INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

AMEC FOSTER WHEELER USA CORPORATION (USA),
PROCESS CONSULTANTS, INC. (USA), AND
JOINT VENTURE FOSTER WHEELER USA CORPORATION AND PROCESS CONSULTANTS, INC. (USA)
Claimants

v.

THE REPUBLIC OF COLOMBIA
Respondent

ICSID Case No. ARB/19/34

CLAIMANTS' REQUEST FOR ANNULMENT OF THE AWARD

April 16, 2025

Contents

In accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**"), Applicants Amec Foster Wheeler USA ("**Foster Wheeler**"), Process Consultants, Inc. ("**PCI**"), and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. ("**FPJVC**") respectfully seek annulment of the Award in *Amec Foster Wheeler USA Corporation, et al. v. Republic of Colombia* (ICSID Case No. ARB/19/34) rendered on December 19, 2024 ("**Award**") under the Colombia-United States Trade Promotion Agreement ("**TPA**"). In support thereof, Applicants show the following:

I. INTRODUCTION

1. In 2009, FPJVC entered into a contract to act as a Project Management Consultant ("**PMC**") for a project to modernize and expand an oil refinery located in Cartegena, Colombia. The refinery is owned and operated by Refinería de Cartegena S.A.S. ("**Reficar**"), a wholly owned subsidiary of Ecopetrol S.A. ("**Ecopetrol**"), Colombia's state-owned oil company (the "**Reficar Project**" or the "**Project**"). FPJVC's role was limited by Reficar to seconding personnel to the Project Management Team ("**PMT**") run entirely by Reficar, a newly incorporated entity with no experience in managing a project of this scale and complexity.

2. In 2017, the Contraloría General de la República (the "**CGR**"), an agency of the Colombian state responsible for overseeing the expenditure of public funds, commenced and prosecuted an administrative proceeding against numerous participants in the Project, including the two members of FPJVC. The CGR sought to recover alleged damages to Colombia's public patrimony for respondents' supposed acts of gross negligence in connection with the Reficar Project. After a proceeding that took years and can fairly be described as

constituting a travesty of due process, the CGR rendered its decision, holding the two members of FPJVC and other respondents jointly and severally liable for nearly three trillion Colombian pesos, or approximately USD 810 million at the then-current rate of exchange, plus interest at approximately 26% per annum, then reduced to 12% per annum. The decision, which is over 6,000 pages long, does not identify a single wrongful or negligent act by FPJVC.

3. In 2019, Foster Wheeler, PCI, and FPJVC commenced an arbitration against Colombia under the TPA, seeking relief arising out of the wrongful commencement and prosecution of the CGR proceedings. Colombia moved to dismiss the case on preliminary objections under Article 10.20.4 of the TPA and for a claimed manifest lack of legal merit under Rule 41 of the 2006 ICSID Arbitration Rules. Colombia's submission set out a laundry list of 10 grounds on which the arbitration should be dismissed. Following two rounds of briefing, the Tribunal held a two day in-person hearing on May 19-20, 2022. The Tribunal then took Colombia's application under advisement for approximately two and a half years.

4. On June 21, 2024, Claimants filed an Amended and Restated Request for Arbitration ("**Amended Request for Arbitration**"), challenging certain of the measures taken by Colombia following the commencement of the arbitration.

5. On December 19, 2024, the Tribunal rendered its final Award, dismissing the Arbitration in its entirety. Although Claimants had asserted five separate claims, for denial of fair and equitable treatment ("**FET**"), indirect expropriation, breach of the guaranty of national treatment, breach of the guaranty of most-favored-nation ("**MFN**") treatment, and breach of an investment agreement, the Award addressed the substance of only a part of the FET claim, a denial of justice in the CGR proceedings. The Tribunal held that

the TPA's guaranty of procedural due process did not apply at all to the CGR proceedings. The Tribunal construed the term "administrative adjudicatory proceedings" in the TPA as referring to proceedings before Colombia's specialized courts for administrative review, excluding adjudicatory proceedings before administrative agencies. The Tribunal further held that the claim was inadmissible because Claimants had not pursued judicial remedies at the time the arbitration was commenced, an exhaustion requirement found nowhere in the TPA. The Tribunal then dismissed all the other claims asserted by Claimants, by referring to its holding regarding the inadmissibility of the denial-of-justice claim, although neither the exhaustion of judicial remedies nor the construction of the term "administrative adjudicatory proceedings" has any bearing on those other claims. The Award did not address the Amended Request for Arbitration or rule on the ancillary claims therein asserted.

6. Applicants now seek full annulment of the Award. The Tribunal manifestly exceeded its powers, seriously departed from fundamental rules of procedure and failed to state reasons in support of its findings, all grounds for annulment under Article 52 of the ICSID Convention.

7. The Tribunal manifestly exceeded its powers by failing to exercise its jurisdiction and egregiously misapplying the law. *First*, the Tribunal failed to rule in any meaningful way on claims other than the denial-of-justice claim and on the ancillary claims asserted in the Amended Request for Arbitration. *Second*, the Tribunal's ruling on the denial-of-justice claim is so egregiously wrong that it constitutes a manifest excess of power.

8. The Tribunal seriously departed from several fundamental rules of procedure, including the rules on the burden of proof, the right to be heard, and the summary disposition of claims and defenses. *First*, the Tribunal improperly

placed an evidentiary burden on Claimants, thus ignoring the fundamental rule that the Request for Arbitration's factual allegations are to be accepted as true when resolving preliminary objections. The Tribunal then compounded that error by ignoring evidence on the record supporting Claimants' position. *Second*, the Tribunal seriously departed from the fundamental right to be heard when it refused to rule on claims properly before it. *Third*, the Tribunal departed from the fundamental rules regarding the summary disposition of claims and defenses. The Tribunal applied the expedited procedures set out in Article 10.24.4 of the TPA and Rule 41 of the ICSID Arbitration Rules. Such procedures are limited to assessing whether a claim or defense manifestly lacks legal, not factual, merit. Those procedures are not meant for resolving contested and complex legal and factual issues, as the ones at issue in this case.

9. Finally, the Tribunal failed to state reasons in support of its conclusions. The Tribunal imposed a non-existent requirement to exhaust local remedies for every claim under the TPA, ignored relevant evidence that was on the record and to which both parties referred to, and failed to apply accepted principles of treaty interpretation in support of its construction of the term "administrative adjudicatory proceedings."

10. Considering these fundamental errors, all of which fall within the scope of Article 52 of the ICSID Convention, the Award should be annulled in its entirety, and a new proceeding should be ordered. Applicants' position is set out in further detail below.

II. SUMMARY OF FACTUAL EVENTS RELATED TO THIS APPLICATION

A. The Controversy

11. The underlying dispute that led to the Award arose out of one of the largest infrastructure projects in the history of Colombia. Ecopetrol, Colombia's state-owned oil company, operated a refinery in Cartagena, on the Caribbean Coast of Colombia. To meet its national clean-fuel objectives and ensure energy sufficiency, the Colombian government undertook a mega-project intended to double the refinery's capacity

12. Reficar, a wholly owned subsidiary of Ecopetrol, was formed to oversee the Project and eventually own and operate the refurbished refinery. Reficar entered into a contract with Chicago Bridge & Iron ("**CB&I**"), a US-based engineering, procurement, and construction ("**EPC**") firm, and Technip, a French engineering firm, to develop the Project's front-end engineering design ("**FEED**"). Ecopetrol and Reficar initially intended that the contract for the Project would be on a lump-sum turnkey basis.

13. At the same time the Reficar Project was in development, but not yet underway, Foster Wheeler entered into a contract with Ecopetrol to develop a FEED and act as a PMC in a project to modernize a different Ecopetrol refinery in Barrancabermeja, a city located in the North of Colombia. Ecopetrol also retained Foster Wheeler to conduct an integration study to assess potential synergies between the Cartagena and Barrancabermeja refineries.

14. Given Foster Wheeler's prior participation in the Barrancabermeja refinery project and in the integration study, Reficar approached Foster Wheeler to consider acting as the Project's PMC. On November 19, 2009, Reficar entered into a PMC Contract with FPJVC, a joint venture between Foster Wheeler and

PCI,[1] both Delaware corporations. At that time, FPJVC expected that, as the PMC, it would have authority to manage the Project and direct the work of the EPC Contractors. Shortly after the conclusion of the PMC Contract, Reficar independently selected CB&I as the Project's sole EPC Contractor to develop a detailed scope for the Project and an EPC execution plan, excluding Technip, the company that had jointly developed the Project's FEED with CB&I. Without input from FPJVC, Reficar eventually entered into a reimbursable-cost EPC Contract with CB&I, ignoring the initial plan of developing the Project on a lump-sum turnkey basis.

15. The PMC Contract expressly gave Reficar the unilateral right to determine what services FPJVC would provide. Shortly after the Project began, relying on those provisions of the PMC Contract, and in an effort to cut costs, Reficar decided that FPJVC would no longer be a PMC with authority to manage the Project. Instead, FPJVC would supply support personnel, as requested by Reficar, who would be seconded to a PMT led and controlled by Reficar itself.

16. In its role as a provider of support personnel for Reficar's PMT, FPJVC had no authority to manage the Project or in any way direct the expenditure of public funds allocated for the Project. Reficar managed and directed Foster Wheeler's and PCI's seconded personnel on the Project and requested recommendations from them from time to time, which Reficar was free to accept or reject. Foster Wheeler's and PCI's seconded personnel also performed specific tasks under the direction and control of Reficar's project managers.

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[1] **C-001 (Request for Arbitration)**: PMC Contract without appendices. Citations in this Request to exhibits C-, CL-, CWS-, R-, RL-, and RWS- refer to documents submitted by the parties in the underlying arbitration. Citations to exhibits A- and AL- refer to factual exhibits and legal authorities submitted along with this Application.

17. Independent consultants, as well as independent agencies of the Colombian government, acknowledged FPJVC's complete lack of decision-making authority in the Reficar Project. For example, the Project's lenders retained Jacobs Consultancy ("**Jacobs**"), a prominent engineering firm, to review various aspects of the Project. Ecopetrol then hired Jacobs for that same purpose. In October 2015, Jacobs issued its report analyzing the Project.[2] Jacobs concluded that in the Reficar Project "all the decisions had to be made only by REFICAR managers" and that "[FPJVC]'s team had no authority and became only additional personnel in REFICAR's team…".[3]

18. The Procuraduría General de la Nación ("**PGN**") later endorsed Jacobs' findings. The PGN is an autonomous agency of the Colombian state in charge of, among other things, conducting disciplinary proceedings against public servants. In disciplinary proceedings against Reficar's former directors and officers arising out of with their participation in the Project, the PGN cited to the Jacobs Report and concluded that Reficar did not allow FPJVC to manage the Project. Instead, Reficar's inexperienced personnel assumed positions of direct control.[4]

19. Ultimately, due to Reficar's and CB&I's poor management, the Project was completed with substantial delays and cost overruns. The CGR opened an investigation into the Project in 2016. The CGR is an autonomous organ of the Colombian state, responsible for overseeing the expenditure of public funds. It has the authority to commence "fiscal liability" proceedings, in which the CGR

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2 **C-002 (Request for Arbitration)**: Jacobs Consultancy, Cartagena Refinery Expansion Project History Summary and Project Analysis (Oct. 2015).

3 *Id*. at 19.

4 **C-008**: PGN, Auto No. DEHP 007 of 2020, at 158 (Jan. 17, 2020).

may issue a finding of liability against public servants or private parties who, through their willful or grossly negligent conduct, have damaged Colombia's public patrimony. The CGR's jurisdiction is subject to strict statutory limitations. As provided by Colombian Law 610, the CGR's organic statute, only "fiscal managers" can be named as respondents in a fiscal liability proceeding. Fiscal managers are defined as those with decision-making authority over public funds.[5] As held by Colombia's Constitutional Court, those who do not manage public funds are not within the CGR's jurisdiction.[6] To make a finding of fiscal liability, Law 610 requires pleading and proof of willful or grossly negligent wrongful acts causally linked to the claimed damages.

20. In March 2017, the CGR commenced fiscal liability proceedings against various parties, including the two members of FPJVC, Foster Wheeler and PCI, despite the complete lack of evidence that either of the FPJVC entities had decision-making authority over Colombia's public funds or over the Project.[7] The CGR charged Foster Wheeler and PCI, among several others, with joint and several liability, despite Law 610's requirements that liability be determined on an individual basis based on particularized damage caused by identified acts of intentional misconduct or gross negligence.

21. Fiscal liability proceedings are inquisitorial in nature, with the CGR being prosecutor and judge, both of the law and the facts. The CGR investigates the

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5 **CL-002**: Law 610 of 2000, Arts. 1, 3, 5.

6 **CL-003**: Colombian Constitutional Court, Judgment C-832 of 2002, at 31 *et seq*.

7 **R-066**: CGR, Auto No. 382 of 2017 (March 10, 2017). In addition to Foster Wheeler and Process Consultants, the CGR named additional individuals and entities as defendants.

facts, brings the charges, determines if the respondents are liable for damages and, if so, fixes the amount.[8]

22. During the four years following the CGR's opening resolution, the CGR subjected Foster Wheeler and PCI to proceedings that made a mockery of due process, including the following irregularities:

- At the outset of the proceeding, the CGR's top officials made a series of inflammatory statements widely reported in the Colombian press, effectively prejudging Foster Wheeler's and PCI's liability. This included statements by the Comptroller General describing FPJVC's "management control" as "shameful" and "really embarrassing."[9]

- The CGR's opening resolution referenced general instances of alleged misconduct that had supposedly led to cost increases for the Project. Foster Wheeler and PCI responded with defensive statements known in Spanish as *exposiciones libres y espontáneas* establishing that they had no role in those acts. The CGR then changed its theory of liability. Instead of holding Foster Wheeler and PCI responsible for specific conduct, it simply referred to the decision of the Boards of Reficar and Ecopetrol—not FPJVC—of approving documents known as change controls, increasing the Project's scope and budget.[10] FPJVC had no authority for approving the Change Controls.

- The CGR commissioned its own officers to calculate the alleged damage to Colombia's public patrimony. The CGR's determination of alleged damage did not follow any accepted methodology for calculating damages but was instead based on the difference between an initial estimated budget submitted by CB&I—not FPJVC—and the total cost of the Project, as

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8 *See* **A-001**: Colombia's Memorial on Preliminary Objections, ¶¶ 77, 82.

9 **A-002**: Claimants' Request for Arbitration, ¶ 165. The award in a well-known investor-state case assessing liability against Colombia for wrongful conduct by the CGR describes the same pattern of inflammatory statements against the respondent in a fiscal liability proceeding. **CL-005**: *Glencore Int'l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 1188 (Aug. 27, 2019).

10 **A-003**: Claimants' Application for Provisional Measures and Emergency Temporary Relief, ¶ 41. *See also* **R-52** to **R-65**: CGR, Auto No. 773 of 2018 (June 5, 2018).

expanded by the Change Controls approved by Reficar and Ecopetrol, the supposed victims of FPJVC's gross negligence. The CGR officers also calculated alleged losses supposedly caused by the delay in completing the Project. As noted above, it was Reficar and its parent Ecopetrol—not FPJVC—that managed and directed the Project, and that approved the Change Controls at issue. The CGR did not allow FPJVC to submit an expert report addressing and rebutting the CGR's damages submission.

- The CGR assessed damages jointly and severally, despite the express requirement of Law 610 that damages be based on specific acts of wrongdoing by particular respondents.

- The CGR dismissed Ecopetrol's Board Members—all prominent Colombian citizens—from the proceeding arguing that they were not fiscal managers because they lacked final authority over the expenditure of funds on the Project. The CGR reached precisely the opposite conclusion regarding Foster Wheeler and PCI, even though FPJVC had no authority whatsoever over the Project's budget.[11]

23. Foster Wheeler and PCI moved to dismiss the fiscal liability proceeding arguing, among other things, that Law 610, under which the proceeding had been brought, required pleading and proof of actual control over specific expenditures of public funds. Law 610 also requires pleading and proof of either gross negligence or intentional misconduct during such control. The CGR had not made either of these showings.

24. Before a decision was rendered on the motion to dismiss, in March 2020, the President of Colombia issued Decree 403, amending, or purporting to amend, Law 610. Decree 403 expanded the definition of "fiscal manager" to include private parties that "participate" or "contribute," directly or indirectly, to acts

[11] **A-002**: Claimants' Request for Arbitration, ¶¶ 174-178.

causing damages to Colombia's public patrimony, ostensibly expending the CGR's jurisdiction.[12]

25. After a proceeding riddled with further gross violations of due process, outlined below, the CGR issued its first instance decision on April 26, 2021, holding Foster Wheeler and PCI liable for COP 2,945,409,783,732.43 in damages to Colombia's public patrimony (the approximate equivalent of USD 810,932,000 at the exchange rate at the time of issuance). The CGR assessed interest at approximately 26% per annum, then reduced to 12% per annum. That decision is, in and of itself, a violation of generally accepted notions of due process. The first instance decision, despite its enormous length, did not identify a willful or grossly negligent act by Foster Wheeler or PCI that caused damage to Colombia's public patrimony, as required by Law 610, let alone the nearly USD one billion assessed.[13] Instead, the CGR in effect held Foster Wheeler and PCI strictly liable for increases to the Project's budget that the Boards of Ecopetrol and Reficar had approved.[14]

26. The CGR also disregarded the evidence that established that Foster Wheeler and PCI had no decision-making authority over public funds and were therefore not subject to the CGR's jurisdiction.[15] In doing so, the CGR retroactively applied the expanded definition of "fiscal manager" from Decree 403, a provision that was issued years after the commencement of the fiscal liability

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[12] **CL-007**: Decree 403 of 2020. As described below, the CGR then applied Decree 403 retroactively to FPJVC.

[13] **R-71** to **R-83**: CGR, Auto No. 749 of 2021 (Apr. 26, 2021).

[14] *Id*.

[15] *Id*.

proceeding. Ultimately, in 2022, the Colombian Constitutional Court struck down the relevant provisions of Decree 403 because the President had exceeded his authority in issuing this Decree.[16]

27. Following the issuance of the first instance decision, the CGR refused to allow Foster Wheeler and PCI a reasonable time to file an internal appeal. The first instance decision is 6,243 pages long. Relying on Article 56 of Law 610, the CGR gave Foster Wheeler and PCI only five business days to file an internal appeal,[17] and refused Foster Wheeler's and PCI's request for a reasonable (or, for that matter, any) extension of time. Ultimately, because of errors by the CGR in serving a complete copy of the first instance decision, Foster Wheeler and PCI had approximately two weeks to submit their appellate brief, an absurdly short time to exercise their right to present their case and defend themselves.

28. On July 6, 2021, the CGR issued its second instance decision, essentially adopting the first instance decision without modification.[18] This marked the conclusion of the fiscal liability proceeding. The first and second instance decisions are referred to as the "**CGR Decision**."

29. Having opted to challenge the CGR's actions in an international arbitration under Chapter Ten of the TPA, Foster Wheeler and PCI did not contest the CGR Decision before the contentious administrative courts of Colombia. These are specialized courts that hear disputes involving the Colombian government. A party that has been held fiscally liable by the CGR may file a nullity action

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16 **AL-036**: Colombian Constitutional Court, Judgment C-090 of 2022.

17 *Id*. **R-083** at 6242.

18 **R-101** to **R-105**: CGR, Auto No. ORD-801119-158-021 of 2021 (July 6, 2021).

before a Colombian court known as an Administrative Tribunal seeking to set aside the CGR's decision.[19] A potential nullity action in this instance was subject to a four-month term that started running after the issuance of the CGR Decision.[20]

30. The CGR has undertaken efforts to enforce the CGR Decision against Foster Wheeler and Process Consultants through a "forced collection proceeding", and those efforts are ongoing.

B. The ICSID Arbitration

31. On December 26, 2018, Claimants Foster Wheeler, PCI, and FPJVC sent Colombia their "Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement."[21] The parties attempted to resolve their dispute, but those efforts failed.[22]

32. On December 6, 2019, Claimants filed their Request for Arbitration with ICSID. At the time that Claimants filed the Request, the CGR had commenced the fiscal liability proceeding and issued charges against Claimants but had not

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[19] **CWS-1 Torrente**, ¶ 20. Mr. Torrente was the CGR's former General Counsel. Claimants submitted Mr. Torrente's witness statement in support of an application for provisional measures. It was also part of the record in the preliminary-objections proceedings and was referenced in the written submissions and in the hearing on preliminary objections.

[20] *Id*.

[21] **C-004**: Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement.

[22] Colombia simply refused to meet with Foster Wheeler and PCI for the entire "cooling off" period under the TPA. Rather than simply commencing an arbitration once that period had expired, Foster Wheeler and PCI reached out to Colombia, offering to hold off on commencing an arbitration if Colombia would meet and discuss a consensual resolution. The parties then met at Bogotá, but Colombia refused to consider any consensual resolution, and Claimants then commenced the ICSID arbitration.

issued the CGR Decision. As Claimants accurately anticipated in the Request for Arbitration, an adverse finding against them was "virtually certain."[23]

33. In the Request for Arbitration, Claimants asserted the following claims for breaches of the TPA:

- **Violation of the FET Standard of Protection**.[24] This claim encompassed four separate components, each of which separately established a breach of the FET standard: (i) a gross misapplication of Colombian and international law that constituted a denial of justice; (ii) a breach of procedural due process in violation of international law and Colombian law; (iii) a violation of Claimants' legitimate expectations; and (iv) prejudgment of the case.

- **Violation of the National Treatment Standard of Protection**.[25] This claim was based on the CGR's unequal treatment of Claimants Foster Wheeler and PCI, two US companies, and Ecopetrol, a domestic investor. The CGR dismissed the Ecopetrol board members, all prominent Colombian citizens, on the basis that that they were not fiscal managers because these individuals supposedly lacked final authority over the expenditure of funds for the Project. The CGR, however, failed to apply the same standard to Foster Wheeler and PCI. In fact, unlike Foster Wheeler and PCI, Ecopetrol and its directors possessed and exercised authority over the Reficar project.

- **Indirect Expropriation**. Claimants argued that Colombia indirectly expropriated their investment by bypassing two fundamental protections Claimants bargained for in the PMC Contract: [redacted] Colombia bypassed these protections and destroyed Claimants' investment by improperly asserting jurisdiction over Foster Wheeler and PCI in the fiscal liability proceeding [redacted] and left Claimants vulnerable to an unlimited

[23] **A-002**: Claimants' Request for Arbitration, ¶ 215.

[24] *Id*. ¶¶ 97-173.

[25] *Id*. ¶¶ 174-178.

damages award [redacted] [26]

- **Violation of the MFN Standard of Protection**.[27] Claimants argued that they could import the umbrella clause from the bilateral investment treaty ("**BIT**") between Colombia and Switzerland relying on the MFN clause in the TPA. The umbrella clause entails that a breach of the PMC Contract would also be a breach of international law. Through the actions of the CGR, Colombia breached the PMC Contract, [redacted] This breach-of-contract became a violation of the TPA by application of the imported umbrella clause.

- **Breach of an Investment Agreement**.[28] Claimants asserted that the PMC Contract was an "Investment Agreement," as that term is defined in the TPA. Article 10.16 of the TPA, in turn, allows parties to bring claims for the breach of an "Investment Agreement." As such, Colombia's breach of the PMC Contract is also a breach of the TPA.

34. After the submission of the Request for Arbitration, the Tribunal was constituted. Its members were Mr. John Beechey (Claimants' nominee), Dr. Marcelo Kohen (Colombia's nominee), and Dr. José Emilio Nunes Pinto, chosen by the two co-arbitrators, who served as the Tribunal's President.

35. On August 24, 2020, Colombia requested that the Tribunal allow it to submit preliminary objections under Article 10.20.4 of the TPA.[29] Ultimately, the Tribunal determined that the preliminary objections could include jurisdictional objections made on the same preliminary basis, with Colombia reserving its right to assert those objections at a later stage of the arbitration on a full

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[26] *Id*. ¶¶ 179-187.

[27] *Id*. ¶¶ 188-200.

[28] *Id*. ¶¶ 201-205.

[29] **A-004**: Colombia's Letter to the Tribunal regarding Preliminary Questions from August 24, 2020.

evidentiary record.[30] It was also determined that disclosure and other evidentiary procedures would occur in a subsequent phase of the arbitration.[31] Procedural Order No. 1 provided a calendar for the submission of written briefs on preliminary objections at Annex A but made no provision for document production or other forms of disclosure.[32]

36. On July 1, 2021, Colombia filed its Memorial on Preliminary Objections, asserting the following 10 objections under Article 10.20.4 of the TPA:

    i. "No Measure Capable of Constituting a Breach of a Treaty Obligation Has Occurred";[33]

    ii. "Claimants Have Failed to Establish *Prima Facie* Breach of Fair and Equitable Treatment";[34]

    iii. "Claimants Have Failed to Establish a *Prima Facie* Expropriation";[35]

    iv. "Claimants Have Failed to Establish a *Prima Facie* Breach of National Treatment";[36]

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30 **A-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021). *See also* **A-006**: Procedural Order No. 1 (March 18, 2021).

31 *Id*.

32 *Id.*

33 **A-001**: Colombia's Memorial on Preliminary Objections, at 94.

34 *Id*. at 101.

35 *Id*. at 122.

36 *Id*. at 128.

v. "Claimants Have Failed to Establish a *Prima Facie* Breach of Most-Favored-Nation Treatment";[37]

vi. "There Could Not Have Been a Breach of an Investment Agreement";[38]

vii. "There Could Not Have Been Any Loss or Damage by Reason of Any Breach of the Substantive Obligations of the Treaty or of an Investment Agreement";[39]

viii. "The Tribunal Is Not Empowered to Award Moral Damages";[40]

ix. "The Tribunal Is Also Not Empowered to Award Non-Monetary Orders or Injunctions";[41] and

x. "The Tribunal Cannot Grant an Offsetting Award Because It Is Not Empowered to Award Hypothetical Damages."[42]

37. Colombia also asserted five objections to jurisdiction on a preliminary basis: (i) "Claimants Do Not Have a Protected Investment Under the Treaty and the ICSID Convention";[43] (ii) "Claimant FPJVC Does Not Qualify as a 'Juridical Person' Under Article 25(2)(b) of the ICSID Convention";[44] (iii) "The Notice of Intent Was Only Sent by FPJVC and Not by the Other Claimants";[45] (iv)

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[37] *Id*. at 131.

[38] *Id*. at 142.

[39] *Id*. at 150.

[40] *Id*. at 157.

[41] *Id*. at 162.

[42] *Id*. at 164.

[43] *Id*. at 171.

[44] *Id*. at 183.

[45] *Id*. at 189.

"Claimants Have Definitively Elected to Submit their Claim for Breach of Fair and Equitable Treatment Before Colombian Courts";[46] and (v) "Claimants' Waiver is Invalid, and Thus There Is No Consent to Submit Their Claim to Arbitration Under the Treaty."[47] The Tribunal did not address those jurisdictional objections in its Award.

38. Colombia's first preliminary objection was premised on the fact that, when Claimants submitted the Request for Arbitration on December 6, 2019, the CGR had not yet issued the CGR Decision.[48] Accordingly, Colombia argued that no breach of the TPA had occurred when Claimants commenced the arbitration.[49] Second, Colombia argued that any subsequent decision by the CGR was subject to review by the contentious administrative courts of Colombia, so that the CGR decision, no matter how egregious, could not constitute a violation of the TPA.[50]

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[46] *Id*. at 196.

[47] *Id*. at 202.

[48] *Id*. ¶¶ 174-175.

[49] *Id*. ¶ 182.

[50] *Id*. In 2022, Colombia created a mechanism under which fiscal liability decisions would be subject to automatic judicial review, but that mechanism was held unconstitutional by the Colombian courts and was never applied. **A-003**: Claimants' Application for Provisional Measures and Emergency Relief, ¶¶ 6-9. In the Award, the Tribunal seemed to argue that Claimants could challenge the CGR Decision before the Colombian courts after their treaty claims were dismissed. **A-007**: Award, ¶ 218 ("It is open to Claimants to pursue an appeal as due process allows and as is consistent with the scope of fair and equitable treatment adumbrated in Article 10.5.2(a) of the TPA."). Not so. By the time the Award was issued on December 19, 2024, the four-month period to challenge the CGR Decision affirmed on July 6, 2021 had long-since expired.

39. Claimants submitted their Counter-Memorial on Preliminary Objections on October 14, 2021,[51] and Colombia submitted its Reply Memorial on December 13, 2021.[52] On February 11, 2022, Claimants submitted their Rejoinder Memorial.[53] A two-day in-person hearing was held in Washington D.C. on May 19-20, 2022.

40. Preliminary objections, by definition, must be decided promptly. Rule 41(5) of the 2006 ICSID Arbitration Rules provides that a tribunal, "…after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection."[54]

41. Here, however, years passed before the Tribunal ruled on Colombia's application. During that time, the three-year limitations period described in Article 10.18.1 to the TPA to raise claims for additional breaches of the TPA by Colombia was running, and arguably could have expired as early as July 6, 2024. Accordingly, in an abundance of caution and to preserve their rights under the TPA, Claimants submitted an Amended Request for Arbitration on June 21, 2024, asserting ancillary claims under Rule 40 of the 2006 ICSID Arbitration Rules.[55] The ancillary claims concerned measures taken by Colombia after Claimants' submission of the initial Request for Arbitration, including the issuance of the CGR Decision and the CGR's subsequent

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[51] **A-008**: Claimants' Counter-Memorial on Preliminary Objections.

[52] **A-009**: Colombia's Reply on Preliminary Objections.

[53] **A-010**: Claimants' Rejoinder on Preliminary Objections.

[54] **AL-001**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 41(5) (2006).

[55] **A-011**: Claimants' Amended and Restated Request for Arbitration.

enforcement efforts. Claimants filed this Amended Request for Arbitration to avoid any assertion by Colombia that the ancillary claims were time barred.

42. Colombia objected to the submission of the Amended Request for Arbitration under Article 10.20.4 of the TPA. Colombia contended that Claimants should have sought leave from the Tribunal, and that the submission constituted a violation of Procedural Order No. 1 because the proceedings on the merits were suspended pending the Tribunal's determination of the preliminary objections.

43. The Tribunal initially found that, because the proceedings on the merits had been suspended pending resolution of Colombia's preliminary objections (which at that point had been pending for over two years), "…it would not entertain a discussion on the Amended and Restated Request for Arbitration until it had issued its ruling on the Respondent's Preliminary Objections, if appropriate."[56]

44. Claimants then asked the Tribunal to clarify whether the Amended Request for Arbitration was part of the record and confirm that it would be considered in due course.[57] In parallel, given the uncertainty surrounding the status of the ancillary claims, Claimants filed a new Request for Arbitration with ICSID also asserting the ancillary claims. On July 12, 2024, the Tribunal confirmed that the Amended Request for Arbitration "was part of the record in this case."[58]

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[56] **A-007**: Award, ¶ 62.

[57] *Id*. ¶ 63.

[58] *Id*.

45. On December 19, 2024, more than two and a half years after the hearing, the Tribunal issued its Award on the preliminary objections, holding that Claimants' claims were inadmissible.

46. One other noteworthy procedural matter relevant to this Application occurred during the arbitration's preliminary objections phase. On September 2, 2021, Claimants submitted their Application for Provisional Measures and Emergency Temporary Relief in which they sought to enjoin Colombia from enforcing the CGR Decision.[59] Claimants' evidence in support of that application included the witness statement of Mr. César Torrente, a former General Counsel of the CGR, in which he provided detailed testimony as to the futility of challenging the CGR Decision in the Colombian administrative courts.[60] Claimants' submission also adduced evidence that the filing of the fiscal liability charges and Colombia's statements in the media had caused FPJVC reputational harm—that is, moral damages. Following an exchange of written submissions, the Tribunal held a hearing on November 4, 2021.[61] Notably, both parties' written submissions on preliminary objections referred to Mr. Torrente's witness statement. The parties also included Mr. Torrente's witness statement in the bundle jointly submitted to the Tribunal for the May 2022 preliminary objections hearing.[62] Claimants' oral submissions at the May

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[59] **A-003**: Claimants' Application for Provisional Measures and Emergency Temporary Relief,

[60] **CWS-1 Torrente**, ¶ 20.

[61] Mr. Torrente's witness statement was referenced several times at the hearing on provisional measures. *See e.g.*, **A-012**: Provisional Measures Hearing Transcript, 12:20-22, 63:17-64:2, 81:3-8, 122:4-11. It was also in the Parties' Joint Electronic Bundle. *See* Electronic Hearing Bundle (May 19-20).

[62] **A-008**: Claimants' Counter-Memorial on Preliminary Objections, fn. 26; **A-010**: Claimants' Rejoinder on Preliminary Objections, fn. 91; **A-009**: Colombia's Reply on Preliminary Objections, fns. 78, 79, 86, 104 and 164; Electronic Hearing Bundle (May 19-20).

2022 preliminary objections hearing also referenced Mr. Torrente's testimony regarding the futility of appealing the CGR Decision in the Colombian courts.[63]

C. The Award

47. In the Award, the Tribunal began its analysis by addressing two discrete procedural points: the burden of proof and the date as of which jurisdiction should be determined. As noted above, Colombia's application was based on Article 10.20.4 of the TPA. Regarding the burden of proof, Article 10.20.4(c) of the TPA provides that, when deciding objections under that provision, "the tribunal *shall* assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)…"[64] Claimants argued that this express presumption applied to all objections raised on a preliminary basis and that the parties had agreed on that point.[65] The Tribunal, however, ruled that the presumption applies only to objections brought under Article 10.20.4(c), "that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26," and not to objections brought under different provisions of the TPA.[66] The Tribunal

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63 *See e.g.*, **A-013**: Preliminary Objections Hearing Transcript, Volume 1, 143:17-144:4 ("But we pleaded that because—particularly in light of the extraordinary delays, a decade or more, that plagued the Colombian judicial system . . . As the Tribunal will recall from the Hearing on Interim Measures, the former chief legal officer of the CGR provided a witness statement detailing exactly the difficulties that we would encounter in seeking relief."); 197:9-15 ("Mr. Torrente's Witness Statement in the interim case makes it clear that a nullity action would take, in the first instance, many years, with levels of review beyond that. Colombia is free to contest that, but they are not free here to assert that that's wrong and that the case should be dismissed on that basis."). *See also* **A-014**: Hearing on Preliminary Objections Transcript, Volume 2, 351:2-8, 351:21-351:7.

64 **CL-001**: Chapter 10 of the TPA (emphasis added).

65 *See e.g.*, **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶ 132.

66 **A-007**: Award, ¶ 101.

went on to state that the presumption was ultimately irrelevant. Because of its ruling on Colombia's preliminary objections, "…the question as to whether the Tribunal should assume Claimants' factual allegations to be true in order to rule on Respondent's jurisdictional objections has no bearing on the conclusions reached by the Arbitral Tribunal."[67] As set forth below, that was not the case. In the Award, the Tribunal improperly engaged in fact finding in violation of both the ICSID Arbitration Rules and the TPA.

48. Regarding the critical date for assessing jurisdiction, the Tribunal ruled that "…for a claim to be admissible, a measure capable of constituting a Treaty breach must have existed as of the date of the submission."[68] By implication, the Tribunal ruled that no ancillary pleading could be considered in ruling on preliminary objections.

49. After having addressed those two preliminary procedural issues, the Tribunal turned to the preliminary objections raised by Colombia. The Award comprises 296 paragraphs set out in 88 pages. However, the substantive discussion that led to the termination of the arbitration consists of only 32 paragraphs, 193 to 224, and the actual ruling is set out in paragraph 296. The remaining paragraphs are a detailed summary of the procedural history and of the parties' arguments.

50. First, the Tribunal addressed Colombia's objection that no measure capable of constituting a breach of a treaty obligation had occurred. In particular, the Tribunal addressed Claimants' argument that the fiscal liability proceeding was an "administrative adjudicatory proceeding[]," as that term is used in Article

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67 *Id*. ¶ 102.

68 *Id*. ¶ 204. Contrary to that ruling, however, the Tribunal accepted that Claimants had exhausted their "administrative appeals" when the CGR affirmed its first instance decision, an act that occurred on July 6, 2021, after the arbitration had commenced. *See id*. ¶ 208.

10.5.2(a) of the TPA, and hence within the scope of the TPA's guaranty of due process.[69] This clarifying provision states that the obligation not to deny justice *includes* "criminal, civil, or administrative adjudicatory proceedings…"[70]

51. Here, the CGR, an administrative organ of Colombia, conducted a proceeding in which it asserted charges of wrongdoing and liability, the parties submitted defensive briefs and evidence, and finally the CGR decided whether the parties were liable for damages to Colombia's public patrimony, just as a court rendering a judgment would. Under every common definition of those terms, the CGR proceedings are 'administrative' and 'adjudicatory' in nature.

52. Colombia, however, argued that the fiscal liability proceeding was not an administrative adjudicatory proceeding, and that Article 10.5's guaranty of due process was limited to Colombia's specialized administrative courts.[71] As a result, in Colombia's view, CGR was free to proceed in any manner that it wished to impose liability through a fiscal liability proceeding, without regard to, in the words of Article 10.5.2(a), the requirement "not to deny justice…in accordance with the principle of due process embodied in the principal legal systems of the world[.]"[72]

53. As Claimants argued, under the Vienna Convention on the Law of Treaties ("**Vienna Convention**"), which is binding here,[73] the proper interpretation is

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69 *See e.g.*, **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶¶ 82 *et seq.*

70 **CL-001**: Chapter 10 of the TPA.

71 **A-001**: Colombia's Memorial on Preliminary Objections, ¶ 201.

72 **CL-001**: Chapter 10 of the TPA.

73 **RL-053**: Vienna Convention on the Law of Treaties, Art. 33, May 23, 1969, 1155 U.N.T.S. 331.

that the term "administrative adjudicatory proceedings" includes adjudicative proceedings, in which an administrative agency weighs evidence offered against a particular party and grants monetary or specific relief against that party, as opposed to legislative or rule-making proceedings in which an agency adopts rules of general applicability.[74]

54. The Tribunal rejected Claimants' interpretation and held that "administrative adjudicatory proceeding[]" was a reference to "a judicial proceeding before the administrative adjudicatory jurisdiction [of Colombia], and not an administrative proceeding as the Fiscal Liability Proceeding."[75] Accordingly, the Tribunal held that the CGR proceedings were subject to no due process constraints at all.[76] The Tribunal asserted two principal arguments in support of its position:

- The Spanish version of the TPA uses the term "*procedimiento contencioso administrativo*."[77] The Tribunal held, with no further explanation and without citation to any supporting authority, that this Spanish term "unequivocally means a proceeding initiated before a national court," and that the Spanish version controlled.[78]

- Other provisions of the TPA use the terms "administrative proceedings" or "administrative process." For the Tribunal, the implication was that

[74] **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶ 83.

[75] **A-007**: Award, ¶ 210.

[76] *See id.*

[77] *Id.* ¶ 211.

[78] *Id.*

"administrative adjudicatory proceedings" "when read in conjunction with 'criminal, civil, or' must refer to judicial proceedings."[79]

55. Second, after having found that fiscal liability proceedings before the CGR are not administrative adjudicatory proceedings, the Tribunal held that "…the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before national courts and does not cover purely administrative proceedings."[80] In effect, the Tribunal ruled that because the CGR proceeding was not an "administrative adjudicatory proceeding[]," a violation of due process could not have occurred, no matter how egregious the CGR's conduct was. The Tribunal then concluded that there could not be a claim for denial of justice because the local judiciary "has not yet intervened."[81] The Tribunal reasoned that, even accepting that events that took place after the arbitration's commencement could cause a claim to ripen, because there was no final decision by the Colombian judiciary regarding the CGR Decision, there could not be a denial of justice "or a breach of any of the other substantive obligations under the Treaty alleged by Claimants."[82] The Tribunal, in effect, created an exhaustion of remedies requirement for every treaty-based claim, a requirement not contained in the TPA.[83]

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79 *Id.* ¶ 213.

80 *Id.* ¶ 214.

81 *Id.* ¶ 215.

82 *Id.* ¶ 216.

83 The Tribunal went on to hold that the "lower-level decision" of a Colombian instrumentality "may not be deemed a denial of justice" since higher-level authorities may overrule that decision, seemingly imposing a further exhaustion requirement not founded in the TPA. *Id.* ¶ 218.

56. Even on its deeply flawed analysis, the Tribunal acknowledged that a requirement to pursue local remedies would be inapplicable if pursuing those remedies would have been obviously futile or manifestly ineffective.[84] The Tribunal then went on to rule that "Claimants…have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability."[85] With this finding, the Tribunal violated the express requirement of Article 10.20.4(c) that the Tribunal accept as true every factual allegation in Claimants' submission, and the well-established notion that a preliminary objection, whether made under Articles 10.20.4 or 10.20.5 of the TPA or under ICSID Arbitration Rule 41(5), is not an occasion for fact finding or determination.[86] But even accepting that there was a requirement to proffer evidence, Claimants submitted a witness statement by the former General Counsel of the CGR explaining the futility and ineffectiveness of seeking judicial review of the CGR Decision in Colombia. Claimants referred to this evidence in their written submissions and oral argument and included the witness statement in the

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84 *Id.* ¶ 217.

85 *Id.*

86 *See* **AL-002**: Koh Swee Yen & Alvin Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures, in* ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY 437-438 (Richard Happ & Stephan Wilske eds.).

parties' joint bundle for the hearing on preliminary objections.[87] The Tribunal, however, did not refer to this evidence at all.[88]

57. The Tribunal then invented yet another evidentiary requirement for a denial of justice claim, stating, without citation to authority, that "the denial of justice when alleged has to be accompanied by strong evidence."[89] The "strong evidence" requirement is not in the TPA, or in relevant arbitral or judicial opinions.

58. Finally, the Tribunal summarized its findings as follows: "The fact that the Ruling with Fiscal Liability issued by the CGR is not an administrative adjudicatory proceeding as provided by the TPA and contemplates certain appeals or defenses at the administrative judicial level is fatal to the admissibility of Claimants' claims."[90] The Tribunal expanded on that ruling to conclude as follows:

> …Claimants failed to comply with the first prerequisites for the admission of their claims under the Treaty in so far as there is no evidence of any

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87 **A-008**: Claimants' Counter-Memorial on Preliminary Objections, fn. 26; **A-010**: Claimants' Rejoinder on Preliminary Objections, fn. 91; **A-013**: Preliminary Objections Hearing Transcript, Volume 1, 143:18-144:4. ("But we pleaded that because—particularly in light of the extraordinary delays, a decade or more, that plagued the Colombian judicial system…As the Tribunal will recall from the Hearing on Interim Measures, the former chief legal officer of the CGR provided a witness statement detailing exactly the difficulties that we would encounter in seeking relief."); 197:9-15 ("Mr. Torrente's Witness Statement in the interim case makes it clear that a nullity action would take, in the first instance, many years, with levels of review beyond that. Colombia is free to contest that, but they are not free here to assert that that's wrong and that the case should be dismissed on that basis"); *See also*, **A-014**: Preliminary Objections Hearing Transcript, Volume 2, 351:2-8; 351:21-351:7. Electronic Hearing Bundle (May 19-20).

88 **A-007**: Award.

89 *Id.* ¶ 218.

90 *Id.* ¶ 220.

> breach of a provision of the TPA at the time the Request for Arbitration was submitted. Hence, the Tribunal accepts the preliminary objection filed by Respondent and, further, decides that Claimants' claims may not be admitted, the arbitration being therefore terminated.[91]

59. Other than its sweeping declaration that all of Claimants' claims were inadmissible because there was no administrative adjudicatory proceeding and that local remedies had not been exhausted, the Tribunal did not rule on any of the remaining claims, including, as described below, claims that did not turn on a claim of denial of justice. Likewise, the Tribunal did not refer to the Amended Request for Arbitration.

III. GROUNDS FOR ANNULMENT

60. Under Article 52 of the ICSID Convention, "[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds" specified in subsections (a) through (e).[92] As addressed below, the Award should be annulled because (A) the Tribunal manifestly exceeded its powers;[93] (B) the Tribunal seriously departed from fundamental rules of procedure;[94] and (C) the Award failed to state the reasons on which it is based.[95]

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91 *Id*. ¶ 222.

92 **AL-003**: Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, Art. 52(1) ["ICSID Convention"].

93 *Id*. art. 52(1)(b).

94 *Id*. art. 52(1)(d).

95 *Id*. art. 52(1)(e).

A. The Tribunal Manifestly Exceeded Its Powers

61. The Tribunal manifestly exceeded its powers by (1) failing to rule, in any meaningful sense, on any of Claimants' claims; (2) failing to address at all the Amended Request for Arbitration; (3) relying on an egregiously erroneous construction of the TPA; and (4) failing to apply, or egregiously misapplying, the proper law.

1. The Tribunal manifestly exceeded its powers by failing to rule on all of Claimants' Claims

62. A tribunal manifestly exceeds its powers when it does not exercise its jurisdiction. The Tribunal in this case did exactly that when it failed to rule in any meaningful way on Claimants' claims, except for the denial-of-justice claim that was, in turn, just one part of the FET claim. The other parts of the FET claim were separate and sufficient on their own, and the Tribunal's ruling on the meaning of "administrative adjudicatory proceedings" or the supposed failure to exhaust local remedies, even assuming for the moment that they had any merit, does not provide a basis for dismissing those claims.

63. It is well-settled that a failure to exercise existing jurisdiction is a manifest excess of powers. As the annulment decision in *Micula* stated:

> Awards can be annulled if tribunals either assume powers to which they are not entitled by way of a decision which is *ultra petita* (e.g. by an excess of jurisdiction), or fail to exercise an existing jurisdiction by way of *infra petita* (e.g. by omitting to decide over a head of a claim raised by the parties).[96]

[96] **AL-004**: *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 126 (Feb. 26, 2016) ["Micula"].

64. Similarly, the committee in *Vivendi I* annulled an award in which a tribunal failed to address the merits of the claims and instead relied on a provision in the underlying investment contract submitting contractual disputes to the host state's local courts. The committee held that the tribunal manifestly exceeded its powers by failing to determine whether there had been a breach of international law, as opposed to a breach of domestic law.[97]

65. In this case, the Tribunal ruled that Claimants' claims were inadmissible; it did not assert that it lacked jurisdiction over the dispute.[98] Despite that, the Tribunal did not rule on Claimants' claims regarding FET, national treatment, indirect expropriation, MFN, and breach of an investment agreement.[99] The FET claim had four separate components: a gross misapplication of domestic law that constituted a denial of justice, breach of procedural due process, a violation of Claimants' legitimate expectations, and prejudgment of the case.[100] The Tribunal substantively addressed only the denial of justice component of the FET claim, ignoring all other claims.[101]

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97 **AL-005**: *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 112 (July 3, 2002) ["Vivendi I"]. *See also* **AL-006**: *Empresas Lucchetti, S.A. et al. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 99 (Sept. 5, 2007) (holding that a tribunal exceeds its powers when it "…refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT.").

98 "Questions of jurisdiction relate to the tribunal, *e.g.*, whether the tribunal is empowered to resolve the dispute. Questions of admissibility relate to the claim itself, *e.g.*, whether the claim is timely filed, whether it is ripe for adjudication, whether the procedural requirements have been met." **AL-007**: *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, ¶ 412 (July 26, 2018).

99 **A-002**: Claimants' Request for Arbitration, ¶¶ 97-205.

100 *Id*. ¶¶ 97-173.

101 **A-007**: Award, ¶ 215.

66. As in *Vivendi I*, the Tribunal in this case did not engage with the merits of the claims that were before it.[102] Indeed, in none of the 32 paragraphs that make up the Award's substantive discussion did the Tribunal analyze violations of FET other than a denial of justice. The Tribunal, likewise, did not address in any meaningful way any of the other claims: the violation of the national treatment standard of protection, the indirect expropriation of Claimants' investment, the violation of the umbrella clause imported through the TPA's MFN clause, and the violation of the PMC Contract, which was an investment agreement under the TPA.

67. Instead, the Tribunal formulaically referred to its holding rejecting the denial of justice claim as somehow establishing that each of those distinct claims was inadmissible, and no consideration was given to the distinct requirements for the other TPA claims. By way of example, the national treatment claim, which is based on the CGR's dismissal of the similarly situated directors of Ecopetrol, all Colombian citizens, does not turn on the denial of procedural due process and would not require Claimants to exhaust local remedies. The same is true of the claims for violation of an investment agreement, violation of the umbrella clause of the Switzerland-Colombia BIT imported through the MFN clause, or the claim for indirect expropriation.

68. By ignoring, or effectively ignoring, most of the claims that were properly before it, the Tribunal failed to exercise its existing jurisdiction, constituting a manifest excess of power.

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[102] In *Vivendi I*, the tribunal refused to engage with the merits of the claims relying on a forum-selection clause in an underlying investment contract. Here, the Tribunal refused to engage with the merits of the claims without any justification whatsoever.

2. The Tribunal manifestly exceeded its powers by failing to rule on the Amended Request for Arbitration

69. The Tribunal also exceeded its powers by failing to rule on the Amended Request for Arbitration. Rule 40 of the 2006 ICSID Arbitration Rules allows parties to present ancillary claims: "Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre."[103]

70. Claimants exercised their right to assert ancillary claims by filing the Amended Request for Arbitration. The ancillary claims arose directly out of the subject-matter of the dispute, as they concerned measures taken by Colombia after the submission of the Request for Arbitration, including the CGR's issuance of the CGR Decision and its subsequent enforcement efforts.[104]

71. The Tribunal initially refused to entertain any discussion of the Amended Request for Arbitration, stating that the proceedings on the merits were suspended pending resolution of Colombia's preliminary objections.[105] Upon Claimants' request for clarification, however, the Tribunal changed course and stated that the Amended Request for Arbitration was part of the record in accordance with Rule 40.[106]

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[103] **AL-001**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 40 (2006).

[104] **A-011**: Claimants' Amended and Restated Request for Arbitration.

[105] **A-007**: Award, ¶ 62.

[106] *Id*. ¶ 63.

72. Even though the Amended Request for Arbitration was part of the record, as the Tribunal itself acknowledged, the Tribunal did not rule in any manner at all on the ancillary claims that it acknowledged were part of the record. Indeed, it did not even mention the ancillary claims, which is particularly striking given the Tribunal's conclusion that the initial claims were not ripe. By doing so, the Tribunal failed to exercise its jurisdiction, again manifestly exceeding its powers.

3. The Tribunal manifestly exceeded its powers by relying on an egregiously erroneous construction of the TPA

73. The Award's key holding rests on nothing more than a pure *ipse dixit*: that the Spanish term "*procedimiento contencioso administrativo*" necessarily refers to Colombia's specialized courts for administrative review, and that the inclusion of such courts required the exclusion of all tribunals not specifically listed. In short, the Tribunal held that there are no constraints at all imposed on the CGR by the TPA.

74. As noted above, the term administrative adjudicatory proceeding, in either English or Spanish, has an ordinary and natural meaning that refers to an administrative proceeding in which claims against particular parties are adjudicated, as opposed to a legislative or rule-making administrative proceeding, in which rules of general applicability are promulgated.

75. The phrase comes from the US Model Bilateral Investment Treaty. Article 5(2)(a) of the text of that model treaty uses the precise words found in Article 10.5 of the TPA.[107] Clearly, that provision, included in a model treaty intended

[107] **CL-152**: 2012 US Model Bilateral Investment Treaty, Article 5.2(a). This provision tracks, word for word, Article 10.5.2(a) of the TPA (**CL-001**).

for use by the US in negotiating bilateral investment treaties with other countries, is not, and could not be intended to be, a reference to Colombia's specialized administrative courts. Moreover, that precise phrase is used in other free trade agreements entered into by the US, including with countries that are not Spanish-speaking.[108] It simply cannot be that this phrase refers to Colombia's specialized administrative courts.

76. The Vienna Convention is generally recognized as the authoritative guide to treaty law and practice and is an essential part of the body of international law. Article 30 requires that a treaty's terms be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their context and purpose." Article 33 sets out the rule for interpreting terms in treaties with texts in two or more languages.[109] Unfortunately, the Award does not refer to the Vienna Convention, let alone follow its dictates. Instead, the Tribunal followed its own haphazard analysis in its critical ruling on the meaning of "administrative adjudicatory proceedings". In so doing, it failed to apply governing international law to this critical issue.

77. Finally, the Award's construction contradicts Colombia's official interpretation of the TPA. On January 20, 2025, Colombia and the US executed Decision No. 9 of the Free Trade Commission interpreting various terms of the TPA.[110] Paragraph 3(b) of Decision No. 9 states that: "…Article 10.5 does not currently

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[108] *See e.g.*, **AL-008**: US-Australia Free Trade Agreement, Chapter 11, Article 11.5(2)(a); **AL-009**: US-Republic of Korea Free Trade Agreement, Chapter 11, Article 11.5(2)(a).

[109] **RL-053**: Vienna Convention, Art. 30.

[110] **AL-037**: Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement.

require States to provide the same level of due process rights in administrative decision-making as in judicial proceedings."[111]

78. Accordingly, it is Colombia's position that the TPA does, and has always, required due process in administrative proceedings, albeit with the caveat that currently the due process standard is lower in administrative proceedings than in judicial proceedings. Nonetheless, the argument advanced by Colombia and adopted by the Tribunal is directly contradictory to the official interpretation of Colombia, further establishing that the Tribunal manifestly exceeded its powers.

4. The Tribunal exceeded its powers by failing to apply the proper law and its egregiously wrong application of existing law

79. A tribunal's failure to apply the proper law and procedure constitutes a manifest excess of powers. As explained by the committee in *MCI*: "The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention."[112]

80. But while a tribunal's analysis of the proper law is typically not grounds for annulment, a logical and practical exception exists for "egregious," "gross," and "unsound" misinterpretation or misapplication of the proper law. Such failure to soundly apply the law constitutes a manifest excess of powers. "[T]he

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111 *Id*. ¶ 3(b).

112 **AL-010**: *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/06, Decision on Annulment, ¶ 42 (Oct. 19, 2009) ["MCI"].

freedom which the tribunal enjoys in the application of the law is not unlimited, since the arbitrators are required to remain within their terms of reference as remarked by the *MINE* annulment decision and not to exceed their powers. The *Soufraki v. UAE* ad hoc Committee recognized that '[m]isinterpretation 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.'"[113] An "egregious violation of the law" by a tribunal assumes "that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations."[114]

81. As the facts set forth above show, the Tribunal applied the wrong law regarding the burden of proof and the threshold for preliminary objections. The Tribunal also grossly and egregiously misapplied the proper law and process in forming its decisions regarding both whether the CGR proceeding was an "administrative adjudicatory proceeding[]" under the TPA and whether the TPA imposes a requirement to exhaust local remedies.

82. Without basis, the Tribunal conditioned Claimant's claims on Claimants first exhausting local remedies, a pre-condition not in the TPA or international law. It required that Claimants provide evidence of the futility of seeking further relief in local courts, even though no such proof is required at the preliminary objections phase, particularly when neither the TPA nor international law

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[113] *Id*. ¶ 43. *See also* **AL-011**: *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 86 (June 5, 2007) ("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".).

[114] **AL-010**: *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/06, Decision on Annulment, ¶ 51 (Oct. 19, 2009).

require such proof. The Tribunal added an equally unsupported and vague requirement of "strong evidence" for futility of local relief where, again, no support for this requirement was in the record. Likewise, regarding its decision regarding "administrative adjudicatory proceeding[]," the Tribunal did not adhere to the Vienna Convention in its interpretation of the TPA. This was done without explanation or cited authority. Accordingly, the Tribunal manifestly exceeded its powers in its failure to apply the proper law as well as its gross and egregious misapplication of the proper law.

B. The Tribunal Seriously Departed from Fundamental Rules of Procedure

83. The Award should separately be annulled under Article 52(1)(d) of the ICSID Convention because there has been a "serious departure from fundamental rules of procedure[.]"[115] This occurred when the Tribunal seriously departed from the rules regarding: (1) the burden of proof; (2) the right to be heard; (3) the disposition of preliminary questions; and (4) the allocation of costs.

1. The Tribunal seriously departed from a fundamental rule of procedure regarding the burden of proof by improperly shifting the burden of proof to Claimants at the preliminary objections phase

84. The Tribunal seriously departed from a fundamental rule of procedure by improperly (i) shifting the burden of proof; (ii) engaging in fact-finding at the preliminary questions phase; (iii) demanding that Claimants prove the factual basis of their claims in responding to an objection on preliminary questions;

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115 **AL-003**: ICSID Convention, Art. 52.

and (iv) ignoring the evidence on the record supporting Claimants, and then holding that the claims were inadmissible due to a lack of evidence.[116]

85. As explained by the committee in *Agility*, "the treatment of evidence and burden of proof" is a fundamental rule of procedure.[117] Professor Schreuer discusses the critical nature of burden shifting, declaring that "…an erroneous reversal of the burden of proof could amount to a serious departure from a fundamental rule of procedure."[118]

86. In this case, Article 10.20.4 of the TPA allows the state respondent to assert as a preliminary question an objection "…that, *as a matter of law*, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."[119] The TPA then sets out a rule regarding the burden of proof for objections under Article 10.20.4. Subsection (c) of that provision provides that, in deciding an objection under Article. 10.20.4, "…the tribunal *shall* assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)."[120]

87. The Tribunal did not follow this basic procedural rule. It did the exact opposite: The Tribunal made an adverse ruling based on Claimants' purported inability to support factual allegations. Placing the burden on Claimants to prove their

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116 **A-007**: Award, ¶¶ 217-218.

117 **AL-012**: *Agility Public Warehouse Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, ¶ 69 (Feb. 8, 2024) ["Agility"].

118 **AL-013**: CRISTOPH S. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1330 (Cambridge University Press, 3rd ed. 2022)

119 **CL-001**: Chapter 10 of the TPA (emphasis added).

120 *Id*. (Emphasis added).

case at this early stage countered the TPA's express provisions, as well as universally accepted contours for preliminary objections, which restrict objections for "manifest lack of legal merit" to legal questions based on undisputed or indisputable facts.[121] The Tribunal, however, did not apply the high standard for such objections, instead applying a much lower one than what is required for preliminary objections. Finally, in dismissing the claims, the Tribunal prejudged the denial of justice claim by ruling on the sufficiency of Claimants' pursuit of domestic remedies against the CGR Decision.

88. One of Colombia's preliminary objections under TPA Article 10.20.4 was that, as a matter of law, Claimants had failed to assert a claim under Article 10.26.1 because, at the time Claimants filed their Request for Arbitration, "there could not have been a breach of a substantive obligation of the [TPA]."[122] Colombia's two primary arguments were:

    i. "…at the time the Notice of Arbitration was filed, a Ruling with Fiscal Liability had not even been issued; rather, there was simply an Indictment Order, which is a procedural or interlocutory decision that does not definitively define any legal situation."[123]

    ii. "At present, it is unknown whether the Ruling with Fiscal Liability will be finally confirmed at the administrative level and, if so, whether it will remain in force after the judicial control is carried

[121] **A-010**: Claimants Rejoinder on Preliminary Objections, ¶¶ 57-58. *See also* **AL-014**: *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶¶ 96, 98, 109-114 (Aug. 2, 2010); **AL-015**: *Daniel W. Kappes et al. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent's Preliminary Objections, ¶ 225 (March 13, 2020).

[122] **A-001**: Colombia's Memorial on Preliminary Objections, ¶ 170.

[123] *Id*. ¶ 173.

> out before the tribunals of the administrative adjudicatory jurisdiction."[124]

The subheading in which Colombia made these arguments is part of a heading titled "PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY."[125]

89. Claimants' position was that there is no general exhaustion of local remedies requirement in the TPA,[126] and that even if there were such a requirement for denial of justice claims, Claimants had properly pleaded that this requirement was inapplicable because pursuing local judicial remedies in Colombia would have been ineffective, futile, or improbable.[127] Claimants provided evidence in the form of a witness statement from Mr. Torrente, former General Counsel of the CGR, to support their position on local remedies. Claimants referred to this evidence in their written submissions on preliminary objections[128] and during oral argument both in the hearing on preliminary objections and the hearing on provisional measures, although there was no obligation to do so in either proceeding.[129] The parties included Mr. Torrente's witness statement in the joint bundle for the hearing on preliminary objections.

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124 *Id*. ¶ 175.

125 *Id*. at 89, 94 (capitalized in the original).

126 **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶ 81.

127 **A-002**: Claimants' Request for Arbitration, ¶ 110.

128 **A-008**: Claimants' Counter-Memorial on Preliminary Objections, fn. 26; **A-010**: Claimants' Rejoinder on Preliminary Objections, fn. 91.

129 **CWS-1 Torrente**, ¶ 20; **A-013**: Preliminary Objections Hearing Transcript, Volume 1, 143:17-144:4, 197:5-15; **A-014**: Preliminary Objections Hearing Transcript, Volume 2, 351:2-8, 351:21-352:7; **A-012**: Provisional Measures Hearing Transcript, 12:20-22, 63:17-64:2, 81:3-8, 122:4-11.

90. The Tribunal ruled that exhaustion of local remedies was required, and since such local remedies were not exhausted, there was no "final administrative act" at the time Claimants filed the Request for Arbitration.[130] Additionally, in the Tribunal's view, there could not be a denial of justice "considering that the judiciary has not yet intervened…" [131] The Tribunal accepted that the requirement to exhaust local remedies is inapplicable if pursuing those remedies would have been obviously futile or manifestly ineffective,[132] but it was not convinced that such futility or ineffectiveness was present here because "Claimants…have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability."[133]

91. Not only did the Tribunal improperly require proof by Claimants; it demanded "strong evidence" to support a denial of justice.[134] The Tribunal did not cite to any authority or provide reasoning for this new evidentiary standard. It then proceeded to effectively prejudge the claim by holding that "[a] lower-level decision by an instrumentality which is made in accordance with applicable procedural rules may not be deemed a denial of justice since the recourse to a higher-level authority may result in a revision or an annulment of the decision."[135] In sum, the Tribunal improperly placed the burden of proof on

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130 **A-007**: Award, ¶ 221.

131 *Id.* ¶ 215.

132 *Id.* ¶ 217.

133 *Id.*

134 *Id.* ¶ 218.

135 *Id.*

Claimants and then denied their claims because they had not provided evidence to meet that burden, although Claimants did indeed provide evidence.

92. The Preliminary Objections phase is not a full-blown evidentiary proceeding.[136] Indeed, it is not an evidentiary proceeding at all, but a preliminary proceeding intended only to address claims that are manifestly without legal merit. The Tribunal, accordingly, seriously departed from the fundamental rules of procedure set out in ICSID Rule 41 and TPA Article 10.20.4 regarding the burden of proof. In that regard, Colombia's objection that Claimants had not challenged the CGR Decision before the Colombian judiciary was an objection under Article 10.20.4 of the TPA.[137] Subsection (c) of that provision instructed the Tribunal that, in deciding Article 10.20.4 objections, it had to assume as true the facts pleaded by Claimants, including the facts concerning the futility of domestic remedies in Colombia.

93. A preliminary proceeding under ICSID Rule 41 or TPA Article 10.20.4 is not one for weighing evidence, but for deciding legal questions. Not only did the Tribunal violate this fundamental procedural rule, but it proceeded to improperly place the burden of proof on Claimants. Claimants had no burden of submitting evidence proving that it would have been obviously futile or manifestly ineffective to seek judicial review of the CGR Decision.[138] The Tribunal had to assume that to be true. However, instead of abiding by the TPA's express directions to accept Claimants' factual allegations as true, the

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136 **A-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021). *See also* **A-006**: Procedural Order No. 1 (March 18, 2021).

137 **A-001**: Colombia's Memorial on Preliminary Objections, at 89, 94.

138 Claimants made that argument before the Tribunal. *See* **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶ 88.

Tribunal penalized Claimants for supposedly not submitting evidence that they had no obligation to submit. But even if there was a requirement to proffer evidence, Claimants indeed provided such evidence, which Colombia never rebutted, but the Tribunal simply ignored it. The Tribunal then proceeded to require "strong evidence" for a denial of justice claim, a new requirement with no foundation in the ICSID Convention, the ICSID Arbitration Rules, or the TPA. Notably, the procedural calendar for the preliminary objections proceedings suspended any form of disclosure (such as an exchange of documents), making the burden on Claimants even greater.[139]

94. Burdening the Claimants with this evidentiary standard flew in the face of well-established ICSID practice of accepting Claimants' allegations in the Request for Arbitration as fact. "[I]t is appropriate that a claimant's Request for Arbitration be construed liberally and that, in cases of doubt or uncertainty as to the scope of claimant's allegation(s), any such doubt or uncertainty should be resolved in favor of the claimant."[140]

95. Also, as explained numerous times by Claimants in the written submissions and the hearings, preliminary measures under TPA Article 10.20.4 are rarely granted because they are reserved for those rare instances when a claim is "certain" to fail.[141] "The threshold to be met to establish that a claim is

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139 **A-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021). *See also* **A-006**: Procedural Order No. 1 (March 18, 2021).

140 **AL-016**: *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, ¶ 6.1.3 (Dec. 10, 2010); *See also* **AL-017**: *Trans-Global Petroleum v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 92 (May 12, 2008).

141 **A-008**: Claimants Counter-Memorial on Preliminary Objections, ¶¶ 34-35; **A-010**: Claimants Rejoinder on Preliminary Objections, ¶¶ 54-58; **A-013**: Preliminary Objections Hearing

'manifestly without legal merit' is a high one."[142] As one annulment committee explained, "…as a general matter, a claim that is tenable, arguable, colorable, or debatable, on the facts asserted, should survive a Rule 41(5) objection"[143] "[A] case is not clearly unequivocally unmeritorious if the Claimant has a tenable arguable case."[144] A respondent's objection must "meet the test of clarity, certainty and obviousness."[145]

96. As the *Brandes* Tribunal stated in rejecting an application under Rule 41(5):

> …[T]he new procedure of the preliminary objections under Rule 41(5) is intended to create the possibility to dismiss at an early stage such cases which are clearly unmeritorious. It is a summary proceeding to be conducted on an expedited basis…A tribunal should therefore uphold such an objection and come to the final conclusion that all claims are without legal merit only if it concludes that this is *'manifestly'* the case. This applies with respect to the

Transcript, Volume 1, 152:6-11; **A-014**: Preliminary Objections Hearing Transcript, Volume 2, 359:1-19, 361:13-17.

[142] **AL-002**: Koh Swee Yen & Alvin Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures, in* ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY 440 (Richard Happ & Stephan Wilske eds.).

[143] **AL-018**: *Optima Ventures LLC et al. v. USA*, ICSID Case No. ARB/21/11, Decision on the Respondent's Objection under Arbitration Rule 41(5), ¶ 95 (Jan. 19, 2024).

[144] **AL-019**: *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, ¶ 88 (Oct. 28, 2014).

[145] **AL-020**: *Mirian g. Dekanoidze and T.G. Trade LLC v. Georgia*, ICSID Case No. ARB/23/45, Decision on the Respondent's Rule 41 Objection, ¶ 166 (Jan. 20, 2025) (citing *Trans-Global*, ¶¶ 104-105).

> merits of the claims but also when the tribunal examines the question of jurisdiction.[146]

97. Tribunals should only dismiss claims that on their face are patently unmeritorious:

> The Tribunal considers . . . that the ordinary meaning of the word [manifest] requires the respondent to establish its objection clearly and obviously with relative ease and dispatch. The standard is thus set high…'[T]he rule is directed only at clear and obvious cases' and 'as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case'…[147]

98. In the Award, the Tribunal disregarded the accepted procedure for preliminary objections and treated the preliminary objections proceedings as full merits proceedings, including placing improper evidentiary burdens on Claimants. The denial of justice aspect of Claimants' FET claim was certainly tenable and meritorious considering the mistreatment by the CGR, and the CGRs' gross misapplication of Colombian law, as were Claimants' national treatment, indirect expropriation and MFN/umbrella clause claims.

99. The Tribunal considered the merits of the claims in forming its decisions, (*i.e.* ruling that denial of justice failed because of the supposed insufficiency of Claimants' appeals of the CGR Decision), in violation of the basic rule for preliminary objections that tribunals should avoid even the appearance of prejudgment of the merits. As explained by the *Pac Rim* tribunal, when ruling on preliminary objections like those authorized by the TPA:

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146 **AL-021:** *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/03, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 62 (Feb. 2, 2009).

147 *Id.* ¶¶ 63-64 (citing *Trans-Global Petroleum v. Jordan*, ¶¶ 88, 90, 92, 97).

> …the Tribunal does not otherwise address any other procedural issues or any of the merits, particularly whether or not any of the Claimant's pleaded claims are well-founded in law or fact. Apart from the Tribunal's decision on these limited issues under CAFTA Articles 10.20.4 and 10.20.5, it should not be assumed that the Tribunal has made any decision on the merits of any of the Claimant's claims or on any of the Respondent's several responses (pleaded or unpleaded), both as to the merits or otherwise.[148]

100. In sum, the Tribunal improperly treated the preliminary objections phase as an evidentiary proceeding and then compounded its error by imposing the burden of proof on Claimants, in direct violation of the TPA and Article 41(5) of the ICSID Arbitration Rules. This constitutes a serious departure from fundamental rules of procedure.[149]

2. The Tribunal seriously departed from the fundamental rule of procedure that grants parties the right to be heard by refusing to rule on most of Claimants' claims and on the Amended Request for Arbitration

101. As discussed above in Sections III.A.1 and III.A.2, the Tribunal failed to rule, in any meaningful sense, on Claimants' claims other than the denial-of-justice as part of FET, and on Claimants' Amended Request for Arbitration, despite acknowledging that it was part of the record in accordance with ICSID Arbitration Rule 40. In addition to a manifest excess of powers, this refusal to rule also amounts to a serious departure from Claimant's right to be heard.

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[148] **AL-014**: *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Objections under CAFTA Articles 10.20.04 and 10.20.5, ¶ 56 (Aug. 2, 2010).

[149] The Tribunal's determination of the inadequacy of the appeals Claimant had sought in Colombia, which led to its dismissal of the denial-of-justice claim, also constitutes a manifest excess of powers by the Tribunal.

102. As determined by the committee in *Pey Casado I*, the right to be heard is a fundamental rule of procedure.[150] There is a violation of that right "…when a party is not given a full, fair, or comparatively equal opportunity to state its case, present its defense, or produce evidence regarding every claim and issue at every stage of the arbitral proceeding."[151] Similarly, in *Wena Hotels*, the committee ruled that "[i]t is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal."[152] In sum, this fundamental rule of procedure protects a party's right to state its claims.[153]

103. In this case, Claimants asserted several TPA claims, not only denial of justice (which was, in turn, only one part of their FET claim). Claimants also exercised their right under ICSID Arbitration Rule 40 to assert ancillary claims concerning measures that took place after the Request for Arbitration. The Tribunal, however, did not rule on most of the initial TPA claims or on the ancillary claims, violating Claimants' right to be heard. Indeed, the Award does not mention the Amended Request for Arbitration, although it addresses measures taken by Colombia following the Request for Arbitration. Applicants respectfully submit that this is not only a manifest excess of powers, but also a serious departure from fundamental rules of procedure.

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150 **AL-022**: *Victor Pey Casado & Foundation Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 184 (Dec. 18, 2012) ["Pey Casado I"].

151 *Id*.

152 **AL-023**: *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application of the Arab Republic of Egypt for Annulment, ¶ 57 (Feb. 5, 2002) ["Wena Hotels"].

153 *Id*.

3. The Tribunal seriously departed from a fundamental rule of procedure because the issues in dispute could not be resolved in summary proceedings and because of the Tribunal's inexplicable delay in rendering the Award

104. The provisions of ICSID Arbitration Rule 41 and Article 10.20.4 of the TPA are limited to cases in which there is a manifest lack of legal, not factual, merit to a particular claim or defense. They are not generally applicable to all cases. They are not to be employed for resolving complex and disputed legal issues and are not to be employed to resolve disputed issues of fact at all.

105. The Tribunal disregarded that basic limitation, which protects a claimant's right to due process. Rather, like the tribunals in *Brandes* and *Trans-Global*, the Tribunal should have determined that Colombia's objections were unsuitable for summary disposition and denied them without prejudice pending further proceedings in which the record and the partes' arguments could be fully developed.[154]

106. The Tribunal should not have applied the provisions for summary disposition. But having applied them, the Tribunal was bound to comply with the strict temporal limitations applicable to such proceedings. An application on preliminary questions must be resolved quickly. Rule 41(5) requires a decision

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[154] See **AL-021:** *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/03, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 62 (Feb. 2, 2009) ("With respect to the merits of the claim, an award denying such claims can only be made if the facts, as alleged by the Claimant and which *prima facie* seem plausible, are not manifestly of such a nature that the claim would have to be dismissed. The Tribunal does not consider this to be the case."); **AL-017**: *Trans-Global Petroleum v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 92 (May 12, 2008) ("…as a basic principle of procedural fairness, an award under Rule 41(5) can only apply to a clear and obvious case.").

on an application that a claim is manifestly without legal merit at the Tribunal's first session or "promptly thereafter." In this case, the last submission on the objection was the last day of the oral hearing in Washington on May 20, 2022, almost 31 months before the Award, which was not a prompt decision by any means. Indeed, the length of time taken by the Tribunal (even allowing for delay due to personal circumstances) is further proof that the issues in dispute were unsuitable for summary disposition.

107. The Tribunal's extraordinary delay violated a fundamental rule of procedure. As two commentators recently observed:

> Last, considering the manifest excess of powers, can the tribunal's powers be understood apart from the procedural constraints that are dictated by the very same provision granting those powers? While Rule 12(1) of the 2022 ICSID Arbitration Rules simply requires tribunals to 'use best efforts to meet time limits', Rule 41(5) of the 2006 ICSID Arbitration Rules requires that a decision be rendered no later than promptly after the first session, whereas Rule 41(3) of the 2022 ICSID Arbitration Rules requires that a decision be rendered no later than 60 days after the last submission on the objection. The tribunal's power to grant a summary dismissal is undergirded by these time periods. Once they pass, the tribunal's powers to render an award also lapse.[155]

108. In conclusion, the Tribunal resolved complex and disputed questions of law and fact applying inapplicable provisions meant only for dismissing claims or defenses that are manifestly without legal merit. The Tribunal also failed to comply with the temporal limitations applicable to this type of proceedings.

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[155] **AL-024**: Camille Ng & Martin Gusy, "Annulment of Investment Arbitration Awards – Article 52 of the ICSID Convention" at 9 (June 25, 2024).

Therefore, when the Tribunal issued its Award, its powers to do so had already lapsed.

4. The Award of costs and fees violated a fundamental rule of procedure

109. TPA Article 10.20.6 provides as follows regarding the allocation of costs when dealing with preliminary objections:

> When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal *shall* consider whether either the claimant's claim or the respondent's objection was frivolous, and *shall* provide the disputing parties a reasonable opportunity to comment. (Emphasis added).

110. This TPA provision sets out both a substantive standard and a procedural requirement. For applications under Articles 10.20.4 and 10.20.5, whether a claim is frivolous is an element that must be considered in any decision to award fees and costs, and the party against which fees and costs are sought must be given "a reasonable opportunity to comment."

111. Here, neither of those requirements were met. The portion of the Award granting fees nowhere refers to Article 10.20.6, or its standard, but only to Article 61(2) of the ICSID Convention.[156] Moreover, there was no opportunity given to Claimants to comment on Colombia's fee application.

112. If the application for annulment is granted, then the costs and fees awarded must necessarily be annulled as well. However, even if the Award were not to

[156] **A-007**: Award, ¶¶ 291-295.

be annulled, the award of costs and fees should be annulled because of the Tribunal's failure to follow a basic rule of procedure set out in the TPA.

C. The Award Fails to State the Reasons on Which It Is Based

113. Failure to state the reasons on which an award is based is another ground for seeking annulment, according to Article 52(1)(e) of the ICSID Convention[157] In this case, the Award effectively fails to state reasons in support of all the substantive determinations that led to the inadmissibility of Claimants' claims.

1. The Award effectively fails to state the reasons for dismissing all of Claimants' claims

114. The only substantive ruling that the Tribunal made was its conclusion that the denial-of-justice component of the FET claim was inadmissible because Claimants should have exhausted judicial remedies in Colombia and because the CGR proceedings were not "administrative adjudicatory proceedings." The Tribunal did not state any reasons as to why that was a ground to dismiss the remaining TPA claims. Each of the other claims asserted by Claimants was dismissed simply by reference to the Tribunal's erroneous ruling regarding denial of justice, although neither the purported exhaustion requirement nor the construction of "administrative adjudicatory proceedings" has any bearing on any of the other claims that were before the Tribunal.

115. As held by the committee in *Soufraki*, "[p]erhaps the simplest form of an annullable failure to state reasons is that of a total failure to state reasons for a

[157] **AL-003**: ICSID Convention, Art. 52(1)(e).

particular point…"[158] That is precisely what happened here. It is a basic principle of international investment law that exhaustion of local remedies is not a requirement unless expressly required by treaty. As noted by Professors Dolzer and Schreuer, "[u]nder traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings, the investor must have exhausted the domestic remedies offered by the host State's legal system. But it is well established that, where there is consent to investor-State arbitration, there is generally no need to exhaust local remedies."[159]

116. The TPA does not require exhaustion of local remedies as a precondition for an investor to bring a claim to arbitration (including denial of justice), unlike other investment instruments of Colombia which expressly require exhaustion of local remedies as a pre-condition to arbitration. For instance, Colombia's BIT with Switzerland requires that "domestic administrative remedies shall be exhausted" in order to submit a claim to arbitration.[160] Colombia's BIT with

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158 **AL-011**: *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 122 (June 5, 2007).

159 **AL-025**: RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 381 (Oxford University Press, 3rd ed. 2022).

160 **AL-026**: Colombia-Switzerland BIT, Protocol, Ad Article 11(3) ("With respect to Colombia, in order to submit a claim for settlement under the said Article, domestic administrative remedies shall be exhausted in accordance with applicable laws and regulations."). *See also* **RL-043**: Colombia-Switzerland BIT. Colombia is a party to other investment instruments that expressly require or offer exhaustion of local remedies. *See* **AL-027**: Colombia-Israel Free Trade Agreement, Art. 10:12.1; **AL-028**: Colombia-Republic of Korea Free Trade Agreement, Chapter 8, Art. 8.18.2.

Japan provides that the state party "may require that local administrative remedies shall be exhausted in advance" of submitting a claim to arbitration.[161]

117. The fact that exhaustion of local remedies is not a requirement for all claims is consistent with the only plausible reading of the TPA. Article 10.18.4(a) is the TPA's fork-in-the-road provision.[162] Under that clause, a claimant cannot commence an arbitration if it "previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure."[163] As explained by the committee in *Vivendi I,* a fork-in-the-road provision gives a claimant a choice of recourse either to the domestic courts of the host state or to an international tribunal.[164] If exhaustion of local remedies were a prerequisite for every treaty claim, then no claim under the TPA could succeed. A claim would have to be dismissed either because of a failure to exhaust local remedies or because of a breach of the fork-in-the-road provision, rendering the arbitration provisions of the TPA a nullity.

118. Despite these well-settled principles, the Tribunal in this case dismissed all claims, not just denial of justice, simply referring to its erroneous ruling on the denial of justice claim, which turned on the supposed requirement of exhaustion of judicial remedies and the Tribunal's construction of the term "administrative adjudicatory proceedings." The Tribunal argued only that

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161 **CL-137**: Colombia-Japan BIT, Art. 27.1.

162 **CL-001**: Chapter 10 of the TPA.

163 *Id*.

164 **AL-005**: *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 113 (July 3, 2002).

"[t]he fact that the Ruling with Fiscal Liability issued by the CGR is not an administrative adjudicatory proceeding as provided by the TPA and contemplates certain appeals or defences at the administrative judicial level is fatal to the admissibility of Claimants' claims."[165] The Tribunal did not even attempt to explain why the inadmissibility of the denial-of-justice claim was a basis for dismissing all the other claims asserted by Claimants. The formulaic reference to the Tribunal's erroneous ruling on denial of justice, without engaging in the merits of the remaining claims, does not meet the Tribunal's obligation to state the reasons for its ruling, and is a separate ground for annulment.

119. ICSID awards have been annulled in similar situations. In *Helnan*, the committee held that imposing a non-existent requirement to exhaust local remedies is a basis for annulment. In that case, the investor was evicted from the management of a hotel in Cairo.[166] The investor chose not to challenge the eviction in the Egyptian administrative courts, and the tribunal dismissed the claims partly on that ground.[167] The ad-hoc committee heavily criticized the tribunal's decision: "The Tribunal's findings on this issue…was a manifest excess of its powers. An ICSID tribunal may not decline to make a finding of breach of treaty on the ground that the investor ought to have pursued local

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165 **A-007**: Award, ¶ 220.

166 **AL-029**: *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad-hoc Committee (June 14, 2010), ¶ 6 ["Helnan"].

167 *Id*. ¶ 28.

remedies or otherwise validated the substance of its claims by recourse to the courts of the host State."[168]

120. In sum, without providing reasons, the Tribunal imposed on Claimants a non-existent requirement to exhaust local remedies as a precondition for the admissibility of every claim under the TPA, and not just a denial-of-justice claim. This failure to state reasons in any meaningful sense is an additional basis for annulment.[169]

2. The Award fails to address evidence regarding the futility and ineffectiveness of judicial remedies in Colombia

121. As discussed above, the Tribunal ignored evidence on the record that established that pursuing judicial remedies in Colombia would have been futile or ineffective. That amounts to a failure to state reasons in support of the dismissal of Claimants' claims.

122. The committee in *Suez* determined that a tribunal's failure to consider highly relevant evidence equates to a failure to state reasons.[170] In *TECO*, the committee annulled the award precisely because of the tribunal's failure to address key evidence that was part of the record. The Claimant in *TECO* made

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[168] *Id.* ¶ 9. In *Glencore I*, Colombia argued that "apply[ing] an inapplicable legal framework" constitutes a failure to state reasons. **AL-030**: *Glencore International AG & CI Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Decision on Annulment, ¶ 204 (Sept. 22, 201). That is what happened in the Award as the Tribunal applied to all the claims the inapplicable requirement to exhaust local remedies.

[169] As explained in Section III.A.2, without offering any explanation, the Tribunal did not rule on Claimants' Amended Request for Arbitration, which included Claimants' ancillary claims. Applicants respectfully submit that this procedural defect is also an absolute failure to state reasons.

[170] **AL-031**: *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 Argentina's Application for Annulment, ¶ 162 (May 5, 2017) ["Suez"].

a claim for the loss of value of its investment. In deciding that claim, the tribunal ignored the expert reports submitted by the parties. Because of the tribunal's failure to engage with that evidence, the committee partially annulled the award, holding as follows:

> 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.[171]

123. Putting to one side that Claimants bore no burden of proof at all in these summary proceedings, as in *TECO*, the Tribunal in this case did not consider highly relevant evidence that was part of the record. In support of their Application for Provisional Measures and Emergency Temporary Relief, Claimants submitted the witness statement of Mr. César Torrente.[172] Mr. Torrente worked at the CGR for four years and occupied several senior positions, including General Vice-comptroller; Deputy Comptroller for Infrastructure, Telecommunications, Foreign Trade and Regional Development; Deputy Comptroller for Justice, Defense and National Security; and General Counsel.[173] Mr. Torrente testified as follows: "Based on my experience, a Nullity Action [the judicial proceeding to challenge the CGR Decision before the Colombian courts] historically take[s] five years to twelve

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[171] **AL-032**: *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 131 (April 5, 2016) ["TECO"].

[172] **CWS-1 Torrente**.

[173] *Id*. ¶ 6.

years to conclude (but in some cases, it can take longer)."[174] Mr. Torrente's witness statement was referenced in Claimants' written submissions on preliminary objections, and was included in the parties' joint hearing bundle. Claimants referred to Mr. Torrente's testimony at the hearing on preliminary objections, arguing that judicial remedies in Colombia were essentially unavailable.[175]

124. In its Award in this case, the Tribunal completely ignored this evidence, stating as follows: "Claimants, however, have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability."[176]

125. As explained above, Claimants did submit evidence establishing that pursuing judicial remedies in Colombia would have been obviously futile or manifestly ineffective. As with the *TECO* tribunal, this Tribunal ignored both Mr. Torrente's witness statement and Claimants' written and oral argument on this point "…without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory."[177] As noted above, the Award does not even mention Mr. Torrente's witness statement. On

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174 *Id*. ¶ 20.

175 **A-013**: Hearing on Preliminary Objections Transcript, Volume 1, 197:5-15.

176 **A-007**: Award, ¶ 217. As explained by the International Law Commission, "[t]hat the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decision and scholarly opinion. **AL-033**: Draft Articles on Diplomatic Protection with commentaries, [2006] 2 Y.B. INT'L L. COMM'N at 48 U.N. Doc. A/CN.4/SER/A/2006/Add.1 (Part 2).

177 **AL-032**: *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 131 (April 5, 2016).

its face, Mr. Torrente's witness stamen is precisely the type of evidence that the Tribunal claimed was lacking.

126. In sum, without explanation or justification, the Tribunal ignored relevant evidence. This is not a case in which the Tribunal analyzed Mr. Torrente's witness statement and Claimants' oral argument and found the evidence unpersuasive. The Tribunal simply ignored the evidence, which amounts to a failure to state reasons and is thus a ground for annulling the Award.

3. The Award effectively fails to state reasons supporting its findings regarding the term "administrative adjudicatory proceedings"

127. The Tribunal did not offer any actual reason on why the fiscal liability proceeding was not an "administrative adjudicatory proceeding[]" and therefore was not covered by the TPA's obligation not to deny justice. The few reasons the Tribunal did offer were so egregiously baseless that they are tantamount to no reasons at all.

128. ICSID Article 52(1)(e) covers both the total failure to state reasons and reliance on reasons that are so egregiously erroneous that they are frivolous or even not reasons at all.[178] Frivolous reasons include reasons that are insufficient, inadequate, or contradictory.[179] As summarized by the committee

[178] **AL-011**: *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 122 (June 5, 2007).

[179] *Id*.

in *Nachingwea*, these terms "…describe reasons which cannot be followed by a willing and intelligent reader."[180]

129. As explained above, the Award turned largely on the Tribunal's interpretation of "administrative adjudicatory proceedings"[181] As Claimants explained, this is a reference to an adjudicatory proceeding before an administrative body.[182] Colombia, however, argued that this was a reference to a proceeding before specialized courts in Colombia that hear proceedings to review the decisions of administrative agencies. The Tribunal adopted Colombia's position.[183]

130. The Tribunal's ruling on the meaning of "administrative adjudicatory proceedings" did not refer to the basic principles of treaty interpretation set forth in Articles 31 to 33 of the Vienna Convention.[184] As Professor Schreuer explains: "Treaty interpretation calls for the consideration of specific provisions in context, in accordance with Art. 31 of the Vienna Convention on the Law of Treaties (VCLT), and context can include other treaty provisions." [185] This universally accepted method of analysis of treaty provisions is conspicuously missing in the Award.

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[180] **AL-034**: *Nachingwea U.K. Limited v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), ¶ 60 (Feb. 2, 2024).

[181] **CL-001**: Chapter 10 of the TPA.

[182] **A-008**: Claimants' Counter-Memorial on Preliminary Objections, ¶¶ 16-17; **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶¶ 82-87.

[183] **A-001**: Colombia's Memorial on Preliminary Objections, ¶ 201.

[184] **A-007**: Award, ¶¶ 210-214.

[185] **AL-013**: CRISTOPH S. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 1323 (Cambridge University Press, 3rd ed. 2022)

131. The two reasons given by the Tribunal are effectively no reason at all. The Tribunal held as follows: "The recourse to the expression used in the Spanish version of the Treaty is helpful to confirm such understanding in so far as '*procedimiento contencioso administrativo*' unequivocally means a proceeding initiated before a national court."[186] The Tribunal provided no further explanation and no authority to support that conclusion.

132. The Tribunal's reliance on the TPA's Spanish version is deeply problematic. The TPA is a bilateral treaty meant to apply to US investors in Colombia and to Colombian investors in the US. The Tribunal, however, interpreted a term in a manner that would apply to Colombia and not the US. Under the Tribunal's reasoning, the TPA refers to a specialized body of courts that exist in Colombia, but not in the US. The Tribunal also failed to include it its explanation that the term "administrative adjudicatory proceedings" comes directly from the 2012 US Model Bilateral Investment Treaty.[187] That term, which comes for an instrument intended to be used for negotiating bilateral investment treaties between the US and other countries, could not possibly be a reference limited to specialized courts in Colombia, as noted by Claimants during oral argument.[188] Moreover, as noted above, that exact language is used, for example, in the free trade agreements between the US, on the one hand, and the Republic of Korea and Australia, on the other.

133. Even assuming that there is a conflict between the Spanish and English versions of the TPA, the Tribunal should have applied Article 33 of the Vienna

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186 **A-007**: Award, ¶ 211.

187 **CL-152**: 2012 US Model Bilateral Investment Treaty, Article 5.2(a). This provision tracks, word for word, Article 10.5.2(a) of the TPA (**CL-001**).

188 **A-013**: Hearing on Preliminary Objections Transcript, Volume 1, 195:5-20.

Convention, which addresses the interpretation of treaties concluded in two or more languages.[189] The Tribunal failed to do so, even though Claimants had invoked that provision in their pleadings.[190]

134. The Tribunal's vague explanation included the TPA's usage of the terms "administrative proceedings" and "administrative process" in other provisions.[191] The Tribunal concluded that the CGR's fiscal liability proceeding is captured by those terms but not by "administrative adjudicatory proceedings." That reasoning is frivolous. "Administrative process" is a broad term that encompasses different functions, such as rule-making and adjudication.[192] Both can be involved in an investor-state claim, as is the case here. As discussed, the President of Colombia issued Decree 403 expanding the definition of fiscal management.[193] Decree 403 is an administrative act of general application issued by the President as part of his rule-making authority.[194] On the other hand, the CGR issued the CGR Decision, an administrative act applicable only to the parties to the fiscal liability

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189 **RL-053**: Vienna Convention, Art. 33.

190 **A-010**: Claimants' Rejoinder on Preliminary Objections, ¶¶ 84-87. Also, at the Hearing on Preliminary Objections, Claimants expressly relied on the Vienna Convention to support their position on this point. **A-013**: Hearing on Preliminary Objections Transcript, Volume 1, 196:10-16 ("Following the rules of the Vienna Convention, it si correct that efforts should be made to harmonize treaties that are executed into authentic languages. The only way in which to do that here is to give these terms their ordinary English meaning. Because it is not a term of art in English. It is not a term of art in American law.").

191 **A-007**: Award, ¶ 213.

192 **A-013**: Hearing on Preliminary Objections Transcript, Volume 1, 195:21-196:4.

193 **CL-007**: Decree 403 of 2020.

194 *Id*.

proceeding.[195] In its Decision, the CGR applied the newly devised rule of Decree 403 retroactively to Claimants during the fiscal liability proceeding, an "administrative adjudicatory act" expressly made subject to the requirement of due process. In short, both Decree 403 and the CGR Decision were the result of administrative processes, one involving rulemaking and the other involving adjudication.

135. In sum, the Tribunal did not offer even arguably plausible substantive reasons to support its ruling that the CGR proceedings are not "administrative adjudicatory proceedings." The reasons the Tribunal did offer are so clearly groundless that they are tantamount to not offering any reasons at all.

4. The Awards contains contradictory reasons regarding the claims' ripeness

136. The Award contains contradictory and mutually exclusive reasoning, which also constitutes a failure to state reasons. According to the committee in *Daimler*: "Two tests must be satisfied before an *ad hoc* committee can annul an award based on contradictory reasons. First, the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all. Second, the point with regard to which these reasons are given is necessary for the tribunal's decision."[196]

137. Both tests were met here. TPA Article 10.20.4(c) sets forth that, when deciding preliminary objections, "[t]he tribunal may also consider any relevant facts not

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[195] **A-001**: Colombia's Memorial on Preliminary Objections, ¶ 82.

[196] **AL-035**: *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, ¶ 77 (Jan. 7, 2015) ["Daimler"].

in dispute."[197] In this case, it was undisputed that during the course of the arbitration the CGR issued a first instance decision holding Claimants liable for hundreds of millions of dollars in damages.[198] The CGR then affirmed that first instance decision in July 2021.[199] As such, there was a final administrative act in existence before the Tribunal issued its Award in December 2024.[200] The Tribunal acknowledged this: "…the Tribunal accepts that when the Fiscal Chamber formally rejected FPJVC's appeal on 6 July 2021 and affirmed the Ruling with Fiscal Liability in its entirety, Claimants had exhausted their administrative appeals."[201] Those subsequent measures are described and challenged in the Amended Request for Arbitration, which was before the Tribunal.

138. Just a few paragraphs later, however, the Tribunal contradicted itself: "The Tribunal reiterates that the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not."[202] These two statements cannot be reconciled with the relevant provisions of the TPA. The Tribunal was not limited to facts pled in the Request for Arbitration; it could also consider relevant facts not in dispute and facts pleaded in an ancillary claim pleaded under ICSID Rule 40. As the Tribunal itself recognized, it was undisputed that the CGR "affirmed the Ruling with Fiscal Liability in its

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197 **CL-001**: Chapter 10 of the TPA.

198 **A-001**: Colombia's Memorial on Preliminary Objections, ¶ 148.

199 **A-009**: Colombia's Reply on Preliminary Objections, ¶ 29.

200 **CWS-1 Torrente**, ¶ 11.

201 **A-007**: Award, ¶ 208.

202 *Id*. ¶ 221.

entirety."[203] The Tribunal, however, then contradicted itself by holding that the fact that the CGR Decision had not been issued at the time of commencement of the arbitration was fatal to Claimants' TPA claims.[204] This was no minor point. This is a primary reason the Tribunal raised for ruling that all the claims were inadmissible.[205]

139. Accordingly, the Tribunal's contradictory and mutually exclusive reasons are tantamount to not stating any reasons at all. These contradictory reasons were directly relevant to the Tribunal's decision to hold all the claims inadmissible. As such, these contradictory reasons are a basis for annulling the Award.

IV. PROCEDURAL MATTERS

140. Applicants will be represented in all matters related to this Application by its attorneys, Pillsbury Winthrop Shaw Pittman LLP. All correspondence and communications should be directed to:

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[203] *Id.* ¶ 208.

[204] *Id.* ¶ 221.

[205] *Id.*

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V. REQUESTS

142. Applicants respectfully request that the Ad-hoc Committee:

(a) Annul the Award in its entirety for the reasons set forth in this Application;

(b) In the alternative, annul the Award in its entirety except for the dismissal of the denial-of-justice part of Claimants' FET claim;

(c) In the alternative, annul the award of costs and fees in favor of Colombia;

(d) Following annulment, remand the arbitration for further proceedings before a newly constituted tribunal, in accordance with Article 52(6) of the ICSID Convention;

(e) Order Colombia to bear all costs of this proceeding, and reimburse Claimants for all of their costs and expenses, including their reasonable attorneys' fees; and

(f) Grant such other and further relief in favor of Applicants that the Committee deems just and proper.

143. Applicants reserve the right to modify, supplement, or complement the arguments contained in this Application in due course. Applicants have paid the applicable filing fee.[206]

DATED: April 16, 2025

PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ Robert L. Sills

_____

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[206] **A-015**: Confirmation of Payment of Filing Fee. **A-016**: Power of Attorney to commence the annulment proceeding.