INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

IC Power Ltd. and Kenon Holdings Ltd.

v.

Republic of Peru

ICSID Case No. ARB/19/19 – Annulment Proceeding

DECISION ON ANNULMENT

Members of the *ad hoc* Committee
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Ms. Carmen Núñez-Lagos, Member of the *ad hoc* Committee
Prof. Prof. Dr. Yannick Radi, Member of the *ad hoc* Committee

Assistant to the *ad hoc* Committee
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Secretary of the *ad hoc* Committee
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June 26, 2026

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TABLE OF DEFINED TERMS

Annulment	Annulment Proceeding ICSID Case No. ARB/19/19
Annulment Hearing	Annulment Hearing held on December 10-11, 2025
Application for Annulment	Partial Annulment Application submitted by the Republic of Peru
Arbitration	Arbitration proceeding ICSID Case No. ARB/19/19
Arbitration Hearing	Hearing on the original proceeding
Arbitration PO1	Procedural Order No. 1 issued in the Arbitration on February 27, 2020
Arbitration PO3	Procedural Order No. 3 issued in the Arbitration on October 25, 2021
Arbitration PO4	Procedural Order No. 3 issued in the Arbitration on November 15, 2021
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of April 10, 2006
Award	Award rendered on October 3, 2023
Bid Terms	PR-22, Technical Note 1, and Guidelines
BRG	Berkeley Research Group
CIL	Customary international law
Claimants or **IC Power**	IC Power Ltd. and Kenon Holdings Ltd.
COES	Comité de Operación Económica del Sistema Interconectado Nacional

Committee	*Ad hoc* Committee composed by Prof. José-Miguel Júdice (President), Ms. Carmen Núñez-Lagos (Member), Prof. Dr. Yannick Radi (Member)
Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
Counter-Memorial on Partial Annulment or **Counter-Memorial**	Counter-Memorial on Partial Annulment submitted by Claimants on May 23, 2025
Espinoza Report	Expert Report of Luis Alberto Espinoza on the Peruvian Electrical System dated May 24, 2021, submitted by Claimants with their Reply on the Merits
FET	Fair and Equitable Treatment
FPS	Full Protection and Security
Guidelines	Guidelines for the award of the Base Provision for Secondary Frequency approved by OSINERGMIN on February 11, 2016
ICJ	International Court of Justice
ICSID or **Centre**	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
Kallpa GSA	Kallpa Generación S.A. (Peru)
Memorial on Partial Annulment or **Memorial**	Memorial on Partial Annulment submitted by Peru on February 27, 2025
MST	Minimum Standard of Treatment
New Methodology Claim	Claim related to the adoption of Resolution No. 164

OSINERGMIN	*Organismo Supervisor de la Inversión en Energía y Minería*
Parties	Republic of Peru and the Claimants
Peru	Republic of Peru
PFR	Primary frequency regulation service
PHC	Pre-hearing Organizational Meeting
PO1	Procedural Order No. 1, issued in the Arbitration on December 23, 2024
PO2	Procedural Order No. 2, issued in the Arbitration on November 14, 2025
PR-22	Technical Procedure No. 22 of March 29, 2014
PSR Report or **PSR Analysis**	Dispatch assessments in the Peruvian power system - Simulations Report, September 2021
Rejoinder on Partial Annulment or **Rejoinder**	Rejoinder on Partial Annulment submitted by Peru on October 20, 2025
Reply on Partial Annulment or **Reply**	Reply on Partial Annulment submitted by Peru on August 6, 2025
Resolution No. 141	OSINERGMIN's Resolution No. 141-2016-OS/CD of June 13, 2016
Respondent or **Peru**	Republic of Peru
SFR	Secondary frequency regulation service
SFR Service Claim	Claim related to the adoption of Resolution No. 141
SIDEC	Sociedad Integrada de Consultoría

Stay Request	Respondent's Request for the Stay of Enforcement of the Award
Tabors Report	Expert Report by Dr. Richard Tabors, dated September 2, 2021
Tr. Day, page: lines	Transcripts of the Annulment Hearing held on December 10-11, 2025
Treaty or **FTA**	Free Trade Agreement between the Republic of Singapore and the Republic of Peru, signed on May 29, 2008 and entered into force on August 1, 2009
Tribunal	Tribunal composed of Prof. Luca G. Radicati di Brozolo (President of the Tribunal), Mr. David R. Haigh KC (Arbitrator), Mr. Eduardo Siqueiros T. (Arbitrator)

I. INTRODUCTION

1. This case concerns an application for partial annulment, submitted by the Republic of Peru ("**Application for Annulment**"), of the award rendered on October 3, 2023 ("**Award**") in the arbitration proceeding ICSID Case No. ARB/19/19 ("**Arbitration"**).

2. The Applicant on Annulment is the Republic of Peru ("**Peru**").

3. The Respondents on Annulment are IC Power Ltd. and Kenon Holdings Ltd. ("**IC Power**" or "**Claimants**").

4. Peru and the Claimants are hereinafter collectively referred to as the "**Parties**" and individually referred to as a "**Party**." The Parties' representatives and their addresses are listed above on page (i).

II. SUMMARY OF THE AWARD

5. The Tribunal summarized the dispute as follows in paragraphs 7-8 of the Award:

> 7. Claimants allege that they suffered damage as a consequence of two measures adopted by the Peruvian regulator of the energy sector, *Organismo Supervisor de la Inversión en Energía y Minería* ("**OSINERGMIN**"), which they claim constituted breaches of Peru's fair and equitable treatment ("**FET**") and full protection and security ("**FPS**") obligations under Article 10.5 of the Treaty.
>
> 8. Claimants bring the following two distinct claims ("**Claims**"), seeking recovery for damages for a total amount of US$ 195.3 million:
>
> - The first relates to the adoption of OSINERGMIN's Resolution No. 141-2016-OS/CD of June 13, 2016 ("**Resolution No. 141**"), regulating the provision of the secondary frequency regulation service ("**SFR**") for the Peruvian electricity grid ("**SFR Service Claim**").
> - The second relates to OSINERGMIN's Resolution No. 164-2016-OS/CD of June 30, 2016 ("**Resolution No. 164**"), modifying the costs apportioning methodology for the use of the electricity system transmission lines by generators ("**New Methodology Claim**").

6. The Tribunal decided in Section IX (the operative part)[1] of the Award as follows:

> (i.) **Declares** that the Tribunal has jurisdiction over the SFR Service Claim and the New Methodology Claim;
>
> (ii.) **Declares** that Respondent breached Article 10.5 of the Treaty by issuing Resolution No. 141;
>
> (iii.) **Declares** that Respondent has not breached Article 10.5 of the Treaty by issuing Resolution No. 164;
>
> (iv.) **Orders that Respondent pay Claimants US$ 110.7 million as** compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD from the Valuation Date to the date of this Award;[2]
>
> […]

III. PROCEDURAL HISTORY

7. On August 21, 2024, ICSID received the Application which contained a request for the stay of enforcement of the Award ("**Stay Request**") pursuant to Article 52(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**Convention**") and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**").

8. On August 28, 2024, pursuant to Rule 50(2) of the Arbitration Rules, the Secretary-General of ICSID registered the Application. In accordance with Arbitration Rule 54(2), the Secretary-General also informed the Parties that the enforcement of the Award had been provisionally stayed.

9. On October 18, 2024, in accordance with Rules 6 and 53 of the Arbitration Rules, the Parties were notified that an *ad hoc* committee composed of Prof. José-Miguel Júdice, a national of Portugal, appointed to the Panel by Portugal, and designated as President of the Committee, Ms. Carmen Núñez-Lagos, a national of Spain, appointed to the Panel by Spain, and Prof. Dr. Yannick Radi, a national of France, appointed to the Panel by Belgium, had been constituted ("**Committee**"). The Parties were also notified that

[1] See: Award, § 624.

[2] On May 3, 2024, the Tribunal issued a Decision on the Requests for Rectification and Clarification, rectifying § 624(iv) of the Award as follows: "**Orders** that Respondent pay Claimants US$ 110.7 million as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD *at the date of this Award based upon the sum of (a) a risk-free rate equal to the one-month average yield of US Treasury bonds with a five-year maturity and (b) the country risk premium for Peru determined by Professor Damodaran most recently published as of the date of this Award*, from the Valuation Date to the date of this Award*, compounded annually*".

Mr. Marco Tulio Montañés-Rumayor, Legal Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

10. On October 23, 2024, the Committee wrote to the Parties (i) proposing dates for a first session; (ii) inviting them to agree on a calendar for the written and/or oral submissions regarding the Stay Request; and (iii) seeking their consent to the appointment of Mr. Julián Garcerant Fuentes as assistant to the Tribunal.

11. On October 25, 2024, the Parties confirmed their availability for a first session and that they had no objection to Mr. Garcerant Fuentes' appointment.

12. On November 11, 2024, the Parties transmitted to the Committee their agreed procedural calendar for approval. The calendar reflected the Parties' agreement to continue with the stay of enforcement of the Award until the annulment proceeding had concluded, on the condition that all written submissions and the final hearing ("**Annulment Hearing**") would be completed by the end of the 2025 calendar year, save for cost submissions.[3]

13. On November 19, 2024, in preparation for the first session, the Committee circulated a draft Procedural Order No. 1 ("**PO1**"), inviting the Parties to confer and submit their observations on the draft.

14. On December 13, 2024, the Parties submitted their comments on draft PO1, indicating the items on which they agreed and their respective positions regarding the items on which they disagreed.

15. On December 17, 2024, the Committee held a first session with the Parties by videoconference, in accordance with Arbitration Rules 53 and 13(1).

16. On December 23, 2024, the Committee issued PO1 recording the agreement of the Parties on procedural matters and the decision of the Committee on disputed issues. PO1 provides, *inter alia*, that the applicable Arbitration Rules will be those in effect from April 10, 2006, that the procedural languages will be English and Spanish, and that the place of proceeding will be Washington, D.C. PO1 also sets out the agreed procedural calendar for the proceeding.

17. On February 27, 2025, Peru submitted its Memorial on Partial Annulment together with legal authorities RLAA-0001 to RLAA-0037 and documents from the underlying Arbitration ("**Memorial**").

18. On May 23, 2025, the Claimants submitted their Counter-Memorial on Partial Annulment together with exhibits CA-0001 to CA-0037, legal authorities CLAA-0001 to CLAA-0076 and documents from the underlying Arbitration ("**Counter-Memorial**").

[3] See: PO1, § 25.1.

19. On August 7, 2025, Peru submitted its Reply on Partial Annulment together with legal authorities RLAA-0038 and RLAA-0039 and documents from the underlying Arbitration ("**Reply**").

20. On October 7, 2025, the Committee proposed dates to the Parties for the pre-hearing organizational meeting ("**PHC**").

21. On October 17, 2025, the Committee confirmed that the PHC would be held on November 7, 2025. It circulated a draft Procedural Order No. 2 ("**PO2**") on the organization of the Annulment Hearing, inviting the Parties to confer and submit their observations by October 20, 2025.

22. Also on October 17, 2025, the Claimants submitted their Rejoinder on Partial Annulment together with exhibits CA-0038 and CA-0039, legal authorities CLAA-0029bis, CLAA-0067bis, CLAA-0077 to CLA-0090, translation of RLAA-0030bis-ENG and documents from the underlying Arbitration ("**Rejoinder**").

23. On October 31, 2025, the Parties submitted a joint proposal containing their agreements and comments on draft PO2.

24. On November 4, 2025, the Committee informed the Parties of its decision to accept all agreed suggestions to draft PO2, indicating that it would rule on the schedule for Day 2 of the Annulment Hearing at the PHC.

25. On November 6, 2025, Peru requested the Committee to exclude from the record new documents submitted by Claimants with their Rejoinder. On November 7, 2025, the Committee invited Claimants to comment on Peru's letter by November 12, 2025.

26. On November 7, 2025, the Committee held the PHC with the Parties. Following the PHC, the Committee invited the Parties to further attempt to reach agreement on the time allocation for Day 2 of the Annulment Hearing by November 12, 2025.

27. On November 12, 2025, Claimants filed a response to Peru's letter of November 6, 2025. The Parties also agreed on the schedule for Day 2 of the hearing.

28. On November 14, 2025, the Committee issued PO2 on the organization of the Annulment Hearing.

29. On November 20, 2025, the Committee issued Procedural Order No. 3, deciding to strike from the record the documents CLAA-82, CLAA-87, CLAA-88, CLAA-89, and CLAA-90; and directing Claimants to resubmit their Rejoinder, without reference to those documents, by November 24, 2025.

30. On November 24, 2025, Claimants submitted a revised Rejoinder.

31. The Annulment Hearing was held in Washington, D.C. on December 10-11, 2025, and was attended by:

Committee:

Prof. José-Miguel Júdice	President
Ms. Carmen Núñez-Lagos	Member of the Committee
Prof. Dr. Yannick Radi	Member of the Committee

ICSID Secretariat:

Mr. Marco Tulio Montañés-Rumayor	Secretary of the Committee

Assistant to the Committee:

Mr. Julián Garcerant Fuentes	Assistant to the Committee

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Mr. Lee Rovinescu	Freshfields US LLP
Mr. Pedro Ramírez	Freshfields US LLP
Ms. Carla Sung Ah Yoon	Freshfields US LLP
Ms. Manpreet Kaur	Freshfields US LLP
Mr. Joonhak Choi	Freshfields US LLP
Ms. Paula Salguero	Freshfields US LLP
Mr. Leonardo Menegon	Freshfields US LLP
Parties:	
Mr. Robert Rosen	Kenon Holdings Ltd. / IC Power Ltd.
Mr. Javier García Burgos	Inkia Energy Ltd.
Mr. Pierre Amariglio	Tenor Capital

For the Respondent:

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Ms. Jennifer Haworth McCandless	Baker Botts LLP
Dr. Alejandro Escobar (virtual)	Baker Botts LLP
Ms. María Carolina Durán	Baker Botts LLP
Ms. Natalia Zuleta	Baker Botts LLP
Ms. Veronica Restrepo	Baker Botts LLP
Mr. Jack Biggs	Baker Botts LLP
Mr. Rodrigo Aguilar	Baker Botts LLP
Ms. Svitlana Stegniy	Baker Botts LLP
Mr. Ricardo Puccio (virtual)	Estudio Navarro & Pazos
Parties:	
Mr. Jean Pierre Galván Ortiz	Ministry of Economy and Finance, Republic of Perú
Mr. Enrique Jesús Cabrera Gómez	Ministry of Economy and Finance, Republic of Perú
Mr. José Luis Cano Cáceres (virtual)	Ministry of Commerce and Tourism, Republic of Perú
Mr. Giancarlo Coello Gadea (virtual)	Ministry of Mines and Energy, Republic of Perú
Mr. José Luis Luna Campodónico (virtual)	OSINERGMIN, Republic of Perú

Mr. Severo Buenalaya Cangalaya (virtual)	OSINERGMIN, Republic of Perú
Mr. Miguel Révolo Acevedo (virtual)	OSINERGMIN, Republic of Perú

Court Reporters:

Ms. Okeemah S. Henderson	English Court Reporter
Ms. Elizabeth Cicoria	Spanish Court Reporter

Interpreters:

Mr. Luis Eduardo Arango	English-Spanish interpreter
Ms. Monique Fernandez	English-Spanish interpreter
Ms. Silvia Colla	English-Spanish interpreter

32. On January 5, 2026, the Parties informed the Committee of their agreement regarding the submission of transcript corrections and cost statements. On January 8, 2026, the Committee approved the Parties' agreement.

33. On January 23, 2026, the Parties filed their proposed corrections to the Annulment Hearing transcripts. The final versions, as issued by the court reporters, were transmitted to the Parties on February 6, 2026.

34. On February 12, 2026, the Parties filed their cost statements.

35. On April 28, 2026, the proceeding was declared closed.

IV. THE RELIEF REQUESTED BY PERU IN THIS PROCEEDING

36. The relief sought by Peru in its Memorial is the following:

> Pursuant to Article 52(1) of the ICSID Convention, Perú respectfully requests partial annulment of the Award, in particular, the Tribunal's conclusion that Perú breached the MST/FET standard in Article 10.5 of the FTA by issuing Resolution No. 141, the portions of the Award on which that conclusion was based, and its ruling on damages flowing from that conclusion, as specified in Annex A[4].

37. The relief sought by Peru in its Reply is the following:

> Pursuant to Article 52(1) of the ICSID Convention, Perú respectfully requests partial annulment of the Award, in particular, the Tribunal's conclusion that Perú breached the MST/FET standard in Article 10.5 of the FTA by issuing Resolution No. 141, the portions of the Award on which that conclusion was based, and its

[4] Memorial, § 262.

> ruling on damages flowing from that conclusion, as specified in Annex A. Perú also requests that Claimants bear full responsibility for all costs incurred in the course of these annulment proceedings[5].

V. SUMMARY OF PERU'S SUBMISSIONS

A. METHODOLOGY

38. The present section (like Section VII with respect to Claimants) is not intended to be more than a summary of Peru's positions. The Committee stresses in this respect that it did not rely only on the aspects summarized below to reach its conclusions.

39. The fact that this summary is primarily based on Peru's Memorial, and, with respect to Claimants, on the Counter-Memorial, does not imply that Peru's Reply and Claimants' Rejoinder were not examined with the same care and attention as the earlier submissions. The same applies to the Parties' submissions at the Annulment Hearing, demonstrative charts and the transcripts of the Annulment Hearing.

40. As each Party maintained the core of its positions intact from their first submissions, and in the interest of procedural efficiency, the Committee has referred to the additional submissions and to the Annulment Hearing transcripts mainly where new relevant arguments or counterarguments were raised. Nevertheless, the Committee confirms that it has duly taken into account all submissions and statements in its analysis and to make its decision.

41. Finally, the Committee has also carefully examined the Award subject to the partial annulment request, together with all the legal authorities and documents submitted, cited or otherwise relied upon by the Parties in this proceeding.

B. GROUNDS FOR ANNULMENT

42. Peru posits that the Award "warrants being partially annulled based on three out of the five possible grounds for annulment"[6].

43. The three grounds are the following:

    a. "[T]he Tribunal failed to apply the applicable law under the Free Trade Agreement between Singapore and Peru ("**Treaty**" or "**FTA**")—customary international law ("**CIL**")—to determine the content of the Minimum Standard of Treatment ("**MST**") as required under the Treaty"[7];

[5] Reply, § 480.
[6] Memorial, § 1.
[7] Memorial, § 3.

b. "the Tribunal failed to provide the reasoning for a number of key conclusions it made" and "[s]pecifically, the Tribunal failed to analyze whether the protection of legitimate expectations and the prohibition of 'serious' arbitrary and discriminatory conduct had crystallized into customary international law" and "[n]evertheless the Tribunal found that Peru had (allegedly) violated these obligations" and "[t]hus, the Tribunal failed to state the reasons on which the Award is based"[8]; and

c. "the Tribunal issued various procedural rulings that deprived Perú of its due process rights, including its right to have a fair and balanced opportunity to fully present its case", as it "denied Peru's right to be heard when it (i) struck from the record all of one technical report and a substantial portion of another report presented by Respondent with its Rejoinder and all passages referring to the stricken text in its Rejoinder submission; (ii) supported its conclusions based on pleadings submitted by Peru in other, entirely separate, arbitration proceedings that were not on the record, without providing an opportunity for the Parties, including Peru, to comment on them; and (iii) adopted a series of procedural decisions which, taken together, had the cumulative effect of depriving Peru of an opportunity to fully present its case" and accordingly "seriously departed from a fundamental rule of procedure"[9].

44. Peru alleges that, in accordance with Article 52 of the Convention, the establishment of a single ground for annulment is sufficient to warrant the annulment of an award[10].

C. FIRST GROUND FOR ANNULMENT

1. Standard for annulment under Convention Article 52(1)(b)

45. According to Peru, the standard for annulment under Article 52(1)(b) of the Convention includes two cumulative elements.

46. First, the tribunal must have exceeded its powers[11]. Peru considers that there is "'widespread agreement' that a tribunal's failure to apply the applicable law to the dispute constitutes a manifest excess of power"[12] because, as established in the *Soufraki* decision, the applicable law constitutes the agreement of the parties to arbitrate a dispute[13]. However, Peru "accepts that Article 52(1)(b) is limited to the application of the applicable

[8] Memorial, § 4.
[9] Memorial, § 5.
[10] Memorial, § 1.
[11] Memorial, §§ 79-83.
[12] Memorial, § 80.
[13] Memorial, § 82. Claimants cite **RLAA-003**, § 45.

law and does not extend to the correctness of the tribunal's application of the applicable law"[14].

47. Second, any excess of powers must be manifest, meaning that it must be "self-evident rather than the product of elaborate interpretations"[15]. Peru considers predominant the view that – quoting from Schreuer - "'manifest' may mean 'plain', 'clear', 'obvious', 'evident' and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity"[16]. Peru also asserts that to be manifest, an excess of powers must be "serious (i.e., a clear and obvious excess of powers alone is insufficient)"[17].

48. According to Peru, the Tribunal manifestly exceeded its powers because "it did not apply customary international law, as expressly required under the FTA, to determine the content of the MST/FET standard provided under the FTA"[18].

2. Applicable law under Article 10.5 of the Treaty

49. Article 10.5 of the Treaty mandates the application of "the customary international law minimum standard of treatment of aliens"[19] to determine whether the actions of a State party to the Treaty have fallen short of its obligations. Ad-note 10-6 complements Article 10.5 and provides additional information about this standard[20].

50. According to Peru, to determine whether a norm has crystallized under customary international law ("**CIL**"), two elements must be evidenced: state practice and *opinio juris.* State practice must be extensive and virtually uniform. *Opinio juris* entails that the state practice must be accepted as law[21]. Peru refers in this respect to the work of the International Law Commission ("**ILC**") on the identification of CIL[22] and to the case-law of the International Court of Justice ("**ICJ**")[23].

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[14] Memorial, § 83.
[15] Memorial, §§ 84-87.
[16] Memorial, § 84. Claimants cite **RLAA-0006**, p. 1269.
[17] Memorial, § 85.
[18] Memorial, § 87.
[19] Article 10.5 of the Treaty: "1. Each Party shall accord to investments of investors of the other Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security. 2. The concepts of fair and equitable treatment and full protection and security in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights (…)".
[20] Ad note 10-6: "Customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation. With regards to this Article, customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".
[21] Memorial, §§ 92-95.
[22] Peru cites in the Memorial, fn. 183: **RL-0039**, p. 72.
[23] Peru cites in the Memorial, fn. 184: **RL-0040**, § 55: "In particular […] the existence of a rule of customary international law requires that there be 'a settled practice' together with *opinio juris*[.]"; **RL-0041,** § 27: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice

51. Peru considers that the Tribunal failed to apply the applicable law with regard to three issues, namely: (i) arbitrariness; (ii) the analysis of Resolution No. 141 as part of the SFR Claim; and (iii) legitimate expectations.

3. The Tribunal failed to apply the applicable law to the issue of arbitrariness

52. First of all, Peru contends that, for the Tribunal to find that serious arbitrary and discriminatory conduct occurred and fell within the scope of Article 10.5 of the Treaty[24], "it needed to conclude that this obligation was supported by both State practice and *opinio juris* [and t]he Tribunal did not do this"[25]. Peru considers that the mere reference to awards is not enough to confirm that a CIL obligation has crystallized[26].

53. It further states that the awards quoted by the Tribunal did not examine evidence of *opinio juris* and do not constitute in of themselves State practice[27]. Peru concludes that "[b]y failing to conduct the proper analysis to determine whether an obligation not to act in a 'seriously arbitrary' manner had crystallized into a rule of customary international law (as expressly required by the Treaty), the Tribunal failed to apply customary international law (the applicable law under the FTA) and, thus, manifestly exceeded its powers"[28].

4. The Tribunal failed to apply the applicable law when analyzing Resolution No. 141 as part of the SFR Claim

54. Secondly, Peru alleges that the Tribunal failed to apply CIL in its assessment of whether Resolution No. 141 was "seriously arbitrary" as it stated that it "is satisfied that Resolution No. 141 rises to that standard for three reasons"[29].

55. Peru submits that the Tribunal, when reaching that conclusion, failed to apply CIL as it was not evidenced that "issues of State practice and *opinio juris* support the conclusion that disregarding fundamental principles of domestic law is a breach of the MST (and therefore a breach of customary international law)"[30].

5. The Tribunal failed to apply the applicable law to the issue of legitimate expectations

56. Thirdly, Peru affirms that the Tribunal decided that Claimants' legitimate expectations fell within the scope of Article 10.5 of the Treaty[31]. To do so, the Tribunal relied on

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and *opinio juris* of States[.]"; **RL-0042**, § 183: "[T]he Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States[.]".

[24] Award, §§ 297-303.

[25] Memorial, § 99.

[26] Memorial, §§ 100-101.

[27] Memorial, § 102. See also Memorial, §§ 103-110.

[28] Memorial, § 111.

[29] Memorial, §§ 114-119.

[30] Memorial, § 118.

[31] Award, § 310.

several investment awards that "have unequivocally acknowledged that the protection of legitimate expectations falls within the purview of the MST"[32]. However, according to Peru, the Tribunal acknowledged that those awards did not analyze *opinio juris* and that they did not discuss State practice in the context of legitimate expectations[33].

57. Peru submits that the Tribunal should have considered the *Bolivia v. Chile* ICJ Judgment in which "the ICJ held that there is no general principle to respect legitimate expectations under customary international law"[34].

58. Peru concludes that "the Tribunal's excess of power is 'manifest' as it is clear from (i) a review of the Award (which is silent on this issue); and (ii) a review of the awards cited by the Tribunal (which are also silent on this issue)"[35].

6. Reply

i. Standard of annulment

59. Peru does not dispute Claimants' position that, under Article 52(3) of the Convention, the Committee has discretion to annul the Award even if an annulment ground exists. However, Peru alleges that this discretion is limited in cases where evidence is provided that the error materially affects the outcome or undermines the integrity and fairness of the proceedings. In other words, Convention Article 52 balances finality with fairness. Once annulment grounds have been established, the Committee's discretion narrows to fulfilling this provision's object and purpose[36], and "ICSID practice consistently affirms this limit to a committee's discretion to annul awards"[37].

60. Peru states that Claimants' own position shows that the Tribunal failed to apply the applicable law[38]. For Peru, Claimants do not contest that the Tribunal was required to apply the MST standard under CIL and that "customary international law results from a general and consistent practice of States that they follow from a sense of legal obligation"[39].

61. Peru clarifies that "[c]ontrary to Claimants' allegations, Peru is not disputing how the Tribunal interpreted the elements of customary international law. Instead, Perú's contention is that the Tribunal failed to apply those elements at all"[40]. For it, a simple reference to CIL does not constitute an analysis of the elements required to determine

[32] Award, § 307.
[33] Memorial, § 122.
[34] Memorial, § 127, citing **RL-061**.
[35] Memorial, § 128.
[36] Reply, §§ 55-57.
[37] Reply, § 58.
[38] Reply, §§ 73-92.
[39] Reply, §§ 73-74.
[40] Reply, § 76.

whether a norm has crystallized as such[41]. In relation to the views expressed by the Claimants that the Tribunal "sought to apply" the applicable law, Peru argues that they "do not explain why seeking to apply the law (as opposed to actually applying the applicable law) would be sufficient"[42].

62. Peru also reacts to the argument put forward by the Claimants according to which "the Tribunal must have failed to apply the applicable law '*in toto*' for there to be an excess of powers". It claims that the standard to fail to apply the law '*in toto*' is a bid to lower the bar. Peru adds that, even if Claimants' argument were true, Peru's claim would still stand because the Tribunal failed to analyse "the elements needed to determine if a norm has crystallized under customary international law", this meaning that the tribunal failed to apply the law in toto[43].

63. Contrary to Claimants' statement, "Peru accepts that previous awards that include an analysis of State practice and *opinio juris* may provide evidence of a norm of customary international law. However, […] the awards relied on by the Tribunal in its Award do not contain analyses of State practice and *opinio juris*"[44].

ii. The Tribunal failed to apply the applicable law to the issue of arbitrariness

64. Peru considers that its position has been misrepresented by Claimants: "[w]hile Perú agrees that the Tribunal identified the applicable law, Perú does not agree that the Tribunal applied the applicable law. Those are two separate steps"[45].

65. Peru agrees with Claimants that an "excess of powers cannot be 'manifest' if the alleged excess is discernible only through elaborate argument or interpretation" and it posits that "[it] is exactly the situation with respect to the Award—the excess of powers is obvious"[46].

66. Peru also refers that "[d]espite discussing certain decisions (e.g., Glamis Gold v. USA), at no point do Claimants contest Perú's central objection: that the Tribunal did not analyze the elements needed to determine whether a norm has crystalized […]"[47].

[41] Reply, § 78.
[42] Reply, § 79.
[43] Reply, §§ 81-82.
[44] Reply, § 88.
[45] Reply, § 97.
[46] Reply, § 100.
[47] Reply, § 108.

iii. The Tribunal failed to apply the applicable law when analyzing Resolution No. 141 as part of the SFR Claim

67. Peru argues that the Tribunal found Resolution No. 141 to be seriously arbitrary, without applying CIL, and by relying on the *Cargill*[48] and *EDF*[49] decisions, which ignored State practice and *opinio juris*. For it, these manifest excesses of power are evident on the face of the Award and they are central to its liability findings. Peru states that the Tribunal reliance on those decisions does not relieve it of its duty to apply the proper law also because none of the 23 references cited by Claimants address whether Resolution No. 141 was seriously arbitrary.[50]

68. Peru does not dispute the Tribunal's right to refer to past decisions, but it argues that those decisions must have analyzed the applicable law. It adds that they are no substitute for the Tribunal's duty to analyze State practice and *opinio juris* to determine whether a norm has crystallized under CIL[51].

69. In Peru's view, "the Tribunal was not permitted to rely on a decision (i.e., *EDF*) that was not based on customary international law as part of its obligation to apply the law chosen by the parties"[52]. It makes a similar claim in relation to other decisions cited by the Tribunal[53].

70. Peru concludes that "the Tribunal manifestly exceeded its powers by repeatedly failing to apply the law selected by the Parties"[54].

iv. The Tribunal failed to apply the applicable law to the issue of legitimate expectations

71. Claimants argue that the Tribunal applied CIL through multiple references. Reacting to this argument, Peru states that citing the law is not the same as applying it[55]. For Peru, the Tribunal's error had a serious impact on it, as the passages of the Award on this issue may have a *res judicata* effect. It argues that, should the Committee annul the Award only on arbitrariness, the finding on legitimate expectations will persist, binding tribunals in the future and influencing the interpretation of the Treaty in later cases[56].

72. Regarding the ICJ case *Bolivia v. Chile*[57], the Tribunal's dismissal of the Judgment is, according to Peru, yet another evidence of its failure to apply the applicable law. The case is relevant because it deals with legitimate expectations under CIL. By contrast, Peru

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[48] **RL-0008**.
[49] **CLAA-0044.**
[50] Reply, §§ 112-116.
[51] Reply, § 118.
[52] Reply, § 121.
[53] Reply, §§ 123-127.
[54] Reply, § 128.
[55] Reply, § 132.
[56] Reply, §§ 139-141.
[57] **RL-0061**.

contends that the cases cited by Claimants, in which ICJ precedents were dismissed, are irrelevant[58].

D. SECOND GROUND FOR ANNULMENT

1. Standard for annulment under Convention Article 52(1)(e)

73. Peru argues that "the requirement to state reasons in an award is satisfied when the reader can understand the facts and law applied by the tribunal in reaching its conclusion"[59]. Peru also refers to "the ad hoc committee in MINE, an authoritative decision on this ground, [which] held that 'the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons'"[60].

74. Moreover, Peru states that "in its Award, the Tribunal failed to explain the reasoning behind a number of key findings it made"[61].

2. The Tribunal failed to provide reasons to support its conclusions regarding arbitrary conduct

75. Peru argues that the Tribunal failed to provide reasons with respect to findings regarding serious arbitrary and discriminatory State conduct in three instances.

76. First of all, Peru submits that "[t]he Tribunal acknowledged that the applicable law under Article 10.5 of the Treaty is the minimum standard of treatment under customary international law, [and a]s part of that, the Tribunal acknowledged that *ad note* 10-6 to Article 10.5 outlined the 'parameters' to customary international law: (i) State practice, and (ii) *opinio juris*"[62] and that it "ultimately concluded that Article 10.5 of the Treaty protected investors from 'serious' arbitrary and discriminatory conduct"[63]. However, Peru considers that "the Tribunal did not explain the steps between that starting point and conclusion. Specifically, the Tribunal did not explain how the prohibition of 'serious' arbitrary and discriminatory conduct had crystallized into customary international law through state practice and *opinio juris*"[64], preferring to cite "several investment awards which purportedly held that arbitrary conduct was prohibited under the minimum standard of treatment under customary international law"[65]. Furthermore, Peru considers that "those awards are also silent on this issue"[66].

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[58] Reply, §§ 142-144.
[59] Memorial, § 131.
[60] Memorial, § 132, Peru cites in the Memorial, fn. 238: **RLAA-0007**, § 5.09; **RLAA-0012**, §129.
[61] Memorial, § 134.
[62] Memorial, § 136.
[63] Memorial, § 137.
[64] Memorial, § 138.
[65] Memorial, § 138.
[66] Memorial, § 139.

77. Secondly, Peru contends that "the Tribunal sought to equate the high threshold in the above-mentioned investment awards with its conclusion that Peru acted in a 'seriously' arbitrary manner". However, it argues that the "Tribunal failed to explain on what basis it equated the higher threshold of 'egregious' conduct with the lower threshold of 'serious' conduct"[67].

78. Thirdly, Peru affirms that the Tribunal "failed to state the reasons for its conclusion that Perú acted in a 'seriously arbitrary' manner"[68]. Peru argues that "the Tribunal's starting point was that Kallpa GSA 'rel[ied] on' or expected permanent dispatch of the tender winner"[69]. It claims that "[t]he Tribunal did not [yet] cite to any representations made by Peruvian authorities to Claimants or to any specific reliance by Claimants when deciding to bid for SFR services"[70].

79. For Peru, this lack of analysis amounts to a failure to state the reasons on which the Tribunal's conclusions regarding arbitrary conduct are based.

3. The Tribunal failed to provide reasons to support its conclusion regarding legitimate expectations

80. Peru submits that the Tribunal failed to provide reasons with respect to its findings on the protection of legitimate expectations. The claim is twofold.

81. First of all, Peru contends that the Tribunal adopted the same approach as the one it followed with regard to arbitrary conduct: the Tribunal began by identifying the applicable law under Article 10.5 of the Treaty as the MST in CIL, with ad note 10-6 outlining its parameters; it then concluded that Article 10.5 protects investors' legitimate expectations[71]. However, Peru states that the Tribunal failed to explain how the protection of legitimate expectations crystallized into and became part of CIL, relying on awards that did not evidence such a crystallization through State practice and *opinio juris*[72].

82. Secondly, Peru asserts that the Tribunal failed to provide reasons when it held that the legitimate expectations standard "stems from" the States' obligation to act in good faith[73].

[67] Memorial, § 140.
[68] Memorial, § 141.
[69] Memorial, § 142.
[70] Memorial, § 141.
[71] Memorial, §§ 145-146.
[72] Memorial, § 147.
[73] Memorial, § 148.

4. Reply

i. Standard for annulment under Convention Article 52(1)(e)

83. Peru agrees with those principles outlined by Claimants: (i) pursuant to Article 48(3) of the Convention, the Tribunal had to state the reasons upon which the Award is based[74], and (ii) the reader must be able to understand the facts and the law applied in reaching its conclusion[75]. Peru also concurs with Claimants that this requirement is met as long as an award shows how the Tribunal moved from Point A to Point B and then to its conclusion, even if it made factual or legal errors[76]. However, it contends that "the Parties disagree on the application of these principles to the present dispute"[77].

ii. The Tribunal failed to provide reasons to support its conclusions regarding arbitrary conduct

84. Peru restates that the Tribunal failed to provide reasons to support its conclusions on arbitrary conduct[78]. For it, the Tribunal's reasoning cannot be followed from Point A to Point B and then to its conclusion regarding the three prongs of this first claim[79].

85. As for the first one, Claimants contend in their Counter-Memorial that the "Tribunal's reasoning was logical, complete, and … understandable"[80]. But, according to Peru, Claimants did not explain how the prohibition of "serious" arbitrary and discriminatory conduct had crystallized into a CIL rule through State practice and *opinio juris*, nor how the awards it cited demonstrated such a crystallization.

86. Concerning the second prong, Peru states that Claimants acknowledge that the two standards ("egregious", as cited from other awards, and "serious", as referred to by the Tribunal) are different.

87. With respect to the last one, it explains that Claimants have failed to identify any specific reason in the Award that demonstrate how Kallpa GSA could have expected permanent dispatch. Also, contrary to Claimants' assertion, Peru argues that the Award contains no reasoning that supports the Tribunal's finding that Kallpa GSA relied on and expected a permanent dispatch[81].

[74] Reply, §§ 151-152.
[75] Reply, §§ 151-152.
[76] Reply, §§ 151-152.
[77] Reply, §§ 153-155.
[78] Reply, §§ 156-171.
[79] Reply, §§ 156-160.
[80] Reply, § 161, quoting Counter-Memorial, § 134.
[81] Reply, §§ 162-171.

iii. The Tribunal failed to provide reasons to support its conclusion regarding legitimate expectations

88. Regarding the first part of its argument (i.e., the Tribunal did not explain how the protection of legitimate expectations can be considered as a CIL rule), Peru alleges that "Claimants accept [its] position that the Tribunal did not address or provide reasons regarding the elements of customary international law" and that "this silence means that it is not possible to follow the Tribunal's reasons on these points"[82].

89. As for the second part of its argument (i.e., the Tribunal did not explain how the concept of legitimate expectations can be construed as "stem[ming] from" the obligation to act in good faith), Peru restates that the Tribunal failed to provide reasons to support this conclusion[83].

90. It also alleges that the Claimants' argument according to which "the Tribunal's findings on law on legitimate expectations were irrelevant to the outcome of the case" is not acceptable. In Peru's view, "ignoring [its] objection would mean that the Tribunal's finding regarding legitimate expectations would survive and have res judicata effect […] [and this] would have a serious impact on Perú in future arbitrations not only with respect to this FTA, but also with respect to any other FTA or Treaty requiring application of the customary international law minimum standard of treatment"[84].

E. THIRD GROUND FOR ANNULMENT

1. Standard for annulment under Convention Article 52(1)(d)

91. Article 52(1)(d) of the Convention and Rule 50(1)(c)(iii) of the Arbitration Rules allow either party to request annulment of an award if "there has been a serious departure from a fundamental rule of procedure"[85].

92. According to Peru, two requirements must be satisfied in this respect, namely: (i) the rule of procedure must be *fundamental*, and (ii) the departure from that rule must be *serious*.

93. As to the first requirement, it is well established that the right to be heard is a fundamental principle that permeates all arbitration proceedings. This principle includes a party's right to present its claim and defense as well as to submit arguments and evidence in support thereof[86]. The equal treatment of the parties is also a cornerstone of procedural fairness

[82] Reply, §§ 176-177.
[83] Reply, §§ 172-178.
[84] Reply, § 178.
[85] See Article 52(1)(d) of the Convention and Rule 50(1)(c)(iii) of the Arbitration Rules (both providing that "there has been a serious departure from a fundamental rule of procedure").
rule of procedure;
[86] Memorial, §§ 151-152.

in international investment arbitration. It has been consistently recognized as a fundamental rule of procedure[87].

94. Regarding the second requirement, a departure is considered to be serious when it is substantial and when it is as such as to deprive a party of the benefit or protection which the rule is intended to provide[88].

95. Peru admits that "there is no consensus among annulment committees on how to prove the 'seriousness' of a tribunal's deviation from a fundamental rule of procedure. Ad hoc committees have not settled, by any means, on a specific test"[89].

96. However, Peru considers that, in three instances, "the Tribunal […] departed from a fundamental rule of procedure—namely, the right to be heard and the principle of the equality of arms— in a way that was substantial and that deprived Perú of the benefit or protection which the rule was intended to provide"[90].

2. The Tribunal seriously departed from a fundamental rule of procedure

i. The Tribunal denied Peru the right to be heard and to be treated equally by striking from the record relevant technical evidence

97. Peru argues that the Tribunal's first departure from a fundamental rule of procedure consists in its decision to strike "significant portions of one expert report and striking entirely a technical analysis attached to Perú's quantum second expert report submitted […] with its Rejoinder on the Merits and Reply on Jurisdiction"[91].

98. Peru argues that "[i]n early September 2021, [it] submitted its Rejoinder on the Merits and Reply on Jurisdiction, […] includ[ing] witness testimony, additional documentary evidence, and expert reports including (i) the Tabors Report and (ii) a technical assessment prepared by PSR, a consultant to Perú's quantum expert, Compass Lexecon, titled 'Dispatch assessments in the Peruvian power system,' which was attached as an Appendix to Compass Lexecon's Second Expert Report"[92].

99. After a request from Claimants, Peru's response, additional comments from Claimants in which they allegedly "admitted to having supplied incorrect data and documentation for the SIDEC dispatch electricity dispatch model, a key component of their damages calculations"[93], and additional Peru's observations, the Tribunal issued on October 25,

[87] Memorial, § 154.
[88] Memorial, § 158.
[89] Memorial, § 165.
[90] Memorial, § 166.
[91] Memorial, § 168.
[92] Memorial, § 170.
[93] Memorial, § 178.

2021 Procedural Order No. 3 ("**Arbitration PO3**") which, according to Peru, "largely grant[ed] Claimants' main request"[94].

100. The Tribunal found that "both the Tabors Report and the PSR Analysis were inadmissible at the Rejoinder stage. With respect to the PSR Analysis, the Tribunal accepted Claimants' argument that Peru should have conducted this analysis earlier and concluded that the report was not a proper rebuttal but rather a new expert submission. [It] ordered that the PSR Analysis be struck from the record in its entirety, along with all references to it in Perú's Rejoinder and Compass Lexecon's second expert report on quantum"[95]. "With respect to the Tabors Report, the Tribunal struck substantial portions" of the Report, but it allowed some paragraphs to remain[96].

101. On November 3, 2021, Peru filed a request for reconsideration of Arbitration PO3 and "[o]n November 15, 2021, the Tribunal issued Procedural Order No. 4 ["**Arbitration PO4**"], denying Perú's reconsideration request, upholding the exclusion of the PSR Analysis in its entirety, and maintaining the removal of key sections of the Tabors Report"[97].

102. Peru states that alternative solutions were available and that "[b]y choosing the most severe and prejudicial approach instead of adopting a proportionate procedural solution, the Tribunal's decision constituted a serious departure from a fundamental rule of procedure, warranting partial annulment of the Award under Article 52(1)(d) of the ICSID Convention"[98].

ii. The Tribunal denied Peru the right to be heard by relying on submissions it made in other cases without providing it an opportunity to comment on those submissions

103. Peru contends that, in its Award, "[t]he Tribunal, acting *sua sponte* and without seeking input from either party, relied on submissions made by Peru in other cases when determining the scope of the MST/FET standard in Article 10.5 of the Treaty"[99]. It further argues that "[n]one of those documents was put on the record by either party", and that the Tribunal relied on them to conclude that "Peru agreed that the MST/FET forbids arbitrary and discriminatory conduct, provided they are sufficiently serious"[100]. According to Peru, this "seriously deprived [it] of its right to be heard on a key issue of

[94] Memorial, § 181.
[95] Memorial, § 181.
[96] Memorial, § 182.
[97] Memorial, § 187.
[98] Memorial, § 191.
[99] Memorial, § 214.
[100] Memorial, § 215.

the case—*i.e.*, the scope of Article 10.5 of the FTA—warranting the partial annulment of the Award"[101].

104. It submits that "[i]n any event, had the Tribunal afforded Perú the right to be properly heard, the Tribunal would not have relied on those documents to conclude (erroneously) that Perú had admitted that MST/FET included a protection against arbitrary and discriminatory conduct or that it included legitimate expectations"[102].

105. For Peru, "if the Tribunal had heard Perú on the arguments it had advanced in those prior pleadings, the Tribunal would have (or, certainly, could have) had a different understanding of Perú's position and, thus, given Perú's arguments on the content of the MST/FET standard further consideration. This could have led to a different outcome in the Award regarding the scope of the MST/FET standard"[103].

106. Thus, Peru asserts that it is "particularly egregious that the Tribunal relied on Peru's submissions in other investment arbitration cases […] without giving Perú an opportunity to comment on or explain the arguments it submitted in those specific pleadings"[104]. It also contends that the Tribunal conduct does not "fall within the Tribunal's powers under the principle of *iura novit arbiter*"[105].

107. According to Peru, "even if the *ad hoc* Committee were to find that the Tribunal rightfully exercised its power to refer to sources that were not invoked by the parties under the principle of *iura novit arbiter* […], the Tribunal, in any case, seriously departed from a fundamental rule of procedure by not allowing the parties, and specifically, Perú, to be heard on those pleadings and to comment on the basis for the Tribunal's decision"[106].

iii. The Tribunal made a series of procedural rulings against Peru that, cumulatively, deprived it of the opportunity to fully present its case and to be treated equally

108. Peru considers that some of the "Tribunal's procedural rulings against Perú, taken as a whole, amount to a serious departure from a fundamental rule of procedure"[107].

109. This was allegedly the case when the Tribunal: (i) denied Peru's request at the beginning of the proceeding that Claimants disclose the identity of their third party funder's investors; (ii) granted Claimants' request to add additional evidence on the record during the Arbitration Hearing; (iii) denied Peru's request that any new calculations, models, or simulations to be presented by Claimants' damages experts at the Arbitration Hearing be

[101] Memorial, § 216.
[102] Memorial, § 228.
[103] Memorial, § 229.
[104] Memorial, § 230.
[105] Memorial, § 231.
[106] Memorial, § 233.
[107] Memorial, § 234.

submitted to counsel for Peru and its experts 24 hours in advance of Claimants' experts' presentations; and (iv) denied Peru's request that slides not discussed during Claimants' damages experts' presentation at the Arbitration Hearing be stricken from the record[108].

110. For Peru, the four situations mentioned above have had a "cumulative effect" that "deprived [it] of its ability to be heard and to be treated equally and, thus, amounts to a serious departure from fundamental rules of procedure that warrants the partial annulment of the Award"[109].

3. The Tribunal's departure from a fundamental rule of procedure was serious

111. Peru posits that "[w]ithout the evidence it submitted in response to Claimants' arguments in their Reply, Perú could not fully and adequately contest Claimants' claims or expose the methodological flaws in their damages' calculations"[110]. It alleges that, "[h]ad the Tribunal considered the stricken portions of the Tabors Report along with the redacted excerpts from more than 13 paragraphs in [its] Rejoinder, which directly engaged with the key issues surrounding PR-22 and the Economic Dispatch Principle, it would have (or, certainly could have) reached the opposite conclusion"[111].

112. For it, "the Tribunal's exclusion of the PSR Analysis and the relevant references in Perú's Rejoinder also led to a fundamentally flawed assessment of Claimants' damages claims"[112]. Peru stresses that this "was not just a procedural formality—it fundamentally altered the fairness of the proceedings"[113].

113. According to it, the "Tribunal's procedural rulings in Procedural Order No. 3 and Procedural Order No. 4, therefore, amount to a serious departure from fundamental rules of procedure: the right to be heard and the right to equal treatment. Both rights are core principles of ICSID arbitration, and the Tribunal's failure to honor them justifies annulment under Article 52(1)(d) of the ICSID Convention"[114].

114. As a consequence, Peru contends that, "[b]y striking from the record expert evidence that was critical to [its] defense, the Tribunal deprived [it] of a full and fair opportunity to present its case, leading to a procedurally defective Award that cannot stand"[115].

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[108] Memorial, §§ 235-259.
[109] Memorial, § 257.
[110] Memorial, § 192.
[111] Memorial, § 195.
[112] Memorial, § 206.
[113] Memorial, § 207.
[114] Memorial, § 213.
[115] Memorial, § 213.

4. Reply

115. According to Peru, "Claimants […] failed to rebut — that the Tribunal seriously departed from a fundamental rule of procedure in multiple respects, substantially undermining Peru's right to be heard"[116].

i. There is no meaningful disagreement between the Parties on the applicable standard under Convention Article 52(1)(d)

116. Peru contends that both Parties agree that Convention Article 52(1)(d) requires showing that a tribunal departed from a fundamental procedural rule and that the departure was "serious," meaning that it was substantial and deprived the party of the rule's protection. It relies on the principle of equality of arms and the right to be heard, whose fundamental nature is not disputed by Claimants. Peru rejects their view that the Tribunal's discretion makes its procedural decisions immune from scrutiny[117].

117. Peru submits that "[d]espite this apparent agreement, Claimants assert that Peru seeks to lower the applicable threshold and introduce a 'third, significantly lower' standard—one under which any procedural deviation, regardless of materiality, would suffice". Peru considers that "Claimants misrepresent [its] position"[118].

118. It restates its position as follows: "[t]he true disagreement between the Parties does not concern the content or scope of the applicable legal standard, but rather its application to the facts of this case. Contrary to Claimants' assertion that Perú merely makes 'bold' or unsubstantiated claims that the outcome could have been different, Perú has in fact demonstrated that the procedural violations committed by the Tribunal meet the seriousness threshold"[119].

ii. Claimants offer no persuasive response to Peru's demonstration that the Tribunal's exclusion of relevant technical evidence violated its right to be heard and to be treated equally

119. Peru reaffirms its views that the Tribunal's exclusion of the Tabors Report and of the PSR Analysis was procedurally inappropriate and that this exclusion deprived it of the evidence needed to defend its case. For Peru, such an exclusion was excessive, disproportionate, and it imposed the "most severe option"[120], leaving it without core technical evidence. It further asserts that the Tribunal failed to apply the same procedural rigor to Claimants' late-filed Expert Report of Luis Alberto Espinoza on the Peruvian Electrical System dated May 24, 2021 ("**Espinoza Report**") and to the witness statement

[116] Reply, §§ 179-472.
[117] Reply, §§ 183-188.
[118] Reply, § 189.
[119] Reply, § 192.
[120] Reply, §§ 194-197.

of Jaime Guerra dated May 24, 2021, creating thereby an unequal treatment and a procedural imbalance.

120. Claimants argued that the evidence was untimely under Section 17.1 of Procedural Order No. 1 ("**Arbitration PO1**"), that the Tribunal had broad discretion, and that Peru was not deprived of an opportunity to present its case. Peru rejects these statements and argues that annulment requires examining whether the Tribunal's discretion resulted in a serious departure from a fundamental rule. It argues that the equality of treatment was not respected because the Tribunal excluded its evidence but retained Claimants' late evidence under that Section[121].

121. Peru maintains that the Committee must examine the merits of the procedural determinations to assess seriousness under Convention Article 52(1)(d). For it, Claimants mischaracterize the procedural context and the timing of their submissions. Peru contends that they did not present their full case in the Memorial and that they only included the Espinoza Report in the Reply, which, it argues, made the Tabors Report necessary[122].

122. Regarding damages and PSR Analysis, Peru reaffirms that BRG did not provide the underlying model, code, or full inputs needed to replicate SIDEC's simulations, and that it only received the necessary data in July 2021 - more than a year after Claimants' Memorial -, data which were then incomplete. Peru argues that it could not have independently modelled dispatch earlier because Claimants withheld the required data. It also asserts that Claimants introduced new evidence in their Arbitration Reply that was not responsive to its Arbitration Counter-Memorial[123].

123. As a consequence, Peru states that the submission of technical evidence with its Arbitration Rejoinder was procedurally proper and timely[124].

124. It also contends that the disclosure of faulty data in July 2021 was a critical fact supporting the timing of its request, and that the Tribunal should have considered that the missing input data prevented its experts from conducting a complete analysis[125].

125. Therefore, Peru disagrees with Claimants' allegations related to Arbitration PO3 and PO4[126] and it concludes that the Tribunal exercised discretion without regard to the fundamental guarantees conferred by the right to be heard and the equality of arms. It also rejects Claimants' argument that this annulment request is a disguised appeal, stating that the complaint is not about correctness but about disproportionate, inconsistent, and

[121] Reply, §§ 198-201.
[122] Reply, §§ 202-210.
[123] Reply, §§ 211-231.
[124] Reply, §§ 232-235.
[125] Reply, §§ 238-244.
[126] Reply, §§ 247-263.

prejudicial exercise of discretion. Peru states in this respect that tribunals are not immune from annulment when discretion is exercised in a way that infringes fundamental due process rights. It also reasserts that Section 17.1 of Arbitration PO1 was accepted with the expectation of a fair and of a proportionate application, and that this section could not be seen as a "carte blanche" [127] given to the Tribunal to do as it wishes. The issue then for Peru is not the rule provided in Section 17.1 as such, but the Tribunal's unequal and disproportionate application of it.

126. Claimants emphasized that no ICSID annulment committee has ever annulled an award based on a tribunal's decision to declare evidence inadmissible. Peru reacts to this asserting that the lack of precedent on this issue is irrelevant because each decision is fact-specific. It stresses in this respect that the severity of the Tribunal's conduct is unprecedented. Peru also contrasts this case with the cases cited by Claimants - including *von Pezold* -, arguing that the tribunals in those cases provided multiple opportunities to cure defects before exclusion, unlike in the present case[128].

127. Peru also argues that, contrary to Claimants' allegations, it has demonstrated that there was a serious departure from a fundamental rule of procedure in the Award[129] and that it was also denied the opportunity to present its case[130].

128. It contends that the Tribunal's exclusion of evidence meets the seriousness threshold under Convention Article 52(1)(d). For Peru, had the excluded expert evidence been admitted, the Tribunal could have reached a different result[131].

129. In sum, Peru states that "[t]he exclusion of [its] expert evidence was not only unjustified and disproportionate, but also fundamentally inconsistent with the basic guarantees of due process and procedural equality. For these reasons, Perú [considers that it] has established that the Tribunal's exclusion of relevant technical evidence warrants partial annulment of the Award"[132].

iii. Peru has shown that the Tribunal blindsided it by relying on arguments from unrelated submissions in other cases without giving it a chance to respond

130. Peru argues that it "showed in its Memorial on Partial Annulment that the Tribunal relied on [its] submissions in unrelated proceedings—that were not part of the record—to define the scope of the MST/FET standard under Article 10.5 of the Treaty and to show alleged inconsistencies in [its] position in the underlying arbitration"[133]. It also disputes a series

[127] Reply, §§ 264-275.
[128] Reply, §§ 276-294.
[129] Reply, §§ 295-314.
[130] Reply, §§ 315-324.
[131] Reply, §§ 326-350.
[132] Reply, § 351.
[133] Reply, § 352.

of contentions made by Claimants, i.e. (i) that the Tribunal's conclusions drawn from Peru's submissions in other arbitrations were merely "incidental", (ii) that they were admissible under the "*iura novit arbiter*" rule, and (iii) that "Peru has not shown that the departure was 'serious' under Article 52 (1)(d) of the ICSID Convention"[134].

131. Peru maintains that it was not afforded an opportunity to comment on these pleadings, and that this omission violated the fundamental rule requiring that parties be treated equally and be afforded a full opportunity to present their case.

132. Peru also states that, although tribunals may refer to legal authorities, parties' pleadings are not legal authorities and that they cannot therefore be relied upon *sua sponte* without hearing from them. It also affirms that *iura novit arbiter* does not authorize a tribunal to use parties' submissions from other proceedings "as admissions" without giving those parties the opportunity to comment thereon. Peru contends that those pleadings "could not constitute sources of international law"[135].

133. It also alleges that the Tribunal exceeded its authority and violated due process by relying on such submissions without notice. Peru claims that this constituted a serious departure because the Tribunal's determinations regarding arbitrariness, discrimination, and legitimate expectations were "significantly shaped" by these supposed admissions. It states that, had it been heard, it could have contextualized the statements made in those submissions and clarified that they could not be considered as admissions, all this leading potentially to a different outcome. Peru concludes that "contrary to Claimants allegations, [it] has met the threshold required under the 'seriousness test' […] recognized by prior committees and warrants partial annulment of the Award"[136].

iv. Peru has demonstrated that the Tribunal engaged in a pattern of procedural conduct against it that, both individually and cumulatively, deprived it of the opportunity to fully present its case and to be treated equally

134. Peru emphasizes that the Tribunal adopted four procedural rulings against it which, both individually and cumulatively, deprived it of the opportunity to fully present its case and to be treated on an equal footing with Claimants. It contends that this amounts to a serious departure from a fundamental rule of procedure[137].

135. According to Peru, "these rulings show a pattern from the Tribunal of disregarding [its] rights. The Tribunal systematically and consistently made decisions that gradually compromised [its] due process rights. The Tribunal thereby placed [it] at a disadvantage

[134] Reply, §§ 353-368.
[135] Reply, §§ 369-375.
[136] Reply, § 393.
[137] Reply, §§ 395-396.

over Claimants, negatively impacting [its] ability to present its case in full and to challenge evidence offered by Claimants"[138].

136. Peru rejects Claimants' argument that each alleged violation must be analyzed in isolation. According to it, the Tribunal's decisions form collectively a pattern that amounts to a disregard of [its] procedural rights. It further asserts that the authorities Claimants rely on (*Azurix, Soufraki, Vivendi II*) do not support their position[139].

137. In relation to each of the four procedural rulings[140]:

    a. Peru maintains that the Tribunal's refusal to order Claimants to disclose the identity of their funder's investors and the funding agreement prevented it from assessing potential conflicts of interest, from evaluating the need to request security for costs, and from making informed strategic decisions. According to it, the Tribunal's finding that Claimants' partial disclosures were sufficient and that no special circumstances justified further production unfairly disadvantaged it;

    b. Peru argues that the Tribunal allowed Claimants to introduce new BRG calculations and data manipulations in their Arbitration Hearing demonstratives as well as previously undisclosed SPA pages during the Arbitration Hearing, even though they had refused to produce them during the written phase. Peru contends that it was not given an opportunity to rebut Claimants' new assertions at that time and that the Tribunal also failed to apply Arbitration PO1's requirements for late evidence, while applying procedural rules strictly against it;

    c. Peru asked the Tribunal to require 24-hour advance disclosure for similar material, but the Tribunal rejected this, leaving it unable to verify or replicate the new analysis before cross-examination. Peru submits that this violated due process and equality of arms; and

    d. Claimants' experts included slides 40–48, but they did not testify on them. Peru sought to have them stricken; the Tribunal refused. Peru argues that the decision of the Tribunal to admit slides not explained during direct examination prevented it from effectively cross-examining Claimants' experts, creating thereby a procedural imbalance.

138. Peru concludes that "even if the Committee determines that none of these decisions, when considered individually, constitutes a serious departure from such a rule […], the

[138] Reply, § 397.
[139] Reply, §§ 400-412.
[140] Reply, §§ 413-466.

Committee should find that the cumulative effect of the Tribunal's procedural rulings amounted to a serious departure from fundamental rules of procedure, warranting partial annulment of the Award"[141].

VI. THE RELIEF REQUESTED BY CLAIMANTS

139. The relief sought by Claimants in the Counter-Memorial is the following:

> (a) REJECT Peru's request for partial annulment in its entirety; and
>
> (b) ORDER that Peru bear all costs and expenses of this proceeding, including the fees of the Centre, the costs and fees of the Committee, and Claimants' legal fees and expenses, plus interest at the rate awarded by the Tribunal in the Award (as rectified) until date of payment.[142]

140. The relief sought by Claimants in the Rejoinder is the following:

> (a) REJECT Peru's request for partial annulment in its entirety; and
>
> (b) ORDER that Peru bear all costs and expenses of this proceeding, including the fees of the Centre, the costs and fees of the Committee, and Claimants' legal fees and expenses, plus interest at the rate awarded by the Tribunal in the Award (as rectified) until date of payment.[143]

VII. SUMMARY OF CLAIMANTS' SUBMISSIONS

141. Claimants submit that "there is no appeal in the ICSID system, and that the grounds for annulment under Article 52 of the ICSID Convention are limited and circumscribed"[144]. They also note that "none of Peru's arguments come close to satisfying its burden of demonstrating an annullable error"[145].

142. In relation to the three grounds upon which Peru bases its Application for Annulment, Claimants state respectively that:

> a. In relation to the first set of annulment arguments, "Peru's main complaint is that, in its view, the Tribunal erred in the sources of law on which it relied to describe the MST under customary international law. Although Peru is incorrect, the inquiry into

[141] Reply, §§ 467-472.
[142] Counter-Memorial, § 369.
[143] Rejoinder, § 329.
[144] Counter-Memorial, § 2.
[145] Counter-Memorial, § 3.

whether the Tribunal was correct in relying on specific sources of law is an appellate-style, mistake-of-law argument"[146];

b. In relation to the second set of annulment arguments, it is allegedly enough to say that it "is reserved for extreme cases where a tribunal's reasoning is simply impossible to follow, not to drive arbitrators to 'reach for juridical perfection in the crafting of their awards'[147][…], [and t]he correctness or persuasiveness of that reasoning is not up for review"[148];

c. In relation to the third set of annulment arguments, Peru's arguments "question the Tribunal's procedural rulings on the admissibility of evidence, which is decidedly within a tribunal's authority and discretion"[149], also because "annulment is not an opportunity to appeal"[150].

143. Claimants also highlight that "[t]he 187-page, 624-paragraph unanimous Award carefully details the Parties' arguments, the evidence, and the Tribunal's conclusions. And the Tribunal came out with a result that was also balanced. The Tribunal wholly dismissed the second of Claimants' two claims, finding in favor of Peru's position on the allocation of transmission costs to generators (the New Methodology Claim) and thus only awarding Claimants 57% of their claimed damages in the arbitration. The Tribunal's findings are consistent, comprehensive, and supported by factual and legal grounds" [151].They contend that "Peru simply disagrees with those findings that were not in [its] favor (notably, it finds no basis to criticize the Tribunal's conclusions on the New Methodology Claim), and [that it] seeks to re-litigate them before another panel"[152].

144. According to Claimants, "a fundamental objective of the ICSID Convention is to assure the finality of ICSID awards [and a]nnulment is thus an 'extraordinary remedy' in the ICSID regime. It is not a mechanism for appeal—which the Convention expressly excludes in Article 53—but rather is designed to safeguard the procedural integrity of arbitral proceedings." They go on: "[c]onsistent with this purpose, annulment is reserved for 'unusual and important cases' in which 'egregious violations of certain basic principles' threaten the very legitimacy of the decision-making process"[153].

145. Claimants contend that the grounds for annulment "should be interpreted as being exhaustive and restrictive"[154]. They further submit that "an annulment committee has no jurisdiction to 'simply substitute its own view of the law and its own appreciation of the

[146] Counter-Memorial, § 4.
[147] Counter-Memorial, § 5. Claimants cite **RLAA-3**, § 127.
[148] Counter-Memorial, § 5.
[149] Counter-Memorial, § 6.
[150] Counter-Memorial, § 6.
[151] Counter-Memorial, § 7.
[152] Counter-Memorial, § 7.
[153] Counter-Memorial, § 38.
[154] Counter-Memorial, § 39. Claimants cite **RLAA-22**, § 118.

facts for those of the Tribunal'[155] [and that] [e]ven when a tribunal has committed evident errors of fact or law […], an annulment committee must 'resist the temptation to rectify incorrect decisions'"[156].

146. Claimants also state that "[t]he combined effect of these principles is that a party seeking annulment of a presumptively final ICSID award carries a very heavy burden. Annulment is an 'extraordinary remedy' available only in very limited circumstances, and it is the applicant's responsibility to prove that the procedure adopted by the tribunal was so egregiously compromised that the award cannot be permitted to stand"[157].

A. FIRST GROUND FOR ANNULMENT

1. Introduction

147. Claimants consider that "Peru first seeks partial annulment of the Award under Article 52(1)(b) of the Convention, which permits annulment where the 'Tribunal has manifestly exceeded its powers.' [They note that] [i]n practice, ad hoc committees have only annulled under this ground where the tribunal has either exceeded its jurisdiction or did not apply the applicable law [and that] Peru's argument is based on the latter"[158].

148. In relation to this first ground for annulment, they submit that "Peru's true complaint is not that the Tribunal failed to apply the applicable law, but that the Tribunal did not apply it as Peru wished it to be applied"[159].

149. Claimants argue in their Rejoinder that "Peru's Annulment Reply confirms what has become increasingly clear. Peru does not pursue annulment on the narrow and exceptional grounds permitted under Article 52 of the ICSID Convention. Instead, Peru seeks to relitigate the Tribunal's legal and procedural determinations through what amounts to a disguised appeal." They stress "[that this] is not the function of the ICSID annulment system"[160].

150. Claimants also allege that "Peru does not dispute that it bears the burden of proving that annulment is warranted. Yet far from meeting that burden, Peru's Annulment Reply largely repeats arguments advanced in its Annulment Memorial without engaging with Claimants' dispositive arguments and observations contained in the Annulment Counter-Memorial"[161].

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[155] Counter-Memorial, § 39. Claimants cite **RLAA-13**, § 158.
[156] Counter-Memorial, § 39. Claimants cite **CLAA-7**, §§ 1.17-1.18; **RLAA-7**, §§ 4.04, 4.05, 4.10.
[157] Counter-Memorial, § 41.
[158] Counter-Memorial, § 44.
[159] Counter-Memorial, § 46.
[160] Rejoinder, § 2.
[161] Rejoinder, § 5.

2. Standard for annulment under Convention Article 52(1)(b)

151. Claimants affirm that "[t]he adjudicative 'powers' of an ICSID tribunal stem from the instrument giving rise to the parties' consent to arbitrate"[162]. Convention Article 52(1)(b) permits annulment of an award when a tribunal has manifestly exceeded its powers. They also mention that "[a]nnulment committees have thus held that a tribunal exceeds its powers when it has 'stepped entirely outside the scope of its authority' as vested in it by the consent of the parties"[163].

152. Regarding the first element of the standard, i.e. the existence of an excess of power, Claimants contend that only a complete failure to apply the correct law amounts to an "excess of power". According to them, "[t]o find an excess of powers for failure to apply the applicable law, a tribunal must have failed to apply the 'proper law *in toto*'"[164]. They add that "[a]nnulment committees have held time and again that the erroneous application of the law is not a manifest excess of powers. Annulment committees distinguish between (a) a failure to apply the proper law and (b) an error in the application of the law"[165].

153. As for the second element of the standard, i.e. the manifest nature of the excess, Claimants argue that an excess of powers must be obvious, self-evident, clear, flagrant and substantially serious to be "manifest", and that it has to be discernible without a need for an elaborate analysis. The term "manifest" relates to the cognitive process to make it apparent[166]. Thus, for them, "an alleged error cannot constitute a 'manifest' excess of power if the underlying issue is subject to more than one reasonable interpretation or is otherwise open to debate"[167].

3. The Tribunal did not manifestly exceed its powers in determining that seriously arbitrary conduct would breach Article 10.5. of the Treaty

154. Claimants state that "Peru hinges its entire argument on the text of Footnote 10-6 [of the Treaty] as if its presence introduced some heightened requirement on what the Tribunal must address in its Award"[168]. However, they allege that "Footnote 10-6 does not impose any requirements or limitations on the sources of law that the Tribunal could rely on to determine the contours of the MST under Article 10.5"[169].

155. Peru argues that the Tribunal erred by citing other arbitral awards to interpret Article 10.5 of the Treaty instead of analyzing CIL's elements. Claimants note in this respect that, in

[162] Counter-Memorial, § 48. Claimants cite **CLAA-67**, Art 52, p. 1268, § 150.
[163] Counter-Memorial, § 48.
[164] Counter-Memorial, § 50. Claimants cite **CLAA-32**, § 35; **CLAA-27**, § 212.
[165] Counter-Memorial, § 52.
[166] Counter-Memorial, §§ 55-56.
[167] Counter-Memorial, § 57.
[168] Counter-Memorial, § 63.
[169] Counter-Memorial, § 64.

the Arbitration, Peru considered Footnote 10-6 irrelevant and that it relied itself on decisions from other investment tribunals to support its position[170].

i. The Tribunal correctly identified and sought to apply the applicable law

156. Claimants posit that the Tribunal correctly identified and sought to apply the applicable law, i.e. Article 10.5 of the Treaty. The objection formulated by Peru, according to which the Tribunal relied on other tribunals' awards to interpret Article 10.5, concerns for them the methodology of its reasoning rather than an alleged failure to apply the law. Claimants allege that *ad hoc* committees have held that, provided that a tribunal correctly identifies and applies the proper law, it cannot be said to have failed in its application[171].

157. They explain how the Award analyzed this issue, arguing that the Tribunal referred to - and sought to apply - the term "customary international law" no less than 23 times. According to Claimants, "the Tribunal's legal findings or manner of reasoning, however erroneous or even egregious (not remotely the case here), is not a basis for annulment". They also allege that "[a]nnulment committees have rejected similar attempts to annul based on a party's dissatisfaction with the sources of law on which a tribunal based its decision"[172].

158. Finally, Claimants contend that "[a]nnulment committees have also rejected arguments on alleged manifest excess of powers based on a tribunal's reliance on decisions of other tribunals"[173] and that "Peru in fact seeks an appellate review of the Tribunal's reasoning"[174], which, in their view, is not admissible.

ii. Although irrelevant for annulment purposes, the Tribunal did not err in relying on the decisions of other investment arbitration tribunals

159. Peru claims that the Tribunal wrongly relied on the decisions of other investment arbitration tribunals to define the MST under Article 10.5 of the Treaty. However, for Claimants, an *ad hoc* committee may not challenge the legal correctness of an award, as this would go beyond the scope of annulment[175].

160. According to them, the 2014 ILC Second Report on the identification of CIL relied on by Peru is at odds with the 2018 ILC Final Report thereon that explains that "[d]ecisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules

[170] Counter-Memorial, §§ 65-66.
[171] Counter-Memorial, § 69.
[172] Counter-Memorial, §§ 71-74.
[173] Counter-Memorial, § 75.
[174] Counter-Memorial, § 76.
[175] Counter-Memorial, § 79.

are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law"[176].

161. Claimants submit that "[p]ractice also supports the conclusion that decisions of international courts and tribunals are proper sources for determining the content of customary international law"[177].

iii. Any excess of power was not manifest

162. Claimants submit that the Committee does not need to consider whether any excess of powers was "manifest" under Article 52(1)(b) of the Convention. This issue would arise only if the Committee were to find that the Tribunal failed to apply CIL in its entirety. They add that, if it does consider this issue, the Committee can conclude that any excess was not manifest, and thus, that no annullable error exists[178].

163. Quoting from the *Duke Energy* decision, Claimants state that "the Tribunal's reliance on other investment arbitration awards in interpreting the scope of the MST is 'not so untenable that it cannot be supported by reasonable arguments'"[179]. They further claim that "[i]n such a scenario, it is well established that any such excess of powers cannot be manifest"[180], as "the Tribunal's approach was reasonable and defensible, and therefore cannot be the foundation for annulment under Article 52(1)(b) of the ICSID Convention"[181].

164. Therefore, Claimants contend that "Peru's first Article 52(1)(b) annulment argument fails at every turn"[182].

4. The Tribunal did not manifestly exceed its powers in analyzing Resolution No. 141

165. Claimants consider that the "second Article 52(1)(b) annulment argument is closely linked to the first, as it is founded on the same criticism over the Tribunal's method of reasoning"[183]. For them, "Peru's arguments are not that the Tribunal failed to apply the applicable law '*in toto*', and so its arguments must be dismissed". They claim that "Peru simply believes the Tribunal was wrong to rely on the *Cargill* and *EDF* awards as part of its reasoning". In their view, "[s]uch a complaint, on its face, relates to the correctness of the Tribunal's analysis"[184].

[176] Counter-Memorial, § 80. Claimants cite **RL-39**, § 21.
[177] Counter-Memorial, § 83.
[178] Counter-Memorial, § 87.
[179] Counter-Memorial, § 89. Claimants cite **CLAA-27**, § 99.
[180] Counter-Memorial, § 89.
[181] Counter-Memorial, § 90.
[182] Counter-Memorial, § 94.
[183] Counter-Memorial, § 95.
[184] Counter-Memorial, § 97.

i. The Tribunal did not exceed its powers in analyzing Resolution 141

166. Claimants argue that "where a tribunal properly identifies the applicable law and endeavors to apply it, there can be no argument that the tribunal 'failed to apply the applicable law' under Article 52(1)(b) of the ICSID Convention"[185]. They contend that the Tribunal (i) correctly identified the applicable provision of the Treaty, (ii) correctly identified the relevance of customary international law to its inquiry, and (iii) sought to apply CIL[186].

167. According to Claimants, reliance on specific cases in attempting to apply the applicable law (which the Tribunal was indisputably doing in this case) is plainly not a failure to apply the proper law "*in toto*". Thus, for them, Peru's complaint goes to the correctness of the Tribunal's choice of legal authorities, which falls well outside the scope of review by an a*d hoc* committee[187].

ii. Any excess of powers is not manifest

168. Even if the Committee concludes that an excess of powers materialized in the Award, Claimants contend that it was not manifest and that Peru "makes little effort to build a case as to how any excess of powers by the Tribunal was 'manifest'"[188].

169. According to them, "many tribunals—including tribunals constituted under treaties that also apply a customary international law standard of treatment—have adopted the *EDF* description of 'arbitrary'. Accordingly, the Tribunal's own reliance on *EDF* for evaluating the arbitrariness of Peru's conduct cannot be considered 'manifest' for purposes of Article 52(1)(b)"[189].

5. The Tribunal did not manifestly exceed its powers in its application of the law on legitimate expectations

170. Claimants argue that, in relation to Peru's third Article 52(1)(b) annulment argument, "[a]ll of the observations above [in relation to the previous grounds] on the Tribunal's reasoning that arbitrary conduct would fall afoul of the MST under Article 10.5 of the Treaty apply with equal force here"[190].

171. They state that the Tribunal concluded in relation to the SFR Claim that "Peru breached Article 10.5 of the Treaty because its measures were impermissibly arbitrary. Because this finding was sufficient to uphold the SFR Claim, the Tribunal 'dispense[d] with analyzing whether Resolution No. 141 also frustrated Claimants' legitimate

[185] Counter-Memorial, § 99.
[186] Counter-Memorial, § 101.
[187] Counter-Memorial, §§ 102-103.
[188] Counter-Memorial, §§ 105-106.
[189] Counter-Memorial, § 107.
[190] Counter-Memorial, § 110.

expectations'[191]. Thus, even if the Committee were to sever the 'relevant portion of the Award' that Peru seeks to annul here, it would not change the Tribunal's conclusions on liability and damages"[192], which makes this ground of annulment irrelevant.

172. Claimants also rebut Peru's reasoning on the Award's conclusion that the ICJ case *Bolivia v. Chile* was not pertinent. In their view, the "Tribunal's assessment that Bolivia v Chile was 'not pertinent' is not a failure to apply law, [this is] just a failure to side with Peru's interpretation of it"[193].

6. Rejoinder

173. Claimants submit that "Peru concedes that '[t]he Tribunal acknowledged in the Award that it was bound to apply customary international law'" [194] and that Peru does not dispute that it sought to do so.

i. Standard for annulment under Convention Article 52(1)(b)

174. Claimants state that only a complete failure to apply the law - not an incorrect application - constitutes an excess of powers. To be "manifest", it must be obvious without a detailed analysis and it must have a significant effect on the Award. They affirm that Peru allegedly agrees with the standard, but that it offers mistaken arguments[195].

175. According to Claimants, (a) ICSID annulment committees have consistently held that only a tribunal's failure to apply the correct law *in toto* constitutes a manifest excess of powers and that the erroneous application of the law does not grant annulment; (b) Peru's argument according to which a simple attempt to apply the law is not enough amounts to requiring from the Committee to review the Tribunal's reasoning, which *ad hoc* committees have consistently refused; (c) no *ad hoc* committee has ever endorsed Peru's proposed view that the seriousness of an error is satisfied by a possible, hypothetical impact on the applicant party in future unrelated disputes[196].

ii. The Tribunal did not manifestly exceed its powers in determining that seriously arbitrary conduct would breach Article 10.5 of the Treaty

176. Claimants posit that the Tribunal identified and sought to apply the applicable law, which is enough to dismiss Peru's claim that it relied on incorrect sources to discern this law's content and limits. Peru's request, in their view, merely challenges the Tribunal's reasoning and conclusions and it does not amount to arguing that the Tribunal failed *in toto* to apply the law. For Claimants, Peru's claim falls therefore outside the limited scope

[191] Counter-Memorial, § 113. Claimants cite Award, § 455.
[192] Counter-Memorial, § 113.
[193] Counter-Memorial, § 116.
[194] Rejoinder, § 9.
[195] Rejoinder, §§ 12-13.
[196] Rejoinder, §§ 14-20.

of annulment, the same occurring as regards all the error-of-law arguments it puts forward[197].

177. According to Claimants, there is no need to consider Peru's claim that the Tribunal erred in relying on other investment decisions instead of independently assessing State practice and *opinio juris*. For them, it was the Tribunal's role - not that of Peru or of the Committee - to determine the weight of legal sources[198]. Claimants add that, although irrelevant for annulment purposes, the Tribunal did not actually err in relying on those decisions. They argue that tribunals can rely on other decisions when determining CIL and that numerous authorities confirm the significant role played by international case-law in shaping and developing international law. Claimants further argue that neither the Treaty nor the ICSID rules require from the Tribunal to conduct a detailed review of State practice and *opinio juris*[199].

178. Finally, Claimants maintain that, even if the Committee were to conclude that the Tribunal exceeded its powers, such an excess would not be manifest. For them, an alleged error does not constitute a "manifest" excess of powers if the issue is subject to more than one reasonable interpretation or if it is open to debate. They stress in this respect that many tribunals have used similar methods to define the MST, and also that Peru itself relied on prior arbitral decisions in its Article 10.5 arguments, mirroring the Tribunal's approach[200].

179. Therefore, for Claimants, Peru's first Article 52(1)(b) annulment argument fails at every level: it misrepresents the Tribunal's reasoning; it imposes unsupported methodological requirements; it ignores relevant authorities; and it contradicts Peru's own prior submissions[201].

iii. The Tribunal did not manifestly exceed its powers in analyzing Resolution No. 141

180. Claimants consider that Peru's Reply fails to engage with the points they made in their Counter-Memorial. They argue that Peru simply reiterates that the Tribunal erred in relying on *Cargill* (because that award did not address State practice and *opinio juris*) and *EDF* (because that award did not apply CIL).

181. Claimants contend that the Tribunal did not exceed its powers because it endeavored to apply CIL. They also posit that Peru ignores in its Annulment Reply the Tribunal's step-by-step analysis of CIL.

[197] Rejoinder, §§ 25-36.
[198] Rejoinder, §§ 37-40.
[199] Rejoinder, §§ 41-44.
[200] Rejoinder, § 46.
[201] Rejoinder, §§ 47-50.

182. According to them, Peru fixates on the Tribunal's reliance on *Cargill* and *EDF*, advancing two broad and misguided arguments. Claimants consider that a Tribunal's reliance on specific cases as part of its effort to apply the applicable law - particularly when the tribunal clearly identifies and engages with that law - cannot reasonably be characterized as a failure to apply that law *in toto*[202].

183. Ultimately, Claimants restate that, should the Committee conclude that the Tribunal exceeded its powers, such an excess would not be manifest. They contend that the Tribunal's reliance on arbitral precedent to conclude that CIL prohibits arbitrary and discriminatory treatment was tenable and aligned with Peru's own position[203].

iv. The Tribunal did not manifestly exceed its powers in its application of the law on legitimate expectations

184. In Claimants' view, Peru adds little to its argument in its Reply. Claimants reaffirm that the Tribunal did not exceed its powers in finding that the protection of investors' legitimate expectations falls within the MST under Article 10.5 and that, even if it did, any such excess would not be manifest[204].

185. Claimants reiterate that the Tribunal did not exceed its powers because it endeavored to apply CIL. They state that Peru has neither alleged nor shown a complete failure to apply the applicable law, as required by Article 52(1)(b). They also allege that it concedes that the Tribunal identified and applied it.

186. Claimants contend that the view expressed by the Tribunal, according to which the "customary international law principles that protect the economic rights and interests of aliens" - as referred to in Footnote 10-6 of the Treaty - includes the protection of legitimate expectations, is supported by scholars and investment awards, including those cited by Peru[205]. For Claimants, Peru's objections to the Tribunal's cited cases are then not only irrelevant but also inconsistent, given that Peru relied on the same authorities in the underlying arbitration. They also explain that a mere disagreement with a tribunal's reasoning does not constitute a ground for annulment, and that the Tribunal's approach is consistent with the case-law. Furthermore, they stress that the Tribunal did not ignore the ICJ *Bolivia v. Chile* decision[206].

187. Claimants consider that Peru fails to evidence the existence of any excess of powers, making it unnecessary to assess whether it was "manifest". Nevertheless, they contend that, would the Committee conclude that the Tribunal exceeded its powers, this excess

[202] Rejoinder, §§ 58-61.
[203] Rejoinder, §§ 62-68.
[204] Rejoinder, § 71.
[205] Rejoinder, § 74.
[206] Rejoinder, §§ 75-76.

would not be manifest, as *ad hoc* committees require a "serious" impact to reach the conclusion that an excess is "manifest"[207].

188. According to Claimants, the Tribunal's views on legitimate expectations had no impact on either liability or damages. They argue that even Peru acknowledges that the Tribunal's finding did not affect the Award, Peru relying instead on speculative assertions as to possible future consequences. Claimants stress in this respect that the issue at stake is not whether the finding may produce hypothetical future effects for the applicant, but whether the alleged error had a material impact on the Award and could have altered its outcome[208].

189. For Claimants, Peru admits that annulment is discretionary, even where a ground is proven, all depending on whether the error materially affected the outcome of the award. They consider that no such material effect is proven here. Accordingly, there is in their view no basis for annulment[209].

B. SECOND GROUND FOR ANNULMENT

1. Standard for annulment under Convention Article 52(1)(e)

190. Claimants argue that Peru's request for annulment related to the failure of the Tribunal to state reasons "repackages many of the same arguments it made under Article 52(1)(b) and, similarly, fails to meet the standard for annulment under Article 52". They argue that "[s]imply put, Peru's argument is not that the Tribunal failed to state reasons, but that it failed to state reasons which Peru agreed with"[210].

191. They consider that it is "well established that Article 52(1)(e) does not authorize annulment committees to review the quality or persuasiveness of a tribunal's reasoning". They add that "[a]nnulment committees have consistently confirmed that there is no basis for annulment so long as it is possible to follow a tribunal's reasoning through to its conclusion, even if the award contains an error of law or fact"[211].

192. Claimants allege also that "annulment committees must consider whether the tribunal's reasons may be implicit". In their view, "[n]either Article 48(3) nor Article 52(1)(e) specifies the manner in which a tribunal must state its reasons—it is up to the arbitrators' discretion to be as succinct (or as verbose) as they wish"[212], "[n]or does Article 52(1)(e) allow the committee to scrutinize the tribunal's interpretive process, including whether and how it cites the evidence or legal authorities on which it relies"[213].

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[207] Rejoinder, § 78.
[208] Rejoinder, §§ 79-82.
[209] Rejoinder, § 83.
[210] Counter-Memorial, § 120.
[211] Counter-Memorial, § 123.
[212] Counter-Memorial, § 125.
[213] Counter-Memorial, § 126.

2. The Tribunal did not fail to state reasons to support its conclusions regarding arbitrary conduct

193. Claimants argue that, despite Peru's claim that the "Tribunal did not explain the steps between [the] starting point and conclusion"[214], there are in fact "[b]etween the 'starting point' and the 'conclusion' […] 22 paragraphs that provide more than a sufficient basis to understand the Tribunal's reasoning"[215].

194. With respect to the first part of Peru's argument - i.e., that the Tribunal failed to explain how the prohibition of serious arbitrary and discriminatory conduct had crystallized into CIL -, Claimants state that "[w]hat Peru is arguing is not an absence of reasons, but an absence of Peru's preferred kind of reasons"[216]. They consider that "[t]here is no rule in the Treaty, the ICSID Convention, or otherwise that prevents a tribunal from referring to the decisions of other tribunals and scholarly writings to determine the contours of principles of customary international law. Nor is there any rule that required the Tribunal to supply specific instances of State practice and *opinio juris* in providing its interpretation of MST under Article 10.5 of the Treaty"[217].

195. Claimants also react to Peru's claim directed to "the Tribunal's citations to several investment awards"[218], namely that the Tribunal "did not explain how any of these awards addressed or showed that 'serious' arbitrary and discriminatory conduct had crystallized into customary international law"[219]. For them, this constitutes neither "a ground of annulment under Article 52(1)(b), […] nor is it [one] under Article 52(1)(e)"[220], as "[r]eferences supporting a proposition in an award, or even the lack thereof, are not a ground for annulment"[221].

196. Regarding the second part of Peru's argument, Claimants contend that "the Committee should dismiss Peru's argument that the Tribunal did not explain why it equated the threshold of 'egregious' conduct with 'serious' conduct". For them, "Peru mischaracterizes the Award: the Tribunal did not 'equate' the two standards, but explained that, while not as stringent as the *Neer* standard, the standard should be 'sufficiently serious' given the high thresholds applied by other tribunals. That reasoning is set forth in paragraphs 285 to 303 of the Award"[222].

[214] Memorial, § 138.
[215] Counter-Memorial, § 132.
[216] Counter-Memorial, § 136.
[217] Counter-Memorial, § 136.
[218] Counter-Memorial, §139.
[219] Memorial, § 139.
[220] Counter-Memorial, § 139.
[221] Counter-Memorial, § 139.
[222] Counter-Memorial, § 140.

197. As to the third part of Peru's argument that relates to "the Tribunal's finding of fact regarding the guarantee of continuous dispatch"[223], Claimants argue that "the Tribunal more than justified its conclusion that the Bid Terms guaranteed the permanent dispatch of the Firm Base Provider"[224].

3. The Tribunal did not fail to state reasons to support its conclusions regarding legitimate expectations

198. Claimants contend that the two aspects of the second claim under this second ground of annulment – namely, that the "Tribunal did not demonstrate the State practice and opinio juris justifying its conclusion [… and that] the Tribunal failed to explain how the obligation arises from the customary international law principle of good faith" – lack merit and are no more that "iterations of the previous arguments"[225].

199. They explain that "[m]any of Claimants' responses to Peru's Article 52(1)(e) annulment argument on the Tribunal's conclusion on seriously arbitrary conduct applies equally here"[226]. In their view, Peru's argument does not evidence that "reasons are missing or unintelligible", but reflects a disagreement with the conclusions, which is not allowed under annulment review[227].

200. Moreover, Claimants affirm that the Tribunal's liability and damages findings did not rely on any conclusion that Article 10.5 protects legitimate expectations. It concluded that Peru breached the Treaty because its conduct was seriously arbitrary; therefore, it did not need to assess whether legitimate expectations had been met. Consequently, that conclusion was irrelevant to the case's outcome. Claimants argue that a failure to state reasons must concern an issue affecting the result and they stress that the paragraphs from the Award (304 to 311) challenged by Peru were not essential to the Tribunal's decision[228].

4. Rejoinder

201. Claimants state that "Peru's Annulment Reply once again repackages the same arguments Peru advances under Article 52(1)(b) and, similarly, fails to meet the standard for annulment under Article 52". They contend that "Peru's real objection is not that the Tribunal failed to state reasons, but rather that it failed to state reasons with which Peru agrees. Peru itself undermines its Article 52(1)(e) claim by conceding—elsewhere in its

[223] Counter-Memorial, §§ 141-142.
[224] Counter-Memorial, §§ 141-142.
[225] Counter-Memorial, § 144.
[226] Counter-Memorial, § 145. This is allegedly the case of: (a) Article 52(1)(e) does not allow challenges to the quality or persuasiveness of the Tribunal's reasoning, it only requires that the reasoning be followable from Point A to Point B; (b) the Tribunal has broad discretion in how it structures its reasoning and it does not need to justify its choice of legal authorities; and (c) even if an error of law existed (and it allegedly does not), it would not constitute a violation of Article 52(1)(e).
[227] Counter-Memorial, § 146.
[228] Counter-Memorial, § 147.

Annulment Reply—that the Tribunal did, in fact, provide 'reasons' for both conclusions"[229].

i. Standard for annulment under Article 52(1)(e)

202. Claimants allege that they demonstrate in their Counter-Memorial that "(i) Article 52(1)(e) does not permit a review of the correctness, quality, or persuasiveness of the reasons offered by the tribunal; (ii) reasons may be implicit, and tribunals enjoy broad discretion in how detailed their reasoning is, so long as a reasonable, attentive reader can follow the path to the conclusion; and (iii) an award need not explain each piece of evidence or legal authority put before the tribunal"[230].

203. According to Claimants, Peru agrees with these principles in its Reply, but "it fails to identify any absent reasons, or even any internal contradictions that could render the Tribunal's reasoning unintelligible"[231].

ii. The Tribunal did not fail to state reasons to support its conclusions regarding arbitrary conduct

204. In Claimants' view, "Peru's Annulment Reply recycles the same discredited arguments, offering no substantive rebuttals" to the Counter-Memorial that allegedly "showed that the Tribunal's reasoning on both issues was logical, complete, and—most importantly for purposes of evaluating whether there was a failure to state reasons—understandable"[232].

205. Regarding the first and second part of Peru's argument - namely, that the Tribunal did not explain how it concluded that the MST prohibits serious arbitrary and discriminatory conduct -, Claimants argue that "Peru does not actually claim that the Tribunal failed to provide reasons for this conclusion". For them, "Peru's objection, instead, concerns the absence of what it considers to be the correct reasons". They stress in this respect that "[t]here is no rule in the Treaty, the ICSID Convention, or otherwise that prevents a tribunal from referring to the decisions of other tribunals and scholarly writings to determine the contours of principles of customary international law. On the contrary, this is a well-established and widely accepted practice among international courts and tribunals"[233].

206. Regarding the third part of Peru's argument - namely, that the Tribunal failed to state reasons for its factual conclusion that Kallpa GSA could have expected permanent dispatch -, Claimants consider that Peru was unable to respond to the arguments presented in the Counter-Memorial. They argue that, instead, "Peru tellingly shifts its position in its Annulment Reply, abandoning paragraph 450 [of the Award] and now

[229] Rejoinder, §§ 88-89.
[230] Rejoinder, § 94.
[231] Rejoinder, § 96.
[232] Rejoinder, § 100.
[233] Rejoinder, §§ 103-104.

focusing on a different alleged 'omission' […] [of] paragraph 139 of the Award, which appears in the Tribunal's summary of facts relevant to the SFR Claim […] and Peru now argues that because the Tribunal made no specific factual finding about what occurred at the 30 March 2016 meeting, the Award 'does not contain any reasoning' supporting the Tribunal's conclusion that Kallpa GSA expected permanent dispatch. This argument is [for Claimants] baseless"[234].

207. However, Claimants affirm that "[t]he key question before the Tribunal […] was 'whether Kallpa GSA's units were guaranteed permanent dispatch under the Bid Terms'. The Tribunal concluded that they were" and "the Tribunal provided extensive reasoning for this conclusion across 23 pages of the Award"[235].

208. They allege that "Peru does not dispute any part of what it calls Claimants' 'lengthy summary' of the Tribunal's reasoning […]. Instead, Peru advances two unpersuasive arguments. First, Peru again challenges the correctness of the Tribunal's reasoning, [and] second [it] contends that the Tribunal's comprehensive 23-page reasoning lacked further, additional reasons"[236].

209. Claimants state that "it is well-established that a tribunal is not required to explain 'its consideration and treatment of each piece of evidence adduced by either party,' as doing so would impose 'an excessive burden for any court or tribunal'"[237].

iii. The Tribunal did not fail to state reasons to support its conclusions regarding legitimate expectations

210. Claimants submit that they demonstrated in their Counter-Memorial that Peru's arguments on this issue lack merit. They affirm that in its "Annulment Reply, Peru abandons any attempt to substantiate its position. It asserts—in a single sentence, without citation, analysis, or argument—that 'it [is] impossible to follow the Tribunal's reasons from Point A to Point B.' Yet Peru refuses to engage with the Tribunal's actual reasoning, which is clearly articulated across paragraphs 280 through 310 of the Award. […] Claimants' response therefore stands unrebutted"[238].

211. Claimants contend that Peru raised a new argument in the Reply, which is also presented in the context of its manifest excess of powers claim: "Tribunal's legal conclusion should still be annulled due to speculative, hypothetical future consequences"[239]. Reacting to this argument, they claim that "the relevant inquiry is not, as Peru suggests, whether the

[234] Rejoinder, § 110.
[235] Rejoinder, § 111.
[236] Rejoinder, §§ 112-114.
[237] Rejoinder, § 114.
[238] Rejoinder, § 118.
[239] Rejoinder, § 119.

alleged error could hypothetically affect 'Peru in some future context'. The proper question is whether the error had a material impact on the Award"[240].

212. Claimants conclude that "even where a ground for annulment is established, ad hoc committees retain discretion to annul", one factor considered by those committees being whether an error had a material effect on the outcome of the case. Claimants argue that "it plainly did not"[241].

C. THIRD GROUND OF ANNULMENT

1. Standard for annulment under Article 52(1)(d)

213. Article 52(1)(d) of the Convention permits the Committee to evaluate whether the Tribunal committed "a serious departure from a fundamental rule of procedure" during the arbitration.

214. Claimants state that "[t]his ground seeks to 'ensure that a set of minimal standards of procedure are observed in the arbitral proceedings'"[242]. They claim that, "[a]s discussed throughout this Section of the Counter-Memorial, for each of its three arguments, Peru has failed to establish that the Tribunal departed from any rule of procedure in how it administered the proceedings, let alone one that is fundamental as required under Article 52(1)(d)". Claimants add that "if there were any departures from a fundamental rules (sic) of procedure (which is denied), Peru fails to show that any such departures were sufficiently "serious" to give rise to an annullable error"[243].

215. Article 52(1)(d) requires proof that the tribunal departed from a fundamental procedural rule and that the departure was serious. Claimants note that this ground serves to ensure the observance of minimal procedural guarantees and that it places the burden of proof entirely on the applicant[244]. Claimants consider that "for the Award to be annulled under Article 52(1)(d), Peru must: (i) identify a departure from a fundamental rule of procedure; and (ii) show that the departure was so 'serious' that it not only deprived Peru of the benefit of that rule, but also materially affected (or at least had the potential to materially affect) the outcome of the Arbitration". They consider that "Peru satisfies neither of these requirements in all three of its Article 52(1)(d) arguments"[245].

i. The rule of procedure in question must be "fundamental"

216. Claimants consider that only rules directly linked to essential elements of due process - such as equality of treatment, the right to be heard, the right to respond, and the right to an impartial tribunal - qualify as "fundamental". In their view, procedural norms that do

[240] Rejoinder, § 121.
[241] Rejoinder, § 122.
[242] Counter Memorial, § 153. Claimants cite **CLAA-50**, § 128.
[243] Counter-Memorial, § 151.
[244] Counter-Memorial, § 153.
[245] Counter-Memorial, § 161.

not concern the fairness or integrity of the arbitral process fall outside the scope of Article 52(1)(d)[246].

217. They add that even fundamental protections are not absolute: the right to be heard does not create an unrestricted entitlement to submit evidence at any moment, and tribunals retain broad discretion over evidentiary matters as long as parties receive a fair opportunity to present their case[247].

ii. The departure must be "serious"

218. Claimants argue that a departure is "serious" only if it caused the tribunal to reach a substantially different result or had the potential to materially affect the outcome. In their view, annulment is not available for minor or technical imperfections[248] and the departure must also be substantial and deprive a party of the protection the rule is intended to afford[249].

219. For them, assertions that an outcome might have been different are insufficient unless they are supported by a concrete showing of material prejudice[250].

2. The Tribunal did not seriously depart from a fundamental rule of procedure by excluding belatedly submitted expert evidence

220. According to Claimants, Peru's argument that the Tribunal "violated the principle of equality of arms and deprived Peru of its right to fully defend itself" when it excluded expert evidence in Arbitration PO3 and PO4 suffers from numerous flaws:

a. "[W]hile the principle of equality between the parties and the right to be heard are fundamental rules of procedure, neither entitles an arbitrating party to submit any evidence in support of its case at any time. The submission of evidence—documentary, fact or expert testimony—is not a free-for-all in ICSID arbitrations"[251];

b. "Peru's argument, as presented, does not support a finding that the Tribunal departed from any fundamental rule of procedure. Rather, Peru's argument primarily explains why it disagrees with the Tribunal that its expert evidence was impermissibly belated and therefore inadmissible. But the Tribunal's finding on the belatedness of the evidence cannot be reviewed by the

[246] Counter-Memorial, § 154.
[247] Counter-Memorial, § 155.
[248] Counter-Memorial, §§ 156-157.
[249] Counter-Memorial, § 159.
[250] Counter-Memorial, § 160.
[251] Counter-Memorial, § 165.

annulment committee, as that would amount to an appeal on a 'correctness' standard which is forbidden in an ICSID annulment"[252];

c. "[T]he procedural history shows that Peru had a full and fair opportunity to rebut Claimants' case on the Expert Subjects at Issue. Peru, however, failed to present expert evidence advancing the entirety of its primary case with its Counter-Memorial, as expressly required under PO1. The Tribunal then accorded Peru, twice, the opportunity to be heard on why the evidence should still be admitted. It then decided reasonably that its inclusion would upend the established procedural calendar and deprive Claimants of an adequate opportunity to address it in writing"[253];

d. "[E]ven if there were a departure from a fundamental rule of procedure (which is denied), Peru cannot establish that it was 'serious' for purposes of Article 52(1)(d) of the ICSID Convention"[254].

i. The procedural background on the Expert Subjects at Issue and the excluded evidence shows that Peru was treated fairly and reasonably

221. Claimants state that Peru had ample opportunity to address both matters earlier[255]. Claimants' Arbitration Memorial, filed in June 2020, presented their interpretation of the Technical Procedure No. 22 of March 29, 2014 ("**PR-22**") and the bases for continuous dispatch, supported by expert valuation work incorporating dispatch simulations prepared with publicly available data from the *Comité de Operación Económica del Sistema Interconectado Nacional*[256].

222. They stress that Peru requested SIDEC's underlying data only in July 2021. They provided it, but Peru then used its Arbitration Rejoinder in September 2021 to introduce an entirely new simulation exercise and a new expert on regulatory matters. Claimants sought exclusion of this evidence as untimely under Section 17.1 of Arbitration PO1, which restricted new expert material to issues arising from the immediately preceding submission[257].

223. Claimants state that both Parties fully briefed the admissibility dispute across multiple rounds of correspondence. In Arbitration PO3, the Tribunal found that Peru unjustifiably delayed requesting the data needed to produce a simulation responsive to Claimants' Memorial, and that submitting the PSR Report with the Arbitration Rejoinder deprived Claimants of their right to respond within the prescribed written sequence. The Tribunal

[252] Counter-Memorial, § 166.
[253] Counter-Memorial, § 167.
[254] Counter-Memorial, § 168.
[255] Counter-Memorial, §§ 173-210.
[256] Counter-Memorial, §§ 173-180.
[257] Counter-Memorial, §§ 182-190.

also concluded that large portions of the Tabors Report related to matters that should have been addressed earlier; it therefore excluded them, while admitting those sections that genuinely replied to new arguments[258].

224. Peru then sought reconsideration of this decision. Arbitration PO4 reaffirmed the exclusion of the PSR Report and rejected Peru's proposed alternative as being unworkable and prejudicial to Claimants. Only one paragraph of the Tabors Report was reinstated when Peru provided adequate justification for the first time. The Tribunal dismissed Peru's request to remove Claimants' Reply evidence based on Peru's waiver under Arbitration Rule 27. It also allowed Peru to cross-examine SIDEC's authors at the Arbitration Hearing, ensuring, according to Claimants, further procedural fairness[259].

ii. The Tribunal did not violate any fundamental rule of procedure

225. Claimants argue that Peru's Application for Annulment fails because it does not identify any violation of a fundamental rule of procedure[260]. For them, the Tribunal acted in accordance with the applicable procedural framework when it excluded Peru's belatedly submitted expert evidence, specifically Section 17.1 of Arbitration PO1 and Arbitration Rule 34(1).

226. Claimants state that ICSID practice shows that tribunals have broad discretion over the admissibility of evidence, and that there is no unlimited right for parties to submit evidence at any time. They stress that Peru had accepted Section 17.1 without objection, and that this provision clearly restricted the ability to introduce new evidence at the Arbitration Rejoinder stage unless strictly responding to the preceding submission. For Claimants, the Tribunal was then not departing from a rule of procedure but rather applying one when it excluded evidence infringing this rule.

227. They contend that numerous ICSID decisions confirm that excluding late evidence does not constitute grounds for annulment, and also that no annulment committee has ever annulled an award on this basis. Claimants affirm that admitting such untimely evidence could in fact have violated their due process rights by preventing them from responding appropriately.

228. They state that the Tribunal's procedural conduct was also fair and afforded Peru full due process. Peru had two rounds of submissions and filed extensive arguments on the matter, while the Tribunal issued a comprehensive, reasoned 19-page decision in Arbitration PO3 and then engaged seriously with Peru's motion for reconsideration in Arbitration PO4.

229. For them, Peru's disagreement with the Tribunal's assessment of belatedness concerns the correctness of the Tribunal's evidentiary evaluation, which is outside the limited

[258] Counter-Memorial, §§ 191-199.
[259] Counter-Memorial, §§ 200-210.
[260] Counter-Memorial, §§ 211-245.

scope of annulment review. Annulment committees consistently hold that they cannot second-guess tribunal's discretionary decisions on evidence.

230. Claimants state that the right to be heard concerns the opportunity to present one's position, not the right to have late evidence admitted. They consider that the Tribunal respected that right.

231. Claimants consider that Peru's additional procedural complaints lack merit. The Tribunal was not required to adopt a "less severe" measure, and equal treatment also does not require in their view a *quid pro quo*[261].

232. For these reasons, Claimants affirm that Peru cannot credibly claim that it was deprived of a fair opportunity to be heard.

233. Finally, they claim that the record shows that Peru was given a full and an adequate opportunity to present its expert case, and that any gap was the result of Peru's own strategic decisions. On the topics of the continuous dispatch according to PR-22 and on the dispatch simulation model presented by Claimants, they add that Peru had ample opportunities to respond to Claimants' case.

iii. Any departure from a fundamental rule of procedure was not "serious"

234. Claimants also consider[262] that, even if a procedural departure had occurred, Peru must show that it was "serious", meaning outcome-determinative. They claim that no ICSID award has ever been annulled on the ground that a tribunal excluded evidence, the reason being, in Claimants' view, that tribunals alone judge the admissibility of evidence under ICSID Arbitration Rule 34(1). Annulment committees cannot reassess such decisions.

235. Regarding the Tabors Report, Peru's argument that it could have changed the Tribunal's interpretation of PR-22 is, for Claimants, untenable. The Tribunal already considered extensive expert testimony from four of Peru's experts on the same regulatory and technical issues and rejected their views. They claim that Dr. Tabors' excluded opinions were largely duplicative, and that he was not an expert on Peruvian regulations.

236. Claimants state that Peru's Arbitration Rejoinder relied minimally on the Tabors Report, this being additional evidence of its limited importance. They stress that assessing whether the excluded material might have changed the Tribunal's reasoning would require from the Committee to weigh evidence, which is outside its mandate.

237. As for the PSR Report, Claimants argue that Peru fails to show that it would have materially affected the damages decision. Peru had extensive opportunities to challenge Claimants' SIDEC model. The Tribunal ultimately rejected Compass Lexecon's

[261] Counter Memorial, § 231.
[262] Counter-Memorial, §§ 246-272.

criticisms and found BRG's approach more credible. Thus, there is in Claimants' view no basis to believe that the PSR Report would have changed the outcome.

238. They insist that allowing annulment based on evidentiary rulings would encourage parties to submit late evidence strategically and that this would undermine tribunals' ability to manage proceedings. They also stress that decisions on the admissibility of evidence fall squarely within the tribunal's discretion, and that reviewing them on annulment would improperly expand the remedy beyond its narrow function. Therefore, according to Claimants, there is no annullable ground[263].

3. The Tribunal did not seriously depart from a fundamental rule of procedure in referencing publicly available submissions by Peru in other cases

239. According to Claimants, "Peru's second Article 52(1)(d) argument is that the Tribunal breached [its] right to be heard by *sua sponte* making references in the Award to [its] publicly available submissions in other arbitrations that had not been briefed during the proceedings"[264].

240. They contend that Peru "heavily" "exaggerates the significance" of allegedly being deprived of the "opportunity to comment on those submissions", as the Award shows that the reference to those submissions was expressly considered "incidental" and not a central part of the Tribunal's reasoning[265].

241. Claimants also consider that paragraph 298 of the Award must be "read in the context of the rest of the Tribunal's reasoning"[266] and that it is *dicta.*

242. For them, "[n]othing in the Award suggests this 'incidental' […]observation held such sway, let alone a determinative one, on the Tribunal's legal conclusions. Peru cannot seriously claim that the Award should be annulled based on *dicta* in one paragraph of the Award"[267].

i. The Tribunal did not depart from a fundamental rule of procedure

243. Claimants emphasize that tribunals are not restricted to authorities cited by the parties. They may develop their own legal reasoning within the legal framework presented by the parties and they may refer to publicly available authorities beyond those supplied by the parties. Claimants add that the principle *iura novit arbiter* obliges tribunals to apply the law based on their professional knowledge. They contend in this respect that annulment committees have held that tribunals may *sua sponte* raise legal arguments within that

[263] Counter-Memorial, § 272.
[264] Counter-Memorial, § 273.
[265] Counter-Memorial, §§ 275-277.
[266] Counter-Memorial, § 279.
[267] Counter-Memorial, § 279.

framework and that committees have repeatedly rejected objections similar to the ones submitted by Peru[268].

ii. Any departure from a fundamental rule of procedure was not "serious"

244. Claimants consider that, "[e]ven if there were a departure from a rule of procedure (which is denied), Peru cannot demonstrate that any such departure was 'serious' for purposes of Article 52(1)(d) of the ICSID Convention"[269].

245. Regarding the "seriousness" requirement, Claimants state that Peru cannot show that the Tribunal's comment caused a "substantially different"[270] outcome, as the Tribunal expressly stated that the observation was an aside and was not determinative. If the alleged contentious paragraph was removed, nothing would be changed in the Tribunal's conclusions. According to Claimants, Peru's argument must then be rejected.

4. The Tribunal did not seriously depart from a fundamental rule of procedure in its various procedural rulings

246. Claimants address certain "cumulative procedural decisions" such as the requests (a) "for further disclosures on Claimants' arbitration financing"; (b) "at the Hearing to supplement an excerpted document already on the record with additional pages to refute a misstatement in Peru's opening argument"; (c) "for a new rule that demonstrative exhibits for the Hearing be submitted 24 hours in advance"; (d) "to strike supplemental slides in Claimants' damages experts' presentation at the Hearing"[271].

247. They consider that Peru does not explain how any of these decisions violated a rule of procedure or how they were "serious" departures. Claimants consider that Peru allegedly presents instead a "litany" of complaints without engaging with the requirements of Article 52(1)(d). They affirm that previous committees have required each request to be analyzed on its "own individual merits" and that a "series of errors" is no more a ground for annulment than a single error. For these reasons, Claimants argue that Peru's Application for Annulment should be dismissed[272].

i. The Tribunal did not seriously depart from a fundamental rule of procedure by refusing to order further disclosure on Claimants' arbitration financing

248. Claimants recall that, at the initial stages of the Arbitration, "Peru made the extraordinary demand that Claimants provide details about their arbitration finance provider: the identity, address, and nationality of every major investor of the funder; and the terms of

[268] Counter-Memorial, §§ 281-289.
[269] Counter-Memorial, § 290.
[270] Counter-Memorial, §§ 291-295.
[271] Counter-Memorial, § 296.
[272] Counter-Memorial, §§ 298-300.

the funding agreement"[273]. They state that Peru "repeats the arguments from its original request that the Tribunal considered and rejected, and omits key facts on which the Tribunal based its decision"[274].

249. Regarding Arbitration financing, Peru repeats its original request that Claimants disclose extensive information about their finance provider, major investors, the funding agreement, shareholders, and corporate operations despite the fact that ICSID Arbitration Rules require no such disclosure. Claimants identified Lomo Investment LP and Tenor Capital Management Company, LP as the capital provider and controlling entity. The Tribunal confirmed that no conflict existed in Arbitration Procedural Order No. 2, reasoning that the disclosure of the funder's identity and the controlling entity was sufficient to assess conflicts, and that absent exceptional circumstances, Claimants had no obligation to reveal "entities or individuals connected with the funder"[275].

250. Claimants consider that the Tribunal's decision was not a serious departure from a fundamental rule of procedure, as tribunals have broad discretion on document production. In their view, Peru does not show that the Tribunal's decision had any impact on the Award and it provides no reason to believe that any conflict existed. They add that Peru's argument about "strategic decisions" is moot because it did not receive a costs award and because security-for-costs requests succeed only in exceptional cases[276].

ii. The Tribunal did not seriously depart from a fundamental rule of procedure by granting Claimants' request at the Arbitration Hearing to supplement an excerpted document on the record

251. Peru alleges unfairness when the Tribunal allowed Claimants at the Arbitration Hearing to submit additional pages to supplement an excerpted document, the SPA, already on the record. They contend that Peru never requested the SPA document and that nothing prevented it from addressing or responding to the added pages. Claimants state that Peru knew of the SPA and that it never requested it; they also stress that it agreed that there would be no document production phase. Claimants note that Peru nevertheless accused them of refusing disclosure[277].

252. They also recall that, in response to Peru's allegedly misleading statements at the Arbitration Hearing, they asked to submit the relevant pages to correct inaccuracies. The Tribunal allowed them to submit these pages to "put an end to the discussion"[278].

253. Claimants consider that the evidentiary decision related to the SPA was within the Tribunal's discretion and that Peru has not shown any "serious" impact caused by such

[273] Counter-Memorial, § 301.
[274] Counter-Memorial, § 301.
[275] Counter-Memorial, §§ 302-309.
[276] Counter-Memorial, §§ 311-315.
[277] Counter-Memorial, §§ 317-325.
[278] Counter-Memorial, §§ 326-329.

decision. They note that Peru could have rebutted or addressed the matter in its post-hearing brief, but that it did not. According to Claimants, the Tribunal's reasoning makes clear that the sale price was irrelevant to the assessment of damages and that the outcome would have been the same even without the additional pages submitted by them[279].

254. They claim that Peru's argument must therefore be rejected[280].

iii. The Tribunal did not seriously depart from a fundamental rule of procedure by denying Peru's request to modify the deadline for submitting demonstrative exhibits during the Arbitration Hearing

255. Claimants submit that "Peru next takes issue with a procedural decision on Day 4 of the Hearing. Peru requested a new rule that any new calculations and figures in the expert direct presentations be distributed 24 hours in advance of their use, as opposed to the 30-minute rule established in Procedural Order No 5 ["**Arbitration PO5**"]"[281].

256. Regarding this issue, Claimants states that Peru asked at mid-Arbitration Hearing to replace the 30-minute rule in Arbitration PO5 with a new requirement, explaining that to refuse its request would "le[ave] the door open" for Claimants to add to new evidence. Claimants urged the Tribunal to adhere to Arbitration PO5 and to the existing rule[282].

257. Claimants consider that the Tribunal acted within its discretion on the admissibility of evidence. They claim that Peru had extensive opportunity to argue its point and that it did not identify any slide containing impermissible material. They add that Peru was not able to show any impact on the Award, as damages were based on BRG's report, not on demonstrative calculations[283].

258. Accordingly, Claimants submit that Peru failed to demonstrate any harm or seriousness, and thus that its request must be dismissed[284].

iv. The Tribunal did not seriously depart from a fundamental rule of procedure by denying Peru's request that slides from Claimants' damages experts' presentation at the Arbitration Hearing be stricken from the record

259. Peru's final request concerns the Tribunal's dismissal of Peru's application to delete from the record certain slides included in the PowerPoint presentation prepared by Claimants' expert BRG that were not orally presented during its direct examination at the Arbitration Hearing[285].

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[279] Counter-Memorial, §§ 330-334.
[280] Counter-Memorial, § 335.
[281] Counter-Memorial, § 336.
[282] Counter-Memorial, §§ 336-342.
[283] Counter-Memorial, §§ 344-349.
[284] Counter-Memorial, § 349.
[285] Counter-Memorial, § 351.

260. Claimants submit that Peru's own experts likewise included supporting slides that were not presented in the hearing. Peru's allegations that it was deprived of an opportunity to respond concern the Tribunal's exercise of its evidentiary discretion. They contend that, in any event, the slides at issue contained only material already on record, and that the Tribunal expressly confirmed that they added little and gave rise to no concerns[286].

261. According to Claimants, Peru could have confronted BRG during cross-examination, responded through its own expert - who engaged directly with BRG's testimony -, or addressed the matter in the post-hearing briefing. They contend that Peru did none of those. Claimants also state that it did not demonstrate any material impact on the Tribunal's decision or identified any instance in which the Tribunal relied on those slides[287].

262. Peru's argument must therefore be rejected in Claimants' view[288].

5. Rejoinder

263. In their Rejoinder, Claimants state that "[o]nce again, Peru has failed to establish that the Tribunal departed from any rule of procedure, let alone one that is fundamental. Even in the unlikely event that this Committee were to find any violations, Peru has not established that any of them are sufficiently 'serious' to warrant annulment. Moreover, Peru's novel theory that these grounds may be 'taken together' to meet a threshold of gravity also fails for the simple reason that such theory of synergy does not exist"[289].

i. Standard for annulment under Convention Article 52(1)(d)

264. Claimants argue that Convention Article 52(1)(d) requires Peru, as the applicant, to establish two elements: (i) that the Tribunal departed from a fundamental rule of procedure, and (ii) that the departure was serious. According to them, "Peru accepts this framework in principle, though not in practice"[290]. They argue that four points remain controversial[291].

265. First, Claimants argue that Peru maintains that the Committee must assess the "correctness" and "substance" of the decisions, and that an annulment committee is "required" to review the "merits" of the Tribunal's procedural determinations[292]. However, Claimants contend that this is not the appropriate standard under Article

[286] Counter-Memorial, §§ 352-355.
[287] Counter-Memorial, § 358.
[288] Counter-Memorial, § 362.
[289] Rejoinder, § 126.
[290] Rejoinder, § 128.
[291] Rejoinder, § 128.
[292] Rejoinder, § 129.

52(1)(d), and that Peru challenges the well-established principle that the merits of procedural decisions are not subject to review by annulment committees[293].

266. Second, Peru misunderstands the scope and application of fundamental rules of procedure[294], namely the right to be heard[295] and the principle of equality of arms[296].

267. Third, according to Claimants, Peru errs in describing the "seriousness" requirement under Article 52(1)(d) of the Convention. Claimants argue that the requirement demands "a showing that the alleged breach substantially affected the award"[297], and such impact needs to be "material" to be relevant[298].

268. Finally, Claimants affirm that the procedural decisions presented by Peru are "inconsequential" and that they cannot be aggregated in order to become "serious" enough to warrant annulment[299], as this is not how Convention Article 52(1)(d) operates.

ii. The Tribunal did not seriously depart from a fundamental rule of procedure by excluding Peru's belatedly submitted expert evidence

269. Claimants note that "Peru contends that the Tribunal's decision violated its 'right to be heard and to be treated equally,' asserting that it was unable to fully confront Claimants' expert testimony without the excluded evidence"[300]. They also state that "Peru reiterates its disagreement with the Tribunal's decision to exclude its expert evidence, repeatedly advocating for an appellate-style review that exceeds the proper scope of Convention Article 52(1)(d). According to Claimants, [t]hese arguments remain unpersuasive" [301] and are nothing more than a repetition of rejected arguments in the Arbitration.

a. Peru's account of the procedural background on the expert subjects at issue is incorrect

270. Claimants refer to Peru's argument in its Reply, where it asserts that they "mischaracterize" the procedural history[302]. Claimants contend that "[t]he procedural history, as described in greater detail in Claimant's Annulment Counter-Memorial, demonstrates that Peru was afforded a full and fair opportunity to respond to Claimants' position on the Expert Subjects at Issue and to fully engage with Claimants' application to exclude Peru's untimely evidence"[303]. They also note that "Peru's rebuttal of the procedural history [in its Reply] rests on two principal arguments: (i) that the Tabors

[293] Rejoinder, § 131.
[294] Rejoinder, § 132.
[295] Rejoinder, § 133.
[296] Rejoinder, § 135.
[297] Rejoinder, § 135.
[298] Rejoinder, §§ 135-136.
[299] Rejoinder, §§ 139-141.
[300] Rejoinder, § 143.
[301] Rejoinder, §§ 144-153.
[302] Rejoinder, § 154.
[303] Rejoinder, § 156.

Report was not untimely because it responded to new arguments and evidence in Claimants' Arbitration Reply; and (ii) that the PSR Report was only submitted late because Claimants 'repeatedly refused' to disclose information that Peru allegedly needed. Both arguments merely reiterate the same positions Peru advanced before the Tribunal—positions that were considered and rejected not once, but twice, in [Arbitration] PO3 and PO4"[304].

b. The Tribunal did not violate any fundamental rule of procedure

271. Claimants argue that the Tribunal did not violate any fundamental rule of procedure. According to them, "the Tribunal: (i) acted in accordance with express procedural rules that entitled it to declare evidence inadmissible; (ii) afforded Peru substantial due process before its decision to exclude the expert evidence; and (iii) in any event, provided Peru with multiple opportunities to submit and present other expert evidence on the Expert Subjects at Issue. Peru attempts—but fails—to rebut each of these points"[305].

272. According to them, "[t]he Tribunal's decision to exclude evidence was taken pursuant to a rule of procedure and therefore was not a departure from any rule of procedure […]; Peru identifies no departure from any rule of procedure in the Tribunal's decision-making process that led to the exclusion of Peru's evidence, […]; [and] Peru has no basis to contend that it was deprived of a full and complete opportunity to present its case on the Expert Subjects at Issue"[306].

273. Claimants conclude that the Tribunal's "findings are not subject to review by the Committee. However, the Committee can conclude—based on Peru's submission of expert evidence on both the Continuous Dispatch Issue and the Dispatch Simulation Issue with its Arbitration Counter-Memorial—that Peru had a perfectly adequate 'opportunity' to present expert evidence on these matters. That is all that the principles of equal treatment and the right to be heard require. Peru may now regret how it chose to use—or not use—that opportunity. But such regret does not amount to an annullable error"[307].

c. Any departure from a fundamental rule of procedure was not "serious"

274. Claimants argue that "Peru profoundly misapprehends the applicable standard under Article 52(1)(d)"[308], as "Peru attempts to dilute this standard by first arguing that it need only show a 'potential,' rather than a certain, impact on the outcome"[309]. However, as also alleged by Claimants, "[e]ven under the more lenient 'potential' line of cases cited

[304] Rejoinder, §§ 157-163.
[305] Rejoinder, § 165.
[306] Rejoinder, §§ 166-201.
[307] Rejoinder, § 201.
[308] Rejoinder, § 205.
[309] Rejoinder, § 204.

by Peru, annulment committees do not excuse applicants from the seriousness requirement"[310]. Claimants also state that "Peru's 'seriousness' arguments fail to identify any material impact—whether certain or potential—on the Award. Peru invites the Committee to reexamine the merits of the Tribunal's evidentiary decisions and to speculate on how the omitted portions of the Tabors Report and the PSR Report might have influenced the Tribunal's conclusions. Such an exercise would require the Committee to delve into and weigh the evidentiary record—a fact-intensive inquiry that exceeds the limited scope of annulment review"[311].

d. Peru fails to show that the Tabors Report would have changed the Tribunal's damages decisions

275. According to Claimants, Peru's two responses to the Counter-Memorial arguments "fail to withstand scrutiny". "Peru attempts to portray Dr Tabors' testimony as unique, offering a 'global' perspective absent from its other experts' reports", but according to Claimants, "the views expressed in the excluded portions of the Tabors Report were materially similar to those presented by Peru's four other experts"[312] and "Peru does not dispute that, […] Dr Tabors was permitted to testify at the Hearing. Nor does Peru deny that Dr Tabors was able to address the economic dispatch principle, which Peru describes as the 'heart' of the dispute. Peru also concedes that the Tribunal posed no questions to Dr Tabors on this principle and did not credit his testimony in the Award. These facts underscore the marginal relevance of Dr Tabors' contribution"[313].

e. Peru fails to show that the PSR Report would have changed the Tribunal's damages decisions

276. Claimants posit that "the PSR Report could not have altered the Tribunal's damages analysis". They allege that "[c]ontrary to Peru's suggestion, it had ample opportunity to 'test and counter Claimants' dispatch model' even without the PSR Report" and that "Peru's two responses in its Annulment Reply are unconvincing"[314].

277. Claimants state that (i) "[t]he Award shows that the Tribunal unequivocally discredited Compass Lexecon's arguments and assumptions", (ii) "Peru now claims that—[…] the PSR Report was 'the one piece of evidence that could have validated [Peru's] criticisms.'" and that "[t]his ignores the fact that the PSR Report itself relied on untestable assumptions. It contained no footnotes or calculations to support its analysis, unlike the SIDEC Model"[315].

[310] Rejoinder, § 205.
[311] Rejoinder, § 207.
[312] Rejoinder, §§ 210, 213.
[313] Rejoinder, § 216.
[314] Rejoinder, § 220.
[315] Rejoinder, §§ 221-229.

iii. The Tribunal did not seriously depart from a fundamental rule of procedure in referencing publicly available submissions by Peru in other cases

278. Claimants allege that "Peru argues that the Tribunal referenced its prior statements in other arbitrations without giving it an opportunity to 'comment on' and 'potentially clarify' those statements before including them in the Award. Peru then asserts, without explaining how, that such clarifications 'could have' impacted the Award". However, Claimants consider that "[r]ather than accept Peru's strained interpretation, the Committee need only examine the Award itself to verify the limited role paragraphs 298 and 309 played in the Tribunal's reasoning". They also invite the Committee to take into account the fact that "[t]he Tribunal referenced Peru's public pleadings only twice: once as an expressly 'incidental' aside in paragraph 298; and once in paragraph 309 to note Peru's reliance on the same awards in other cases"[316].

a. The Tribunal did not depart from a fundamental rule of procedure

279. Claimants restate that, in their Counter-Memorial, they affirmed that "irrespective of the weight the Tribunal gave to Peru's submissions in other cases, it did not depart from any fundamental rule of procedure"[317]. In its Reply, Peru "offers two counter-arguments. Neither withstands scrutiny"[318].

280. First of all, Peru claims "to have found support for its view that parties must be given an opportunity to comment on any references the Tribunal intends to make in its Award", citing *Fraport v. Philippines.* Claimants consider that "*Fraport* does not support Peru's position, and in fact undermines it"[319].

281. Secondly, Claimants argue that Peru "offers a narrow and strained interpretation of the principle of *iura novit curia*. Peru agrees that this principle allows a tribunal to 'obtain evidence and evaluate it independently of the parties' pleadings to form its opinion or decide on the law.' Yet Peru argues nonetheless that tribunals may independently reference only 'sources of international law'—a term Peru continues to leave undefined—and 'legal authorities', though not other types of documents"[320], but "[i]n sum, Peru still cites no authority for its proposition that parties must be given an opportunity to comment on any references a tribunal wishes to include in its award. That is because no such rule exists"[321].

[316] Rejoinder, §§ 237-240.
[317] Rejoinder, § 242.
[318] Rejoinder, § 243.
[319] Rejoinder, § 244.
[320] Rejoinder, § 248.
[321] Rejoinder, § 254.

b. Any departure from a fundamental rule of procedure was not "serious"

282. Claimants contend that "Peru makes little effort to show how the outcome would—or even could—have been 'substantially different' had it been given an opportunity to comment on sources the Tribunal barely relied on". They also allege that "[w]orse still, Peru misstates the applicable legal standard, suggesting that it need only allege a departure from a fundamental rule of procedure, without also showing that such departure was 'serious'" and "[s]imply put, paragraphs 298 and 309 could be deleted from the Award, and the Tribunal's remaining reasoning would still lead to the same conclusion. Peru has therefore failed to show that any departure from any rule of procedure was 'serious'"[322].

iv. The Tribunal did not seriously depart from a fundamental rule of procedure in its various procedural rulings

283. Claimants state that "Peru objects to the Tribunal's decisions to: (a) deny Peru's request for further disclosure regarding Claimants' arbitration financing; (b) allow Claimants at the Hearing to supplement an excerpted document already on the record with additional pages to correct a misstatement in Peru's opening argument; (c) reject Peru's proposal for a new rule requiring demonstrative exhibits to be submitted 24 hours in advance to their use at the Hearing; and (d) deny Peru's request to strike supplemental slides in Claimants' damages experts' presentation at the Hearing"[323].

284. They allege that Peru failed to make even a *prima facie* showing that any of these decisions meet the standard under Convention Article 52(1)(d). According to Claimants, "Peru concedes this" and yet advances "a novel theory that these rulings reflect a 'systematic' […] or 'gradual' […] deprivation of due process, amounting to a 'pattern' or 'cumulative effect' sufficient to meet the seriousness threshold of Article 52(1)(d)"[324]. For them, "Peru does not dispute that the four procedural decisions are unrelated. Nor does it meaningfully explain how any of them could have impacted the Award. More importantly, Peru's own submissions confirm that the Tribunal did not prevent Peru from presenting its case in full. Rather, Peru repeatedly chose not to avail itself of the procedural opportunities provided. In short, Peru was not denied any fundamental rights—it simply declined to exercise them"[325].

285. Claimants contend that the Tribunal did not seriously depart from a fundamental rule of procedure by (i) refusing to order further disclosure on Claimants' arbitration financing; (ii) granting Claimants' request at the Arbitration Hearing to supplement an excerpted document already on the record; (iii) denying Peru's request to modify the deadline for

[322] Rejoinder, §§ 256-257, 259.
[323] Rejoinder, § 261.
[324] Rejoinder, § 262.
[325] Rejoinder, § 264.

submitting demonstrative exhibits during the Arbitration Hearing; and (iv) denying Peru's request that slides from Claimants' damages experts' presentation at the Arbitration Hearing be stricken from the record[326].

VIII. ANALYSIS OF THE COMMITTEE

A. INTRODUCTION

286. The Committee notes that the Parties agree that the ICSID's annulment mechanism differs from an appeal system and that its purpose is limited to the grounds set out in Article 52 of the Convention.

287. They also agree that, notwithstanding Peru's alleged three grounds for annulment, the occurrence of a single ground is sufficient to justify the annulment of an ICSID award[327]. The Committee will consider each alleged ground for annulment separately.

288. The Committee also observes that there are several areas of agreement between the Parties on the applicable standards. However, it also notes that they differ on other areas. Those agreements/disagreements were summarized above[328]. When relevant, they will also be addressed below in the context of the Committee's analysis.

B. FIRST GROUND FOR ANNULMENT: WHETHER THE TRIBUNAL MANIFESTLY EXCEEDED ITS POWERS

1. Preliminary considerations

289. Peru contends that the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the Convention by failing to apply the applicable law prescribed under Article 10.5 of the Treaty. Peru's claim is threefold:

a. The Tribunal failed to apply the applicable law with regard to arbitrariness;

b. The Tribunal failed to apply the applicable law in its analysis of Resolution No. 141 as part of the SFR Service Claim; and

c. The Tribunal failed to apply the applicable law with regard to legitimate expectations.

290. These three alleged failures correspond to different sections of the Award. Peru's arguments in support of each allegation have been summarized above.

[326] Rejoinder, §§ 267-317.
[327] Memorial, § 1.
[328] See: Section V and Section VII of this Decision.

291. The Committee will first examine the Award with respect to this ground for annulment. It will then set forth the applicable legal standard of annulment under Article 52(1)(b) of the Convention. Based on that, the Committee will address each of the three instances in which Peru claims that the Tribunal manifestly exceeded its powers.

2. Award

292. In Section VI of the Award, the Tribunal analyzed Peru's liability in respect of the SFR Service Claim and the New Methodology Claim. It began by examining the applicable standard under Article 10.5 of the Treaty. After having set out the Parties' positions (Sections VI.A.1 and VI.A.2 of the Award), the Tribunal noted that Claimants alleged the breach of two obligations contained within the MST as referred to in Article 10.5 of the Treaty[329], namely the FET and the FPS. The Tribunal addressed both obligations in Section VI.A.3 of the Award.

293. The Tribunal first analyzed the level of protection under the MST/FET standard (Section VI.A.3.i of the Award) which, according to the Committee, lies at the core of the first and second grounds for annulment. The Tribunal concluded that, under Article 10.5, the "FET is now part of the MST under customary international law"[330]. Relying on prior awards, it further held that the MST/FET standard establishes a "high threshold for a finding of breach, without however requiring that the State's conduct be outrageous as dictated by the *Neer* standard"[331].

294. The Tribunal then analyzed the content of the MST/FET standard, identifying the obligations it encompasses. It concluded that:

a. "serious arbitrary and discriminatory State measures entail a breach of the standard of treatment under Article 10.5 of the Treaty"[332];

b. "the standard of treatment under Article 10.5 of the Treaty includes an obligation for the host State not to frustrate the investor's legitimate expectations"[333]; and

c. the Treaty "does not incorporate a duty to maintain a stable and predictable legal and regulatory environment"[334].

295. The Tribunal subsequently examined the FPS standard (Section VI.A.3.ii of the Award), an examination which is not relevant in the context of the present annulment proceeding.

[329] Award, § 280.
[330] Award, § 289.
[331] Award, § 295.
[332] Award, § 303.
[333] Award, § 310.
[334] Award, § 316.

296. Having determined the applicable standards, the Tribunal turned to the SFR Service Claim (Section VI.B of the Award). It concluded that:

a. "[T]he Bid Terms guaranteed to the winner of the Tender the continuous dispatch of energy to provide the SFR service, irrespective of its inclusion in the Merit Order"[335]; and

b. "Respondent acted in a seriously arbitrary manner by issuing Resolution No. 141"[336].

297. On that basis, the Tribunal upheld the SFR Service Claim.

298. The Tribunal then addressed the New Methodology Claim, which it rejected, finding no breach of Article 10.5 of the Treaty[337]. That claim is expressly excluded from the present analysis.

299. Finally, based on its findings, the Tribunal proceeded to quantum in Section VII and determined that "the damages suffered by Claimants as a consequence of the issuance of Resolution No. 141 amount to US$ 110.7 million"[338].

300. For the purposes of this analysis, it is important to note that, in the *dispositif* of Section IX, the Tribunal[339]:

a. "**Declares** that Respondent breached Article 10.5 of the Treaty by issuing Resolution No. 141"[340];

b. "**Orders** that Respondent pay Claimants **US$ 110.7 million** as compensation for the damages caused by the issuance of Resolution No. 141 in breach of the Treaty, plus pre-award interest at a rate equal to Peru's CoD from the Valuation Date to the date of this Award;"[341]

301. Peru's first ground for annulment is that the Tribunal manifestly exceeded its powers by failing to apply the applicable law (i.e. CIL) in relation to Article 10.5 of the Treaty, specifically in the sections that led the Tribunal to conclude that: (i) serious arbitrary and discriminatory State measures constitute a breach of the standard of treatment under Article 10.5 of the Treaty[342]; (ii) the standard of treatment under Article 10.5 of the Treaty includes an obligation for the host State not to frustrate an investor's legitimate

[335] Award, § 436.
[336] Award, § 454.
[337] Award, § 513.
[338] Award, § 601.
[339] See: § 6 of the present Decision.
[340] Award, § 624.ii.
[341] Award, § 624.iv.
[342] Memorial, Annex A, p. 1. More specifically, to annul paragraphs 287 to 311.

expectations[343]; and (iii) Respondent acted in a seriously arbitrary manner by issuing Resolution No. 141[344].

302. If any of these grounds is upheld, the relevant section of the quantum[345] and, therefore, of the *dispositif*[346] may be consequently annulled.

303. Based on these considerations, the Committee will first address the applicable standard for annulment under Convention Article 52(1)(b). It will then examine the three instances in which Peru claims that the Tribunal manifestly exceeded its powers.

3. Standard for annulment under Convention Article 52(1)(b)

304. Article 42(1) of the Convention states that tribunals "shall decide a dispute in accordance with such rules of law as may be agreed by the parties". Article 52(1)(b) of the Convention provides that an award may be annulled if "the Tribunal has manifestly exceeded its powers".

305. It is well established in ICSID case-law and in the legal literature that Article 52(1)(b) of the Convention sets out two conditions for annulment[347]: (i) the tribunal must have acted, or failed to act, in excess of its powers; and (ii) that excess must be "manifest".

306. With respect to the first requirement, a tribunal may exceed its powers either through a positive act (i.e. assuming jurisdiction where none exists, or applying a law that is not the proper law) or through an omission (i.e. failing to exercise jurisdiction while it exists, or failing to apply legal rules it was bound to apply). The powers of a tribunal are determined by the parties' consent, as expressed - in investment treaty arbitration - by States in the applicable treaties conferring jurisdiction to tribunals, and by investors when they initiate proceedings. In the present case, the Tribunal's powers are defined by the Treaty and the Convention.

307. *Ad hoc* committees have consistently agreed that a failure to apply the law chosen by the parties constitutes an excess of powers[348]. They equally agree that a disregard of the applicable law must be distinguished from an erroneous application of that law, which - as a rule - does not provide a ground for annulment[349]. The role of annulment committees

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[343] Memorial, Annex A, p. 1. More specifically, to annul paragraphs 287 to 311.
[344] Memorial, Annex A, p. 2. More specifically, to annul paragraphs 328, 363-455.
[345] Memorial, Annex A, p. 2. More specifically, to annul paragraphs 563-606.
[346] Memorial, Annex A, p. 2. More specifically, to annul paragraphs 624(ii), 624(iv), 624(v), 624(vi).
[347] **RLAA-026**, § 39; **CLAA-002**, § 4 (p. 2); **RLAA-003**, § 37; **CLAA-077**, § 44; **CLAA-021**, § 45; **CLAA-025**, § 96; **CLAA-044**, § 191.
[348] **RLAA-008**, § 22; **CLAA-002**, § 59 (pp. 42-43); **CLAA-007**, § 7.19; **CLAA-017**, § 1.18; **RLAA-007**, § 5.03; **RLAA-026**, § 40; **RLAA-003**, § 45; **CL-018**, § 86; **RLAA-013**, § 49; **CLAA-077**, § 44; **CLAA-021**, §§ 46, 137; **CLAA-025**, § 67; **CLAA-027**, § 126; **RLAA-022**, § 129; **CLAA-032**, § 33; **RLAA-031**, § 55; **CLAA-044**, § 191; **RLAA-027**, § 106; **CLAA-060**, § 60.
[349] **CLAA-007**, § 7.12; **CLAA-002**, § 60 (p. 43); **RLAA-026**, § 43; **CLAA-018**, § 38; **RLAA-003**, § 86; **RLAA-013**, § 50; **CLAA-021**, § 47; **CLAA-25**, §§ 68, 219; **CLAA-027**, § 213; **CLAA-028**, § 91; **CLAA-040**, §§ 232,

is not to review or assess the correctness of the tribunals' application of the proper law, but to determine whether they applied such law.

308. As regards the second requirement, it is well established that any excess of power has no consequence unless it is manifest[350]. The term "manifest" has been interpreted in different manners by *ad hoc* committees. Some of them have understood it as referring to the obviousness of the excess of powers in the logical reasoning process, using terms such as "clear" or "self-evident"[351]. Other committees have focused on its gravity or its impact on the decision, describing it as "serious", "substantial", or "egregious"[352].

309. The Committee considers that the use of the term "manifest" in the Convention entails that the excess of powers must be clear as the manifest nature of an excess relates to the ease with which it is perceived[353]. However, the impact of such an excess appears equally relevant to the Committee: even where an excess of powers is clear, it cannot be considered as manifest if it has no relevant effect on the decisions reached in the award. This results from the fact that the ICSID annulment system seeks to safeguard both the finality of awards and the integrity of the system. Accordingly, the Committee considers that manifest excess of powers requires a failure to apply the law that is both textually evident and substantively serious.

310. Another issue discussed in the case-law concerns the extent of the failure which is required to qualify as "manifest". During the Annulment Hearing, this question was debated by the Parties[354].

311. Each Party relied on different standards to determine whether the Tribunal failed to apply the applicable law. Peru opted for a broad approach that allows committees to analyze situations of misinterpretation or misapplication of the applicable law. Claimants relied on a more restrictive one, as expressed by the Committees in *MINE v. Guinea* and *AES v. Hungary*[355]. Under this latter approach, committees can merely check whether

236; **RLAA-022**, § 131; **CLAA-032**, §§ 33-34; **CLAA-042**, § 189; **RLAA-027**, § 105; **RLAA-034**, §§ 78, 311; **CLAA-060**, §§ 59-60.

[350] **RLAA-005**, § 20; **CLAA-018**, § 36; **CLAA-002**, § 10; **RLAA-008**, § 25; **RLAA-013**, §§ 113-114; **CLAA-077**, § 44; **CLAA-025**, § 69; **CLAA-027**, § 98; **CLAA-028**, § 86; **CLAA-040**, § 230; **RLAA-022**, § 128; **CLAA-032**, § 30; **CLAA-043**, § 186; **RLAA-009**, § 50; **RLAA-034**, § 77; **RLAA-181**, § 181; **CLAA-050**, § 111.

[351] **RLAA-003**, §§ 39-40; **RLAA-026**, § 41; **CLAA-044**, § 193.

[352] **RLAA-005**, § 45.

[353] **RLAA-003**, §§ 39-40; **RLAA-026**, § 41; **CLA-044**, §116.

[354] The Parties discussed the extent of the failure in applying the applicable law in order for it to be a manifest excess of powers. This issue was raised in the Counter-Memorial (§§ 55-59, 87-90) and in the Reply (§§ 99-102). This was also discussed on the second day of the Annulment Hearing after the President of the Committee's question regarding "What do you mean for failure to apply the applicable law in total […]. A simple question would be if the Tribunal, for instance, applied 1 percent of the applicable law or failed to apply 99 percent, does it signify that the Applicant's case must be dismissed?" (Tr., Day 2, pp. 137: 17-22- 138: 1-2).

[355] Counter-Memorial, §§ 39, 73; Rejoinder, § 16.

tribunals applied the proper law; they cannot analyze those situations of misinterpretation or misapplication.

312. The Committee acknowledges that both approaches find support in the case-law. It further notes that the text of Convention Article 52(1)(b) refers to a tribunal that has "manifestly exceeded its powers", without requiring a "total" or a "complete" excess of powers. Accordingly, the Committee considers that a clear and grave misapplication or misinterpretation of the proper law may, in exceptional circumstances, amount to a failure to apply the law and therefore to a manifest excess of powers.

313. As mentioned in *Caratube v. Kazakhstan*, the Committee finds "the correct position to be that misinterpretation or misapplication of the proper law, even if serious, does not justify annulment", but that "in exceptional circumstances, a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment". The Committee concurs that "the threshold for applying this exceptional rule must be set very high" as "otherwise the annulment mechanism permitted by the Convention would expand into a prohibited appeal system"[356].

314. In the present case, Peru submits that the Tribunal failed to apply the applicable law, namely Article 10.5 of the Treaty, which provides:

> 1. Each Party shall accord to investments of investors of the other Party treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. The concepts of fair and equitable treatment and full protection and security in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens and do not create additional substantive rights.

315. In its Memorial and Reply, Peru argues that the Tribunal did not apply CIL as required by Article 10.5 of the Treaty. According to it, this provision incorporates CIL by express reference. Therefore, the applicable law consists of the Treaty provisions as interpreted through, and limited by, the CIL minimum standard of treatment of aliens. Peru devotes several pages to explaining the nature of CIL and it maintains that the Tribunal failed to apply it.

316. As regards CIL, the Committee considers that the determination of whether the Tribunal applied the proper law raises the issue of the identification of its content. The identification of the content of CIL is indeed a necessary precondition for its application.

[356] **CLAA-0039,** § 81.

It is therefore essential as a preliminary stage to clarify how its content is identified under international law.

317. As expressed by the ILC, "[c]ustomary international law is unwritten law deriving from practice accepted as law"[357]. The ILC further specifies that, "to determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law"[358]. The Parties agree with these statements.

318. The ILC also notes that various materials, in addition to primary evidence of instances of practice accepted as law, may be consulted in the process of determining the existence and content of CIL rules. International courts and tribunals decisions' form part of such materials. In this respect, Conclusion 13(1) of the 2018 ILC Report establishes that "[d]ecisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules"[359]. Those decisions assist in determining the existence and scope of CIL; they are not themselves the source of the rule. All this is also recognized in the ICJ Judgments and in the legal literature which were submitted by the Parties into the record of this proceeding.

319. Both Parties acknowledge this, as they both quote the ILC 2018 Report stating that "[d]ecisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law"[360].

320. However, Peru stresses that the ILC notes that the value of such decisions varies greatly, the extent to which they examine the evidence of an alleged general practice accepted as law being critical[361]. On this basis, Peru argues that the decisions relied upon by the Tribunal either do not analyze CIL as such, or are silent on the existence of CIL. On the other hand, Claimants consider that the Tribunal correctly identified the content of CIL through the reference to arbitral decisions.

321. The scope of the Committee's mandate, as explained in paragraphs 304 to 319 of the present Decision, is to determine whether the Tribunal manifestly exceeded its powers by failing to apply CIL as the applicable law. In that regard, the Committee considers that it may and must review the methodology used by the Tribunal to identify the content of CIL, as this identification is a requisite to determining whether or not the Tribunal applied

[357] **CL-147**, p.122.
[358] **CL-147**, p.119.
[359] **CL-147**, p.149.
[360] **CL-147**, p. 149.
[361] Reply, § 91.

the applicable law. However, its role is not to reassess the evidentiary value of the awards relied upon as subsidiary means for identifying the content of that applicable law. Such an exercise would exceed the Committee's mandate and it would transform the annulment proceeding into an appeal on the merits. This is even more so as the determination of the value of those awards would require, as explained by the ILC in the excerpt quoted by Peru,[362] to also take into consideration the reception of the awards by States and in subsequent case-law as well as a series of additional considerations.

322. In light of the foregoing, the Committee considers that in assessing whether the Tribunal manifestly exceeded its powers by failing to apply the applicable law, it must examine whether the Tribunal (i) identified the applicable law; (ii) identified the content of the applicable law; and (iii) applied such content to the facts of the present case. If these three requirements are satisfied, there is no basis to annul the Award under Convention Article 52(1)(b).

4. Applicable law under the Treaty

323. There is no disagreement between the Parties in relation to the relevance of Article 10.5 of the Treaty, which orders the application of "the customary international law minimum standard of treatment of aliens" to determine whether the actions of a State may constitute an illegal treatment under this provision. They also agree that two elements must be evidenced to admit the existence of CIL: State practice and *opinio juris*[363].

324. However, as explained below, the Parties disagree in relation to the next steps in the necessary analysis.

5. Identification of the law applicable to the dispute

325. The Committee considers that the Tribunal correctly identified CIL as being the applicable law in relation to Article 10.5 of the Treaty[364]. Neither Claimants, nor Peru dispute that the Tribunal acknowledged that CIL was the applicable law[365].

326. So, the Committee considers that the Tribunal did not manifestly exceed its powers in identifying the applicable law.

6. Identification of the content of the applicable law

327. As explained above in paragraph 321, the Committee considers that it may and must review the methodology used by the Tribunal to identify the content of the customary international law related to the FET/MST standard.

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[362] Reply, § 91.
[363] See: §§ 50 and 177 of the present Decision.
[364] Award, § 283.
[365] Memorial, §§ 88-92; Counter-Memorial, § 64; Reply, § 6; Rejoinder, §§ 26-27.

i. Identification of the content of the applicable law regarding arbitrariness

328. Regarding the first claim made by Peru which pertains to the Tribunal's finding that seriously arbitrary conduct is a breach of Article 10.5. of the Treaty, Peru considers that the Tribunal should have "conduct[ed] the proper analysis to determine whether an obligation not to act in a 'seriously arbitrary' manner had crystallized into a rule of customary international law (as expressly required by the Treaty)"[366]. To that end, Peru admits that "a tribunal may, in certain circumstances, identify sources on its own to add to the record, [but] this authority is constrained by the duty to uphold due process"[367].

329. However, Peru considers that the Tribunal did not provide evidence that the alleged obligation crystallized into a CIL rule, supported by both State practice and *opinio juris*[368]. Peru also argues that as "[t]he Tribunal comes up with a new standard"[369] ("serious arbitrariness"), then "[n]o prior decision or award […] can serve as evidence that this is a standard under customary international law"[370], therefore, "[i]n these circumstances, the Tribunal definitely must perform its own analysis and it did not"[371].

330. According to Peru, the relevant standard comes from *Neer v. Mexico*[372] and, in relation to "serious arbitrariness", no decision ever approached the question, and therefore the standard did not evolve[373].

331. For Claimants, it has been established for decades that the language for arbitrariness encompasses "egregious, shocking, manifest"[374]. They consider that the concept of "seriousness" does not create a new standard, but rather that "[s]erious was just a synthesis or summary of what the prior cases found"[375].

332. Claimants also affirm that the ILC and "[p]ractice […] supports the conclusion that decisions of international courts and tribunals are proper sources for determining the content of customary international law"[376]. Therefore, the Tribunal was entitled, as it did, to rely only on previous decisions.

333. For Claimants, the Committee is not empowered to address the issue whether the decisions of international courts and tribunals quoted by the Tribunal analyzed correctly the existence of State practice and *opinio juris*. This conclusion stems also, in their view,

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[366] Memorial, § 111.
[367] Reply, § 387.
[368] Memorial, § 99.
[369] Tr., Day 2, p. 13: 7.
[370] Tr., Day 2, p. 13: 7-10.
[371] Tr., Day 2, p. 13: 12-14.
[372] Memorial, § 67; Reply, § 49.
[373] Tr., Day 2, pp. 13: 15-22, 14: 1-8.
[374] Tr., Day 2, p. 50: 3-9.
[375] Tr., Day 2, p. 50: 20-22.
[376] Counter-Memorial, § 83.

from the fact that "[w]hen a decision or award interprets norms of customary international law that had been established for decades, they can dispense with this analysis of the two elements under customary international law"[377].

334. As explained in paragraphs 317 to 321 in relation to the work of the ILC, decisions of international courts and tribunals constitute "subsidiary means" for the identification of CIL. Such a means is often used in international judicial practice. The Tribunal aligned with this practice and consensus when relying on past awards. The Committee therefore considers that the methodology used by the Tribunal to identify CIL may not be censored under Convention Article 52(1)(b).

335. As regards the issue of whether or not those awards have an adequate probative value, the Committee considers that it cannot and shall not investigate it. is then an issue the Committee cannot and shall not investigate. The Committee recalls that such an investigation falls outside the scope of its mandate. It does not operate as a court of appeal and therefore it cannot reassess or reweight the probative value attributed by the Tribunal to the awards it relied on.

336. To conclude on the first part of Peru's first ground for annulment, the Committee notes that the Parties agree that an analysis of State practice and *opinio juris* is not needed as regards those CIL rules which have been established for decades[378]. Their disagreement pertains to whether "serious arbitrariness" is a new standard or not[379]. Peru argues that it is a new standard that was invented by the Tribunal[380]. This is denied by Claimants who claim that "[s]erious was just a synthesis or summary of what the prior cases found"[381].

337. In this respect, the Tribunal refers to its findings regarding the claim made by Peru that the Tribunal failed to state reasons concerning "serious arbitrariness"[382]. The Committee concludes that, on the face of the Award, the difference for the Tribunal between "serious arbitrariness" and "manifest arbitrariness" is merely terminological and not substantive. "Serious arbitrariness" corresponds to the long-established element of the customary international law minimum standard of treatment of aliens.

338. In the context of this discussion, the Committee notes therefore and subsidiarily that the methodology and evidence relied upon by the Tribunal correspond to the common view of the Parties as to how long-established CIL rules or elements thereof, like "manifest" or "serious" arbitrariness, shall be evidenced.

[377] Tr., Day 2, p. 52: 12-16.
[378] Tr., Day 2, pp. 12: 15-20, 49: 18-22, 50: 1-9.
[379] Tr., Day 2, pp. 50: 5-22, 53: 2-8.
[380] Tr., Day 2, p. 12: 6-10.
[381] Tr., Day 2, pp. 50: 20-22, 107: 1-5.
[382] See: §§ 384-387 of this Decision.

ii. Identification of the content of the applicable law regarding whether Resolution No. 141 was seriously arbitrary

339. As to the second claim made by Peru, the Committee observes that, in paragraphs 364 to 436 of the Award, the Tribunal conducted a fact-intensive analysis of the (i) PR-22, (ii) the Technical Note 1, and the (iii) Guidelines for the award of the Base Provision for SFR approved by OSINERGMIN on February 11, 2016 ("**Bid Terms**"). The Tribunal concluded that the Bid Terms guaranteed the winner of the tender the right to continuous dispatch. This assessment of the facts and the evaluation of the evidence are not subject to review by the Committee.

340. The Tribunal then addressed the meaning of "seriously arbitrary" under international law in paragraphs 437 to 455 of the Award, relying on the case-law and referring to its discussion in Section VI.A.3i of the Award.

341. Peru argues in this respect that "[t]he Tribunal's failure to apply customary international law was carried through to the Tribunal's consideration of whether Resolution No. 141 was 'seriously arbitrary'"[383].

342. The Committee has concluded that the methodology used by the Tribunal was not censorable and that past awards can be relied upon in the context of identifying the content of CIL rules and applying them. It has also concluded that it falls outside the scope of its mandate to appraise the evidentiary value of those awards. Those conclusions apply *mutatis mutandis* to that second part of Peru's argument.

iii. Identification of the content of the applicable law regarding legitimate expectations

343. The reasons exposed in the paragraphs above, in Subsections VIII.B.6.i) and ii), apply *mutatis mutandis* to the third of Peru's claims, namely, that the Tribunal failed to apply the applicable law as regards legitimate expectations. The Committee observes that the Tribunal referred to six arbitral awards and one doctrinal opinion in the process of determining whether the protection of legitimate expectations is part of the MST/FET[384]. It considers that this is in line with the methodology discussed in paragraph 334. The Committee recalls that it does not fall within its mandate to assess the probative value of the awards referred to by the Tribunal.

344. Furthermore, the Committee disagrees with the *res judicata* argument formulated by Peru as regards the Tribunal's findings on legitimate expectations[385]. The Committee is not entitled to take into account effects unrelated to the Award under review when exercising its annulment mandate.

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[383] Memorial, § 113.
[384] Award, §§ 306-308.
[385] Reply, §§ 139-141.

345. As regards the three claims made by Peru under Convention Article 52(1)(b), the Committee considers that the way the Tribunal identified the content of the applicable law does not amount to a manifest excess of powers.

7. Application of the content of the applicable law to the present case

346. Having reached that conclusion, the Committee must now examine whether the Tribunal failed to apply the content of the applicable law.

347. This issue is closely connected to that of the identification of the content of the applicable law analyzed above.

348. Peru claims that "the Tribunal didn't even endeavor to apply customary international law because it never attempted to identify a norm of customary international law that it then applied to the facts"[386].

349. Claimants, on the contrary, argue that "where a tribunal properly identifies the applicable law and endeavors to apply it, there can be no argument that the tribunal 'failed to apply the applicable law' under Article 52(1)(b) of the ICSID Convention"[387]. For them, "it is enough for the Tribunal to endeavor to apply the law because if [the Committee] appl[ies] any other standard [it is] necessarily going to get engaged in an assessment of the merits of what the Tribunal did"[388].

350. The Committee considers that the distinction between "endeavor to apply" and "to apply" is largely semantic and that no conclusion should been reached here on formalistic grounds.

351. The Committee has concluded above that the way the Tribunal identified the content of the law to be applied is not censorable. In light of the analysis conducted by the Tribunal in Section VI.B.3.ii of the Award, notably in paragraphs 448[389] and 450[390], the Committee also concludes that the Tribunal effectively applied that law as regards serious arbitrariness and Resolution No. 141.

352. Another issue - and Peru does not disagree with that[391] - is the effort to apply the proper law to the facts, which any practitioner knows is prone to errors. A tribunal may err in its effort and reach an erroneous conclusion that might after review be censored by an appeal

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[386] Tr., Day 2, p. 137: 11-16.
[387] Counter-Memorial, § 99.
[388] Tr., Day 2, pp. 135: 2-5.
[389] Award, § 448: "It follows that Resolution No. 141 would only breach the MST/FET clause of Article 10.5 of the Treaty if it were shown to be seriously arbitrary, i.e. if it is 'shockingly' or 'manifestly' arbitrary or, otherwise, rises to a level 'unacceptable from the international perspective'".
[390] Award, § 450: "Resolution No. 141 is seriously arbitrary because, to borrow the words of Cargill, it constituted an 'unexpected and shocking repudiation' of the 'purpose and goals' of the Bid terms".
[391] Tr., Day 2, p. 25: 14-17: "A Tribunal must have first correctly identify the applicable law, and then having done that the Tribunal must have then endeavored to applied it to the facts". See also Tr., Day 2, p. 27: 6-7.

court. However, such a review falls as a rule outside the scope of the committees' mandate.

353. The Committee does not need to examine the application of the content of the applicable to law to the facts in relation to legitimate expectations. The Tribunal dispensed itself to analyze whether the adoption of Resolution No. 141 frustrated Claimants' legitimate expectations[392].

354. The Committee concludes that the Tribunal did not manifestly exceed its powers when applying the content of the applicable law.

8. Conclusion

355. For the above-mentioned reasons, the Committee rejects the first ground for annulment advanced by Peru as no manifest excess of powers has been evidenced.

C. SECOND GROUND FOR ANNULMENT: WHETHER THE TRIBUNAL FAILED TO STATE REASONS

1. Preliminary considerations

356. Peru contends that the Tribunal failed to state the reasons upon which the Award is based. Consequently, it argues that the Award must be partially annulled pursuant to Article 52(1)(e) of the Convention.

357. According to Peru, the Tribunal failed to provide reasons to support its conclusions regarding (i) arbitrary conduct and (ii) legitimate expectations. Peru's arguments in support of each allegation have been summarized above[393].

358. As it did in its analysis of the first ground, the Committee will first examine the Award with respect to this second ground for annulment. It will then set forth the applicable legal standard of annulment under Article 52(1)(e) of the Convention. Based on that, the Committee will address each of the two instances in which Peru contends that the Tribunal failed to provide reasons in the Award.

2. Award

359. In paragraphs 284 to 316 of the Award, the Tribunal determined the content of the MST/FET standard under CIL, applicable pursuant to Article 10.5 of the Treaty. First, in paragraphs 285 to 294, the Tribunal concluded that "the MST/FET standard in Article 10.5 of the Treaty imposes a high threshold for a finding of breach, without however requiring that the State's conduct be outrageous as dictated by the *Neer* standard"[394].

[392] Award, § 455.
[393] See: Section V of the present Decision.
[394] Award, § 295.

360. Then, the Tribunal examined the specific obligations encompassed by that standard: (i) in paragraphs 297 to 303, it analyzed whether serious arbitrary and discriminatory State measures constitute a breach of Article 10.5; (ii) in paragraphs 304 to 311, it addressed whether Article 10.5 includes an obligation not to frustrate an investor's legitimate expectations; and (iii) in paragraphs 312 to 315, it analyzed whether Article 10.5 requires the host State to maintain a stable and predictable legal and regulatory environment.

361. The Tribunal answered the first two questions in the affirmative and the third one in the negative. On that basis, it proceeded to analyze Peru's liability in respect of the SFR Service Claim.

362. Peru's second ground for annulment under Article 52(1)(e) of the Convention is that the Tribunal failed to explain its reasoning for concluding that, under the MST/FET standard in Article 10.5 of the Treaty, (i) serious arbitrary and discriminatory State measures amount to a breach of the Treaty and (ii) Peru was obliged not to frustrate an investor's legitimate expectations.

363. The Committee will first establish the standard for annulment under Convention Article 52(1)(e) and will then analyze each of these claims.

3. Standard for annulment under Convention Article 52(1)(e)

364. Article 48(3) of the Convention states that tribunals have an obligation to "state the reasons" upon which their award is based. Article 52(1)(e) of the Convention and Rule 50(1)(c)(iii) of the Arbitration Rules provide that an award may be annulled if "the award has failed to state the reasons on which it is based".

365. Several *ad hoc* committees have analyzed the reference to a "failure to state the reasons" under Article 52(1)(e)[395]. The *MINE* decision - which can be seen as establishing a minimum standard - is considered to be a landmark to assess whether a tribunal has stated reasons: "the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B. and eventually to its conclusion, even if it made an error of fact or of law"[396]. Since the *MINE* decision was issued, numerous committees have relied on this formulation, often citing the same paragraph[397]. The Committee therefore considers this standard to be consolidated in annulment case-law. It also notes that both Parties have invoked it[398].

366. The *MINE standard* has later been developed notably by the Committee in *Vivendi I*. Drawing on past decisions, it established that the failure to state reasons "entails two

[395] **CLAA-007**, § 7.56; **CL-018**, § 64; **RLAA-013**, § 54; **RLAA-016**, § 277; **CLAA-050**, § 163.
[396] **RLAA-007**, § 5.09.
[397] **RLAA-007**, § 5.09; **RLAA-008**, § 77; **CLAA-021**, § 53; **RLAA-013**, § 55; **CLAA-025**, § 221; **CLAA-028**, § 100; **CLAA-038**, § 39; **RLAA-022**, § 181; **RLAA-027**, § 261; **RLAA-031**, § 100; **CLAA-022**, § 66; **RLAA-016**, § 272; **CLAA-043**, § 267; **CLAA-070**, § 127.
[398] Counter-Memorial, fn. 278, 345; Reply, § 228.

conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision"[399]. This understanding has been endorsed by several committees when assessing whether a tribunal stated reasons in its award[400].

367. The Parties relied on this standard interchangeably in their memorials,[401] and also at the Annulment Hearing where the meaning of a total failure to state reasons was extensively debated[402].

368. Absent any indication in the Convention about how tribunals should state reasons and how committees should review their reasoning, the Committee considers - in light of the foregoing - the standard established in *MINE* to be adequate for reviewing the Award under Article 52(1)(e). Therefore, to annul the Award, the Committee would be required to find that the Tribunal failed to discharge its duty to render an award whose reasoning can be understood and followed. The duty to state reasons is not subject to specific formal requirements; it is sufficient that the Parties and the Committee can comprehend the reasoning.

369. When reviewing the Award, the Committee must examine only whether reasons are stated. It shall not inquire into the "quality" of the reasons, i.e. whether the reasons are correct, adequate or convincing[403]. Also, the Committee shall neither focus on the number of reasons given by the Tribunal when dealing with a question, nor on the brevity of a particular reason or a passage. Not every finding, assumption, or legal conclusion made by a tribunal when dealing with the questions presented by the parties, or in reaching the decision must be set out in detail[404]. All that is required for the purpose of the Committee's review under Convention Article 52(1)(e) is that the reasoning can be understood and followed.

370. In this respect, the Committee considers that it can, not only focus on expressly stated reasons, but also on the reasoning implicit in the Tribunal's considerations and conclusions, provided that this reasoning can be reasonably inferred from the terms of the Award. This approach has been consistently endorsed by *ad hoc* committees[405]. The

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[399] **CL-018**, § 65.
[400] **CLAA-021,** § 55; **RLAA-013**, § 54; **CLAA-024**, § 137; **CLAA-025**, § 76; **CLAA-028**, § 102; **CLAA-44**, § 195; **CLAA-045**, § 139; **CLAA-070**, § 129.
[401] Memorial §§ 131-133; Counter-Memorial, §§ 122-127; Reply, §§ 151-155; Rejoinder, §§ 94-97.
[402] Tr., Day 2, pp. 137-139.
[403] **RLAA-007**, § 5.08; **RLAA-008**, § 79; **CLAA-007**, § 7.55; **CL-018**, § 64; **RLAA-003**, § 123; **CLAA-021**, § 53; **CLAA-027**, § 162; **RLAA-023**, §§ 217, 235; **CLAA-039**, § 101; **CLAA-040**, § 197; **RLAA-031**, § 104; **RLAA-026**, § 70; **RLAA-016**, § 277; **CLAA-044**, § 195; **CLAA-045**, § 135; **CLAA-050**, § 154; **CLAA-083**, § 106; **CLAA-070**, § 128.
[404] **RLA-003**, § 131; **CLAA-028**, § 261; **CLAA-044**, § 334; **CLAA-83**, § 130.
[405] **RLAA-008**, § 81; **CLAA-021**, § 54; **RLAA-013**, § 56; **CLAA-024**, § 83; **CLAA-025**, § 74; **CLAA-028**, § 101; **RLAA-023**, § 263; **RLAA-031**, § 108; **CLAA-022**, § 76; **CLAA-083**, § 112; **CLAA-070**, § 132.

Committee also notes that the passages in which Peru alleges that the Tribunal failed to state reasons must be read together with the Award as a whole[406].

371. The Committee also considers that it cannot review whether all the arguments or legal authorities advanced by the Parties were addressed in the Award. As several *ad hoc* committees have held, a tribunal is not required to comment on all the arguments advanced by the parties in relation to each question[407]. To impose such a duty would undermine efficiency and risk producing awards of excessive length. For the Committee, as long as the questions raised by the Parties were answered in a reasoned manner, the Tribunal was entitled not to rely on all the evidence that they submitted.

372. The Committee further notes that, as expressed by the *Wena* committee, an award cannot be annulled for an alleged lack of reasons in respect of arguments or evidence that were not presented to the Tribunal during the proceeding[408].

373. The Committee observes that both Parties agree that the Committee cannot review the correctness or adequacy of the reasons given by the Tribunal[409], or the degree of detail with which they are stated[410]. However, they disagree on how to apply the standard under Article 52(1)(e) of the Convention and whether the Tribunal addressed some arguments or legal authorities that, Peru argues, were fundamental to address the issue of the applicable law.

374. Peru claims that the Tribunal failed to state the reasons on which the Award is based with respect to its findings on arbitrary conduct and legitimate expectations. The Committee will now examine these two allegations in turn. To the extent that, in its Memorial and Reply, Peru links arguments under the present second ground for annulment to the first ground, the Committee will refer, where relevant, to the reasoning set out in its analysis of the first ground.

4. Did the tribunal fail to provide reasons to support its conclusions regarding arbitrary conduct?

375. The first part of the second ground for annulment refers that the Tribunal failed to provide reasons to support its finding that "serious" arbitrary and discriminatory State conduct are covered by Article 10.5 of the Treaty. Peru divides this claim into three parts, stating respectively that the Tribunal failed to explain[411]:

[406] **CLAA-028**, § 261; **CLAA-044**, § 334.
[407] **CLAA-025**, §§ 72, 222; **CLAA-028**, § 98; **CLAA-044**, § 197; **CLAA-083**, § 120; **CLAA-40**, § 120; **CLAA-044**, § 346.
[408] **RLAA-08**, § 82.
[409] Counter-Memorial, § 123; Reply, § 152; Rejoinder, § 94.
[410] Counter-Memorial, § 127; Reply, § 152; Rejoinder, § 94.
[411] Reply, §§ 157-159.

a. first, how the prohibition of "serious" arbitrary and discriminatory conduct had crystallized into a norm of CIL; relatedly, how the awards it cited demonstrated that this prohibition had so crystallized;

b. second, the basis on which the Tribunal equated the higher threshold of "egregious" conduct with the lower standard of "serious" conduct; and,

c. third, its conclusion that Peru acted in a "seriously arbitrary" manner.

376. Even though the Tribunal reached its conclusions in paragraphs 297 to 302 of the Award, those paragraphs are not isolated from the rest of the Award and they have to be read in conjunction with other paragraphs to understand the reasoning in support of the decision. Specifically, the Committee recalls that the Tribunal's analysis of the standard of "arbitrary conduct" was developed as part of the discussion of the specific obligations encompassed by the MST/FET standard under Article 10.5 of the Treaty[412].

377. Regarding the first part of Peru's claim (namely, how the prohibition of "serious" arbitrary and discriminatory conduct had crystallized into a norm of CIL), Peru contends that "[t]he Tribunal acknowledged that the applicable law under Article 10.5 of the Treaty is the minimum standard of treatment under customary international law" (the Point A) and "ultimately concluded that Article 10.5 of the Treaty protected investors from 'serious' arbitrary and discriminatory conduct"[413] (the Point B). It considers that "the Tribunal did not explain the steps between that starting point and conclusion. Specifically, the Tribunal did not explain how the prohibition of 'serious' arbitrary and discriminatory conduct had crystallized into customary international law through state practice and *opinio juris*"[414].

378. At the Annulment Hearing, Peru further explained that "[i]t's not that we disagree with the reasoning. It just cannot be followed. The Tribunal doesn't explain how it reaches that point"[415]. It concluded that "[i]f there is no analysis, it is impossible to follow the tribunal's reasons from point A to point B"[416].

379. The Committee notes that prior to the paragraphs challenged by Peru, the Tribunal stated in paragraphs 280 and 281 of the Award that the applicable law was CIL; it indicated in paragraph 283 that it would analyze the MST/FET standard under CIL; in paragraphs 285 through 295, it examined the level of protection afforded by the MST/FET; and in paragraphs 299 through 302, it cited and discussed the awards in *International Thunderbird*, *Glamis Gold*, *Cargill*, and *Waste Management II*. With that context, the

[412] Award, §§ 284-316.
[413] Memorial, §§ 136-137.
[414] Memorial, § 138.
[415] Tr., Day 1, p. 52: 15-17.
[416] Tr., Day 2, p. 29: 21-22.

Tribunal concluded that "MST/FET prohibits both arbitrariness and discrimination by the host State"[417].

380. The Committee considers that it can reasonably be inferred from these parts of the Award that the Tribunal relied upon the awards cited to conclude that the prohibition of serious arbitrary and discriminatory conduct crystallized into a CIL norm. The Committee is satisfied that the reasoning exists, that it is understandable and that it allows an attentive reader to follow how the Tribunal proceeded from the determination of the relevant applicable law (Point A) to the decision that serious arbitrary conduct forms part of CIL (Point B) and is therefore forbidden by Article 10.5 of the Treaty.

381. Even if Peru opines that the Tribunal erred in relying on those awards, the test under Convention Article 52(1)(e) is not whether the reasons provided in the award are correct, but whether reasons are provided. The Committee also recalls that annulment committees do not have a mandate to review the evidentiary value of the awards relied on by tribunals.

382. Those considerations apply *mutatis mutandis* to the related allegation made by Peru according to which the Tribunal did not explain how the awards it cited demonstrated that the prohibition of "serious" arbitrary and discriminatory conduct had crystallized into a CIL norm.

383. Moving to the second part of the claim (namely, on which basis the Tribunal equated the higher threshold of "egregious" conduct with the lower standard of "serious" conduct), Peru disagrees with Claimants who argue that the Tribunal "was using serious to synthesize and summarize the state of the jurisprudence"[418]. Peru states that "manifest on the one hand and serious on the other hand was never discussed by the Tribunal; the so-called synthesis was not there, it was provided by counsel"[419]. It also argues that "reasoning […] is missing from the award. The quote in [paragraph] 303 [of the Award] […] begins with the phrase 'for these reasons' but the reasons are not there. The reasons were supplied by counsel in his presentation"[420].

384. The Committee notes that, in analyzing the legal authorities submitted by both Parties concerning the meaning of arbitrariness, the Tribunal took note of the language employed in the relevant case law ("egregious", "shocking", and "manifest") in order to articulate the applicable standard.

385. On the face of the Award, the Committee considers that the two formulations - "egregious" conduct and "serious" conduct - reflect for the Tribunal the same substantive

[417] Award, § 299.
[418] Tr., Day 2, p. 52: 9-10.
[419] Tr., Day 2, p. 100: 9-11.
[420] Tr., Day 2, p. 99: 22 - 100: 1-4.

content. The difference is merely terminological. For example, in paragraph 448 of the Award, it stated:

> It follows that Resolution No. 141 would only breach the MST/FET clause of Article 10.5 of the Treaty if it were shown to be seriously arbitrary, i.e. if it is "shockingly" or "manifestly" arbitrary or, otherwise, rises to a level "unacceptable" from the international perspective.

386. Also, based on the standard exposed in *Cargill* that used the words "unexpected and shocking", the Tribunal concluded in paragraph 450 that Resolution No. 141 was seriously arbitrary.

387. The Committee concludes that the Tribunal did not equate the threshold of "egregious" conduct with what it referred to as "serious" conduct. Instead of referring to two different thresholds, it relied on two formulations to reflect one and the same threshold. Therefore, it could not have been expected and required from the Tribunal to provide the type of reasons called for by Peru.

388. Finally, regarding the third part of this claim (namely, why the Tribunal concluded that Peru acted in a "seriously arbitrary" manner), Peru notes that this conclusion was based on the premise that Claimants could have expected permanent dispatch[421]. But Peru argues that the Tribunal did not provide reasons for why Claimants could have had that expectation and, by extension, how Peru's decisions regarding Resolution No. 141 affected that expectation[422].

389. The Committee notes that the Tribunal, in Subsection IV.B.3.i of the Award, from paragraphs 364 to 436, analyses each of the Bid Terms and concludes that "the Bid Terms guaranteed to the winner of the Tender the continuous dispatch of energy to provide the SFR service, irrespective of its inclusion in the Merit Order"[423]. The Committee considers that those analyses and findings constitute reasons which enable an attentive reader to understand why the Tribunal concluded that Claimants could have expected permanent dispatch and how it concluded that Peru's decisions regarding Resolution No. 141 affected that expectation.

390. Based on the above, the Committee rejects the three aspects of the first claim of the second ground for annulment. It concludes that the Tribunal did not fail to state the reasons in support of its conclusion regarding arbitrary conduct.

[421] Memorial, §§ 141-142.
[422] Memorial, § 159.
[423] Award, § 436.

5. Did the tribunal fail to provide reasons to support its conclusions regarding legitimate expectations?

391. Peru's second claim relating to the second ground for annulment is that the Tribunal failed to provide reasons to support its conclusions regarding legitimate expectations.

392. Peru divides this claim into two parts, stating that the Tribunal failed to explain[424]:

a. first, its conclusion that the protection of legitimate expectations had crystallized into a norm of CIL; relatedly, how the awards it cited demonstrated that this protection had so crystallized; and,

b. second, its conclusion that the concept of legitimate expectations "stems from" the obligation to act in good faith.

393. The Tribunal addressed the obligation to protect the investor's legitimate expectations in paragraphs 304 to 311 of the Award, following the analysis of the MST/FET standard under Article 10.5 of the Treaty and the obligation not to act in a seriously arbitrary manner. Those paragraphs must be read within that broader context.

394. Regarding the first part of this claim, the Committee considers that Peru puts forward and relies on arguments similar to those advanced in relation to arbitrary conduct.

395. The Committee notes that, in paragraphs 300 and 306 of the Award, the Tribunal relied upon six arbitral awards and one doctrinal source to support its conclusions regarding the status of legitimate expectations. In addition, in paragraphs 304 and 305, the Tribunal explained why the decision of the ICJ in *Bolivia v. Chile* was not applicable to the present case.

396. The Committee reaffirms its findings in paragraph 370 of this Decision, where it recognized that a tribunal's reasons may be implicit, provided that they can be reasonably inferred from the context preceding the relevant analysis and, more generally, from the decision as a whole.

397. In this instance, it may reasonably be inferred by an attentive reader that the Tribunal relied on the authorities cited to elucidate its conclusion that the protection of legitimate expectations has crystallized into a norm of CIL.

398. As explained in paragraphs 369, 373, and 381 even if Peru considers that the Tribunal erred in relying on those authorities, the test under Convention Article 52(1)(e) is not whether the reasons provided in the Award are correct, but whether reasons are provided. The Committee also recalls that the review of the evidentiary value of the awards relied on by the Tribunal falls outside the scope of its mandate.

[424] Reply, §§ 173-174.

399. Those considerations apply *mutatis mutandis* to the related allegation made by Peru according to which the Tribunal did not explain how the awards it cited demonstrated that the protection of legitimate expectations has crystallized into a CIL norm.

400. Regarding the second part of Peru's claim (namely, that the Tribunal did not provide reasons when concluding that the concept of legitimate expectations "stems from" the obligation of States to act in good faith), the Committee first notes that none of the Parties went to the point of considering that the principle of good faith is not part of the "customary international law principles that protect the economic rights and interests of aliens".

401. The Committee also observes that two awards and one doctrinal opinion are referred to by the Tribunal in paragraph 306 (footnote 324) in support of its finding that the obligation to protect legitimate expectations stems from the principle of good faith. The Committee considers that it may reasonably be inferred by an attentive reader that the Tribunal relied on these authorities to elucidate this finding.

402. Peru may opine that the Tribunal erred in doing so. But, as explained in paragraphs 369, 373, and 381 of this Decision, correctness is not the test under "failure to state reasons" and the review of the probative value of awards is alien to the annulment committees' mandate.

403. As a final argument, Peru states that "ignoring Perú's objection would mean that the Tribunal's finding regarding legitimate expectations would survive and have *res judicata* effect […] [and] would have a serious impact on Perú in future arbitrations not only with respect to this FTA, but also with respect to any other FTA or Treaty requiring application of the customary international law minimum standard of treatment"[425].

404. The Committee reiterates its disagreement with this *res judicata* argument formulated by Peru[426]. Effects unrelated to the awards under review cannot be taken into account by committees in the exercise of their mandate.

405. Consequently, the Committee rejects the second claim of the second ground for annulment regarding legitimate expectations.

6. Conclusion

406. For the above-mentioned reasons, the Committee rejects the second ground for annulment advanced by Peru.

[425] Reply, § 178.
[426] See: § 344 of the present Decision.

D. THIRD GROUND FOR ANNULMENT: WHETHER THE TRIBUNAL SERIOUSLY DEPARTED FROM A FUNDAMENTAL RULE OF PROCEDURE

1. Preliminary considerations

407. Peru claims that the Tribunal committed a series of serious departures from a fundamental rule of procedure. Consequently, it argues that the Award must be partially annulled pursuant to Article 52(1)(d) of the Convention.

408. According to Peru, the Tribunal seriously departed from a fundamental rule of procedure by (i) excluding expert evidence, (ii) relying on submissions made by Peru in other cases without providing it an opportunity to comment on those submissions, and (iii) by engaging into a pattern of procedural conduct against it that, both individually and cumulatively, deprived it of the opportunity to fully present its case and to be treated equally. Peru's arguments in support of each allegation have been summarized above[427].

409. The Committee will first set forth the applicable legal standard of annulment under Article 52(1)(d) of the Convention. It will then detail the content of the right to be heard which is central to Peru's claims under this ground for annulment. Based on that, the Committee will address each of the three instances in which Peru contends that the Tribunal seriously departed from a fundamental rule of procedure.

2. Standard for annulment under Convention Article 52(1)(d)

410. Article 52(1)(d) of the Convention mandates the Committee to evaluate whether the Tribunal committed "a serious departure from a fundamental rule of procedure" during the Arbitration.

411. Both Parties agree that the annulment of an award under Convention Article 52(1)(d) requires showing (i) a departure from a fundamental rule of procedure, and that (ii) the departure is "serious", meaning substantial and depriving the party of the rule's protection.

412. As regards the first part of the test, the Committee agrees with Peru that it is well established that the principle of equality of arms and the right to be heard are fundamental principles that permeate all arbitration proceedings. This not disputed by Claimants. The right to be heard notably is a cornerstone of procedural fairness in international investment arbitration that has been consistently recognized as a fundamental rule of procedure[428]. Therefore, its violation will be considered a departure from a fundamental rule of procedure. However, the Committee considers that there is no right without

[427] See: Section V of the present Decision.
[428] Memorial, § 154.

limitations and that this is a fact-specific issue that needs to be addressed accordingly. In the next section, the Committee will analyze the content of the right to be heard.

413. As for the second element of the standard, the Committee understands that for a departure from a fundamental rule of procedure to be considered serious, it must be substantial and be as such as to deprive a party of the benefit or protection which the rule is intended to provide[429].

414. Peru admits that "the true disagreement between the Parties does not concern the content or scope of the applicable legal standard, but rather its application to the facts of this case"[430]. For this reason, the Committee does not find it necessary to elaborate further on that standard.

415. The Committee considers that the main issue in the present case arises from the different interpretations that the Parties have of the right to be heard and from its application to the facts of the case.

416. The Committee will then first analyze the content of this principle.

3. The right to be heard

417. The right to be heard is an essential part of the principle of equality of the parties. It encompasses: (i) the right for each party to be afforded a full and fair opportunity to present its case; and (ii) the right for each party to be afforded a full and fair opportunity to comment on and to respond to the submissions and evidence presented by the opposing party[431].

418. The first aspect of the right to be heard requires that each party be afforded a full opportunity to present its case. The Committee considers that this right entails for each party a full, fair, or at least comparatively equivalent opportunity to present its claim or defense, and to submit all the arguments and evidence in support thereof[432]. In this respect, a breach of the right to be heard may occur where a tribunal, without justification or in an arbitrary manner, refuses to allow a party to present certain evidence or to articulate a particular argument.

419. This does not mean that the parties are conferred unlimited opportunities to be heard. The right to be heard is not absolute. This entails that this right is not violated merely because a tribunal rejects one or more of the parties' arguments. This also implies that not all evidence must be admitted.

[429] Memorial, § 158.
[430] Reply, § 192.
[431] **CL-018**, § 85; **RLAA-017**, § 69; **RLAA-018**, § 76.
[432] **RLAA-008**, § 57; **RLAA-014**, § 184; **RLAA-018**, § 76; **RLAA-019**, § 295; **RLAA-031**, § 80.

420. The Committee considers that the right to be heard does not concern how tribunals assess or weigh the evidence or the arguments advanced by the parties. Every tribunal has discretion to decide whether to admit new documents or evidence into the record, provided that such discretion is exercised in a manner consistent with the parties' right to due process[433]. In the same vein, the right to be heard does not extend to how tribunals analyze the evidence or the submissions made by the parties. They are not required to address or expressly rule on every argument advanced by the parties. Their right to be heard on all the issues that they consider relevant does not entail a corresponding duty on tribunals to address expressly each of those issues[434].

421. The right to be heard is satisfied where the tribunal affords the parties reasonable opportunities to present their case in accordance with the applicable rules of procedure[435].

422. The Committee also notes that the parties' right to be heard does not prevent a tribunal from basing its decision on a legal reasoning that was not expressly advanced by the parties, provided that such a reasoning falls within, or can be reconciled with, the legal framework established by them[436].

423. The second aspect of the right to be heard requires that each party be given the opportunity to respond to the submissions and evidence produced by the opposing party. This entails that the tribunal must afford both parties the opportunity to make submissions whenever new evidence is submitted or admitted[437]. The Committee notes that, in case a party considers that the tribunal violated this aspect of the right to be heard, it must duly raise the matter before that tribunal at that time[438].

424. The Committee will now analyze the three instances in which Peru contends that the Tribunal seriously departed from a fundamental rule of procedure.

4. Did the Tribunal seriously depart from a fundamental rule of procedure by excluding expert evidence?

425. Peru notes that, by issuing Arbitration PO3 and PO4, the Tribunal decided to strike significant portions of one expert report and to remove entirely a technical analysis attached to Peru's second quantum expert report. It considers that this decision amounts to a serious departure from a fundamental rule of procedure, "namely the right to be heard and the right to equal treatment"[439]. Peru states that the Committee must examine the merits of the procedural determinations to assess whether its right to be heard and to

[433] **RLAA-019**, § 284; **RLAA-024**, § 172; **RLAA-031**, § 82; **CLAA-021**, § 219.
[434] **RLAA-034**, § 184; **CLAA-042**, § 295.
[435] **RLAA-019**, §§ 285-286; **CLAA-055**, § 255; **RLAA-020**, § 178; **RLAA-036**, § 449.
[436] **RLAA-018**, § 77; **RLAA-019**, § 289.
[437] **RLAA-006**, § 391; **RLAA-015**, § 129: **RLAA-016**, § 202.
[438] **RLAA-006**, § 377.
[439] Memorial, § 213.

equal treatment were violated and whether that violation was sufficiently serious to justify annulment[440].

426. According to Peru, this assessment is mandatory as that decision led to a fundamentally flawed examination of Claimants' damages claims, which "was not just a procedural formality—it fundamentally altered the fairness of the proceedings"[441]. It posits that evidence exists that proves that its submission of technical evidence with the Arbitration Rejoinder was procedurally proper and timely[442]. Peru considers that the lack of prior annulment cases on this issue is irrelevant as, in its view, each decision is fact-specific and as the severity in the present case is unprecedented[443].

427. Peru contends that this complaint is not about the correctness of the Award, but about the disproportionate, inconsistent, and prejudicial exercise of its discretion by the Tribunal. For it, awards are not immune from annulment when discretion is exercised in a way that infringes the fundamental right to due process[444].

428. Claimants consider that Peru's argument "suffer[s] from numerous flaws", namely that (i) the rights referred above do not entitle "an arbitrating party to submit any evidence in support of its case at any time"[445]; (ii) Peru's argument primarily explains why it "disagrees with the Tribunal that its expert evidence was impermissibly belated and therefore inadmissible" but a ICSID Committee may not analyze and decide on this discrepancy of positions "as that would amount to an appeal on a 'correctness' standard which is forbidden in an ICSID annulment"[446]; (iii) "the procedural history shows that Peru had a full and fair opportunity to rebut Claimants' case on the Expert Subjects at Issue"[447]; and (iv) "even if there were a departure from a fundamental rule of procedure (which is denied), Peru cannot establish that it was 'serious' for purposes of Article 52(1)(d) of the ICSID Convention"[448].

429. Specifically, Claimants emphasize that "the Tribunal: (i) acted in accordance with express procedural rules that entitled it to declare evidence inadmissible; (ii) afforded Peru substantial due process before its decision to exclude the expert evidence; and (iii) in any event, provided Peru with multiple opportunities to submit and present other expert evidence on the expert subjects at issue"[449]. This means for Claimants that "[t]he

[440] Reply, §§ 202-210.
[441] Memorial, § 207.
[442] Reply, §§ 232-235.
[443] Reply, §§ 276-294.
[444] Reply, §§ 264-275.
[445] Counter-Memorial, §§ 164, 165.
[446] Counter-Memorial, § 166.
[447] Counter-Memorial, § 167.
[448] Counter-Memorial, § 168.
[449] Rejoinder, § 165.

Tribunal's decision to exclude evidence was taken pursuant to a rule of procedure and therefore was not a departure from any rule of procedure"[450].

430. Claimants also state that, under ICSID practice, tribunals have broad discretion over the admissibility of evidence[451]. This explains for them why numerous ICSID decisions confirm that excluding late evidence does not constitute a ground for annulment, and why no annulment committee has ever annulled an award on this basis.

431. *Ex abundanti*, Claimants state[452] that even if a procedural departure occurred, Peru must show that it was "serious", meaning outcome-determinative. They state in this respect that (i) the Tribunal considered extensive expert testimony from four of Peru's experts on the same regulatory and technical issues and rejected these views; (ii) Dr. Tabors' excluded opinions were largely duplicative; and (iii) he was not an expert on Peruvian regulations. Likewise, Claimants state that, as to the excluded PSR Report, Peru fails to show that it would have materially affected the damages award.

432. In any case, Claimants affirm that "Peru invites the Committee to reexamine the merits of the Tribunal's evidentiary decisions and to speculate on how the omitted portions of the Tabors Report and the PSR Report might have influenced the Tribunal's conclusions. Such an exercise would require the Committee to delve into and weigh the evidentiary record—a fact-intensive inquiry that exceeds the limited scope of annulment review"[453].

433. The Committee first notes that the respect of the right to be heard shall be appraised in relation to the arbitration proceeding as a whole, meaning in the course of the proceeding considered holistically. The issue to be analyzed is whether the Parties had the opportunity during the Arbitration, including the Arbitration Hearing, to express their views on every legal issue raised in the case.

434. The Committee further considers that, in certain circumstances, scrutiny of procedural decisions may be possible or even necessary. However, it is worth stressing in this respect that Convention Article 52(1)(d) serves to ensure observance of fundamental procedural guarantees. The Committee also recalls that the lack of respect of such guarantees must be proven, the burden of proof in the present case being on Peru[454].

435. Based on the analysis of the Award and of the Parties' submissions in this annulment proceeding, the Committee considers that evidence supporting Peru's position is lacking. Peru was heard extensively before Arbitration PO3 and PO4 were issued. Peru has not demonstrated how, despite these opportunities it was given to be heard, it could be

[450] Rejoinder, §§ 166-201.
[451] Counter-Memorial, § 268.
[452] Counter-Memorial, §§ 246-272.
[453] Rejoinder, §§ 204-207.
[454] Counter-Memorial, § 153.

considered as having been deprived of the protection of a fundamental rule of procedure, let alone seriously as necessary under Convention Article 52(1)(d).

436. Given the evidence which was available to the Tribunal, the Committee considers that it is highly unlikely that the Tabors Report – if admitted *in totum* – would have had an impact on the Award and on the Tribunal's conclusions. Four largely coincidental expert reports were attached to the Arbitration Counter-Memorial; those experts made presentations during the Arbitration Hearing and they were cross-examined; this includes Dr. Tabors in relation to the part of his report admitted by the Tribunal. Furthermore, Claimants also provided evidence on those issues.

437. The same considerations and reasoning apply *mutatis mutandis* to the PSR Report. The Committee observes in particular that (i) Peru did not ask the SIDEC input data in due course, (ii) nothing prevented Peru from presenting its own independent position with its Arbitration Counter-Memorial, and (iii) Peru was authorized by the Tribunal to cross-examine BRG and SIDEC.

438. The Committee concludes that the Tribunal did not violate Peru's right to be heard and that it did not commit a serious departure from a fundamental rule of procedure. As it explained[455], this fundamental right must be exercised – as any other right – within reasonable limits; it may not constitute a license to submit documents and/or an expert report in breach of the agreed rules of procedure.

439. Consequently, the Committee rejects this first claim of the third ground for annulment regarding the exclusion of expert evidence.

5. Did the Tribunal deny Peru the right to be heard by relying on submissions it made in other cases without providing it with an opportunity to comment on those submissions?

440. Peru states that the Tribunal relied in the Award on submissions - not in the record of the proceeding - that it presented in other arbitrations in order to demonstrate "inconsistencies in [its] position in the underlying arbitration"[456] and without giving it the possibility to contextualize and comment on them. Peru characterizes such a conduct as a serious violation of the right to be heard, because it considers that the Tribunal's determinations regarding arbitrariness, discrimination, and legitimate expectations were "significantly shaped" by these submissions.

441. Contrary to Claimants' position[457], Peru posits that these submissions cannot be treated as legal authorities to which the *iuria novit arbiter* principle applies. Moreover, in its

[455] See: § 419 of the present Decision.
[456] Reply, § 352.
[457] Counter-Memorial, § 288.

view, the Tribunal's use of the word "incidentally"[458] does not render the references irrelevant; on the contrary, it undermines the contention that the consequences were not "serious".

442. Claimants argue that the Award shows that the reference to those submissions was expressly considered "incidental" and that they are not central in the Tribunal's reasoning. For them, Peru "heavily" "exaggerates" "the significance of these remarks"[459] when it claims that the Tribunal deprived it from the "opportunity to comment on those submissions"[460]. Claimants conclude that "Peru cannot seriously claim that the Award should be annulled based on *dicta*"[461].

443. According to Claimants, "tribunals have, not just the discretion, but a duty, under the principle of *iura novit curia*, to apply the law and develop their own legal reasoning based on their professional knowledge"[462]. They consider that this reasoning and the principle itself apply to submissions made by parties in other arbitral proceedings and that "[a]nnulment committees have thus consistently rejected arguments analogous to Peru's"[463].

444. Claimants also posit that the "Tribunal here referred to Peru's other pleadings in assessing a legal question: the scope of the MST. Part of that assessment is to weigh the strength and credibility of each side's legal advocacy"[464].

445. They conclude that "[t]o establish a violation under Article 52(1)(d), Peru must establish that the Tribunal's conduct caused it to reach an outcome substantially different from that it would have otherwise reached. However, as the Tribunal expressly stated, the Tribunal's observation about Peru's submissions in other memorials was an aside, and not determinative, of its legal conclusions"[465].

446. For the Committee, the submissions made by parties in the context of international arbitration proceedings may not be considered as legal authorities. Neither do they fall within the scope of the *iura novit arbiter* principle.

447. Furthermore, the Committee considers that, when tribunals rely on submissions made by the parties in other such proceedings which are not in the record, they should - as a rule - give them the possibility to comment thereon. Such a "good practice" is intended to

[458] Award, § 298: "That position is incidentally also irreconcilable with the one Respondent has itself adopted in other recent investment treaty cases, as emerges from Peru's memorials in those cases which are public, but were not referred to by the Parties".
[459] Counter-Memorial, § 277.
[460] Counter-Memorial, § 275.
[461] Counter-Memorial, § 279.
[462] Counter-Memorial, § 282.
[463] Counter-Memorial, § 283.
[464] Counter-Memorial, § 290.
[465] Counter-Memorial, § 293.

avoid a "surprise effect" for the party concerned. It also aims at benefiting from the parties' cooperation to, at least, help tribunals to look at those submissions from different angles.

448. In the present case, the Tribunal failed to do so. Therefore, the Committee considers that it showed, at least, a lack of procedural courtesy which may be considered as a possible violation of the right to be heard.

449. However, the Committee considers that, even if it was to conclude that the Tribunal did violate this right and that the Tribunal departed from a fundamental rule of procedure, this would not be sufficient to annul the Award.

450. On the face of the Award, the submissions made by Peru in other proceedings do not appear to have been "outcome-determinative" in the Tribunal's conclusion.

451. First of all, the Tribunal focused in paragraphs 297 and 299 on *International Thunderbird*, *Glamis Gold*, *Cargill and Waste Management II* in reaching its conclusion, four awards which were in the record of the Arbitration proceeding in the present case.

452. Second, the Committee notes that the reference to the submissions in paragraph 298 fits into a broader analysis which encompasses the Parties' positions[466]. The Committee also notes that the Tribunal explicitly used the word "incidentally", which may denote something that is connected to the main subject, but that is of a lesser importance, or something additional that is not central to the main issue at stake[467]. This fact, together with the above-mentioned considerations, evidences that the reference to Peru's submissions in other proceedings has not had a material impact on the outcome of the Award.

453. As a consequence, even if the Tribunal was considered as having committed a departure from a fundamental rule of procedure, this departure would not be substantial and thereby not serious[468].

454. The Committee therefore rejects this second claim of the third ground for annulment regarding the reference to Peru's submissions in other proceedings.

6. Did the Tribunal engage in a pattern of procedural conduct against Peru that, both individually and cumulatively, deprived it of the opportunity to fully present its case and to be treated equally?

455. Peru argues that the Tribunal adopted four procedural rulings against it which, individually and cumulatively, prevented it from fully presenting its case, were

[466] Counter-Memorial, § 279.
[467] The Cambridge Dictionary refers that "incidentally" is "used before saying something that is not as important as the main subject of conversation, but is connected to it in some way". Extracted from: https://dictionary.cambridge.org/dictionary/english/incidentally (Last consulted on May 22, 2026).
[468] See: § 413 of the present Decision.

incompatible with the principle of equality of arms, and thus constituted a serious departure from a fundamental rule of procedure.

456. The four situations mentioned by Peru are the following: (i) the Tribunal's refusal to order Claimants to disclose the identity of their funder's investors and the funding agreement; (ii) the Tribunal's authorization that Claimants introduce new BRG calculations and data manipulations in their Arbitration Hearing demonstratives and also previously undisclosed SPA pages during such Hearing; (iii) the Tribunal's refusal of Peru's request to a 24-hour advance for disclosure of some material at the Arbitration Hearing; and (iv) the Tribunal's refusal to strike slides 40-48 of Claimants' experts presentation from the record because they did not testify on them.

457. Peru considers that "these rulings show a pattern from the Tribunal of disregarding Perú's rights", the Tribunal having in its view "systematically and consistently made decisions that gradually compromised Perú's due process rights"[469]. Also, Peru claims that, in case "[the Committee would] determin[e] that none of these decisions, when considered individually, constitutes a serious departure from such a rule […], [it] should find that the cumulative effect of the Tribunal's procedural rulings amounted to a serious departure from fundamental rules of procedure, warranting partial annulment of the Award"[470].

458. Claimants argue that Peru does not explain how any of these decisions violated a rule of procedure or constituted a "serious" departure from a fundamental one. They also contend that previous committees have required that each request be analyzed on its "own individual merits". For them, "'a series of errors is no more necessarily a ground for annulment than a single error'"[471].

459. After expressing their position on the alleged cumulative effect of the four situations, Claimants address each of them individually:

    (i) With respect to the documents relating to the funding, Claimants submit that Peru is attempting to relitigate issues already decided by the Tribunal. They argue that arbitral tribunals enjoy a broad discretion in matters of document production and, in any event, that Peru has failed to demonstrate that these decisions had any impact on the Award. Claimants further contend that Peru has not provided any reason to believe that a conflict existed, and that its argument regarding "strategic decisions" is moot, given that it was not awarded costs and that requests for security for costs are granted only in exceptional circumstances;

    (ii) Claimants submit that the evidentiary decision concerning the SPA fell within the Tribunal discretion and that Peru has failed to demonstrate any "serious" impact

[469] Reply, § 397.
[470] Reply, § 468.
[471] Counter-Memorial, §§ 298-300.

arising from that decision. They argue that it could have filed a rebuttal at a later stage or addressed the issue in its post-hearing but that it chose not to do so. Finally, they contend that the Tribunal's reasoning makes clear that the sale price was irrelevant to the assessment of damages and that the outcome would have been the same even in the absence of the additional pages;

(iii) With respect to Peru's request for 24-hour advance for disclosure of certain materials to be used at the Arbitration Hearing, Claimants submit that the Tribunal acted within its discretion. They argue that Peru had ample opportunity to present its position, that it failed to identify any slide containing impermissible material and that it did not demonstrate any impact on the Award. Claimants further contend that damages were based on BRG's report, rather than on demonstrative calculations;

(iv) Finally, regarding the Tribunal's refusal to strike certain slides, Claimants submit that Peru's own experts likewise included supporting slides that were not presented during the Annulment Hearing. They argue that the decision fell within the Tribunal's evidentiary discretion, that the slides contained only material already on record and that the Tribunal itself confirmed that they added little and raised no issues.

460. The Committee considers that the cumulative effect's theory pertaining to unrelated decisions is not admissible *per se* as a ground for annulment under Convention Article 52(1)(d). It cannot serve as a proxy (through the untested concept of "pattern of procedural conduct") in circumstances where each decision in and of itself is not censorable and where no evidence has been adduced that establishes a connection between them.

461. As regards each one of the four situations here at stake, the Committee, after having analyzed the documents on record, considers that they are in line with standard practice in international arbitration. For it, none of those situations amount to a serious departure from a fundamental rule of procedure.

462. With respect to the disclosure of third-party funding, the Committee considers that the Tribunal's decision on this matter was sufficiently substantiated. The record does not demonstrate that the outcome affected Peru's right to be heard, nor that the Parties were treated unequally.

463. Regarding the request made at the Arbitration Hearing to supplement an excerpted document, the Committee notes that the SPA was already part of the evidentiary record. The Tribunal grounded its decision in the procedural context of the Arbitration Hearing and it did not deprive Peru of an opportunity to present its case. Accordingly, no violation of the right to be heard and of the equality of arms principle has been shown.

464. As to the request to modify the procedural deadline, the Committee recalls that matters concerning the allocation of time and the admissibility of evidence fall within the Tribunal's procedural discretion. It also considers that the Tribunal's decision did neither affect Peru's right to be heard, nor led it to be treated in an unequal manner.

465. Finally, the Committee reaches *mutatis mutandis* the same conclusion with respect to the slides presented by BRG. Decisions concerning whether or not to strike evidence fall within the Tribunal's discretion. The decision it made did not prevent Peru from the opportunity to address matters of quantum at the Arbitration Hearing. In those circumstances, the Committee considers that Peru's right to be heard was not impaired and that it was not treated unequally.

466. Accordingly, the Committee concludes that none of the procedural matters raised by Peru constitutes a departure from a fundamental rule of procedure, let alone, a serious one which would be substantial and be as such as to deprive Peru of the benefit or protection that any such rule is intended to provide.

467. The Committee therefore rejects this third claim of the third ground for annulment regarding those procedural matters.

7. Conclusion

468. For the above-mentioned reasons, the Committee rejects the third ground for annulment advanced by Peru.

IX. COSTS OF THE PROCEEDING

A. PERU'S STATEMENT ON COSTS

469. Peru submits that, if its Application for Annulment is successful, Claimants should bear the costs of the annulment proceedings[472]. However, Peru argues that, if the Committee was to reject its Application, it should order the costs to be divided equally between the Parties given the serious due process and procedural fairness concerns raised therein[473]. Regardless of the Committee's decision on that matter, Peru submits that the Committee should order each Party to bear its own legal fees[474].

470. It posits that several *ad hoc* committees, in the exercise of their discretion, have ordered each party to bear its own legal fees and have shared the costs of the annulment

[472] Reply, § 475.
[473] Reply, § 475.
[474] Reply, § 476.

proceedings equally between them[475]. Peru cites to several annulment decisions in support thereof[476].

471. Peru finally argues that, even if the Committee were to reject its request for partial annulment, the seriousness of its allegations militates against an order requiring it to bear the entirety of the proceedings' costs and of Claimants' legal fees.

472. Peru submitted a statement of its costs, including attorney's fees associated with the annulment phase. Peru incurred a total of US$ 3,619,398.79, an amount which corresponds to the following:

Baker Botts LLP	US$ 2,502,246.29
Stanimir A. Alexandrov PLLC	US$ 370,840.00
Estudio Navarro & Pazos Abogados	US$ 21,312.50
Costs Paid to ICSID	US$ 725,000.00

B. CLAIMANTS' STATEMENT ON COSTS

473. Claimants contend that Peru must cover the costs of the present proceedings, including the fees and expenses of the Committee, the fees and expenses of ICSID, the fees and expenses related to Claimants' legal representation, plus interest thereon[477].

474. They argue in support of this contention that annulment committees have ordered unsuccessful applicants to pay part or all of the successful party's costs in cases similar to the present case[478]. Claimants also posit that holding Peru accountable for the costs and legal fees of this proceeding would discourage future baseless requests for annulment[479].

475. Claimants submitted a statement of their costs, including attorney's fees associated with the annulment phase. Claimants have incurred a total of US$ 2,504,681.70.

[475] Reply, § 477.
[476] Reply, § 477; **RLAA-009**, § 318; **RLAA-030**, §§ 146, 149; **CLAA-059**, § 210; **RLAA-019**, § 318.
[477] Counter-Memorial, § 365.
[478] Counter-Memorial, § 366.
[479] Counter-Memorial, § 367.

C. THE COSTS OF THE PROCEEDING

476. The costs of the annulment proceeding, including the Committee's fees and expenses, the Assistant's expenses, ICSID's administrative fees and direct expenses, are as follows:

Committee Members' fees and expenses		
Prof. José-Miguel Júdice	USD	233,195.35
Ms. Carmen Núñez-Lagos	USD	164,669.65
Prof. Dr. Yannick Radi	USD	122,362.30
Assistant to the Committee's expenses[480]	USD	4,120.82
ICSID's administrative fees	USD	104,000.00
Direct expenses	USD	63,665.07
Total:	**USD**	**692,013.19**

D. THE COMMITTEE'S DECISION ON COSTS

477. Articles 61(2) and 52(4) of the Convention confer upon the Committee the discretion to allocate all costs of the annulment proceeding, including legal fees and related expenses, between the Parties as it considers appropriate. Both Parties acknowledge that the Committee may exercise such a discretion[481].

478. The Committee recalls that all the three grounds for annulment have been unsuccessful in this proceeding and that the Application for Annulment is to be rejected in its entirety.

479. For that reason, with respect to the costs of the proceeding as established in Section VIII.C of the present Decision, the Committee considers that it should follow the consistent approach adopted by a majority of annulment committees, namely that an unsuccessful applicant should generally bear the full costs of the Centre and of the Committee members[482].

480. Therefore, the Committee orders that the costs of the proceeding shall be borne exclusively by Peru.

481. With respect to the costs of legal representation, the Committee considers that, contrary to Claimants' position, the annulment request was not frivolous and, more generally, that

[480] See: PO1, § 8.4.
[481] Reply, § 474.
[482] **RLAA-029**, § 384.

annulment is part of the ICSID system Claimants decided to "enter into" when initiating the arbitration proceeding.

482. The Award itself justifies, for a number of reasons addressed by the Committee, that any "reasonable and impartial observer" could consider it legitimate for Peru to have decided to initiate an annulment proceeding in relation to such an award and arbitration proceeding. It was a good faith exercise – and not an abusive one – of the right to request annulment under the Convention.

483. The Committee also notes that the Parties' costs are generally comparable and reasonable for a proceeding involving four rounds of written pleadings and a two-day oral hearing. The Committee further considers that the Parties conducted the proceeding in an efficient manner and that neither Party raised any relevant issue in respect of the costs.

484. For those reasons, and also because there is no consistent practice of applying the "cost follow the event" rule to the costs of legal representation, the Committee determines that Peru shall bear its own legal fees and shall reimburse 50% of the Claimants' costs of legal representation, this amount being of US $1,252,340.85.

485. In its Counter-Memorial, Claimants requested as relief that Peru be ordered to pay their "legal fees and expenses, plus interest at the rate awarded by the Tribunal in the Award (as rectified) until date of payment"[483], without presenting arguments and/or referring to legal authorities in support of this request[484].

486. This lack of justification alone suffices for the Committee to decide not to uphold this request. Furthermore, the Committee did not find any evidence that Peru, without such a "pressure", would not comply with the order to pay part of the Claimants' costs of legal representation.

X. DECISION

487. For the reasons set out above, the Committee unanimously decides as follows:

a. The Application for Annulment of the Award is dismissed in its entirety;

b. Peru shall bear all costs incurred in connection with this annulment proceeding;

c. Peru shall reimburse 50% of the Claimants' costs of legal representation, this amount being US $1,252,340.85;

d. All the other requests from the Parties are dismissed.

[483] Counter-Memorial, § 369 b). See also §§ 141 and 142 above.
[484] Counter-Memorial, §§ 365-368 and Rejoinder, §§ 324-328.

[signed]

Ms. Carmen Núñez-Lagos
Member of the *ad hoc* Committee

Date: June 26, 2026

Prof. Dr. Yannick Radi
Member of the *ad hoc* Committee

Date:

Prof. José-Miguel Júdice
President of the *ad hoc* Committee

Date:

[signed]

Ms. Carmen Núñez-Lagos Member of the *ad hoc* Committee	Prof. Dr. Yannick Radi Member of the *ad hoc* Committee
Date:	Date: June 26, 2026

Prof. José-Miguel Júdice
President of the *ad hoc* Committee

Date:

Ms. Carmen Núñez-Lagos
Member of the *ad hoc* Committee

Date:

Prof. Dr. Yannick Radi
Member of the *ad hoc* Committee

Date:

[signed]

Prof. José-Miguel Júdice
President of the *ad hoc* Committee

Date: June 26, 2026