardt, who likewise refused without reasons to appear for cross-examination. *See* Procedural Order No. 23 (**A-167**) ¶¶ 54-56, § VII.2; Award ¶¶ 335-338, 463. The Tribunal did not indicate the evidentiary value it accorded to that expert report.

notwithstanding Claimants' objections to their inability to confront his testimony, this defect is serious and warrants annulment of the majority's liability decision.

D. The Majority Failed to State the Reasons for Its Outcome-Determinative Conclusions and for Important Decisions on Matters of Due Process

221. The majority's liability decision must be annulled because the majority failed to state reasons supporting its outcome-determinative conclusions and important decisions on matters of due process.

1. Failing to State the Reasons for Outcome-Determinative Decisions or Providing Vague or Contradictory Reasons That Cannot Support the Conclusion Is a Ground for Annulment

222. An award may be annulled if it failed to state the reasons on which it was based.[288] The requirement to state reasons stems from Article 48(3) of the ICSID Convention, which provides that the award must "deal with every question submitted to the Tribunal" and "state the reasons upon which it is based."[289] The purpose of the requirement to state reasons "is to explain to the reader of the award, especially to the parties, how and why the tribunal came to its decision in light of the facts and applicable law."[290]

223. Annulment for failure to state reasons is not limited to instances of a total failure to state reasons. Rather, "even short of a total failure [to state reasons], some defects in the statement of reasons could give rise to annulment."[291] If a tribunal's failure to address a question or evidence submitted might have affected its ultimate decision, this could amount to a failure to state reasons warranting annulment.[292]

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288 ICSID Convention, Art. 53(1)(e).

289 ICSID Convention, Art. 48(3). ICSID Arbitration Rule 47(1)(i) (2006) in turn provides that the award must contain "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based."

290 C. H. Schreuer, L. Malintoppi, A. Reinisch, and A. Sinclair, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION (3rd ed., Cambridge University Press, 2022) (**AL-62**), at 1343 ¶ 457.

291 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment of June 5, 2007 (**AL-60**) ¶ 122.

292 *See* ICSID Background Paper on Annulment (2024) (**AL-21**) ¶ 99.

224. Thus, for example, in *TECO v. Guatemala I*, the tribunal had dismissed the claimant's claim for damages on the ground that there was not sufficient evidence of a loss of value. In its award, however, the tribunal did not address certain aspects of the evidence presented on that issue.[293] The *ad hoc* committee observed that "while the Tribunal was within its right to hold that this evidence was unpersuasive, immaterial, or insufficient, it did not make any such finding," as it simply failed to address the evidence.[294] The committee explained:

> While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.[295]

In that case, because "the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case,"[296] the tribunal's reasoning was not evident.[297] The committee therefore annulled that part of the award for failure to state the reasons.[298]

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[293] *See TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶¶ 127-38.

[294] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 130. *See also id*. ¶¶ 131-36 (similar).

[295] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 131.

[296] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 135.

[297] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 138.

[298] *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment of Apr. 5, 2016 (**AL-65**) ¶ 138.

225. The requirement to state reasons means that the reasons presented in the award must "themselves [be] capable of leading to the conclusions reached by the tribunal."[299] Annulment for failure to state reasons therefore is warranted where the reasons in the award are contradictory so that they "cancel each other out."[300]

226. Annulment for failure to state reasons also may be warranted when the reasons set forth in the award are "manifestly irrelevant" or "absurd" such that they cannot support the conclusion reached.[301]

227. Ultimately, one should not have to speculate about the reasons supporting the award; if "there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow."[302]

2. The Majority Failed to State Reasons Supporting Its Decision Regarding the Government's Demands for Revised Economics

228. As discussed above,[303] without any consideration of Gabriel and RMGC's contracts with the State that established Gabriel and the States's shareholding percentages in RMGC and the State's entitlement to royalties on Project revenues, the majority proceeded in its assessment of liability from the unexplained starting point that the Government "needed to revisit" the issue of the Project's economics, that "this was one aspect that had to be

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299 *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 (**AL-78**) ¶ 87.

300 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment of Feb. 21, 2014 (**AL-26**) ¶ 102; *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 (**AL-63**) ¶ 116. *See also ConocoPhillips v. Venezuela*, ICSID Case No. ARB/07/30, Annulment Decision of Jan. 22, 2025 (**AL-51**) ¶ 203 ("[U]nder Article 52(1)(e) that insufficient, inadequate or contradictory reasons which cancel each other are regarded as an absence of reasons.").

301 *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment of Feb. 21, 2014 (**AL-67**) ¶ 102; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Annulment of May 28, 2021 (**AL-27**) ¶ 167 ("[T]he Committee is of the view that irrelevant or absurd arguments apparently supporting a conclusion do not amount to reasons."); ICSID Background Paper on Annulment (2024) (**AL-21**) ¶ 113 ("[A] majority of ad hoc Committees have concluded that 'frivolous' and 'contradictory' reasons are equivalent to no reasons and could justify an annulment.").

302 *Víctor Pey Casado v. Chile*, ICSID No. Case No. ARB/98/2, Decision on Annulment dated Dec. 18, 2012 (**AL-5**) ¶ 86.

303 *See supra* § III.B.

clarified,"[304] and that "outstanding issues relating to the Project" included "the economic issues."[305]

229. In so doing, the majority failed to state reasons for its decision as it is not understood why or on what basis "the economic issues" that were reflected in RMGC's Articles of Association and in the Roşia Montană License were "open" and "outstanding," that the State "needed to revisit the issue," and that the economics "was one aspect that had to be clarified."[306]

230. Equally unexplained is the majority's assessment of the numerous public demands that Romania's successive Ministers of Environment and Ministers of Culture, among other senior Government officials, made in nationally televised statements in 2011 and in 2013. In those statements, Romania's Ministers of Environment and its Ministers of Culture demanded both that Gabriel agree to renegotiate and improve the State's share of the Project economics and that the Government, and later Parliament, take a "decision" politically to move forward before they would permit the Project. The majority reasoned that many public statements in the record demonstrated that "some Ministers (the Minister of Culture and Minister of Environment in particular) considered that the outstanding issues relating to the Project (principally the environmental issues and the economic issues) needed to be addressed at a Governmental level before further progress could be made."[307] Given that decisions by the Ministry of Culture and Ministry of Environment were vital to permitting and the majority's acknowledgement that these ministries considered economics needed to be addressed before further progress could be made, the majority does not explain its conclusion that there was no coercion in the Government's demand for revised Project economics and no link between those demands and the Government's willingness to issue the environmental permit for the Roşia Montană Project.[308]

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304 Award ¶¶ 949, 951, 954.

305 Award ¶ 955.

306 Award ¶¶ 951, 954, 955.

307 Award ¶ 955.

308 Award ¶¶ 958-960, 1165, 1191.

231. The majority's conclusion that there was no link between the Government's economic demands and Project permitting was also left unexplained by the majority's further acknowledgement that these same aspects (economics and permitting) "were two issues of importance for the implementation of the Project, where the status of one could also affect the other."[309] The majority did not explain how Project economics could affect the administrative permitting procedure under Romanian law or, indeed, in any way other than by the State unlawfully holding up the EIA process and refusing to issue a decision on the environmental permit until it extracted a better economic deal and political cover from Gabriel.

232. This failure to state reasons mandates annulment because it was fundamental to the majority's liability decision, and because it was the basis of Claimants' case that the State's demands for revised Project economics on condition of not permitting the Project was coercive. It also was a primary reason the Government made clear in 2013 that the only possible way forward for the Project was if Parliament would approve a Draft Law incorporating a new agreement on revised Project economics.[310]

3. The Majority Failed to State Reasons about the Lack of Any Decision on the Environmental Permit or End to the EIA Process

233. As demonstrated above,[311] the majority failed to address the fundamental and undisputed fact that there was never any decision made on the Roşia Montană environmental permit, which was a central aspect of Claimants' claim, and thus the failure to address it was a serious departure from a fundamental rule of procedure.

234. It was Claimants' case that, following rejection of the Draft Law and the multiple pronouncements by the Government's leaders that the Project therefore would not be done, the Government would not permit the Project, as demonstrated by the lack of any decision

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309 Award ¶ 959.

310 See, *e.g.*, Memorial ¶¶ 389, 403-406; Reply ¶¶ 32, 34-35, 183-184; C-PO27 ¶¶ 29-30, 34-37, 41, 198; C-PHB ¶¶ 165-170.

311 *See supra* § III.C.

made on the Roşia Montană environmental permit.[312] The majority's failure to address that issue was also a complete absence of reasoning that requires annulment because the majority thus failed to state reasons for its decision on a central aspect of Claimants' case.

235. The majority said nothing at all about the fact that no further action was taken in the environmental permitting process after the TAC meeting in April 2015 and no decision was ever issued to end the procedure or to make a recommendation on whether to issue or deny the environmental permit.[313] The majority also did not address what, if anything, remained to be done or what, if any, legal requirements remained to be satisfied to obtain the environmental permit. There is thus a complete absence of reasoning about the fact that the environmental permitting process for the Roşia Montană Project was simply abandoned.

236. The majority's failure to state reasons on this essential aspect of the case is underscored in its "causation considerations" where it stated that "the nature of the Project, with its social, public, political and other elements, made the case a difficult and not a simple one, and therefore brought in the interests of many stakeholders," and then simply stated that "this ultimately explains how things turned out, for better or for worse."[314] This conclusion, however, is not explained, as the majority did not say what it meant by "how things turned out" or by "for better or for worse."

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[312] Memorial § IX.A; Reply § V.A; C-PO27 ¶¶ 51, 200, 205-206, 209-210; C-PHB ¶¶ 195-196, 238, 240, 252; Claimants' Response to the Tribunal's Questions Regarding post-2013 Events ¶¶ 13, 40, 49, 58-60.

[313] Award ¶¶ 1232 – 1244.

[314] Award ¶ 1312.

4. The Majority Failed to State Reasons about the Lack of Any Decision on the Bucium Applications

237. Claimants claimed that Romania's wrongful conduct included the failure to act on the Bucium Applications following Parliament's 2013 rejection of the Draft Law, as evidenced by the fact that Romania's licensing authority, NAMR, never took any decision to grant or deny the Bucium Applications.[315]

238. The majority's decision on this issue must be annulled because the few reasons the majority provided to dismiss this claim do not address NAMR's lack of a decision and are manifestly irrelevant and incapable of supporting the majority's conclusion.

239. Rather than consider the legal rules applicable to NAMR and the evidence relating to NAMR's decision-making,[316] the majority referred to Claimants' statements to the effect that NAMR was expected to act, and to the lack of commentary about Bucium within the Roşia Montană environmental permitting process. Such analysis fails to address why the Bucium Applications remained perpetually pending is manifestly deficient and inexplicable from a legal point of view.

240. Specifically, in its decision, the majority referred to [redacted][317] The majority then:

(a) cited to RMGC's own comment in a 2011 TAC meeting during the Roşia Montană environmental permitting procedure stating that Bucium is a separate project;[318]

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[315] *E.g.* Memorial § IX.B.3; Reply § VI; C-PO27 ¶¶ 59, 66, 68, 118, 202-204, 206-207, 210, 224; C-PHB ¶¶ 195-196, 238, 240, 252; Claimants' Response to the Tribunal's Questions Regarding post-2013 Events ¶¶ 13, 43-44, 61-62.

[316] *See*, *e.g.*, Memorial ¶¶ 552-557; Reply ¶¶ 294-309.

[317] Award ¶ 17.

[318] Award ¶ 1163 (citing Dragoş Tănase stating that "We are talking only about the Roşia Montană project today. This is the project under discussion, it does not have anything to do with the licenses for Bucium, those licenses will be discussed separately….").

(b) stated that there was no evidence of delay or misconduct relating to the Bucium Applications in the context of or as part of the Roşia Montană Project environmental permitting process;[319]

(c) referred to Gabriel's public disclosures starting in 2012, before Parliament's rejection of the Draft Law,[320] stating that a decision on the Bucium licenses was expected after further progress was made on permitting for the Roşia Montană Project; and

(d) referred to statements made by NAMR in support of the Roşia Montană Project and RMGC.[321]

241. On this basis the majority concluded that the State did nothing wrong.[322] The majority, however, did not address the legal regime governing the Bucium Applications or the significance of the fact that NAMR never took a decision on the Bucium Applications.[323] The majority did not refer to any legal basis to come to any conclusion on this aspect of the claim and thus there is a fatal absence of reasoning on this aspect of the majority's decision.

5. The Majority Failed to State Reasons for Its Conclusion Regarding the Impact of the UNESCO Inscription on the Ability to Implement the Roşia Montană Project

242. The majority's decision regarding the inscription of the Roşia Montană Mining Landscape as a UNESCO World Heritage site likewise must be annulled for a failure to state reasons.

243. On July 27, 2021, at the request of the Romanian Government, following the conclusion of the hearings in the case but while the arbitration was still pending, UNESCO listed the

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319 Award ¶ 1163 n. 828 (citing minutes of several TAC meetings that were part of the Roşia Montană environmental permitting process).

320 Award ¶ 1163 n. 829.

321 Award ¶ 1163 n. 830.

322 *See* Award ¶¶ 1163-1164. *See also id.* ¶ 1192.

323 *See also* Award ¶¶ 1207, 1213, 1215.

Roşia Montană Mining Landscape as a protected World Heritage site and as a site on the List of World Heritage in Danger.[324]

244. Claimants claimed that the inscription made obtaining a construction permit for the Roşia Montană Project impossible,[325] and that if Romania's conduct prior to that date had not frustrated Gabriel's investment, the UNESCO inscription did so in view of the Romanian law that applied to the protection of such sites and that would prevent issuance of a construction permit.

245. It was undisputed that a construction permit was necessary to implement the Project and that Romanian law provided that one could be issued only in accordance with the land use, or urbanism, plans adopted for the area.[326] Although Romanian law requires urbanism plans to permit mining in areas covered by mining licenses,[327] the law prohibits mining in areas where cultural heritage assets are located,[328] and requires that urbanism plans designate protection of cultural heritage sites and prohibit construction where such sites are located.[329] Romanian law thus prioritizes protection of cultural heritage over mining

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[324] Award ¶¶ 188, 1287, 1292, 1293. *See also* UNESCO announcement dated July 27, 2021 (**C-2984**) (announcing the inscription of the Roşia Montană Mining Landscape onto the UNESCO World Heritage List and simultaneously onto the List of World Heritage in Danger "pending the removal of threats to its integrity posed by possible extractive activities").

[325] Award ¶ 1297. While the majority states that Claimants did not explain how the UNESCO listing would impact the availability of a construction permit for the Roşia Montană Project (Award ¶ 1301), the majority disregards Claimants' submissions on this issue. *See*, *e.g.*, Memorial ¶¶ 604-613; Reply § V.5.7; C-PO27 ¶¶ 214-215, 222-223; C-PHB ¶ 251; Claimants' Observations on New Evidence (Oct. 29, 2021) ¶¶ 19-35; Claimants' Response to Tribunal Questions Regarding Post-2013 Events (June 14, 2022) ¶¶ 30-38, §§ 2.B.4, 2C.

[326] *E.g.*, Counter-Memorial ¶¶ 58-62; Rejoinder ¶¶ 252-255. *See also* Bîrsan Supplemental Legal Opinion ¶ 30 ("A mining exploitation license does not automatically confer rights over the land included in the mining perimeter to the titleholder."); Award ¶ 76.

[327] *See*, *e.g.*, Memorial ¶¶ 185-187; Bîrsan Legal Opinion ¶ 253 (referring to Article 41 of Mining Law 85/2003); Respondent's Response to Claimants' Observations on New Exhibits ¶ 25 note 28. *See also* Podaru ¶¶ 189-190 (describing the requirements in the urbanism law and in the mining law that urbanism plans permit mining activities in areas containing identified resources).

[328] *See* Mining Law 85/2003 (**C-11**) Art. 11(2) ("Carrying out mining activities on such lands where historical, cultural, religious monuments, archaeological sites of special interest, or natural reservations … are strictly prohibited"); Bîrsan Supplemental Legal Opinion ¶¶ 82-86; Podaru ¶ 203. *See also* Dragoş Legal Opinion ¶ 75.

[329] *E.g.*, Schiau Legal Opinion ¶ 12 (*quoting* Land Law 18/1991, Art. 71(1) ("Locating any type of constructions on land … upon which there are … reservations, monuments, archaeological and historical assemblies, is

and prohibits issuance of a construction permit for a mining project in an area designated for cultural heritage protection.[330]

246. For this reason and because the Roşia Montană Project was situated in an area that included archaeological sites, including sites of special significance categorized as historical monuments, the Ministry of Culture's issuance of archaeological discharge certificates ("ADCs") in the Roşia Montană Project area was an important factor in permitting the Project, and the relevance of the ADCs to the Ministry of Culture's list of historical monuments ("LHM") was a significant issue in dispute in the case.[331]

247. The majority recognized that an ADC "is an administrative act that removes the protections previously afforded to the site as an area with archeological value."[332] The majority also recognized that the UNESCO listing triggered special protections under Romanian law that are distinct from the general protections in place for historical monuments included on the LHM.[333]

248. In addressing Claimants' claim regarding the effects of the UNESCO inscription, the majority concluded that, because the UNESCO listing did not affect the ADCs issued for the area, it "cannot point to anything to support the allegation that Claimants would not be able to obtain the declassification of the Roşia Montană area from the LHM."[334]

249. The majority, however, did not explain how declassification of the area's status as an archeological site, or as an archeological site of such significance so as to be classified as an historical monument, would remove the requirement in Romanian law to put protections

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strictly prohibited"); Podaru Legal Opinion ¶¶ 197-198. *See also* Dragoş Legal Opinion ¶¶ 75 101; Dragoş Supplemental Legal Opinion ¶¶ 331, 429-430.

330 Schiau Legal Opinion ¶¶ 12-17; Podaru Legal Opinion ¶¶ 197-203. *See also* Bîrsan Supplemental Legal Opinion ¶¶ 83-86; Respondent's Response to Claimants' Observations on New Exhibits (Dec. 6, 2021) ¶¶ 27-28, 31; Award ¶¶ 183, 1288 (*citing* (**C-2517**) Letter from the Minister of Culture to the Mayor of Roşia Montană emphasizing that according to the law, cultural heritage properties must be given priority over mining in urbanism plans).

331 *See* Schiau Legal Opinion ¶¶ 77-79, 91-92.

332 Award ¶ 84.

333 Award ¶¶ 182, 1287 n. 925 (*citing* **C-2350**).

334 Award ¶ 1301.

in place to safeguard the UNESCO-protected landscape. Indeed, UNESCO had inscribed the "Roşia Montană Mining Landscape" onto the List of World Heritage in Danger "due to threats posed by plans to resume mining which would damage a major part of the inscribed Mining Landscape."[335]

250. The majority's reasoning on this claim failed to address the evidence on which Claimants relied showing that protection of the Roşia Montană Mining Landscape was incompatible with the Project. Claimants referred in its submissions, among other things, to the Romanian law mandating UNESCO protections, to Romania's own UNESCO application and related materials, to the public statements of Romania's Minister of Culture immediately preceding the UNESCO inscription, and to the UNESCO inscription itself, all of which confirmed that the protection would extend to the landscape of the area and thus would make it impossible to implement the Project.[336] The majority failed to address that

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335 UNESCO announcement dated July 27, 2021 (**C-2984**).

336 *See, e.g.*, Screenshot of UNESCO website (**C-1275**) at 2-4 (showing submission by Romania on February 18, 2016 of *Roşia Montană Mining Cultural Landscape* for inclusion on the World Heritage tentative list for Romania, which stated that the entire "mining cultural landscape" of Roşia Montană merits treatment as a site of "outstanding universal value" and that "this cultural landscape is threatened by irreversible changes following the ending of traditional mining operations and the associated social changes. The area is still rich in minerals and the proposed resumption of open cast mining with modern quarrying techniques would inevitably entail the quasi-total and irreversible destruction of the cultural heritage and its setting, which is the principal resource for the sustainable development of the area."); Ministry of Culture Informational Brochure describing the Roşia Montană UNESCO Application distributed to residents of Roşia Montană in Dec. 2016 (**C-1406**) (describing the "cultural landscape" as broadly comprising "valleys, houses and churches, streets and mountains, rivers and ruins" and stating that "[i]f this cultural landscape, which includes the natural environment surrounding Roşia Montană, were to be destroyed, a great bond with our ancestors and an irreplaceable piece of our identity would also be broken"); Romania's UNESCO Nomination Document (**C-1892**) at 131 (stating that the urbanism plan for the area "is to ensure the desired state of conservation of the property while making the transition from industrial zoning, in support of open pit mining and processing, to that of heritage-lead [sic] zoning appropriate to a nominated World Heritage property"); Interview of Minister of Culture Bogdan Gheorghiu and others, Radio Guerilla, July 8, 2021 (**C-2986**) (in response to the question whether there can be a UNESCO designation of the site if it had been archaeologically discharged, Minister of Culture Bogdan Gheorghiu explained, "[y]es, because there isn't only an archaeological heritage, but also a landscape heritage"); UNESCO announcement dated July 27, 2021 (**C-2984**) at 2-3 (inscribing the "Roşia Montană Mining Landscape" and stating, "The site demonstrates a fusion of imported Roman mining technology with locally developed techniques, unknown elsewhere from such an early era. Mining on the site was also carried out, albeit to a lesser extent, between medieval times and the modern era. The later extractive works surround and cut across the Roman galleries. The ensemble is set in an agro-pastoral landscape which largely reflects the structures of the communities that supported the mines between the 18th and early 20th centuries. The site was also inscribed on the List of World Heritage in Danger due to threats posed by plans to resume mining which would damage a major

evidence and did not explain why it was unpersuasive or insufficient to establish Claimants' claim that the UNESCO inscription effectively prevented implementation the Project.

251. The majority's reasoning thus was illogical and incapable of supporting its conclusion. Indeed, its conclusion makes no sense.

6. The Majority Failed to State Reasons for Its Conclusions That the State's Conduct Did Not Breach the BITs

252. Although the majority set out certain findings of fact and then referred in a cursory manner to the treaty standards,[337] its brief conclusory statements fall far short of the reasoning required to support the majority's liability decision.

253. Specifically, the majority accepted that fair and equitable treatment required a lack of arbitrariness, and that in turn required the Tribunal to engage in an objective assessment of the State's conduct in view of the relevant legal norms and evidence before it.[338] Yet, the majority failed to assess what the relevant legal requirements were for making a decision regarding whether to grant the environmental permit for the Roşia Montană Project and for completing the EIA process and whether the process that was followed, and particular the lack of any decision, was grounded in the applicable legal requirements.[339] The majority likewise failed to assess what the relevant legal requirements were for making a decision regarding whether to grant the Bucium Applications and for completing that administrative licensing procedure and whether the procedure that was followed was based on those requirements.[340] The majority thus failed to state reasons as to how in that significant respect the State's conduct was not arbitrary and thus failed to state reasons in relation to, *inter alia*, its dismissal of Gabriel's fair and equitable treatment claim.

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part of the inscribed Mining Landscape."). *See also, e.g.*, Memorial ¶¶ 604-610; Claimants' Response to the Tribunal's Questions Regarding Post-2013 Events ¶¶ 30-38, 66-73.

337 *See* Award ¶¶ 1166, 1186, 1198-1200, 1218, 1306-1307.

338 *See supra* § III.B.2.

339 *See supra* § III.B.2.

340 *See supra* § III.B.2.

254. The majority also accepted that Claimants' "umbrella" clause claims were admissible and apply where the conduct of the State interferes with any obligations entered into between State organs and private parties.[341] Yet, having failed to assess the nature of the obligations entered into by the State with Gabriel Jersey in relation to their respective shareholdings in RMGC, the majority failed to state reasons as to how the requirement to revise the State's shareholding in RMGC as a condition to implement the Project did not interfere with Gabriel's contract rights and thus failed to state reasons in relation to its dismissal of Gabriel's umbrella clause claims.

255. Similarly, 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.[342] Yet, the majority failed to state reasons as to how the lack of any decision on the Roşia Montană environmental permit or on the Bucium Applications did not have an expropriatory effect or interfere with Gabriel's investment and thus failed to state reasons in relation to its dismissal of Gabriel's expropriation claim.

256. The majority's reasoning was also contradictory and thus fails to state reasons in several significant respects. Specifically, the majority recognized that an omission, or failure to act, may constitute conduct that violates the standards of treatment set forth in the BITs,[343] yet failed without any explanation to take account of the central omission in the course of conduct at issue, which was Romania's failure at any point to make any decision on the Roşia Montană environmental permit or on the Bucium Applications. In addition, the majority recognized that the standards of treatment set forth in the BITs may be violated even where there is no intention to harm the investment,[344] yet repeatedly concluded that there was no breach by the State because in the majority's view there was no intention to harm Gabriel's investment.[345]

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341 Award ¶¶ 906 – 908.

342 Award ¶ 931.

343 Award ¶¶ 820, 826, 828, 852, 892, 929.

344 *See supra* § III.B.2.

345 *See supra* § III.B.2.

7. The Majority Failed to State Reasons for Important Decisions That Deprived Claimants of Due Process

257. As described above,[346] the majority deprived Claimants of due process by failing to consider key evidence underlying Claimants' claims. In particular, the majority failed to address or acknowledge the principal testimonial and contemporaneous email evidence relied on by Claimants to show that the demands for renegotiations and associated threats of non-permitting coerced Gabriel to seek to reach agreement on revised economic terms with the State, or the videorecorded statements of Prime Minister Ponta that Claimants relied on extensively because of his admission that "we should, under the current laws, issue the environmental permit and the exploitation should begin," but instead "we are basically performing a nationalization, we are nationalizing the resources."

258. The majority gave no reasons for failing to consider that key evidence and did not explain whether or why it was unpersuasive or insufficient to establish Claimants' claims about the *de facto* taking of Gabriel's investment.

259. In addition, as also described above, the Tribunal admitted into the record a lengthy adverse testimonial statement that Respondent submitted with its Rejoinder on behalf of former Prime Minister Ponta, a central figure in the case, in circumstances that deprived Claimants of any opportunity to cross-examine Mr. Ponta. When it took that decision, the Tribunal stated that it "would need to assess the evidentiary value of the statement at a later stage of the proceedings and in light of the entire record," but the majority never indicated anywhere in the record how it assessed the evidentiary value of Mr. Ponta's unexamined witness testimony.[347]

260. The failure to provide reasons for these important decisions that impaired Claimants' due process rights is another reason the majority's liability decision must be annulled.

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[346] *See supra* § III.C.3.

[347] *See supra* § III.C.4.

IV. REQUEST FOR RELIEF

261. For the reasons set forth above, Applicants respectfully request that the Committee:

a. annul the Award in its entirety on the grounds set forth in Section II above;

b. alternatively, on the grounds set forth in Section III above, annul the Award in the parts containing the majority's decisions on liability and on costs in Sections IV and V of the Award (paragraphs 767-1357) together with the majority's decision at paragraph 1358.2, except for the unanimous decisions at Award paragraphs 1183-1185 and 1220-1223; and

c. order Respondent to pay all of Applicants' costs in these annulment proceedings, including the Applicants' legal fees and expenses, with interest.

Respectfully submitted,

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April 3, 2025