
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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

v.

THE REPUBLIC OF COLOMBIA
Respondent

ICSID Case No. ARB/19/34

MEMORIAL ON ANNULMENT

January 19, 2026

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GLOSSARY

Term	Definition
Amended Request for Arbitration or Amended Request	Amended and Restated Request for Arbitration dated June 21, 2024
Applicants or Foster Wheeler	Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc.
Award	Award issued on December 19, 2024 in <i>Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. The Republic of Colombia</i> , ICSID Case No ARB/19/34
Barrancabermeja Project	A project to modernize Ecopetrol's refinery in Barrancabermeja, Colombia
BIT	Bilateral Investment Treaty
Cartagena Project or the Project	The Cartagena Refinery Modernization Project
CB&I	Chicago Bridge & Iron, the Project's engineering, procurement, and construction contractor

CGR Decision	CGR's first instance decision dated April 26, 2021, and second instance decision, denying Foster Wheeler's appeal, dated July 6, 2021
CGR	<i>Contraloría General de la República</i> , an administrative agency of the Republic of Colombia
Colombia	The Republic of Colombia
Law 610	Law 610 of 2000, the CGR's organic statute
Decree 403	Decree 403 of 2020 amending Law 610
Ecopetrol	Ecopetrol S.A., Colombia's state-owned oil company
EPC	Engineering, procurement, and construction
EPC Contract	EPC Contract between Reficar and CB&I dated June 2010
FEED	Front-end engineering design
FET	Fair and Equitable Treatment Standard of Protection

Fiscal Liability Proceeding	Fiscal liability proceeding initiated by the CGR in March 2017 against Foster Wheeler and others
Forced Collection Proceeding	A collection action seeking to recover the damages assessed by the CGR
FPJVC	Joint venture between Amec Foster Wheeler USA Corporation and Process Consultants, Inc.
ICC	International Chamber of Commerce
ICSID	The International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	2006 ICSID Arbitration Rules
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Jacobs Report	Jacobs's report summarizing the Project's history dated October 2015
MFN	Most-Favored-Nation
MST	Minimum Standard of Treatment
NAFTA	North American Free Trade Agreement

PGN	<i>Procuraduría General de la Nación</i> , an autonomous agency of the Colombian government
PMC	Project Management Consultant
PMC Contract	PMC Contract between Reficar and FPJVC dated November 19, 2009
PMT	Project Management Team
Reficar	Reficar S.A.S., a wholly owned subsidiary of Ecopetrol
Request for Arbitration	Foster Wheeler's Request for Arbitration dated December 6, 2019
TPA	Trade Promotion Agreement between the Republic of Colombia and the United States of America
USMCA	The United States-Mexico-Canada Agreement.
Vienna Convention	Vienna Convention on the Law of Treaties

I. INTRODUCTION

Applicants Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. respectfully submit this Memorial in support of their Application for Annulment of the Award issued on December 19, 2024 in *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. The Republic of Colombia*, ICSID Case No ARB/19/34, and show as follows:

1. On December 6, 2019, Foster Wheeler submitted its Request for Arbitration against Colombia after the CGR, a Colombian administrative agency in charge of oversight of fiscal managers with power over public funds, wrongfully named Foster Wheeler, which had no such authority, as a respondent in a Fiscal Liability Proceeding seeking several billion dollars in damages.
2. Foster Wheeler sought relief for five distinct violations of Chapter 10 of the TPA relating to the CGR's wrongful and unsupported assertion of jurisdiction and the resulting damages. In response, on August 24, 2020, Colombia sought leave to submit preliminary objections under Article 10.20.4 of the TPA, which allows a party to seek summary disposition of a claim. Over ten months later, on July 1, 2021, Colombia filed its preliminary objections and a series of jurisdictional objections under Article 10.20.5 of the TPA. During the Tribunal's ensuing multi-year deliberation period, the CGR took additional acts in violation of the TPA, including a Decision that constitutes a further gross violation of Foster Wheeler's rights. On June 21, 2024, Foster Wheeler submitted an Amended and Restated Request for Arbitration seeking relief arising from those related TPA violations that occurred after the Request for

Arbitration was submitted. The Tribunal confirmed that the Amended Request was part of the record.

3. The Tribunal issued its Award on December 19, 2024, approximately three and a half years after Colombia submitted its preliminary objections application. The Tribunal upheld Colombia's preliminary objections and dismissed all five TPA claims after partially and incorrectly analyzing only the alleged denial of justice violation of the TPA's FET provision, on the basis that the TPA did not provide for due process rights in administrative proceedings before the CGR and that Foster Wheeler had not exhausted local judicial remedies.
4. As set forth in this Memorial, the Award violated the TPA and the ICSID Convention in multiple ways, any one of which calls for annulment.
 - First, the Tribunal violated a fundamental rule of procedure by abusing the preliminary objections process. That process is limited to the disposition of claims that are manifestly legally defective. It is not applicable to complex legal questions or mixed questions of law and fact, nor is it intended to be a "mini-trial" in advance of an actual hearing. The Tribunal deprived Foster Wheeler of the right to assert its claims, engage in disclosure, and develop an evidentiary record and legal argument throughout a full arbitration proceeding. Indeed, the extraordinary length of time taken by the Tribunal to render its Award—1268 days from the time that Colombia submitted its objections and 945 days after Colombia's application was fully briefed and argued—underscores how inappropriate this case was for a decision on summary disposition based on preliminary objections.

- Foster Wheeler raised five distinct TPA claims challenging the CGR's actions: (i) the failure to provide National Treatment; (ii) breach of the protection against uncompensated indirect expropriation; (iii) the breach of the umbrella clause in the Colombia-Switzerland BIT imported through the TPA's MFN clause; (iv) the breach of an investment agreement; and (v) failure to provide FET based on four separate violations. The Tribunal, however, only addressed the substance of one of the four FET violations, denial of justice, and then relied on that decision to dismiss the entire FET claim as well as every other TPA claim, although denial of justice was not an element of any of those claims.
- In dismissing all of Foster Wheeler's claims, the Tribunal determined that there was a requirement to exhaust local judicial remedies for every TPA claim, in violation of the TPA itself and of the ICSID Convention.
- The Tribunal did not even mention, let alone analyze, any of the ancillary claims—those arising from the acts of Colombia following the filing of the Request—despite acknowledging that they were part of the record. Strikingly, the Tribunal partly held the claims inadmissible arguing that there was no final administrative act because the CGR had not issued its Decision when the arbitration began.
- The Tribunal disregarded the express mandate of Article 10.20.4 of the TPA that the claimant's factual allegations must be assumed to be true for ruling on preliminary objections. The Tribunal dismissed the claims partly on grounds that Foster Wheeler had not submitted evidence in support of its allegations, particularly evidence that any proceeding before the Colombian courts challenging the CGR Decision would have been futile. But Foster Wheeler had no such burden. And despite having no burden

whatsoever, Foster Wheeler did in fact submit uncontested evidence in support of its allegations. The Tribunal compounded its error by simply ignoring that evidence.

- Under Article 10.5 of the TPA, the protection against denial of justice extends to “administrative adjudicatory proceedings.” The Tribunal’s disregard of the TPA’s plain terms was the principal underpinning of its dismissal of Foster Wheeler’s entire case. Without providing any supporting authority, the Tribunal held that “administrative adjudicatory proceedings” referred only to proceedings before specialized Colombian courts that hear disputes involving state agencies. Under the plain terms of the TPA and universally accepted principles of international law, the protection against denial of justice and the guaranty of due process extends to adjudicatory proceedings before an administrative entity like the CGR. The Tribunal ignored this well-settled principle. This is one of those cases where a legal ruling by an ICSID tribunal on a key issue is so egregiously wrong that it constitutes a failure to follow the applicable law, one of the ICSID Convention’s grounds for annulment.
- Finally, in keeping with its limited scope, a summary proceeding under Article 10.20 of the TPA is subject to strict time limits. The extraordinary length of time the Tribunal took to issue its Award deprived it of its jurisdiction. As such, by the time the Tribunal issued its Award, its powers to do so had already lapsed.

Background

5. The underlying dispute arose from the Cartagena Refinery Modernization Project, one of the largest infrastructure ventures in Colombia’s history. The

Project sought to more than double the capacity of a state-owned refinery located in Cartagena, Colombia. Reficar, the special-purpose vehicle created for the Project and the owner of the refinery, is a wholly owned subsidiary of Colombia's state-owned oil company, Ecopetrol.

6. Reficar engaged FPJVC, a joint venture between Applicants Amec Foster Wheeler USA Corporation and Process Consultants, Inc., to act as the Project's Management Consultant or PMC.
7. As set forth in Foster Wheeler's Request for Arbitration, at the time the parties entered into the PMC Contract, Foster Wheeler expected to have managerial authority over the Project. But shortly after the Project began, Reficar relegated Foster Wheeler to a purely advisory role without any decision-making power over the expenditure of public funds or the management of the Project.¹ Instead, Reficar decided to manage the Project itself through its own Project Management Team or PMT, assigning discrete tasks to Foster Wheeler personnel who were seconded to Reficar's PMT. Due to Reficar's poor management and the deficient performance of the Project's EPC contractor, CB&I, the Project faced substantial delays and cost overruns.
8. The CGR is an administrative agency of Colombia that is responsible for fiscal oversight. It has the power to commence "fiscal liability proceedings," in which it may make a finding of liability against public servants or private parties who, through their willful or grossly negligent conduct with respect to

¹ The factual matters in this section of Foster Wheeler's Memorial are based on its Request for Arbitration. Because the Tribunal's Award was rendered under Article 10.20.4 of the TPA, the Tribunal was obligated to "assume to be true claimant's factual allegations in support of any claim in the notice of arbitration..." **CL-001**: Ch. 10 of the TPA. Foster Wheeler does not, of course, ask the Committee to resolve any factual disputes.

public funds, have damaged Colombia's public patrimony. The CGR's jurisdiction is limited to "fiscal managers," that is, parties who have decision-making authority over the expenditure of public funds.

9. Even though Foster Wheeler had no control over the public funds allocated for the Project, the CGR initiated fiscal liability proceedings against Foster Wheeler and others, alleging mismanagement of public resources in connection with the Project. Foster Wheeler's wrongful inclusion in the Fiscal Liability Proceeding caused it to suffer moral damages, principally reputational harm. Indeed, at the time the CGR initiated the Fiscal Liability Proceeding, the CGR issued a series of highly inflammatory press releases accusing Foster Wheeler of "shameful" management, even though Foster Wheeler had no managerial authority at all. The resulting loss of business was directly attributed to the CGR's improper commencement of the Fiscal Liability Proceeding, and not to its subsequent improper conduct.
10. After a proceeding riddled with due process violations, the CGR issued its first instance decision in which it imposed an extraordinary liability of COP 2,945,409,783,732.43 (approximately USD 810 million at the time of the Decision) jointly and severally on all the respondents, including Foster Wheeler, together with interest at approximately 26% per annum. The CGR subsequently denied Foster Wheeler's administrative appeal. The CGR's forced collection efforts are ongoing as the CGR attempts to enforce its Decision against Foster Wheeler.
11. In its Request for Arbitration, Foster Wheeler claimed that the CGR's wrongful inclusion of Foster Wheeler in the Fiscal Liability Proceeding and related acts breached the TPA and caused Foster Wheeler moral damages, principally through reputational harm. Importantly, Foster Wheeler raised

several distinct claims: (i) violation of the FET standard of protection; (ii) violation of the National Treatment standard of protection; (iii) uncompensated indirect expropriation; (iv) violation of the umbrella clause in the Colombia-Switzerland BIT, a protection afforded through the TPA's MFN provision; and (v) breach of an investment agreement.

12. In response, Colombia raised a series of preliminary objections, all under Article 10.20.4 of the TPA.² The Tribunal suspended all other proceedings on the merits and set a schedule for briefing and argument on preliminary objections. Foster Wheeler later filed an Amended and Restated Request for Arbitration to include subsequent TPA breaches related to the proceedings before the CGR, including the CGR Decision. On July 12, 2024, the Tribunal confirmed that the Amended Request for Arbitration was part of the record.

The Award

13. The Tribunal heard argument on Colombia's application on May 19 and 20, 2022. After more than 30 months of deliberations, the Tribunal issued a cursory 88-page award, containing only 32 paragraphs, approximately seven pages, of legal and factual analysis on Colombia's preliminary objections, and one paragraph dismissing all of Foster Wheeler's claims. The Tribunal ruled that the denial of justice violation was inadmissible because (i) the TPA did not guaranty any right to due process in administrative proceedings; (ii) Foster Wheeler's claims were not ripe until Colombia's domestic courts had reviewed the CGR Decision, an exhaustion requirement nowhere found in the TPA and directly contrary to Article 26 of the ICSID Convention; and

² Colombia also raised a series of jurisdictional objections under Article 10.20.5. The Tribunal did not rule on any of them, and they are not at issue in this application.

(iii) because the CGR Decision post-dated the Request for Arbitration, no measure capable of constituting a treaty breach existed when the arbitration began, and the Tribunal was foreclosed from considering subsequent events.

14. Foster Wheeler asserted five different claims against Colombia. Of those TPA claims, the Tribunal only substantively addressed one part of one TPA claim, the denial of justice violation of the TPA's FET provision, wholly ignoring all the other claims. The FET claim included four distinct violations—denial of justice, breach of legitimate expectations, failure to provide due process, and prejudgment of the case—each of which on their own constituted a TPA breach. The Tribunal did not address all the other FET violations, although all of them had been briefed and argued.
15. The Tribunal then relied on its findings regarding denial of justice as the sole ground to dismiss the other TPA claims: national treatment, indirect expropriation; breach of the umbrella clause from the Colombia-Switzerland BIT imported through the TPA's MFN clause; and breach of an investment agreement. The Tribunal did not address in any substantive manner those other TPA claims, as well as the other three FET violations. The Tribunal simply swept those claims aside by referring back to its decision rejecting the denial of justice violation of FET, although those other claims are separate and distinct and do not turn on a denial of justice or a violation of the FET standard.
16. Likewise, the Tribunal did not even address Foster Wheeler's ancillary claims, which addressed developments since the case's commencement, including the rendition of the CGR Decision. Those claims were properly filed under ICSID Arbitration Rule 40, and the Tribunal itself accepted that the Amended Request for Arbitration setting forth the ancillary claims was

part of the record. Despite this, the ancillary claims are not even mentioned in the analysis part of the Award, which rests, in significant part, on the notion that the claims were not ripe because the Fiscal Liability Proceeding, at the time the arbitration was initiated, was a “mere accusatory instrument.”

First Ground for Annulment—Serious Departure from Fundamental Rules of Procedure

17. The Tribunal seriously departed from several fundamental rules of procedure:

- **Right to be heard:** The Tribunal did not fully address any of the TPA claims and did not address the ancillary claims at all. It dismissed Foster Wheeler’s claims after partially analyzing only one of the alleged four FET violations. In so doing, the Tribunal denied Foster Wheeler the opportunity to be heard and to have its case adjudicated. The Tribunal’s failure to address the issues raised by Foster Wheeler violated Article 48(3) of the ICSID Convention, which requires that “[t]he award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.”
- **Burden of proof:** Article 10.20.4(c) of the TPA and accepted ICSID practice required the Tribunal to assume the truth of all of Foster Wheeler’s factual allegations at the preliminary objections phase. The Tribunal did not follow this presumption. Instead, it placed an improper evidentiary burden on Foster Wheeler to prove the futility of exhausting local judicial remedies in Colombia, and then ruled that Foster Wheeler had not adduced any proof regarding futility—although the record unequivocally shows that it did, and that no contrary proof was offered by Colombia—as the basis for its decision on denial of justice.

- **Ignoring evidence:** Not only did the Tribunal impose an improper evidentiary burden on Foster Wheeler, but it also ignored the evidence Foster Wheeler offered to prove the futility of exhausting local remedies in Colombia: the unrefuted witness statement of Mr. César Torrente, former General Counsel of the CGR. Foster Wheeler submitted that evidence despite bearing no burden of proof whatsoever and cited it numerous times in the preliminary objections proceedings, including at the May 2022 hearing, as well as in other phases of the arbitration. The Tribunal did not even mention, let alone analyze, that evidence in its Award. Instead, it incorrectly asserted that no evidence of futility had been presented.
- **Improper use of summary proceedings:** The Tribunal improperly used the arbitration's truncated preliminary objections phase to resolve complex questions of fact or mixed questions of fact and law, disregarding the well settled contours of summary proceedings set forth in the TPA and the applicable ICSID Arbitration Rules.
- **Unreasonable delay:** The Tribunal deliberated for more than 30 months on a procedure required to be prompt. The Tribunal's disregard of the temporal limitations applicable to summary disposition proceedings meant that, by the time the Tribunal issued its Award, its powers to do so had already lapsed. Other than a notice that one arbitrator had fallen ill early in deliberations, the Tribunal provided no explanation for the significant delay. And the Tribunal notified the parties that the arbitrator had recovered and had returned to his duties at least 10 months before the Award was rendered.

Second Ground for Annulment—Manifest Excess of Powers

18. The Award is a textbook case of failure to exercise existing jurisdiction, which, in turn, constitutes a manifest excess of powers. First, the Tribunal abdicated its mandate by treating denial of justice as a standalone claim, when it is actually only one of four alleged FET violations.³ As explained in multiple instances in the arbitration, the FET claim—only one of five TPA claims—was based on four independent violations: denial of justice, legitimate expectations, due process, and prejudgment by the CGR. The Tribunal only ruled on the alleged denial of justice violation.
19. Relatedly, the Tribunal manifestly exceeded its powers by addressing only the denial of justice violation of FET, and holding all the other TPA claims raised by Foster Wheeler inadmissible based on a formulaic reference to its erroneous findings regarding denial of justice, although a failure to establish a denial of justice is irrelevant to each of those other TPA claims. The Tribunal did not substantively address most of the initial claims raised by Foster Wheeler, and did not even mention, let alone rule, on the ancillary claims.
20. The Tribunal failed to apply the governing law, or so egregiously misapplied it that it was a failure to follow the law at all. Without undertaking a proper analysis, including under the Vienna Convention, the Tribunal interpreted, as a matter appropriate for disposition on preliminary questions, the TPA's reference to "administrative adjudicatory proceedings" as limited to proceedings before specialized Colombian courts that hear disputes involving

³ Article 10.5.2(a) provides that FET includes the obligation not to deny justice but does not limit the FET standard to denial of justice claims, although the Tribunal proceeded as if that were the case. CL-001: Ch. 10 of the TPA.

actions by the Colombian government. This decision was based entirely on the Tribunal's mistaken interpretation of that term in the Spanish language version of the TPA. Based on its interpretation of that treaty term, the Tribunal concluded that the CGR's quasi-judicial proceedings—in which the parties file briefs, the CGR hears testimony from witnesses and argument from counsel, and then proceeds to impose enormous monetary liability—were not “administrative adjudicatory proceedings,” and hence were free from any due process obligations at all.⁴ In fact, the only plausible reading of that phrase is that the TPA's requirement of due process applies to adjudicatory proceedings before an administrative agency, in which rights and claims are decided, as opposed to rule-making proceedings, in which rules of general application are promulgated.

Third Ground for Annulment—Failure to State Reasons

21. Other than addressing only one of the four alleged FET violations—denial of justice—the Award contains no rationale for dismissing the other three FET violations, the remaining TPA claims, or the ancillary claims. The Tribunal's reasoning on denial of justice turns on its interpretation of the TPA term “administrative adjudicatory proceedings,” a term that applies only to denial of justice, but the Tribunal's reasoning is flawed to the point of frivolousness, resulting in the equivalent to a complete failure to state reasons. The Tribunal does not, and could not, explain how the term “adjudicatory administrative proceedings” that appears only in the TPA's denial of justice provision impacts the remaining three FET violations or the other TPA claims based on TPA provisions that have nothing to do with denial of justice. The Tribunal

⁴ Resolving such a complex and disputed question of law was also wholly inappropriate as the basis for a decision on a preliminary objection.

also fails to explain why the dismissal of one of four alleged FET violations causes the entire FET claim to fail, and the dismissal of other separate TPA claims. Regarding the ancillary claims, the Award does not even purport to state any reason for their dismissal; indeed, other than an acknowledgement that the ancillary claims were part of the record, they get no mention at all in the Award.

22. The Award also fails to explain its imposition of a non-existent requirement to exhaust local judicial remedies to every TPA claim, and not just to denial of justice. Under Article 26 of the ICSID Convention, an investment treaty must include an exhaustion requirement for one to be applicable. As the widely cited jurisdictional award in *Maffezini v. Spain* held, “...unless a Contracting State has conditioned its consent to ICSID arbitration on the prior exhaustion of domestic remedies, no such requirement will be applicable.”⁵ Unlike other investment treaties, the TPA contains no requirement for the exhaustion of remedies. And even if there was such a requirement, which there is not, the Tribunal acknowledged that it would be inapplicable if exhausting remedies in Colombia would have been futile or ineffective. The Tribunal ignored the futility exception, even though Foster Wheeler had raised it, holding that Foster Wheeler had not submitted any supporting evidence of futility. Putting to one side that Foster Wheeler bore no burden of proof whatsoever in the preliminary objections phase, the Award did not even discuss the unrebutted evidence, a witness statement from the former chief legal officer of the CGR, that Foster Wheeler provided to establish the futility

⁵ **RL-118:** *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶ 22 (Jan. 25, 2000).

of exhausting local judicial remedies in Colombia. On its face, that witness statement is the evidence that the Tribunal found to be lacking.

23. Finally, the Tribunal acknowledged that it could consider undisputed facts that occurred after the commencement of the arbitration, not just those set forth in the Request for Arbitration. It was undisputed, and the Tribunal so recognized, that while the arbitration was pending the Fiscal Liability Proceeding concluded and the CGR Decision became final, and hence constituted a measure taken by Colombia. However, in contradiction of its own statements, the Tribunal held all the TPA claims inadmissible because the CGR Decision had not been issued when Foster Wheeler filed the Request for Arbitration. The Tribunal did not consider Foster Wheeler's allegations that the CGR's wrongful assertion of jurisdiction was in and of itself a violation of the TPA. The Tribunal's contradictory reasoning constitutes a further failure to effectively state reasons in support of its findings.

24. Each violation outlined above independently justifies annulment.

Relief Sought

25. The Tribunal's Award grossly misapplied the TPA, including its provision for resolving claims on preliminary questions. The only remedy consistent with the ICSID Convention and the TPA is the annulment of the Award.

II. FACTUAL BACKGROUND

A. Colombia Undertakes a Project to Modernize a Refinery in the City of Cartagena

26. The underlying dispute that led to the Award arose out of one the largest infrastructure projects in the history of Colombia. The project concerned what is today one of the largest and most modern refineries in Latin America.

Exxon (then known as Standard Oil of New Jersey) built the refinery in 1957 in Cartagena, a city located on the Caribbean Coast of Colombia. Ecopetrol, Colombia's state-owned oil company, acquired the refinery in 1974.

27. More than 20 years ago, the Colombian government started planning a project to more than double the refinery's capacity to meet the country's clean fuel objectives and ensure its energy sufficiency. Colombia structured the Project around two main pillars to reduce its financial exposure: including an experienced international partner and hiring an EPC contractor on a lump-sum basis.
28. Ecopetrol initially chose Glencore, a Swiss enterprise, as its international partner for the Project. Ecopetrol and Glencore incorporated Reficar, a special-purpose vehicle that would oversee the Project and eventually own and operate the refurbished refinery. Glencore then withdrew from the Project, and instead of finding a new partner, Ecopetrol decided to continue the Project on its own. Reficar then became a wholly owned subsidiary of Ecopetrol, which in turn is owned and controlled by Colombia.
29. Reficar then entered into a contract with CB&I, a US-based EPC firm, and Technip, a French engineering firm, to develop the Project's front-end engineering design or FEED. Reficar's intention at the time was for CB&I and Technip to be the Project's EPC contractors on a lump-sum basis.

B. Reficar Selects Foster Wheeler as the Cartagena Project's Management Consultant

30. At the same time as the Cartagena Project was underway, Foster Wheeler entered into a contract with Ecopetrol to develop a FEED and be the PMC in a project to modernize a different Ecopetrol refinery in Barrancabermeja, a

city in the North of Colombia. Foster Wheeler and Ecopetrol also entered into a contract for Foster Wheeler to conduct an integration study assessing potential synergies between the Cartagena and Barrancabermeja refineries.

31. Given Foster Wheeler's involvement in the Barrancabermeja Project and in the integration study, Reficar proposed that Foster Wheeler also be the Cartagena Project's PMC. On November 19, 2009, Reficar entered into a PMC Contract with FPJVC, a joint venture between Amec Foster Wheeler USA Corporation and Process Consultants, Inc., both Delaware corporations. For ease of reference, Applicants use the term Foster Wheeler to refer to the joint venture and to its members. Foster Wheeler expected at that point that it would be a PMC with the authority to manage the Project and direct the EPC Contractors' work.
32. After the conclusion of the PMC Contract, Reficar entered into an EPC Contract with CB&I. Without consulting Foster Wheeler, Reficar excluded Technip from the Project, the company that had developed the FEED together with CB&I. Reficar also entered into a cost-reimbursable contract with CB&I, ignoring the original plan of working with a lump-sum EPC contractor. In a cost-reimbursable contract, unlike a lump-sum arrangement, the risk of cost overruns lies with the Project's owner, Reficar, and not with the EPC Contractor, CB&I.

C. Reficar Relegates Foster Wheeler to Providing Support Personnel for a Project Management Team Led by Reficar Itself

33. The PMC Contract granted Reficar the unilateral right to define the scope of Foster Wheeler's work in the Project. Exercising those contractual powers, Reficar relegated Foster Wheeler to supplying support personnel for a PMT led by Reficar itself. In that supporting role, Foster Wheeler had no authority

to direct the expenditure of public funds for the Project or manage the work of CB&I and its subcontractors. Reficar managed and directed Foster Wheeler's personnel on the Project and requested recommendations from them from time to time, which Reficar was free to accept or reject, and it did both. Foster Wheeler's personnel also performed specific tasks under the direction and control of Reficar's project managers.

34. A well-known and widely respected independent consultant engaged by Ecopetrol, Jacobs Consultancy, analyzed the Project and accurately described Foster Wheeler's limited role. Jacobs is one of the world's leading engineering companies and is one of Foster Wheeler's competitors. The Project's lenders first hired Jacobs to review the Project. Ecopetrol then hired Jacobs for that same purpose. In October 2015, six years after Reficar and Foster Wheeler entered into the PMC Contract, Jacobs issued a report to Ecopetrol summarizing the Project's history. Jacobs concluded that Foster Wheeler had no authority over the Project, with Reficar officials making every decision:

In an integrated management team (PMT), the authority and responsibility for decision-making must be delegated in specific positions within the organization, and these positions should not be duplicated. This was not so in the REFICAR project, and all the decisions had to be made only by REFICAR managers. FW's team had no authority and became only additional personnel in REFICAR's team, and many of the management functions were duplicated.⁶

⁶ **C-002 (Request for Arbitration):** Jacobs Consultancy, Cartagena Refinery Expansion Project History Summary and Project Analysis, at 19 (Oct. 2015) ["Jacobs Report"].

35. The PGN, an autonomous agency of Colombia responsible for conducting disciplinary proceedings against public servants, endorsed Jacobs' findings. In disciplinary proceedings against Reficar's former directors and officers arising out of their participation in the Project, the PGN cited the Jacobs Report and concluded that Reficar managed the Project itself and did not allow Foster Wheeler to manage the Project. Instead, Reficar's inexperienced personnel assumed positions of direct control.⁷
36. Ultimately, due to Reficar's and CB&I's inexperience and poor management, the Project was completed with substantial delays and cost overruns. Foster Wheeler, however, properly performed its limited role in the Project, as evidenced by the fact that Reficar paid without objection every single invoice issued by Foster Wheeler, and made no complaint regarding Foster Wheeler's performance at any time while the Project was underway.

D. The CGR Commences Fiscal Liability Proceedings Against Foster Wheeler and Other Project Participants

37. The CGR opened an investigation into the Project in 2016. Like the PGN, the CGR is an autonomous organ of the Colombian state and is responsible for overseeing the expenditure of public funds.⁸ It has the authority to commence "fiscal liability proceedings," in which it may issue a finding of liability

⁷ **C-008:** PGN, Auto No. DEHP 007 of 2020, at 158-159 (Jan. 17, 2020).

⁸ **RL-005:** Political Constitution of the Republic of Colombia, prior to Legislative Act No. 4 of September 18, 2019, Articles 267-274; **RL-006:** Political Constitution of the Republic of Colombia, after Legislative Act No. 4 of September 18, 2019, Articles 267-274.

against public servants or private parties who, through their willful or grossly negligent conduct, have damaged Colombia's public patrimony.⁹

38. The CGR's jurisdiction is subject to strict statutory limitations. Under Colombia's Law 610, the CGR's organic statute, only "fiscal managers" can be named as respondents in a fiscal liability proceeding.¹⁰ Law 610 defines "fiscal managers" as parties with decision-making authority over public funds.¹¹ As held by Colombia's Constitutional Court, those who do not manage public funds are not fiscal managers and therefore are not within the CGR's jurisdiction.¹² For the CGR to make a finding of fiscal liability, Law 610 requires pleading and proof of willful or grossly negligent acts causally linked to the claimed damages.¹³
39. Fiscal liability proceedings conducted by the CGR are inquisitorial in nature.¹⁴ The CGR is the prosecutor and the judge of both the law and the facts. The CGR investigates the facts, drafts and present charges, oversees the taking of evidence, holds evidentiary hearings, and determines if the respondents are fiscally liable.¹⁵ If the CGR issues a finding of fiscal liability,

⁹ **CL-002**: Law 610 of 2000, Arts. 1-6.

¹⁰ *Id.* Arts. 1, 3.

¹¹ *Id.* Arts. 1, 3, 5.

¹² **CL-003**: Colombian Constitutional Court, Judgment C-832 of 2002, at 31 *et seq.*

¹³ **CL-002**: Law 610 of 2000, Art. 5.

¹⁴ **CL-005**: *Glencore Int'l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 392 (Aug. 27, 2019).

¹⁵ **CL-002**: Law 610 of 2000, Arts. 10, 40, 48, 51, 53.

it also determines the amount of damages to Colombia's public patrimony, in effect a judgment for which the respondents are liable.¹⁶

40. After conducting a preliminary investigation into the Project, in March 2017, the CGR commenced a Fiscal Liability Proceeding against various parties involved in the Project, including the two members of the FPJVC joint venture, Amec Foster Wheeler and Process Consultants.¹⁷ The other respondents were various CB&I entities, high-ranking officers from Reficar, members of Reficar's Board of Directors, members of Ecopetrol's Board of Directors, and two insurance companies.¹⁸ As explained above, only fiscal managers—parties that have decision-making authority over public funds—are subject to the CGR's jurisdiction.¹⁹ The commencement of the Fiscal Liability Proceeding against Foster Wheeler was in and of itself wrongful, considering that Foster Wheeler was not a fiscal manager, because it had no decision-making authority whatsoever over the public funds allocated for the Project.²⁰ This wrongful assertion of jurisdiction by the CGR caused moral damages to Foster Wheeler.
41. During the four years following the CGR's opening resolution, the CGR subjected Foster Wheeler to a proceeding riddled throughout with gross violations of due process:

¹⁶ *Id.* Art. 53.

¹⁷ **R-066**: CGR, Auto No. 382 of 2017 (March 10, 2017).

¹⁸ *Id.* at 1-5.

¹⁹ **CL-002**: Law 610 of 2000, Arts. 1, 3, 5.

²⁰ *See, e.g., C-002 (Request for Arbitration)*: Jacobs Report, at 19.

- At the outset of the proceeding, the CGR’s top officials made a series of inflammatory public statements widely reported in the Colombian press, effectively prejudging Foster Wheeler’s liability. For example, the Comptroller General, the head of the agency that would act as adjudicator of the claims against Foster Wheeler, described Foster Wheeler’s “management control” as “shameful” and “really embarrassing.”²¹
- The CGR’s opening resolution referenced instances of alleged misconduct that had supposedly led to cost increases for the Project.²² Foster Wheeler responded with defensive statements known in Spanish as *exposiciones libres y espontáneas* establishing that it had no role in any of those acts.²³ When it came time for the CGR to decide whether to press fiscal liability charges against Foster Wheeler and the other respondents, it completely changed its liability theory from the one advanced in the opening resolution. In the charging document, instead of referring to the alleged instances of misconduct listed in the opening resolution, the CGR referred to the decision of the Boards of Reficar and Ecopetrol—not Foster Wheeler—to approve documents known as change controls that

²¹ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶ 165. The award in a well-known investor-state case assessing liability against Colombia for wrongful conduct by the CGR describes the same pattern of inflammatory statements against a respondent in a fiscal liability proceeding. **CL-005**: *Glencore Int’l A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, ¶ 1188 (Aug. 27, 2019).

²² **R-066**: CGR, Auto No. 382 of 2017 (March 10, 2017), at 281-289. This is a chart summarizing each alleged instance of misconduct or, as the CGR refers to them, ‘fiscal findings’ or ‘*hallazgos fiscales*’.

²³ See **CL-002**: Law 610 of 2000, Art. 42.

increased the Project's scope and budget.²⁴ As the CGR was well aware, Foster Wheeler had no say at all in the approval of the change controls.

- The CGR commissioned its own officers to calculate the alleged damages to Colombia's public patrimony. This calculation of alleged damages did not follow any accepted methodology. It was instead based on the difference between an initial estimated budget submitted by CB&I and the total cost of the Project, which had been materially expanded since its inception.²⁵ The CGR officers also calculated alleged losses supposedly caused by the delay in completing the Project.²⁶ As noted above, Reficar and its parent Ecopetrol managed and directed the Project and approved the change controls at issue. Foster Wheeler did not make those decisions or approvals. The CGR did not allow Foster Wheeler to submit an expert report to rebut the CGR's damages submission, despite Foster Wheeler's request to do so.
- The CGR assessed damages against the respondents jointly and severally,²⁷ despite Law 610's express requirement that damages be based on specific acts of wrongdoing by particular respondents.²⁸

²⁴ **AA-002**: Foster Wheeler's Application for Provisional Measures and Emergency Temporary Relief, ¶¶ 41-42, 57. *See also* **R-052** to **R-065**: CGR, Auto No. 773 of 2018 (June 5, 2018), at 764 (**R-054**).

²⁵ **R-052** to **R-065**: CGR, Auto No. 773 of 2018 (June 5, 2018), at 764 (**R-054**).

²⁶ *Id.* at 1216 (**R-054**).

²⁷ *Id.* at 4738-4739 (**R-065**).

²⁸ **CL-002**: Law 610 of 2000, Art. 5.

- As previously discussed, the CGR’s opening resolution listed members of Ecopetrol’s Board of Directors. In the ensuing charging document, the CGR dismissed Ecopetrol’s Board Members—all prominent Colombian citizens—from the proceeding alleging that they were not fiscal managers because they lacked final authority over the expenditure of funds on the Project.²⁹ At the same time, the CGR did not dismiss the claims against Foster Wheeler, even though Foster Wheeler undisputedly had no authority—much less final authority—over the Project’s budget.³⁰
- While the Fiscal Liability Proceeding was ongoing, in March 2020, the President of Colombia issued Decree 403 amending Law 610. Decree 403 expanded the definition of “fiscal manager” to include private parties that “participate” or “contribute,” directly or indirectly, to acts that cause damages to Colombia’s public patrimony, ostensibly expanding the CGR’s jurisdiction.³¹

The following chart submitted by Foster Wheeler in the underlying arbitration shows some of the changes that Decree 403 introduced to Law 610³²:

²⁹ **R-052 to R-065**: CGR, Auto No. 773 of 2018 (June 5, 2018), at 4444 (**R-063**). The Comptroller General affirmed the decision not to press fiscal charges against the Ecopetrol Board members. **C-026**: CGR, Auto No. 0188 of 2018 (Aug. 15, 2018), at 48.

³⁰ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶¶ 174-178.

³¹ **CL-007**: Decree 403 of 2020.

³² *Id.*

ARTICLE 4

Article 4. Purpose of Fiscal Liability. The purpose of fiscal liability is to compensate the damages caused to the public patrimony as a result of an intentional or negligent act carried out by those who perform fiscal management, by [seeking] the payment of a compensation that redresses the detriment suffered by the corresponding entity. For purposes of establishing fiscal liability, the governing principles of the administrative function and fiscal management will be taken into consideration.	Article 4. Purpose of Fiscal Liability. The purpose of fiscal liability is to compensate the damages caused to the public patrimony as a result of an intentional or grossly negligent act carried out by those who perform fiscal management <u>or by public servants or private parties who participate, concur, influence, or contribute directly or indirectly to the generation of [such damages]</u>, by [seeking] the payment of a compensation that redresses the detriment suffered by the corresponding entity. For purposes of establishing fiscal liability, the governing principles of the administrative function and fiscal management will be taken into consideration.
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As shown in this chart, Decree 403 vastly expanded the CGR’s jurisdiction over private parties to face charges of misconduct and possibly be held fiscally liable for damages to Colombia’s public patrimony. As described below, the CGR retroactively applied the new standard of “contribution” set out in Decree 403 in its Decision against Foster Wheeler.

42. Besides these gross violations of due process, the commencement of the proceeding was in and of itself wrongful and caused damages to Foster Wheeler. There was no basis for the CGR to assume jurisdiction over Foster Wheeler, but the CGR still named Foster Wheeler as a respondent in the Fiscal Liability Proceeding. As Foster Wheeler explained in its Request for Arbitration, the CGR’s “...improper assertion of fiscal liability charges against [Foster Wheeler] seeking more than US\$2.4 billion has gravely injured [Foster Wheeler’s] reputation and credit. That harm is compounded by [the CGR’s] repeated inflammatory and injurious statements in the media that [Foster Wheeler] is responsible for fraudulent conduct and corruption on

the Project. [Foster Wheeler is] entitled to compensation, in the form of moral damages, for such harm.”³³

E. The CGR Holds Foster Wheeler Fiscally Liable for Increases to the Project’s Estimated Budget

43. Subsequent acts by the CGR constituted additional TPA breaches. After a proceeding riddled with further gross due process violations, the CGR issued its first instance decision on April 26, 2021, holding Foster Wheeler liable for COP 2,945,409,783,732.43 in damages to Colombia’s public patrimony—approximately USD 810,932,000 at the exchange rate at the time of issuance.³⁴ The CGR also assessed interest at approximately 26% per annum, later reduced to 12% per annum.³⁵ That decision is a gross violation of every notion of due process. The first instance decision, despite having 6,243 pages, does not identify a single willful or grossly negligent act by Foster Wheeler that caused damage to Colombia’s public patrimony, as required by Law 610, let alone the USD 800 million assessed in damages.³⁶ Instead, the CGR in effect held Foster Wheeler strictly liable for increases to the Project’s budget that the Boards of Ecopetrol and Reficar had approved, and over which Foster Wheeler had no control.³⁷
44. The CGR also disregarded evidence establishing that Foster Wheeler had no decision-making authority over public funds and was therefore not within the

³³ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶ 206.

³⁴ **R-071** to **R-083**: CGR, Auto No. 749 of 2021 (Apr. 26, 2021), at 6230-6234 (**R-083**).

³⁵ **CL-007**: Decree 403 of 2020, Art. 111.

³⁶ **R-071** to **R-083**: CGR, Auto No. 749 of 2021 (Apr. 26, 2021).

³⁷ *Id.*

CGR’s jurisdiction. For example, the CGR held that the Jacobs Report—commissioned and accepted by Ecopetrol, an arm of the Colombian state—was not evidence of Foster Wheeler’s lack of decision-making authority, despite Jacobs’ unequivocal finding, quoted above at paragraph 34, establishing that lack of authority, and its acceptance by the PGN.³⁸

45. The CGR went on to hold that Foster Wheeler had “contributed to the process of approval” of the change controls at issue.³⁹ Putting to one side the total lack of proof for any such “contribution,” as discussed above, “contribution” to fiscal management as a basis for the CGR’s jurisdiction was introduced for the first time by Decree 403 to expand the CGR’s reach over private companies. That provision was issued after the events at issue in the Project took place and after the CGR had commenced the Fiscal Liability Proceeding.⁴⁰ Indeed, Decree 403 was promulgated after Foster Wheeler had moved to dismiss the case for lack of jurisdiction under the standard set out in Law 610. Despite that, the CGR retroactively applied the new standard of Decree 403 to assert jurisdiction over Foster Wheeler and hold it fiscally liable for more than 800 million dollars in damages.⁴¹
46. Following the issuance of the first instance decision, which has 6,243 pages, the CGR refused to grant Foster Wheeler reasonable time to file an internal appeal. Relying on Article 56 of Law 610, the CGR gave Foster Wheeler only

³⁸ *Id.* at 5202-5203 (**R-080**).

³⁹ *Id.* at 5478 (**R-080**).

⁴⁰ **CL-007**: Decree 403 of 2020.

⁴¹ As explained below, Decree 403 was struck down by Colombia’s Constitutional Court as violative of Colombia’s Constitution.

five business days to file an internal appeal,⁴² and refused Foster Wheeler's request for a reasonable (or, for that matter, any) extension of time. Ultimately, because of errors by the CGR in serving a complete copy of the first instance decision, Foster Wheeler had approximately two weeks to submit its appellate brief, still an absurdly short time to exercise its right to present its case, defend itself, and challenge a complex 6,243-page decision.

47. On July 6, 2021, the CGR issued its second instance decision, adopting the first instance decision without modification, and denying Foster Wheeler's appeal.⁴³ This marked the conclusion of the Fiscal Liability Proceeding.
48. Having opted to challenge the CGR's actions in an international arbitration under the TPA, Foster Wheeler did not challenge the CGR Decision before the contentious administrative courts of Colombia (*jurisdicción de lo contencioso administrativo* in Spanish). These are specialized courts that hear disputes involving the Colombian government.⁴⁴ A party that has been held fiscally liable by the CGR may file a nullity action against the CGR's

⁴² **R-071 to R-083**: CGR, Auto No. 749 of 2021 (Apr. 26, 2021), at 6242 (**R-083**).

⁴³ **R-101 to R-105**: CGR, Auto No. ORD-801119-158-021 of 2021 (July 6, 2021).

⁴⁴ **AA-003**: Colombia's Memorial on Preliminary Objections, ¶ 160. Misleadingly, Colombia translated "*jurisdicción de lo contencioso administrativo*" as "administrative adjudicatory jurisdiction." Foster Wheeler, on the other hand, uses the natural translation "contentious administrative courts" or "contentious administrative jurisdiction."

decision.⁴⁵ Such nullity action is subject to a four-month statute of limitations that started running after the issuance of the CGR Decision on July 6, 2021.⁴⁶

49. In 2022, the Colombian Constitutional Court struck down the relevant provisions of Decree 403 because the President had exceeded his authority in issuing the Decree.⁴⁷ At that point, however, the CGR had already retroactively applied Decree 403 to manufacture jurisdiction over Foster Wheeler and issue a finding of fiscal liability against it.

F. The CGR Brings Enforcement Proceedings Against Foster Wheeler

50. The CGR is actively attempting to enforce its Decision against Foster Wheeler. The CGR commenced a Forced Collection Proceeding against all the parties that it held fiscally liable. The Forced Collection Proceeding is a collection action that seeks to recoup the damages assessed by the CGR. As of the time of filing of this Memorial, the Forced Collection Proceeding is still ongoing.

III. PROCEDURAL BACKGROUND

A. Foster Wheeler Asserts Claims Against Colombia Under the TPA

51. On December 26, 2018, Foster Wheeler initiated the dispute resolution process set forth in the TPA by sending Colombia its “Notice of Intent to

⁴⁵ **CWS-1 Torrente**, ¶ 20. Mr. Torrente was the CGR’s former General Counsel. Foster Wheeler submitted Mr. Torrente’s witness statement in support of an application for provisional measures. It was also part of the record in the preliminary objections phase and was referenced in the written submissions and in the hearing on preliminary objections.

⁴⁶ *Id.*

⁴⁷ **AALA-001**: Colombian Constitutional Court, Judgment C-090 of 2022.

Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement.”⁴⁸

52. Despite the TPA’s requirement that the parties negotiate in good faith, Colombia refused to meet with Foster Wheeler during the TPA’s 90-day “cooling-off” period. Rather than simply commencing an arbitration once that period expired, Foster Wheeler reached out to Colombia offering to hold off on commencing an arbitration if Colombia would meet and discuss a consensual resolution. The parties then met at Bogotá D.C. to discuss the matter, but Colombia refused to consider any consensual resolution.
53. On December 6, 2019, Foster Wheeler filed its Request for Arbitration with ICSID.⁴⁹ At that time, the CGR had already commenced the Fiscal Liability Proceeding⁵⁰ and issued fiscal liability charges against Foster Wheeler,⁵¹ but had not yet rendered the CGR Decision.⁵² But as Foster Wheeler accurately anticipated in the Request for Arbitration, an adverse finding against it by the CGR was “virtually certain.”⁵³

⁴⁸ **C-004**: Notice of Intent to Submit a Claim to Arbitration Under Chapter Ten of the United States-Colombia Free Trade Agreement.

⁴⁹ **AA-001**: Foster Wheeler’s Request for Arbitration.

⁵⁰ **R-066**: CGR, Auto No. 382 of 2017 (March 10, 2017).

⁵¹ **R-052** to **R-065**: CGR, Auto No. 773 of 2018 (June 5, 2018).

⁵² **R-071** to **R-083**: CGR, Auto No. 749 of 2021 (Apr. 26, 2021); **R-101** to **R-105**: CGR, Auto No. ORD-801119-158-021 of 2021 (July 6, 2021).

⁵³ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶ 215.

54. In the Request for Arbitration, Foster Wheeler asserted the following claims for breaches of the TPA:

- **Violation of the FET Standard of Protection.**⁵⁴ This claim encompassed four separate violations, each of which on their own established a breach of the TPA's FET provision: (i) a gross misapplication of Colombian and international law that constituted a denial of justice; (ii) a breach of procedural due process in violation of Colombian and international law; (iii) a violation of Foster Wheeler's legitimate expectations; and (iv) prejudgment of the case. Regarding denial of justice, Foster Wheeler explained that it had pursued all available and practical local remedies and that pursuing any further local remedies would be ineffective, futile, or improbable.⁵⁵
- **Violation of the National Treatment Standard of Protection.**⁵⁶ This claim was based on the CGR's unequal treatment of Claimants, US companies, and Ecopetrol, a domestic investor. The CGR did not charge Ecopetrol's board members, all prominent Colombian citizens, on the basis that they were not fiscal managers because these individuals supposedly lacked final authority over the expenditure of funds for the Project. The CGR did not apply the same standard to Foster Wheeler. In fact, unlike Foster Wheeler, Ecopetrol and its directors possessed and exercised authority over the Project, including authority over the

⁵⁴ *Id.* ¶¶ 97-173.

⁵⁵ *Id.* ¶ 110.

⁵⁶ *Id.* ¶¶ 174-178.

expenditure of state funds. Reficar required Ecopetrol's approval before it could issue the change controls increasing the Project's budget.

- **Indirect Expropriation.** ⁵⁷ Foster Wheeler argued that Colombia indirectly expropriated its investment by bypassing two fundamental protections that Foster Wheeler had bargained for in the PMC Contract:

[REDACTED]

[REDACTED]

[REDACTED] Through the actions of the CGR, Colombia bypassed these protections and destroyed Foster Wheeler's investment by improperly asserting jurisdiction over Foster Wheeler in the Fiscal Liability Proceeding [REDACTED]

[REDACTED] The CGR effectively left Foster Wheeler vulnerable to an unlimited damages award

[REDACTED]

[REDACTED]

- **Violation of the MFN Standard of Protection.** ⁵⁸ Foster Wheeler imported the umbrella clause from the Colombia-Switzerland BIT pursuant to the TPA's MFN clause. The umbrella clause provides that a breach of the PMC Contract is also a breach of international law. Through the actions of the CGR, Colombia breached the PMC Contract, specifically [REDACTED]
[REDACTED]. This breach of contract became a violation of the TPA by application of the imported umbrella clause.

⁵⁷ *Id.* ¶¶ 179-187.

⁵⁸ *Id.* ¶¶ 188-200.

- **Breach of an Investment Agreement.**⁵⁹ Foster Wheeler asserted that the PMC Contract was an Investment Agreement, as that term is defined in the TPA. Article 10.16 of the TPA, in turn, allows parties to bring claims for the breach of an Investment Agreement. As such, Colombia's breach of the PMC Contract is also a breach of the TPA.

55. Foster Wheeler also pleaded that it had already suffered financially, in the form of moral damages and reputational harm, arising from Colombia's conduct in violation of the TPA. In its Request for Arbitration, Foster Wheeler provided ample authority supporting entitlement to "loss of credit, loss of business opportunities, and various forms of reputational harm" under the rubric of moral damages.⁶⁰ The Award's conclusion that Foster Wheeler's claims were not ripe does not even mention Foster Wheeler's claim for moral damages arising out of the commencement, and not the conduct, of the Fiscal Liability Proceeding, although that is an allegation of present definite harm at the time of the arbitration's commencement.
56. After the submission of the Request for Arbitration, the parties constituted the Tribunal. Its members were Mr. John Beechey, Foster Wheeler's nominee, Dr. Marcelo Kohen, Colombia's nominee, and Dr. José Emilio Nunes Pinto, chosen by the two co-arbitrators, who served as the Tribunal's President.

⁵⁹ *Id.* ¶¶ 201-205.

⁶⁰ *Id.* ¶ 209.

B. Colombia Raises Preliminary Objections

57. On August 24, 2020, Colombia requested that the Tribunal allow it to submit preliminary objections under Article 10.20.4 of the TPA.⁶¹ No other basis than Article 10.20.4 was cited for seeking summary adjudication. The Tribunal determined that the preliminary objections could include jurisdictional objections made on the same basis, with Colombia reserving its right to assert those objections at a later stage of the arbitration on a full evidentiary record.⁶² The Tribunal also determined that disclosure and other evidentiary procedures would take place in a subsequent phase of the arbitration.⁶³ Annex A of Procedural Order No. 1 set forth a calendar for the submission of written briefs but made no provision for document production or other forms of disclosure during the preliminary objections phase.⁶⁴ Rather, all proceedings on the merits, other than Colombia's preliminary objections, were indefinitely suspended.
58. On July 1, 2021, Colombia filed its Memorial on Preliminary Objections, asserting ten objections under Article 10.20.4 of the TPA:
- i. "No Measure Capable of Constituting a Breach of a Treaty Obligation Has Occurred",⁶⁵

⁶¹ **AA-004**: Colombia's Letter to the Tribunal regarding Preliminary Questions from August 24, 2020.

⁶² **AA-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021). *See also* **AA-006**: Procedural Order No. 1 (March 18, 2021).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ **AA-003**: Colombia's Memorial on Preliminary Objections, at 94.

- ii. “Claimants Have Failed to Establish *Prima Facie* Breach of Fair and Equitable Treatment”;⁶⁶
- iii. “Claimants Have Failed to Establish a *Prima Facie* Expropriation”;⁶⁷
- iv. “Claimants Have Failed to Establish a *Prima Facie* Breach of National Treatment”;⁶⁸
- v. “Claimants Have Failed to Establish a *Prima Facie* Breach of Most-Favored-Nation Treatment”;⁶⁹
- vi. “There Could Not Have Been a Breach of an Investment Agreement”;⁷⁰
- vii. “There Could Not Have Been Any Loss or Damage by Reason of Any Breach of the Substantive Obligations of the Treaty or of an Investment Agreement”;⁷¹
- viii. “The Tribunal Is Not Empowered to Award Moral Damages”;⁷²
- ix. “The Tribunal Is Also Not Empowered to Award Non-Monetary Orders or Injunctions”;⁷³ and
- x. “The Tribunal Cannot Grant an Offsetting Award Because It Is Not Empowered to Award Hypothetical Damages.”⁷⁴

⁶⁶ *Id.* at 101.

⁶⁷ *Id.* at 122.

⁶⁸ *Id.* at 128.

⁶⁹ *Id.* at 131.

⁷⁰ *Id.* at 142.

⁷¹ *Id.* at 150.

⁷² *Id.* at 157.

⁷³ *Id.* at 162.

⁷⁴ *Id.* at 164.

59. Colombia also asserted five jurisdictional objections on a preliminary basis:
- i. “Claimants Do Not Have a Protected Investment Under the Treaty and the ICSID Convention”;⁷⁵
 - ii. “Claimant FPJVC Does Not Qualify as a ‘Juridical Person’ Under Article 25(2)(b) of the ICSID Convention”;⁷⁶
 - iii. “The Notice of Intent Was Only Sent by FPJVC and Not by the Other Claimants”;⁷⁷
 - iv. “Claimants Have Definitively Elected to Submit their Claim for Breach of Fair and Equitable Treatment Before Colombian Courts”;⁷⁸ and
 - v. “Claimants’ Waiver is Invalid, and Thus There Is No Consent to Submit Their Claim to Arbitration Under the Treaty.”⁷⁹
60. Colombia’s first preliminary objection was premised on the fact that, when Foster Wheeler submitted the Request for Arbitration on December 6, 2019, the CGR had not yet issued its Decision.⁸⁰ Accordingly, Colombia argued that no breach of the TPA had occurred when Foster Wheeler commenced the arbitration.⁸¹ Colombia also argued that because the CGR Decision was subject to review by Colombia’s contentious administrative courts, the CGR Decision, no matter how egregious a violation of the TPA’s substantive and procedural requirements, could not constitute a violation of the TPA until

⁷⁵ *Id.* at 171.

⁷⁶ *Id.* at 183.

⁷⁷ *Id.* at 189.

⁷⁸ *Id.* at 196.

⁷⁹ *Id.* at 202.

⁸⁰ *Id.* ¶¶ 174-175.

⁸¹ *Id.* ¶ 182.

such a judicial review had been completed. In Colombia's view, only the ruling of such a hypothetical review before a Colombian court could violate the TPA.⁸²

61. While Colombia's preliminary objections were pending, on September 2, 2021, Foster Wheeler submitted an Application for Provisional Measures and Emergency Temporary Relief seeking to enjoin Colombia from enforcing the CGR Decision.⁸³ In support of that application, Foster Wheeler submitted a witness statement by Mr. César Torrente.⁸⁴ Mr. Torrente worked at the CGR for four years and occupied several senior positions, including General Vice-comptroller; Deputy Comptroller for Infrastructure, Telecommunications, Foreign Trade, and Regional Development; Deputy Comptroller for Justice, Defense, and National Security; and General Counsel.⁸⁵ Mr. Torrente's testimony was submitted as evidence that challenging the CGR Decision before Colombia's contentious administrative courts would have been obviously futile or manifestly ineffective due to extreme levels of judicial

⁸² *Id.* In 2022, Colombia created a mechanism under which fiscal liability decisions would be subject to automatic judicial review, but the Colombian courts held that mechanism unconstitutional and it was never applied. **AA-002**: Foster Wheeler's Application for Provisional Measures and Emergency Relief, ¶¶ 6-9. In the Award, the Tribunal seemed to argue that Foster Wheeler could challenge the CGR Decision before the Colombian courts after its treaty claims were dismissed. **AA-007**: Award, ¶ 218 ("It is open to Claimants to pursue an appeal as due process allows and as is consistent with the scope of fair and equitable treatment adumbrated in Article 10.5.2(a) of the TPA."). This is incorrect. By the time the Award was issued on December 19, 2024, the four-month limitations period to challenge the CGR Decision affirmed on July 6, 2021 had long-since expired. Also, had Foster filed a nullity action while the arbitration was pending, that could have arguably been a violation of Article 10.18.2(b) of the TPA, which requires a claimant to waive any right to challenge the measure at issue before the local courts.

⁸³ **AA-002**: Foster Wheeler's Application for Provisional Measures and Emergency Temporary Relief.

⁸⁴ **CWS-1 Torrente**.

⁸⁵ *Id.* ¶ 6.

backlog. Mr. Torrente testified that a judicial challenge against a decision by the CGR “...historically take[s] five to twelve years to conclude (but in some cases, it can take longer).”⁸⁶

62. Following the parties’ written submissions, the Tribunal held a hearing on Foster Wheeler’s provisional measures application on November 4, 2021.⁸⁷ The parties discussed Mr. Torrente’s witness statement several times at the hearing.⁸⁸ Colombia itself relied on this evidence to argue that any risk to Foster Wheeler’s assets was not imminent because it would take local courts several years to rule on the CGR Decision.⁸⁹
63. The Tribunal denied Foster Wheeler’s application, holding that there was no imminent risk of Colombia seizing Foster Wheeler’s assets, but allowed the possibility of a renewed application if new facts showing such an imminent risk took place.
64. In parallel to the proceedings on provisional measures, the parties made their written submissions on Colombia’s preliminary objections. Foster Wheeler submitted its Counter-Memorial on Preliminary Objections on October 14, 2021.⁹⁰ Colombia submitted its Reply Memorial on December 13, 2021.⁹¹

⁸⁶ *Id.* ¶ 20.

⁸⁷ **AA-008**: Provisional Measures Hearing Transcript.

⁸⁸ *Id.* at 12:20-22; 32:17-22; 63:16-64:2; 81:3-8; 122:4-11.

⁸⁹ *Id.* at 63:16-64:2.

⁹⁰ **AA-009**: Foster Wheeler’s Counter-Memorial on Preliminary Objections.

⁹¹ **AA-010**: Colombia’s Reply on Preliminary Objections.

Foster Wheeler submitted its Rejoinder Memorial on February 11, 2022.⁹² Mr. Torrente’s witness statement was cited in Foster Wheeler’s submissions.⁹³

65. After the close of pleadings, the Tribunal held a two-day in-person hearing on Colombia’s preliminary objections in Washington D.C. on May 19-20, 2022.⁹⁴ Foster Wheeler included Mr. Torrente’s witness statement in the evidentiary bundle and referred to his testimony numerous times in the hearing to support its position on the futility of challenging the CGR Decision before the Colombian courts:⁹⁵

- “As the Tribunal will recall from the Hearing on Interim Measures, the former chief legal officer of the CGR provided a witness statement detailing exactly the difficulties that we would encounter in seeking relief.”⁹⁶
- “Mr. Torrente’s Witness Statement in the interim measures case makes it clear that a nullity action would take, in the first instance, many years, with levels of review beyond that. Colombia is free to contest that, but

⁹² **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections.

⁹³ **AA-009**: Foster Wheeler’s Counter-Memorial on Preliminary Objections, ¶ 15 n. 26; **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 45 n. 91.

⁹⁴ At that hearing, Arbitrator Beechey noted that the Request for Arbitration alleged that “substantive wrongs” had already taken place at the time of the arbitration’s commencement. **AA-012**: Preliminary Objections Hearing Transcript, Volume 1, at 239:2-11. Unfortunately, none of those “substantive wrongs” is addressed in the Award.

⁹⁵ See, e.g., *Id.* at 143:17-144:4, 197:9-15; 254:3-13. See also **AA-013**: Hearing on Preliminary Objections Transcript, Volume 2, at 351:2-8, 351:21-352:7.

⁹⁶ **AA-012**: Preliminary Objections Hearing Transcript, Volume 1, at 143:22-144:4.

they are not free here to assert that that's wrong and that the case should be dismissed on that basis.”⁹⁷

- “But the pleading here states that recourse to the Colombian courts, to the extent would be required—although there is no exhaustion requirement—would be futile. And that’s supported by the Witness Statement at the Interim Measures Hearing of Mr. Torrente, to which no rebuttal has been offered.”⁹⁸
- “I’ve already addressed the question of futility...We have pleaded compliance...that we have pursued all available and practical local remedies, to no avail. That is all that is required at this stage. Colombia has presented nothing to the contrary...It’s worth recalling that Mr. Torrente was formerly the chief legal officer of the CGR.”⁹⁹

66. Colombia did not rebut Mr. Torrente’s testimony.

C. Foster Wheeler Asserts Ancillary Claims under ICSID Arbitration Rule 40

67. ICSID tribunals must rule on preliminary objections promptly. Rule 41(5) of the 2006 ICSID Arbitration Rules provides that a tribunal, “...after giving the parties the opportunity to present their observations on the objection, shall, at

⁹⁷ *Id.* at 197:9-15.

⁹⁸ **AA-013**: Hearing on Preliminary Objections Transcript, Volume 2, at 351:2-8.

⁹⁹ *Id.* at 351:21-352:7.

its first session *or promptly thereafter*, notify the parties of its decision on the objection.”¹⁰⁰

68. Here, however, years passed before the Tribunal ruled on Colombia’s preliminary objections. During that time, the three-year limitations period of Article 10.18.1 of the TPA to raise claims for additional breaches of the TPA by Colombia was running and arguably could have expired as early as July 6, 2024—three years after the CGR affirmed its first instance decision. Accordingly, to preserve its rights under the TPA, Foster Wheeler submitted an Amended and Restated Request for Arbitration on June 21, 2024, asserting ancillary claims under Rule 40 of the 2006 ICSID Arbitration Rules.¹⁰¹ Foster Wheeler explained that the timing of its Amended Request for Arbitration was required due to the Tribunal’s delay in rendering a decision and to avoid any argument that the limitations period had run on Colombia’s TPA

¹⁰⁰ **AA-002:** ICSID, Rules of Procedure for Arbitration Proceedings, Rule 41(5) (2006) [emphasis added]. ICSID’s official commentary on Rule 41(5) states, under the subheading “Provisions Similar to Rule 41,” that “[s]ome investment treaties contain procedures similar to Rule 41, which are applicable to cases brought to ICSID under these instruments. An example of this is Article 10.20.4 of the United States-Dominican Republic - Central America Free Trade Agreement (CAFTA).” Article 10.20.4 of that treaty is substantially identical to Article 10.20.4 of the TPA. **AA-019:** ICSID, Manifest Lack of Legal Merit - ICSID Convention Arbitration (2006 Rules), available at: [Manifest Lack of Legal Merit - ICSID Convention Arbitration \(2006 Rules\) | ICSID](#) (last accessed Jan. 6, 2026).

¹⁰¹ **AA-014:** Foster Wheeler’s Amended and Restated Request for Arbitration. In the preliminary objections hearing, Foster Wheeler explained that it expected to amend its claims in due course to account for facts that took place after the commencement of the arbitration. **AA-012:** Preliminary Objections Hearing Transcript, Volume 1, at 146:12-20 (“And I should say at the outset, you know, as the case goes forward, we will, of course, amend it because there is now an award of the [CGR], which we were told at the hearing on interim measures they intend to enforce and are making efforts to enforce, depending on the exchange rate in effect, somewhere between USD 750 million and USD 900 million. So, of course, we will address that as the case moves forward.”). Colombia did not claim at the time that such an amendment would be improper or barred by the applicable procedural rules, nor did the Tribunal assert that any such amendment would be futile because the case was “frozen” as of the moment it was filed.

violations that occurred after the filing of the initial Request for Arbitration on December 6, 2019.¹⁰²

69. Rule 40 allows parties to present ancillary claims in situations exactly like the ones in this arbitration: “Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.”¹⁰³
70. The ancillary claims concerned ongoing and additional measures taken by Colombia in violation of the TPA that occurred after Foster Wheeler’s December 2019 submission of the initial Request for Arbitration, including the issuance of the CGR Decision and the CGR’s subsequent enforcement efforts.¹⁰⁴ Foster Wheeler filed the Amended Request for Arbitration at the time it did to avoid any assertion by Colombia that the ancillary claims were time barred.
71. Colombia objected to the submission of the Amended Request for Arbitration on procedural grounds. Colombia contended that Foster Wheeler should have sought leave from the Tribunal, and that the submission constituted a violation of Procedural Order No. 1 because the proceedings on the merits

¹⁰² **AA-015:** Foster Wheeler’s Letter to ICSID, dated September 3, 2024, at 1 (“Claimants submitted the Amended RFA on June 21, 2024, in order to preserve their ancillary claims and to avoid any potential limitations arguments that Respondent might assert against them given the length of time Respondent’s Preliminary Objection in Amec Foster Wheeler I have remained pending.”).

¹⁰³ **AA-002:** ICSID, Rules of Procedure for Arbitration Proceedings, Rule 40 (2006).

¹⁰⁴ *See, e.g., AA-014:* Foster Wheeler’s Amended and Restated Request for Arbitration, ¶¶ 140-151, 163-166.

were suspended pending the Tribunal's determination of Colombia's preliminary objections.¹⁰⁵

72. The Tribunal initially considered that, because the proceedings on the merits were suspended pending the resolution of Colombia's preliminary objections, which at that point had been pending for over two years, "...it would not entertain a discussion on the Amended and Restated Request for Arbitration until it had issued its ruling on the Respondent's Preliminary Objections, if appropriate."¹⁰⁶ Foster Wheeler then asked the Tribunal to clarify whether the Amended Request for Arbitration was part of the record and to confirm that it would be considered in due course.¹⁰⁷ On July 12, 2024, the Tribunal confirmed that the Amended Request for Arbitration "was part of the record in this case."¹⁰⁸
73. In parallel, given the uncertainty surrounding the status of the ancillary claims, on July 5, 2024, Foster Wheeler filed a new Request for Arbitration with the ICSID Secretariat asserting these claims. That case has been registered by the ICSID Secretariat but is stayed by agreement of the parties.

¹⁰⁵ AA-007: Award, ¶ 61.

¹⁰⁶ *Id.* ¶ 62.

¹⁰⁷ *Id.* ¶ 63.

¹⁰⁸ *Id.*

D. The Tribunal Holds All of Foster Wheeler’s Claims Inadmissible

1. The Tribunal addresses the burden of proof and the date as of which jurisdiction should be determined as preliminary matters

74. On December 19, 2024, more than two and a half years after the hearing and nearly three and a half years after Colombia filed its application, the Tribunal issued its Award on Colombia’s preliminary objections. The Tribunal held all of Foster Wheeler’s initial claims inadmissible and did not rule on the ancillary claims, or, for that matter, address them at all.¹⁰⁹
75. The Tribunal began its analysis by addressing two discrete procedural points: the burden of proof and the date as of which jurisdiction is determined. As noted above, Colombia raised its objections invoking Article 10.20.4 of the TPA. Regarding the burden of proof, Article 10.20.4(c) of the TPA provides that, when deciding objections under that provision, “the tribunal shall assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)...”¹¹⁰
76. Foster Wheeler argued that this presumption applied to all objections raised on a preliminary basis.¹¹¹ But the Tribunal ruled that the presumption applies only to objections brought under Article 10.20.4, meaning objections “that, as a matter of law, a claim submitted is not a claim for which an award in

¹⁰⁹ *Id.* ¶ 296.

¹¹⁰ **CL-001**: Chapter 10 of the TPA.

¹¹¹ *See, e.g., AA-011*: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 132.

favor of the claimant may be made under Article 10.26.”¹¹² That observation was entirely *dictum*, because all of Colombia’s objections to admissibility were brought under Article 10.20.4. Its jurisdictional objections, which the Tribunal never ruled on, were brought under Article 10.20.5.

77. The Tribunal then declared that the Article 10.20.4(c) presumption was irrelevant for its ruling. According to the Tribunal, given its decision to uphold some of Colombia’s objections, “...the question as to whether the Tribunal should assume Claimants’ factual allegations to be true in order to rule on Respondent’s jurisdictional objections has no bearing on the conclusions reached by the Arbitral Tribunal.”¹¹³ This assertion by the Tribunal is inconsistent with the TPA and contradicts the Tribunal’s own findings.

78. The Tribunal upheld Colombia’s objections under Article 10.20.4.¹¹⁴ Pursuant to the TPA, and as the Tribunal itself accepted, when ruling on those objections the Tribunal had to apply the presumption set forth in Article 10.20.4(c).¹¹⁵ Without any justification, the Tribunal disregarded that mandate and faulted Foster Wheeler for not submitting evidence to prove its factual allegations regarding the futility and ineffectiveness of exhausting local judicial remedies in Colombia.¹¹⁶ In reality, despite having no obligation

¹¹² **AA-007**: Award, ¶ 101.

¹¹³ *Id.* ¶ 102.

¹¹⁴ *Id.* ¶¶ 215, 219. These paragraphs are part of heading V.A “Preliminary Objection Under Article 10.20.4 of the Treaty” found at page 21 of the Award.

¹¹⁵ **CL-001**: Chapter 10 of the TPA, Art. 10.20.4(c); **AA-007**: Award, ¶ 101.

¹¹⁶ **AA-007**: Award, ¶ 217.

to do so, Foster Wheeler did submit precisely the evidence that the Tribunal held was lacking: the witness statement of former CGR General Counsel César Torrente testifying as to the futility of exhausting local judicial remedies.¹¹⁷ The Tribunal compounded its error by simply ignoring that evidence.¹¹⁸

79. In sum, the Tribunal wrongly insisted that the 10.20.4(c) presumption that Foster Wheeler’s factual allegations were true was inapplicable and that Foster Wheeler needed to provide evidence. As noted above, Foster Wheeler did provide that evidence and even addressed it during the oral hearings, but the Tribunal ruled that no evidence had been provided, and for that reason dismissed the claims.
80. Regarding the critical date for assessing jurisdiction, the Tribunal ruled that “...for a claim to be admissible, a measure capable of constituting a Treaty breach must have existed as of the date of the submission.”¹¹⁹ That holding is inconsistent with Article 10.20.4(c), which allows a tribunal to “consider any relevant facts not in dispute” when resolving 10.20.4 objections.¹²⁰ The Tribunal itself acknowledged that it was undisputed that “...when the Fiscal Chamber formally rejected Claimants’ appeal on 6 July 2021 and affirmed the Ruling with Fiscal Liability in its entirety, Claimants had exhausted their

¹¹⁷ **CWS-1 Torrente.**

¹¹⁸ **AA-007:** Award, ¶ 217. In this paragraph the Tribunal held that “Claimants...have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability.” This is demonstrably false. Despite not having an obligation to prove its factual allegations, Foster Wheeler presented this evidence in the form of Mr. Torrente’s witness statement.

¹¹⁹ *Id.* ¶ 204.

¹²⁰ **CL-001:** Chapter 10 of the TPA, Art. 10.20.4(c).

administrative appeals.”¹²¹ Despite the TPA’s clear terms and the Tribunal’s acknowledgment that the CGR had issued its Decision in the course of the arbitration, and that Foster Wheeler had exhausted all the available administrative remedies, the Tribunal dismissed the claims because the CGR Decision had not occurred when Foster Wheeler filed the Request for Arbitration: “The Tribunal reiterates that the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not.”¹²²

81. Foster Wheeler could, of course, have commenced a new arbitration raising the claims set out in the Amended Request, and then seek consolidation. Rule 40 is designed to avoid such wasteful and duplicative proceedings by allowing the submission of claims arising from new facts in a single proceeding. Once amended and supplemental claims are before a tribunal, jurisdiction and admissibility are to be tested on the case as a whole, and not with the case frozen as of the time of its inception. Putting to one side that Foster Wheeler’s claims were ripe at the time it commenced the case because the Fiscal Liability Proceeding was underway and Foster Wheeler had incurred damages, the Award’s ruling that no amended pleading could cure a defect in the original pleading—although there was none—violated a fundamental rule of procedure.
82. But even if one were to accept the Tribunal’s flawed reasoning that the case is effectively frozen as of the date of submission of the Request for Arbitration, in any case Foster Wheeler had pleaded that the commencement

¹²¹ **AA-007**: Award, ¶ 208.

¹²² *Id.* ¶ 221.

of the Fiscal Liability Proceeding was a breach of the TPA in and of itself, regardless of the ultimate outcome.¹²³ Foster Wheeler explained that being named as a respondent in the Fiscal Liability Proceeding, a fact that took place before Foster Wheeler commenced the arbitration, and then the CGR's campaign of public denunciation of Foster Wheeler, had caused it moral damages, including reputational harm and loss of business opportunities.¹²⁴ The Tribunal did not address those allegations and never explained why it could not consider the breaches that had already crystallized at the time of the arbitration's commencement.

2. The Tribunal holds that the Fiscal Liability Proceeding is not an administrative adjudicatory proceeding and therefore is outside the scope of Colombia's obligation under the TPA not to deny justice to US investors

83. After having addressed the burden of proof and the critical date for assessing jurisdiction, the Tribunal turned to its substantive analysis of Colombia's objections. The Award has 296 paragraphs, only 32 of which, 193 to 224, contain any substantive analysis of Colombia's objections. The Tribunal's dispositive orders are set out in paragraph 296. The remaining paragraphs provide a detailed summary of the procedural history and of the parties' arguments.
84. First, the Tribunal addressed Colombia's objection that no measure capable of constituting a breach of a treaty obligation had occurred. Colombia argued that it had not violated the TPA's FET standard of protection.¹²⁵ Colombia

¹²³ AA-001: Foster Wheeler's Request for Arbitration, ¶ 2

¹²⁴ *Id.* ¶¶ 206-215.

¹²⁵ AA-003: Colombia's Memorial on Preliminary Objections, ¶ 201.

invoked Article 10.5.2(a) of the TPA which sets forth that this standard “...includes the obligation not to deny justice in criminal, civil, or *administrative adjudicatory proceedings* in accordance with the principle of due process embodied in the principal legal systems of the world[.]”¹²⁶ According to Colombia, the Fiscal Liability Proceeding did not fall within the Article 10.5.2(a)’s definition of “administrative adjudicatory proceedings.”¹²⁷ Instead, said Colombia, the TPA’s protection against denial of justice in administrative adjudicatory proceedings is limited to proceedings before specialized Colombian courts that hear disputes involving the State.¹²⁸ Because the proceedings before the CGR were not administrative adjudicatory proceedings, the TPA’s denial of justice provision did not protect foreign investors from gross due process violations by the CGR. Under Colombia’s reading of the TPA, the only remedy for foreign investors was to challenge the actions of the CGR before the Colombian courts. Resorting to local courts, of course, would trigger the TPA’s fork in the road provision, effectively depriving a foreign investor of the TPA’s protections.

85. Foster Wheeler, on the other hand, argued that under the Vienna Convention the proper interpretation of the TPA is that the term “administrative adjudicatory proceedings,” in keeping with its plain meaning, encompasses adjudicatory proceedings before an administrative agency like the CGR.¹²⁹

¹²⁶ **CL-001**: Chapter 10 of the TPA, Art. 10.5.2(a) [emphasis added].

¹²⁷ **AA-007**: Award, ¶ 109; **AA-010**: Colombia’s Reply on Preliminary Objections, ¶ 98.

¹²⁸ **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 201.

¹²⁹ **AA-007**: Award, ¶ 159; **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶¶ 81-83, 86. The Vienna Convention embodies customary international law and is therefore applicable regardless of whether a state is a party to it or not. *See, e.g., AALA-003: Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Decision on Jurisdiction, ¶ 36 (April 13, 2015);

There is no support whatsoever for limiting that term to proceedings before domestic courts. Indeed, the plain meaning of that term refers to proceedings in which an administrative agency presses charges against a party, conducts evidentiary hearings, weighs evidence, and finally adjudicates the case by determining liability and assessing damages, which is precisely what the CGR did in the Fiscal Liability Proceeding.¹³⁰

86. The Tribunal agreed with Colombia, holding that “administrative adjudicatory proceedings” was a reference to “a judicial proceeding before the administrative adjudicatory jurisdiction [of Colombia], and not an administrative proceeding as the Fiscal Liability Proceeding.”¹³¹ Accordingly, the Tribunal held that the CGR proceedings were subject to no due process constraints at all.¹³² The Tribunal asserted only a simplistic semantic argument in support of its position:

- The Spanish version of the TPA uses the term “*procedimiento contencioso administrativo*.”¹³³ With no explanation and without citation to any supporting authority, the Tribunal held that this Spanish term “unequivocally means a proceeding initiated before a national court.”¹³⁴ By relying on its interpretation of the Spanish terms, the Tribunal

AA-004: *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 50 (Oct. 12, 2005).

¹³⁰ **AA-011:** Foster Wheeler’ Rejoinder on Preliminary Objections, ¶ 83.

¹³¹ **AA-007:** Award, ¶ 210.

¹³² *See id.*

¹³³ *Id.* ¶ 211.

¹³⁴ *Id.*

implicitly held that the Spanish version of the TPA prevails over the English version, even though under Article 23.6 both versions are equally authentic,¹³⁵ as Foster Wheeler had explained in its submissions.¹³⁶

- The Tribunal noted that other provisions of the TPA use the terms “administrative proceedings” or “administrative process.” For the Tribunal, this meant that “administrative adjudicatory proceedings” must refer to court proceedings, especially when read together with the reference in Article 10.5.2(a) to “criminal [and] civil” proceedings.¹³⁷

87. Given its interpretation of the term “administrative adjudicatory proceedings,” the Tribunal held that “...the obligation not to deny justice established in the TPA is limited to judicial proceedings before national courts and does not cover purely administrative proceedings.”¹³⁸ As explained in detail in Section IV.B.3, that ruling is so egregiously wrong that it amounts to no ruling at all. The Tribunal then concluded that there could not have been a denial of justice because the local judiciary—which, in the Tribunal’s view, was the only adjudicatory body bound by the guaranty of due process—“has not yet intervened.”¹³⁹

¹³⁵ *Id.*; **AALA-005**: Chapter 23 of the TPA, Article 23.6. Because of the length of the TPA, the parties only submitted specific chapters as exhibits, including Chapter 10. Colombia provided the Tribunal with a public link to the full text of the TPA. **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 3, n. 3.

¹³⁶ **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 83.

¹³⁷ **AA-007**: Award, ¶ 213.

¹³⁸ *Id.* ¶ 214.

¹³⁹ *Id.* ¶ 215.

3. The Tribunal holds that there cannot be a breach of any of Colombia's obligations under the TPA because there was no decision by the Colombian judiciary regarding the CGR Decision at the time Foster Wheeler commenced the arbitration

88. The Tribunal went on to hold that each of Foster Wheeler's TPA claims was inadmissible because of the alleged failure to exhaust local remedies before the contentious administrative courts. The Tribunal provided only a conclusory statement:

Even if one might argue that subsequent events could ripen a claim after the commencement of the arbitration, in the present case, no final decision before the administrative adjudicatory jurisdiction exists. Considering that the Ruling with Fiscal Liability could be overturned after judicial review, it cannot constitute a denial of justice *or a breach of any of the other substantive obligations under the Treaty alleged by Claimants*.¹⁴⁰

89. The Tribunal, in effect, created a requirement to exhaust local judicial remedies for every treaty-based claim, a requirement not found in the TPA and contrary to the terms of the ICSID Convention. The Tribunal did not explain how its exhaustion requirement applied to any claim other than the denial of justice violation of FET, including the ancillary claims.

¹⁴⁰ *Id.* ¶ 216 [emphasis added].

4. The Tribunal rules that Foster Wheeler had an evidentiary burden to prove that exhausting local remedies in Colombia would have been futile or ineffective and that Foster Wheeler did not submit evidence

90. Even on its flawed analysis, the Tribunal acknowledged that a party would be excused from exhausting local remedies if pursuing such remedies would have been obviously futile or manifestly ineffective.¹⁴¹ That it is exactly what Foster Wheeler pleaded throughout the arbitration.
91. First, in its Request for Arbitration, Foster Wheeler emphasized that the futility exception applied to this case, assuming that there was any exhaustion requirement at all.¹⁴² Then, over the course of the arbitration, Foster Wheeler presented the only evidence provided by either party on the futility of local remedies. Specifically, in support of its Application for Provisional Measures and Emergency Temporary Relief, Foster Wheeler submitted a witness statement by Mr. César Torrente, explaining in detail that pursuing judicial remedies in Colombia would have been futile or ineffective due to extreme levels of judicial backlog.¹⁴³ Speaking of his experience as former General Counsel of the CGR, Mr. Torrente testified in his witness statement that a judicial challenge against a CGR decision “historically take[s] five to twelve years to conclude (but in some cases, it can take longer).”¹⁴⁴

¹⁴¹ *Id.* ¶ 217.

¹⁴² **AA-001**: Foster Wheeler’s Request for Arbitration, ¶ 110.

¹⁴³ **CWS-1 Torrente**.

¹⁴⁴ *Id.* ¶ 20.

92. At the subsequent hearing on provisional measures, both parties highlighted Mr. Torrente’s witness statement.¹⁴⁵ Foster Wheeler included Mr. Torrente’s witness statement in the hearing bundle for the preliminary objections phase of the arbitration.¹⁴⁶ The Tribunal was bound to apply Article 10.20.4(c) of the TPA, under which it had to “assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof)...”¹⁴⁷
93. Despite having been presented with Mr. Torrente’s witness statement on several occasions, the Tribunal did not analyze it and actually faulted Foster Wheeler for not submitting evidence in support of its allegations of futility: “Claimants, however, have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability.”¹⁴⁸ The Tribunal not only disregarded the Article 10.20.4(c) presumption, it also ignored Foster Wheeler’s evidence that met the non-existent evidentiary burden the Tribunal had created.
94. The Tribunal even placed a heightened evidentiary burden on Foster Wheeler, requiring “strong evidence” for a claim of futility. The Tribunal did not cite to any authority in support of this heightened burden.¹⁴⁹ Again, neither the

¹⁴⁵ **AA-008**: Provisional Measures Hearing Transcript, at 12:20-22; 32:17-22; 63:16-64:2; 81:3-8; 122:4-11.

¹⁴⁶ See **AA-016**: Electronic Hearing Bundle (May 19-20), at 3.

¹⁴⁷ **CL-001**: Chapter 10 of the TPA, Art. 10.20.4(c).

¹⁴⁸ **AA-007**: Award, ¶ 217.

¹⁴⁹ *Id.* ¶ 218.

TPA nor applicable ICSID rules place an evidentiary burden, much less a heightened one, on Foster Wheeler at the preliminary objections phase. And even if such burden was required, Foster Wheeler satisfied it with Mr. Torrente's witness statement.

95. After holding all of the claims inadmissible, the Tribunal held that Foster Wheeler could, after the issuance of the Award, challenge the CGR Decision in the Colombian courts.¹⁵⁰ That is incorrect and inconsistent with the evidence in the record. As explained by Mr. Torrente in his witness statement, the judicial remedy to challenge the CGR Decision—a nullity action—is subject to a four-month limitations period.¹⁵¹ By the time the Tribunal issued the Award, on December 19, 2024, the four-month period to challenge the CGR Decision, which the CGR affirmed on July 6, 2021, had expired.
96. Finally, the Tribunal summarized its findings as follows: “The fact that the Ruling with Fiscal Liability issued by the CGR is not an administrative adjudicatory proceeding as provided by the TPA and contemplates certain appeals or defenses at the administrative judicial level is fatal to the admissibility of Claimants’ claims.”¹⁵² The Tribunal expanded on its explanation by again faulting Foster Wheeler for its supposed failure to provide evidence:

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

¹⁵⁰ *Id.* (“It is open to Claimants to pursue an appeal as due process allows and as is consistent with the scope of fair and equitable treatment adumbrated in Article 10.5.2(a) of the TPA.”).

¹⁵¹ **CWS-1 Torrente**, ¶ 20.

¹⁵² **AA-007: Award**, ¶ 220.

breach of a provision of the TPA at the time the Request for Arbitration was submitted. Hence, the Tribunal accepts the preliminary objection filed by Respondent and, further, decides that Claimants' claims may not be admitted, the arbitration being therefore terminated.¹⁵³

97. Even though the Tribunal substantively addressed only one of the four FET violations—denial of justice—it held the entire FET claim and all of Foster Wheeler's other TPA claims inadmissible. There was no substantive analysis of any of the other FET violations or additional TPA claims raised in the Request for Arbitration. Those other claims included violation of the national treatment standard of protection, indirect expropriation of Foster Wheeler's investment, violation of the umbrella clause imported through the TPA's MFN clause, and a breach of the PMC Contract, which was an investment agreement under the TPA. The Award also fails to mention the ancillary claims from the Amended Request for Arbitration at all, despite the Tribunal having acknowledged that such Amended Request formed part of the record. None of these claims, including the other three FET violations, turned on the interpretation of “administrative adjudicatory proceedings” or on the exhaustion of local judicial remedies. Nevertheless, the Tribunal found all of them inadmissible based on a formulaic reference to its erroneous ruling on denial of justice.
98. The Tribunal's focus on the fact that the CGR had not yet issued its Decision at the time of the arbitration's commencement is also a failure to address the case as it was presented. Putting to one side that the Tribunal could, and should, have considered undisputed facts that took place during the course of

¹⁵³ *Id.* ¶ 222.

the arbitration, the Tribunal failed to address Foster Wheeler's contention in the Request for Arbitration that the CGR's assertion of jurisdiction was wrongful in and of itself and had caused recoverable moral damages. The Tribunal never explained the reasons why actions by the CGR taken in advance of a final decision could not be a breach of international law.

IV. GROUNDS FOR ANNULMENT

99. The Award should be annulled under Article 52 of the ICSID Convention because (A) the Tribunal seriously departed from fundamental rules of procedure; (B) the Tribunal manifestly exceeded its powers; and (C) the Award failed to state the reasons on which it is based.¹⁵⁴

A. The Tribunal Seriously Departed from Several Fundamental Rules of Procedure

100. In its Award, the Tribunal seriously departed from several fundamental rules of procedure, including rules that form the cornerstone of arbitration as a balanced, fair, and reliable method of alternative dispute resolution:

- First, the Tribunal deprived Foster Wheeler of its right to be heard when it failed to rule on almost all of the initial claims and all of the ancillary claims
- Second, the Tribunal exceeded its mandate by imposing a requirement to exhaust local remedies for every TPA claim in violation of the TPA itself and of the ICSID Convention.

¹⁵⁴ **AAIA-006:** Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270, Art. 52(1)(b), 52(1)(d), 52(1)(e) ["ICSID Convention"].

- Third, the Tribunal disregarded the TPA and ICSID Arbitration Rules by improperly imposing an evidentiary burden on Foster Wheeler during the preliminary objections phase.
- Fourth, the Tribunal improperly decided complex questions of fact or mixed questions of law and fact through summary disposition proceedings.
- Fifth, the Tribunal did not comply with the time limits applicable to summary disposition proceedings.

1. The Tribunal seriously departed from the fundamental rule of procedure that grants the parties the right to be heard by effectively failing to rule on Foster Wheeler’s initial claims, except for the denial of justice violation of FET, and on all of its ancillary claims

101. A party’s right to be heard is, of course, one of the fundamental rules of procedure in any international arbitration and, for that matter, in any system of dispute resolution.¹⁵⁵ The Tribunal seriously departed from that fundamental rule when it failed to hear Foster Wheeler’s argument, either written or oral, on its initial claims and on the ancillary claims.

¹⁵⁵ **AAIA-007:** *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 57 (Feb. 5, 2002) [“Wena Hotels v. Egypt”] (“[Article 52(1)(d) of the ICSID Convention] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it.”); **AAIA-008:** *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 198 (Dec. 23, 2010) (“The right to be heard has been recognised as a fundamental rule of procedure applicable to international arbitral proceedings generally.”).

102. As noted by the *Pey Casado* committee: “...there is a departure from the right to be heard, which is a fundamental rule of procedure, when a party is not given a full, fair, or comparatively equal opportunity to state its case, present its defense, or produce evidence regarding every claim and issue at every stage of the arbitral proceeding.”¹⁵⁶ Similarly, the *Wena Hotels* committee held that “[i]t is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it.”¹⁵⁷
103. The International Court of Justice has also held that a conscious omission to exercise jurisdictional powers (*i.e.*, an *infra petita* judgment) is a serious departure from fundamental rules of procedure in international adjudication. The Court held that: “...the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue.”¹⁵⁸ In fact, the ICSID Convention specifically addresses *infra petita* awards. Article 48(3) provides that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”¹⁵⁹ The Award failed to meet that basic obligation.

¹⁵⁶ **AAIA-009:** *Victor Pey Casado & Foundation Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, ¶ 184 (Dec. 18, 2012) [“Pey Casado v. Chile (I)”].

¹⁵⁷ **AAIA-007:** *Wena Hotels v. Egypt*, ¶ 57.

¹⁵⁸ **AAIA-010:** *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion of July 12, 1973, 1973 I.C.J. Rep. 166, at 190.

¹⁵⁹ **AAIA-006:** ICSID Convention, Art. 48(3).

104. In this case, the only claim that the Tribunal actually addressed was the denial of justice violation of the FET claim. As to each of the other TPA claims pleaded by Foster Wheeler, the Tribunal simply cited its holding on denial of justice to dismiss each of those distinct claims as inadmissible.¹⁶⁰ The Tribunal gave no consideration whatsoever to the distinct requirements for the other TPA claims, none of which had any relation to whether a denial of justice had occurred.¹⁶¹
105. By way of example, Foster Wheeler's national treatment claim, which is based on the CGR's dismissal of the similarly situated Colombian directors of Ecopetrol, does not turn on the denial of procedural due process and would not require Foster Wheeler to exhaust local judicial remedies. The TPA breach there arises from the decision by the CGR to pursue claims against Foster Wheeler while dismissing all claims against a similarly situated Colombian investor. The claim was largely ignored by the Tribunal but was dismissed nonetheless.
106. The same is true of the TPA claim for breach of an investment agreement. The PMC Contract contains two critical provisions intended to protect Foster Wheeler: [REDACTED]
[REDACTED]. In Foster Wheeler's written submissions, and at the oral hearing, there was extensive discussion of how the PMC Contract comes within the TPA's definition of an investment agreement, and how the commencement and prosecution of the Fiscal Liability Proceeding violates the undertakings [REDACTED] [REDACTED]

¹⁶⁰ AA-007: Award, ¶¶ 219-222.

¹⁶¹ *Id.* ¶¶ 219-220.

██████, rather than administrative proceedings in Colombia.¹⁶² The Award asserts that there was no need to address that argument, given its holding regarding denial of justice.¹⁶³ That is a complete *non sequitur*, and the equivalent of no ruling at all on that claim.

107. Foster Wheeler also asserted a claim for breach of the umbrella clause of the Colombia-Switzerland BIT imported through the TPA's MFN clause. That provision makes a violation of the PMC Contract a violation of international law. The Tribunal gave the same non-answer on this point, asserting that there was no need to address this claim in light of its holding on denial of justice, again the equivalent to no ruling at all.¹⁶⁴

108. Similarly, Foster Wheeler's separate claim for indirect expropriation of its investment has nothing to do with the Tribunal's finding that there had not been a denial of justice. Rather, the question is whether there was an uncompensated taking of Foster Wheeler's investment. Again, the Tribunal failed to address Foster Wheeler's claim by invoking its holding on denial of justice.¹⁶⁵

109. The Tribunal also failed to consider Foster Wheeler's claim that the commencement of the Fiscal Liability Proceeding and then the CGR using that filing to attack Foster Wheeler in the media was a breach of the TPA

¹⁶² See, e.g., **AA-001**: Foster Wheeler's Request for Arbitration, ¶¶ 201-205.

¹⁶³ **AA-007**: Award, ¶ 220.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

causing immediate damage to Foster Wheeler without regard to the subsequent proceedings.¹⁶⁶

110. Each of these separate claims was extensively briefed and argued. By refusing to engage substantively with Foster Wheeler's claims, the Tribunal seriously departed from the most fundamental rule of procedure in international arbitration, a party's right to be heard. Foster Wheeler had an unqualified right to state its claims and have them resolved by a tribunal constituted under the TPA's arbitration provisions. The Tribunal in this case infringed upon that right.¹⁶⁷

111. Accordingly, the Tribunal failed to address Foster Wheeler's initial claims in any meaningful sense, and with regard to the ancillary claims, in any sense at all. A party's right to be heard and an adjudicator's duty to resolve the questions that have been presented to it are, without question, fundamental rules of procedure in international law. An international tribunal must keep within its jurisdiction and exercise it by ruling on the questions presented. The Tribunal completely failed to meet that requirement, and the Award should therefore be annulled.

¹⁶⁶ **AA-001**: Foster Wheeler's Request for Arbitration, ¶ 2.

¹⁶⁷ The Tribunal's error could not have been cured through a request for a supplemental decision under Article 49(2) of the ICSID Convention. Such a request is limited to "unintentional omissions to decide any question." **AALA-011**: *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/06, Decision on Annulment, ¶ 69 (Oct. 19, 2009) ["MCI v. Ecuador"]; **AALA-012**: *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Ad Hoc Committee Decision on the Application for Annulment, ¶ 34 (May 16, 1986) ["Amco Asia v. Indonesia"]. This is not a case of a simple unintentional error. The Tribunal purposefully held all of the claims inadmissible, without offering any reasons, and relying solely on a formulaic reference to its findings regarding denial of justice.

2. The Tribunal departed from a fundamental rule of procedure and exceeded its mandate by imposing a requirement to exhaust local remedies in violation of the TPA and the ICSID Convention

112. The Award rested on the Tribunal's conclusion that there is no guaranty of due process applicable to the Fiscal Liability Proceeding, and on the notion that Foster Wheeler was required to exhaust local judicial remedies before proceeding in arbitration.¹⁶⁸ That directly contradicts the express language of the ICSID Convention and the TPA.

113. The ICSID Convention contains an express provision regarding exhaustion of local remedies. Article 26 of the ICSID Convention provides as follows:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.¹⁶⁹

114. As the text indicates, the state party may require exhaustion as a condition to arbitration, and some have done so. It necessarily follows that, if a state consents to arbitration under the ICSID Convention without imposing an exhaustion requirement, then there is no such requirement. As Professors Dolzer and Schreuer explain:

Under traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings, the

¹⁶⁸ AA-007: Award, ¶ 220.

¹⁶⁹ AALA-006: ICSID Convention, Art. 26.

investor must have exhausted the domestic remedies offered by the host State's legal system. But it is well established that, where there is consent to investor-State arbitration, there is generally no need to exhaust local remedies.¹⁷⁰

115. There is no such requirement of exhaustion in Colombia's instrument of accession to the ICSID Convention or in the TPA. It follows that any requirement that local remedies be exhausted has been waived by Colombia.
116. Indeed, the TPA's fork in the road provision is inconsistent with the exhaustion requirement imposed by the Tribunal. Under that provision, a claimant must elect between pursuing remedies before the local courts or in an international arbitration.¹⁷¹ However, under the Tribunal's holding, a party could never elect arbitration, because it would, by definition, have failed to exhaust the foregone local remedies. If, on the other hand, a claimant pursued every available local remedy, it would have foregone its opportunity to pursue arbitration.¹⁷² The same is true of the waiver requirement of the TPA.¹⁷³ Under the Tribunal's approach, as soon as such a waiver is delivered, the claim at issue would be rendered inadmissible because those waived remedies, by definition, could not be exhausted. Likewise, if the TPA imposed a requirement to exhaust every available local remedy before pursuing arbitration, then there would be no point in demanding a waiver, as there would be no remedies left to waive. The Tribunal's holding regarding

¹⁷⁰ **AALA-013:** RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 381 (Oxford University Press, 3rd ed. 2022)

¹⁷¹ **CL-001:** Chapter 10 of the TPA, Annex 10-G.

¹⁷² *Id.*

¹⁷³ *Id.* Art. 10.18.2(b).

exhaustion violates the TPA's basic procedural rules that balance the litigation and arbitration options available to claimants.¹⁷⁴

117. Foster Wheeler waived its right to pursue remedies in the Colombian courts when it decided to opt for arbitration. The result of accepting the Tribunal's requirement for exhaustion would be that any claimant under the TPA could not pursue a claim, for denial of justice or otherwise, until it had pursued its remedies through the Colombian courts. However, doing so would constitute a waiver of the right to seek arbitration under the treaty for violations of international law due to the fork in the road provision. Accepting the Tribunal's position would render the investment arbitration provisions of the TPA a dead letter.
118. By inventing and applying a requirement to exhaust local remedies as a condition to pursuing arbitration, the Tribunal violated a fundamental rule of procedure set out in the ICSID Convention: There is no requirement to exhaust local remedies unless the state party conditioned its consent to ICSID arbitration on compliance with such a requirement. Colombia did no such thing.

¹⁷⁴ **AALA-062:** *Honduras Próspera Inc., St. John's Bay Development Company LLC, and Próspera Arbitration Center LLC v. Republic of Honduras*, ICSID Case No. ARB/23/2, Decision on Preliminary Objections Under Article 10.20.5 of CAFTA-DR, ¶¶ 119-122 (Feb. 26, 2025) ["Próspera v. Honduras"]. This Decision dealt with provisions substantially identical to those of the TPA.

3. The Tribunal seriously departed from the fundamental rule of procedure regarding burden of proof by requiring that Foster Wheeler establish at the preliminary objections phase that exhausting local remedies in Colombia would have been futile or ineffective

119. The Tribunal seriously departed from a fundamental rule of procedure by improperly (i) shifting the burden of proof; (ii) engaging in fact-finding at the arbitration’s preliminary objections phase; (iii) demanding that Foster Wheeler prove the factual basis of its claims in responding to a preliminary objection; and (iv) ignoring evidence provided by Foster Wheeler, and then holding that the claims were inadmissible due to a lack of evidence
120. As explained by Professor Schreuer, “...an erroneous reversal of the burden of proof could amount to a serious departure from a fundamental rule of procedure.”¹⁷⁵ The *ad hoc* committee in *Agility* confirmed that “the treatment of evidence and burden of proof” is a fundamental rule of procedure.¹⁷⁶
121. The TPA and the ICSID Arbitration Rules provide clear mandates regarding the burden of proof for preliminary objections. Pursuant to Article 10.20.4 of the TPA, a state respondent may assert as a preliminary objection “...that, *as a matter of law*, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26.”¹⁷⁷ The TPA then provides the burden of proof for that objection. Article 10.20.4(c) provides that for

¹⁷⁵ **AALA-014:** CRISTOPH S. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1330 (Cambridge University Press, 3rd ed. 2022).

¹⁷⁶ **AALA-015:** *Agility Public Warehouse Company K.S.C.P. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, ¶ 69 (Feb. 8, 2024).

¹⁷⁷ **CL-001:** Chapter 10 of the TPA [emphasis added].

objections that a claim fails as a matter of law, “...the tribunal *shall* assume to be true claimant’s factual allegations in support of any claim in the notice of arbitration (or any amendment thereof).”¹⁷⁸ Likewise, ICSID Arbitration Rule 41(5) provides that a state may assert a preliminary objection that a claim is manifestly without legal merit.¹⁷⁹ When determining if a claim is manifestly without merit, a tribunal must assume that the facts alleged by the claimant are true.¹⁸⁰

122. In this case, the Tribunal expressly disregarded these requirements when ruling on an Article 10.20.4 preliminary objection by Colombia. As explained before, the Tribunal made an adverse ruling based on Foster Wheeler’s purported failure to support factual allegations, when, in fact, Foster Wheeler made the only evidentiary submission on that point.
123. One of Colombia’s preliminary objections under TPA Article 10.20.4, and the one on which it prevailed, was that, as a matter of law, Foster Wheeler had failed to assert a claim under Article 10.16.1 because, at the time Foster Wheeler filed its Request for Arbitration, “there could not have been a breach

¹⁷⁸ *Id.* [Emphasis added]. Article 10.20.4 is based on Article 28(5) of the 2012 US Model BIT (**CL-152**). As explained by Professor Vandevelde, “[t]he mechanism is modeled in concept after Rule 12(b)(6) of the [United States] Federal Rules of Civil Procedure, which authorizes dismissal of a claim upon which relief cannot be granted and which directs the court, in deciding whether to dismiss the claim, to assume that the facts alleged by the plaintiff are true.” **RL-121**: KENNETH J. VANDEVELDE, U.S. INTERNATIONAL INVESTMENT AGREEMENTS 608 (Oxford University Press 2009).

¹⁷⁹ **AAIA-002**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 41(5) (2006).

¹⁸⁰ **AAIA-016**: *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/03, Decision on the Respondent’s Objection under Rule 41(5) of the ICSID Arbitration Rules, ¶ 61 (Feb. 2, 2009) [“Brandes v. Venezuela”]; **AAIA-017**: *InfraRed Environmental Infrastructure GP Limited et al. v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Claimants’ Objection under ICSID Rule 41(5) to Respondent’s Application for Revision, ¶ 55 (March 8, 2021).

of a substantive obligation of the [TPA].”¹⁸¹ Colombia’s two primary arguments were:

- “...at the time the Notice of Arbitration was filed, a Ruling with Fiscal Liability had not even been issued; rather, there was simply an Indictment Order, which is a procedural or interlocutory decision that does not definitively define any legal situation.”¹⁸²
- “At present, it is unknown whether the Ruling with Fiscal Liability will be finally confirmed at the administrative level and, if so, whether it will remain in force after the judicial control is carried jurisdiction.”¹⁸³

124. The caption to the portion of Colombia’s memorial in which it made these arguments is part of a heading titled “PRELIMINARY OBJECTION UNDER ARTICLE 10.20.4 OF THE TREATY.”¹⁸⁴ Consequently, the Tribunal had to apply the presumption set forth in Article 10.20.4(c)—that the tribunal *shall* assume Foster Wheeler’s factual allegations to be true.¹⁸⁵

125. As explained above, and as Foster Wheeler argued, there is no general exhaustion of local remedies requirement in the TPA.¹⁸⁶ Even if there was such a requirement, it was inapplicable here because pursuing local judicial

¹⁸¹ **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 170.

¹⁸² *Id.* ¶ 173.

¹⁸³ *Id.* ¶ 175.

¹⁸⁴ *Id.* at 89, 94 [capitalized in the original].

¹⁸⁵ **CL-001**: Chapter 10 of the TPA

¹⁸⁶ **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 81.

remedies in Colombia would have been ineffective, futile, or improbable.¹⁸⁷ Because it was deciding an Article 10.20.4 objection, the Tribunal was required to assume Foster Wheeler’s assertions to be true¹⁸⁸ Instead, without explanation or citation to authority, the Tribunal required evidence: “Claimants...have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability.”¹⁸⁹ For this reason, the Tribunal dismissed the claims.

126. Put simply, the Tribunal ignored the TPA and ICSID Arbitration Rules by improperly imposing an evidentiary burden on Foster Wheeler instead of assuming the factual allegations to be true, and then dismissing the claims based on Foster Wheeler’s supposed failure to meet that burden.¹⁹⁰ As a sign that this evidentiary task was not contemplated for this phase of the arbitration, the procedural calendar for the preliminary objections phase did not include a disclosure process, such as an exchange of documents.¹⁹¹

¹⁸⁷ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶ 110.

¹⁸⁸ A Tribunal is bound by the terms of the applicable investment protection treaty. The committee in *Malaysian Historical Salvors* annulled an award because the tribunal did not follow the mandates of the United Kingdom-Malaysia BIT. **CL-240**: *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 74 (Apr. 16, 2009) (“...the Committee finds that the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the Agreement to be a gross error that gave rise to a manifest failure to exercise jurisdiction.”).

¹⁸⁹ **AA-007**: Award, ¶ 217.

¹⁹⁰ *Id.* The Tribunal went as far as holding that “...the denial of justice when alleged has to be accompanied by strong evidence.” *Id.* ¶ 218. The Tribunal did not cite the TPA or any other authority in support of this imposition of a heightened standard of proof in a phase of the arbitration in which there is no evidentiary burden at all.

¹⁹¹ **AA-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021). *See also* **AA-006**: Procedural Order No. 1 (March 18, 2021).

Nevertheless, the Tribunal stated that Foster Wheeler was required to prove its case, even though Foster Wheeler's ability to provide such proof would be hindered by the absence of a disclosure process for preliminary questions. This approach made no sense, further evidencing that submission of proof was not supposed to be a part of this phase of the arbitration.

127. The Tribunal's error was compounded by the fact that Foster Wheeler did in fact provide the evidence the Tribunal found lacking in the Award, but the Tribunal simply ignored it. On several occasions in the arbitration, including during the preliminary objections phase, Foster Wheeler provided evidence in the form of a witness statement from Mr. César Torrente, former General Counsel of the CGR, to support its position on the futility of pursuing local remedies.¹⁹² Foster Wheeler referred to this evidence in its written submissions on preliminary objections¹⁹³ and during oral argument, both in the hearing on provisional measures and the hearing on preliminary objections, although there was no obligation to do so in either proceeding.¹⁹⁴ Far from challenging Mr. Torrente's statement, Colombia relied on his testimony about the extended time it would take to exhaust local remedies: "According to Claimants' own witness, a judicial decision (from the local courts) would take between five to 12 years..."¹⁹⁵

¹⁹² **CWS-1 Torrente**, ¶ 20

¹⁹³ **AA-009**: Foster Wheeler's Counter-Memorial on Preliminary Objections, ¶ 15, n. 26; **AA-011**: Foster Wheeler's Rejoinder on Preliminary Objections, ¶ 45, n. 91.

¹⁹⁴ **AA-012**: Preliminary Objections Hearing Transcript, Volume 1, at 143:17-144:4, 197:5-15; **AA-013**: Preliminary Objections Hearing Transcript, Volume 2, at 351:2-8, 351:21-352:7; **AA-008**: Provisional Measures Hearing Transcript, at 12:20-22, 63:16-64:2, 81:3-8, 122:4-11.

¹⁹⁵ **AA-008**: Provisional Measures Hearing Transcript, 63:16-64:2.

128. In conclusion, the Tribunal wrongfully shifted the burden of proof and disregarded its obligation pursuant to the TPA and the ICSID Arbitration Rules to assume as true the facts alleged by Foster Wheeler. By doing so, the Tribunal seriously departed from a fundamental rule of procedure.

4. The Tribunal seriously departed from a fundamental rule of procedure by resolving complex questions of fact or mixed questions of law and fact through summary proceedings

129. Preliminary objections serve a limited purpose: dismissing claims that manifestly lack any legal basis in advance of a full hearing on the merits. The preliminary objections phase is not designed to resolve complex questions of fact or mixed questions of fact and law, or to be a mini-trial before the record is developed. The Tribunal, however, seriously departed from fundamental rules of procedure by transforming the preliminary objections phase into a full examination of the factual and legal merits of Foster Wheeler's claims.

130. The TPA establishes that preliminary objections under Article 10.20.4 are limited to assessing whether "...as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26."¹⁹⁶ Faced with a 10.20.4 objection, a tribunal should limit itself to legal analysis and not delve into factual matters. That is why subsection (c) of Article 10.20.4 clarifies that the allegations included in the Request for Arbitration must be taken as true.¹⁹⁷

¹⁹⁶ **CL-001**: Chapter 10 of the TPA.

¹⁹⁷ *Id.* A recent case involving Colombia and the TPA reiterates that the preliminary objections phase is not designed to address disputed factual issues. **AALA-018**: *Sea Search Armada, LLC v. The Republic of Colombia*, PCA Case No. 2023-37, Decision on Respondent's Preliminary Objections Under Article 10.20.5 of the United States-Colombia TPA, ¶ 155 (Feb. 16, 2024).

131. The ICSID Arbitration Rules further clarify the permissible scope of preliminary objections. Rule 41, titled “Preliminary Objections,” provides that the purpose of these summary proceedings is to assess whether “a claim is manifestly without legal merit.”¹⁹⁸ There is no exploration at all into factual questions, as that is reserved for subsequent stages of the proceeding.
132. Noted commentators and ICSID tribunals consistently find that meeting the high threshold to prove that a claim is “manifestly without legal merit” is extremely difficult. One recent commentary explains the rarity of successful 41(5) claims due to the high threshold:

The threshold to be met to establish that a claim is ‘manifestly without legal merit’ is a high one. Indeed, there have only been a handful of cases where the Tribunal has upheld an objections that a claim is ‘manifestly without merit’. Since this summary procedure was first introduced in the 2006 ICSID Arbitration Rules, objection of manifest lack of legal merit have been raised in 42 cases but only upheld in 6 cases.¹⁹⁹

133. As held by numerous ICSID tribunals, claims that are at least colorable based on the facts asserted do not meet the dismissal threshold: “...as a general

¹⁹⁸ **AALA-002:** ICSID, Rules of Procedure for Arbitration Proceedings, Rule 41 (2006). As explained by ICSID, the procedure of Rule 41 is similar to the preliminary objections procedure under the United States-Dominican Republic Central America Free Trade Agreement, which is substantially identical to the TPA. **AALA-019:** ICSID, Manifest Lack of Legal Merit - ICSID Convention Arbitration (2006 Rules), available at: [Manifest Lack of Legal Merit - ICSID Convention Arbitration \(2006 Rules\) | ICSID](#) (last accessed Jan. 6, 2026).

¹⁹⁹ **AALA-020:** Koh Swee Yen & Alvin Yeo, *Part 3: ICSID Arbitration Rules, Chapter VI: Special Procedures*, in ICSID RULES AND REGULATIONS 2022: ARTICLE-BY-ARTICLE COMMENTARY 440 (Richard Happ & Stephan Wilske eds.) See also **AALA-060:** *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, Decision on the Respondent’s Objection Under Rule 41(5) of the ICSID Arbitration Rules, ¶ 92 (May 2, 2008) [“*Trans-Global v. Jordan*”].

matter, a claim that is tenable, arguable, colorable, or debatable, on the facts asserted, should survive a Rule 41(5) objection.”²⁰⁰ The claim’s alleged lack of legal merit must be manifest.²⁰¹ As such, “...the respondent [must] establish its objection clearly and obviously with relative ease and dispatch.”²⁰² To be successful, a preliminary objection must “meet the test of clarity, certainty and obviousness.”²⁰³

134. The high threshold for Article 10.20.4 objections matches the one for Rule 41 objections. Tribunals analyzing objections made under provisions similar to TPA Article 10.20.4 have consistently reached similar conclusions as those of tribunals dealing with Rule 41 objections. For instance, the tribunal in *Pac Rim* (decided under CAFTA provisions substantially identical to TPA Article 10.20.4) left no doubt that preliminary objections are not meant to be a “mini-trial” of the action:

To that end, there can be no evidence from the respondent contradicting the assumed facts alleged in the notice of arbitration; and it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex

²⁰⁰ **AALA-021**: *Optima Ventures LLC et al. v. USA*, ICSID Case No. ARB/21/11, Decision on the Respondent’s Objection under Arbitration Rule 41(5), ¶ 95 (Jan. 19, 2024). *See also AALA-022*: *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Decision on the Respondent’s Objections under Rule 41(5) of the ICSID Arbitration Rules, ¶ 88 (Oct. 28, 2014).

²⁰¹ **AALA-016**: *Brandes v. Venezuela*, ¶ 62.

²⁰² *Id.* ¶¶ 63-64 (citing *Trans-Global v. Jordan*, ¶¶ 88, 90, 92, 97).

²⁰³ **AALA-023**: *Mirian g. Dekanoidze and T.G. Trade LLC v. Georgia*, ICSID Case No. ARB/23/45, Decision on the Respondent’s Rule 41 Objection, ¶ 166 (Jan. 20, 2025) (citing *Trans-Global v. Jordan*, ¶¶ 104-105).

questions of fact or mixed questions of law and fact.²⁰⁴

135. There is good reason for the procedural limits imposed on summary disposition proceedings. Complex questions of fact or mixed questions of law and fact can only be resolved after a full evidentiary record has been developed.²⁰⁵

136. Here, the Tribunal failed to abide by these fundamental rules of procedure. The Tribunal interpreted the phrase “administrative adjudicatory proceedings” found in Article 10.5 of the TPA,²⁰⁶ and simply dismissed Foster Wheeler’s substantial arguments to the contrary, even though this was a complex issue of law that should have been resolved upon a full record.²⁰⁷ The Tribunal then imposed a non-existent requirement to exhaust local judicial remedies for each TPA claim,²⁰⁸ a requirement not found either in the TPA or in the ICSID Convention. The Tribunal acknowledged that such a requirement would be inapplicable if exhausting those remedies would have been obviously futile or manifestly ineffective.²⁰⁹ The Tribunal then faulted Foster Wheeler for not presenting “any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek

²⁰⁴ **RL-036:** *Pac Rim v. El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Objections under CAFTA Articles 10.20.4 and 10.20.5, ¶ 112 (Aug. 2, 2010).

²⁰⁵ **RL-176:** *Daniel W. Kappes et al. v. Republic of Guatemala*, ICSID Case No. ARB/18/43, Decision on Respondent’s Preliminary Objections, ¶ 226 (March 13, 2020).

²⁰⁶ **AA-007:** Award, ¶¶ 210-214.

²⁰⁷ As discussed below, in Section IV.B.3, the Tribunal’s interpretation of that phrase is so erroneous as to constitute a failure to follow the applicable law.

²⁰⁸ **AA-007:** Award, ¶ 220.

²⁰⁹ *Id.* ¶ 217.

further review of the Ruling with Fiscal Liability.”²¹⁰ But, as discussed here, preliminary objections were not designed to resolve factual questions and the claimant’s allegations must be taken as true.

137. These findings by the Tribunal seriously depart from the well-defined contours of preliminary objections that prohibit resolution of complex factual and legal issues. Foster Wheeler should have been allowed to present evidence and argument substantiating its allegations during a full arbitration proceeding and with the benefit of document disclosure or discovery. Instead, the Tribunal dismissed the claims based on clearly inapplicable rules designed only to dismiss claims that, unlike Foster Wheeler’s TPA claims, manifestly lack any legal merit.

5. The Tribunal seriously departed from a fundamental rule of procedure by not complying with the time limits applicable to summary proceedings

138. An application on preliminary objections must be resolved promptly. Rule 41(5) requires a decision at the Tribunal’s first session or “promptly thereafter.”²¹¹ If a tribunal fails to comply with this strict temporal limitation, its powers to issue an award based on the preliminary objections lapse. As two commentators recently observed:

...[C]onsidering the manifest excess of powers, can the tribunal’s powers be understood apart from the procedural constraints that are dictated by the very same provision granting those powers?...Rule 41(5) of the 2006 ICSID Arbitration Rules requires that a

²¹⁰ *Id.*

²¹¹ **AALA-002:** ICSID, Rules of Procedure for Arbitration Proceedings, Rule 41(5) (2006). The TPA also clearly anticipates an expedited process for preliminary objections and provides short deadlines to realize that objective. **CL-001:** Chapter 10 of the TPA, Arts. 10.20.4(a), 10.20.5.

decision be rendered no later than promptly after the first session...The tribunal's power to grant a summary dismissal is undergirded by these time periods. Once they pass, the tribunal's powers to render an award also lapse.²¹²

139. In this case, the last submission on Colombia's preliminary objections was after the oral hearing in Washington D.C. on May 20, 2022. The Award was issued 31 months later, on December 19, 2024.²¹³ That is nothing short of astounding for a preliminary objections decision, particularly one that resolved only a single issue. One comprehensive study, as of 2019, found that the time to dispose of a Rule 41 objection for cases between 2012 and 2017 ranged from 14 to 204 days, counting from the time the objection was raised, with a median time to disposition of 101 days.²¹⁴ The average duration of ICSID proceedings from registration to award on a full evidentiary record is 3.86 years or 1,408 days.²¹⁵ The Tribunal here took 2.58 years, 945 days, deliberating and issuing an award ruling on Colombia's preliminary objections. Even allowing for delay due to personal circumstances, the Tribunal's decision was not prompt by any conceivable standard. The length of time the Tribunal took to issue its Award is further proof that the issues in dispute were unsuitable for summary disposition.

²¹² **AALA-024:** Camille Ng & Martin Gusy, "Annulment of Investment Arbitration Awards – Article 52 of the ICSID Convention" at 9 (June 25, 2024).

²¹³ **AA-007:** Award.

²¹⁴ **AALA-025:** Ted Howes, Allison Stowell, and William Choi, *The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID's Rule 41(5) on Its Tenth Anniversary*, 13 DISPUTE RES. INT. 7, 22 (2019).

²¹⁵ **AALA-026:** JEFFERY P. COMMISSION & RAHIM MOLOO, *PROCEDURAL ISSUES IN INTERNATIONAL INVESTMENT ARBITRATION* 194 (Oxford University Press, 2018).

140. The Tribunal's failure to comply with the temporal limitations applicable to preliminary objections leads to the conclusion that, when the Tribunal issued its Award, its power to do so had already lapsed. This is yet another serious departure from a fundamental rule of procedure justifying the annulment of the Award.

B. The Tribunal Manifestly Exceeded Its Powers

141. In addition to seriously departing from various fundamental rules of procedure, the Tribunal manifestly exceeded its powers, a separate ground for annulment. The Tribunal did not rule on most of Foster Wheeler's initial claims or its ancillary claims, thereby failing to exercise its existing jurisdiction. The Tribunal also manifestly exceeded its powers when it failed to apply, or egregiously misapplied, the law applicable to Foster Wheeler's claim that Colombia had denied it justice and violated the TPA's FET provision.

1. The Tribunal failed to exercise its jurisdiction by not substantively considering and ruling on Foster Wheeler's initial claims, except for the denial of justice violation of the FET claim

142. Foster Wheeler asserted five distinct claims. Despite having jurisdiction to rule on those claims, the Tribunal's only substantive analysis was on denial of justice, only one of several alleged FET violations. The Tribunal did not substantively address any of the other of the initial claims, none of which had any connection to denial of justice. Instead, it held that all of them were inadmissible based on its erroneous findings on denial of justice. Without regard to the erroneous nature of that ruling on denial of justice, those findings were irrelevant for all the other claims. This failure to exercise existing

jurisdiction is a textbook example of a tribunal manifestly exceeding its powers.

143. As has been recognized by various annulment committees, a tribunal exceeds its powers when it fails to exercise its existing jurisdiction.²¹⁶ As the annulment decision in *Micula* stated: “Awards can be annulled if tribunals...fail to exercise an existing jurisdiction by way of *infra petita* (e.g. by omitting to decide over a head of a claim raised by the parties).”²¹⁷ The committee in *Helnan* endorsed this position: “[A] failure to decide a question entrusted to the tribunal also constitutes an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties’ agreement.”²¹⁸ The ICSID Convention directly addresses

²¹⁶ **AALA-027**: *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 99 (September 5, 2007) [“Lucchetti v. Peru”] (“[w]here a tribunal assumes jurisdiction in a matter for which it lacks competence under the relevant BIT, it exceeds its powers. The same is true in the inverse case where a tribunal refuses or fails to exercise jurisdiction in a matter for which it is competent under the BIT.”); **AALA-028**: *Orascom TMT Investments S.à r.l. v. People’s Democratic Republic of Algeria*, ICSID Case No. ARB/12/38, Decision on Annulment, ¶ 155 (September 17, 2020) (“It is settled [...] that an ICSID Tribunal commits an excess of powers not only if it exercises jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, but also if it fails to exercise a jurisdiction which it possesses under those instruments. One might qualify this by saying that it is only where the failure to exercise a jurisdiction is capable of making a difference to the result that it can be considered a manifest excess of power.”) See also **AALA-029**: Gonzalo Cordero Arce, *Anulación de Laudos Arbitrales en el CIADI*, 32 REVISTA CHILENA DE DERECHO 219, 228 (2005).

²¹⁷ **AALA-030**: *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, ¶ 126 (Feb. 26, 2016) [“Micula v. Romania”].

²¹⁸ **AALA-031**: *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the ad-hoc Committee, ¶ 41 (June 14, 2010) [“Helnan v. Egypt”]. See also **AALA-032**: *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the Ad Hoc Committee, ¶ 97 (March 1, 2011) [“Duke Energy v. Peru”]; **AALA-027**: *Lucchetti v. Peru*, ¶ 99; **AALA-033**: *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki, ¶ 43 (June 5, 2007) [“Soufraki v. The United Arab Emirates”].

the question of *infra petita* awards. Article 48(3) of the Convention provides as follows: “The award shall deal with every question submitted to the Tribunal, and shall state the reasons on which it is based.”²¹⁹

144. The *ad hoc* committee in *Soufraki v. United Arab Emirates* aptly summarized how tribunals manifestly exceed their powers by failing to exercise their existing jurisdiction:

[I]t has also been considered that there is an excess of power if a tribunal acts “too little” with regard to the same three parameters; it does not accept and exercise the powers granted to it and fails to fulfill its mandate. The manifest and consequential non-exercise of one’s full powers conferred or recognized in a tribunal’s constituent instrument such as the ICSID Convention and the relevant BIT, is as much a disregard of the power as the overstepping of the limits of that power.²²⁰

145. An excess of powers is “manifest” when it is “obvious,” “clear,”²²¹ “plain,” “evident,”²²² or “perceived without difficulty.”²²³ “[A] manifest excess of power should at once be textually obvious and substantively serious.”²²⁴

²¹⁹ **AAIA-006**: ICSID Convention.

²²⁰ **AAIA-033**: *Soufraki v. The United Arab Emirates*, ¶ 43.

²²¹ **AAIA-031**: *Helnan v. Egypt*, ¶ 55.

²²² **AAIA-033**: *Soufraki v. United Arab Emirates*, ¶ 39.

²²³ **AAIA-034**: *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, ¶ 57 (Nov. 2, 2015); **AAIA-035**: *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, ¶ 203 (November 30, 2022).

²²⁴ **AAIA-033**: *Soufraki v. United Arab Emirates*, ¶ 40.

146. This was the approach taken by the committee in *Vivendi I* in deciding to annul an award in which a tribunal failed to address the merits of the treaty claims before it. In *Vivendi I*, the claimants made a series of claims under the France-Argentina BIT regarding the actions of the Argentinian province of Tucumán.²²⁵ Those claims concerned the performance of a concession contract that contained an exclusive jurisdiction clause submitting all disputes to the jurisdiction of the Contentious Administrative Tribunals of Tucumán.²²⁶ The tribunal refused to address the claims on the ground that they involved contractual issues subject to the jurisdiction of the Tucumán courts.²²⁷
147. The claimants sought to annul the award because the tribunal had manifestly exceeded its powers by failing to address the so-called Tucumán claims.²²⁸ The annulment committee agreed and annulled the award. For the committee, that failure to address claims constituted a manifest excess of powers: “It is settled, and neither party disputes, that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possess under those instruments.”²²⁹ This

²²⁵ **RL-133:** *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 93 (July 3, 2002) [“*Vivendi v. Argentina (I)*”].

²²⁶ *Id.* ¶ 14(d).

²²⁷ *Id.* ¶ 108.

²²⁸ *Id.* ¶ 93.

²²⁹ *Id.* ¶ 86.

was particularly true when such failure to consider claims impacts the outcome:

...[T]he failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers withing the meaning of Article 52(1)(b).²³⁰

148. The *Vivendi I* tribunal, despite being duty-bound to do so, failed to rule on the claimants' treaty claims because the underlying facts could also constitute a violation of a concession contract with an exclusive jurisdiction provision.²³¹ The tribunal's refusal to do so directly affected the outcome: "Having availed itself of [the treaty] option, Claimants should not have been deprived of a decision, one way or another, merely on the strength of the observation that the local courts could conceivably have provided them with a remedy, in whole or in part. Under the BIT they had a choice of remedies."²³²
149. Like the *Vivendi I* tribunal, the Tribunal here failed to rule on the TPA claims properly brought before it. The Tribunal did not analyze the substance of the claims brought by Foster Wheeler. It held all of them inadmissible based only on a formulaic reference to its erroneous findings regarding denial of justice.²³³ The Tribunal did not analyze the TPA breaches that had crystallized at the time Foster Wheeler filed the Request for Arbitration. The

²³⁰ *Id.*

²³¹ *Id.* ¶ 108.

²³² *Id.* ¶ 114.

²³³ **AA-007**: Award, ¶¶ 219-222.

Tribunal also ignored the undisputed facts that took place after the arbitration's commencement.²³⁴ As in *Vivendi I*, the Tribunal's failure to consider the TPA claims had "clear and serious implications" for Foster Wheeler, and the outcome was directly affected by the Tribunal's failure to exercise jurisdiction. The Tribunal's disregard is obvious and plain.

150. Notably, the Tribunal did not hold that it lacked jurisdiction over the dispute; rather, it found that the claims were inadmissible.²³⁵ The Tribunal confirmed this when it refused to decide Colombia's jurisdictional objections, holding that they "...need not be examined in light of the Tribunal's decision regarding the *inadmissibility* of the claims when appraising the Preliminary Objection."²³⁶

151. Although the Award refers to each of the claims in the initial Request for Arbitration, its invocation of its holding on denial of justice as the sole basis for dismissing every other claim is no reason at all but a mere pretense of form. In sum, by effectively failing to substantively engage with the claims that were properly before it, the Tribunal failed to exercise its existing jurisdiction, constituting a manifest excess of power.

²³⁴ Article 10.20.4(c) of the TPA allows the Tribunal to "consider any relevant facts not in dispute." **CL-001**.

²³⁵ **AA-007**: Award, ¶ 222.

²³⁶ *Id.* ¶¶ 236, 247, 255, 269, 283. [Emphasis added]. The distinction between admissibility and jurisdiction is well established: "Questions of jurisdiction relate to the tribunal, e.g., whether the tribunal is empowered to resolve the dispute. Questions of admissibility relate to the claim itself, e.g., whether the claim is timely filed, whether it is ripe for adjudication, whether the procedural requirements have been met." **AA-036**: *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, ¶ 412 (July 26, 2018).

2. The Tribunal failed to exercise its jurisdiction and complete its mandate by not substantively considering and ruling on Foster Wheeler’s ancillary claims

152. Not only did the Tribunal effectively ignore Foster Wheeler’s initial TPA claims, but it also failed to address Foster Wheeler’s ancillary claims.
153. Rule 40(1) of the 2006 ICSID Arbitration Rules allows parties to present ancillary claims: “Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.”²³⁷ If the ancillary claim is raised before a reply brief, there is no need to seek leave from the tribunal.²³⁸ Ultimately, Rule 40’s objective is to allow parties to reach a final adjudication of their dispute in a single proceeding.²³⁹
154. Foster Wheeler’s exercise of its rights under Rule 40 was necessitated by the Tribunal’s extraordinarily long deliberation period. The parties made their final submissions on Colombia’s preliminary objections on May 19-20, 2022. The Tribunal then took the objections under advisement for more than two and a half years. During that time, the TPA’s three-year limitations period was arguably running.

²³⁷ **AALA-002**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 40(1) (2006).

²³⁸ *Id.* See also **CL-205**: *Gran Colombia Gold Corp. v. Republic of Colombia*, ICSID Case No. ARB/18/23, Decision on the Bifurcated Jurisdictional Issue, ¶ 154 (Nov. 23, 2020) [“Gran Colombia Gold”].

²³⁹ **CL-205**: *Gran Colombia Gold*, ¶ 151.

155. Out of an abundance of caution and to avoid the potential forfeiture of its rights, Foster Wheeler filed its Amended Request for Arbitration asserting ancillary claims. Foster Wheeler complied with all the requirements set forth in Rule 40: (i) Foster Wheeler raised the ancillary claims far in advance of the submission of a reply on the merits, and (ii) the claims arose directly out of the subject-matter of the dispute, as they involved conduct by the CGR that took place after the commencement of the arbitration, including the issuance of the CGR Decision and the CGR's subsequent enforcement efforts.²⁴⁰
156. In the Award, the Tribunal acknowledged that the Amended Request for Arbitration was part of the record in its detailed recitation of the case's procedural history.²⁴¹ However, the ancillary claims are never-again mentioned in the Award and there is no analysis whatsoever regarding them.
157. This error is plain and obvious on the face of the Award. As discussed, the Tribunal's substantive analysis is confined to a mere 32 paragraphs, none of which rule on the ancillary claims. Again, as in *Vivendi I*, the Tribunal failed to exercise its existing jurisdiction, a decision that had a direct effect on the outcome. Possibly, the Tribunal considered that the ancillary claims were also inadmissible due to the non-exhaustion of local judicial remedies, although the Award is silent on that point, and such a holding would make no sense.²⁴² But as was the case with the initial claims, save for the denial of justice violation of FET, the ancillary claims did not turn on the denial of procedural due process and would not require Foster Wheeler to exhaust local judicial

²⁴⁰ **AA-014**: Foster Wheeler's Amended and Restated Request for Arbitration, ¶¶ 140-151, 163-166.

²⁴¹ **AA-007**: Award, ¶ 63.

²⁴² *Id.*

remedies, even if there were such a requirement for denial of justice.²⁴³ Indeed, the ancillary claims directly address the Tribunal's erroneous ruling based on the notion that, when the arbitration began, there was no final administrative act, but merely the commencement of the Fiscal Liability Proceeding.

158. In conclusion, the Tribunal effectively nullified Foster Wheeler's rights under Rule 40 of the 2006 ICSID Arbitration Rules. The Tribunal's failure to exercise its jurisdiction over Foster Wheeler's ancillary claims is yet another instance of a manifest excess of powers.

3. The Tribunal failed to apply, or egregiously misapplied, the applicable law when it dismissed the denial of justice violation in Foster Wheeler's FET claim

159. The only TPA violation that the Tribunal substantively addressed was denial of justice. The Tribunal, however, failed to apply, or egregiously misapplied, the law applicable to that violation, once again manifestly exceeding its powers.
160. A tribunal's failure to apply the proper law constitutes a manifest excess of powers.²⁴⁴ Although annulment is not an appeal, and a tribunal's analysis of the law, even if incorrect, is typically not grounds for annulment, a logical and practical exception exists for "egregious," "gross," and "unsound"

²⁴³ **AAIA-013**: RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 381 (Oxford University Press, 3rd ed. 2022) ("Under traditional international law, before an international claim on behalf of an investor may be put forward in international proceedings, the investor must have exhausted the domestic remedies offered by the host State's legal system. But it is well established that, where there is consent to investor-State arbitration, there is generally no need to exhaust local remedies.").

²⁴⁴ **AAIA-011**: *MCI v. Ecuador*, ¶ 42; **AAIA-012**: *Amco Asia v. Indonesia*, ¶ 23.

misinterpretation or misapplication of the proper law. As explained in *Soufraki*, “...a tribunal goes beyond the scope of its power if it does not respect the law applicable to the substance of the arbitration under the ICSID Convention.”²⁴⁵ The *Soufraki* committee recognized that “[m]isinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law.”²⁴⁶ An “egregious violation of the law” assumes “that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations.”²⁴⁷ Or as the *Soufraki* committee put it: Failure to apply the proper law involves “...a gross and consequential misinterpretation or misapplication of the proper law which no reasonable person...could accept.”²⁴⁸

161. In this case, the Tribunal’s ruling on Foster Wheeler’s denial of justice argument rested on the Tribunal’s interpretation of the term “administrative adjudicatory proceedings” in Article 10.5.2(a) of the TPA.²⁴⁹ However, the Tribunal’s cursory analysis is so deficient, particularly in the context of a proceeding on preliminary questions, that it amounts to a failure to apply the proper law.

²⁴⁵ **AA-LA-033**: *Soufraki v. United Arab Emirates*, ¶ 45.

²⁴⁶ *Id.* ¶ 86.

²⁴⁷ **AA-LA-011**: *MCI v. Ecuador*, ¶ 51.

²⁴⁸ **AA-LA-033**: *Soufraki v. United Arab Emirates*, ¶ 86.

²⁴⁹ **AA-007**: Award, ¶¶ 210-214. The text of that provision is: “‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]” **CL-001**: Chapter 10 of the TPA, Art. 10.5.2(a).

(i) The Tribunal's failure to apply the Vienna Convention

162. It is well settled in ICSID jurisprudence and the work of leading commentators that an investment protection treaty must be interpreted in accordance with the customary international law rules of treaty interpretation embodied in the Vienna Convention.²⁵⁰ As explained by Professor Schreuer, “[t]reaty interpretation calls for the consideration of specific provisions in context, in accordance with Art. 31 of the Vienna Convention on the Law of Treaties (VCLT), and context can include other treaty provisions.”²⁵¹

163. The Vienna Convention sets forth a general rule of interpretation (Article 31) and, relevant for our purposes, a rule of interpretation specifically applicable to treaties authenticated in two or more languages (Article 33). Article 31 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and

²⁵⁰ **AALA-037**: *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 114(c) (July 30, 2010).

²⁵¹ **AALA-014**: CRISTOPH S. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1323 (Cambridge University Press, 3rd ed. 2022). *See also* **AALA-038**: CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 291, ¶ 7.85 (Oxford University Press, 2d ed. 2017) (“The interpretation of treatment standards in investment treaties must begin, like any other process of treaty interpretation, with the approach indicated by arts. 31-33 of the Vienna Convention on the Law of Treaties 1969 (VCLT). These articles have been widely accepted as stating rules of customary international law on treaty interpretation. They have also been repeatedly accepted by investment arbitration tribunals as constituting rules of interpretation that are binding on them in the interpretation of investment treaties, whether by virtue of being directly binding on the parties to the BIT as treaty rules, or as customary international law.”); **AALA-039**: KENNETH J. VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 693-694 (Oxford Press 2009) (“Tribunals universally hold that the BIT is to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which is declaratory of customary international law.”).

in the light of its object and purpose.”²⁵² Article 33 addresses treaties like the TPA that are authenticated in two or more languages. If a treaty expressly prioritizes one of the authentic languages over the other, that is the end of the inquiry.²⁵³ But if both languages are equally authoritative, as is the case here, and a comparison of the two authentic texts leads to a difference in meaning that cannot be resolved through the application of other rules of interpretation, then “...the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”²⁵⁴

164. Foster Wheeler cited Articles 31 and 33 of the Vienna Convention in its written submissions for interpreting “administrative adjudicatory proceedings”²⁵⁵ but these articles are not even mentioned, much less applied, in the Tribunal’s analysis of that term.²⁵⁶

165. Without reference to the Vienna Convention, or to any other source of international law, the Tribunal ruled that “...the administrative adjudicatory proceeding referred to in Article 10.5.2(a) is a judicial proceeding before the administrative adjudicatory jurisdiction, and not an administrative proceeding as the Fiscal Liability Proceeding.”²⁵⁷ The Tribunal reached that conclusion without applying the elements of the general rule of treaty interpretation set

²⁵² **RL-053**: Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969, 1155 U.N.T.S. 331 [“Vienna Convention”].

²⁵³ *Id.* Article 33.1.

²⁵⁴ *Id.* at Article 33.4.

²⁵⁵ **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶¶ 82-87.

²⁵⁶ **AA-007**: Award, ¶¶ 210-214.

²⁵⁷ *Id.* ¶ 210.

forth in Article 31 of the Vienna Convention. The Tribunal did not consider the ordinary meaning of the terms at issue or the TPA’s object and purpose. At most, the Tribunal engaged in an entirely superficial semantic interpretation by noting that other provisions of the TPA refer to “administrative proceedings” and “administrative process” and that TPA Article 10.5.2(a) also refers to “criminal” and “civil” proceedings.²⁵⁸ It is well-established that no single element of Article 31 of the Vienna Convention is dispositive, and that all the elements—good faith, ordinary meaning, context, and the treaty’s object and purpose—must be applied in conjunction when interpreting a treaty provision.²⁵⁹

166. The Tribunal relied on its own understanding of the Spanish version of the TPA, which uses the term “*procedimiento contencioso administrativo*.”²⁶⁰ Without undertaking a Vienna Convention analysis or citing any legal authority, the Tribunal held as follows: “The recourse to the expression used in the Spanish version of the Treaty is helpful to confirm such understanding in so far as ‘*procedimiento contencioso administrativo*’ unequivocally means a proceeding initiated before a national court.”²⁶¹

167. The TPA expressly provides that its English and Spanish versions are equally authoritative.²⁶² The applicable Vienna Convention analysis would have been

²⁵⁸ *Id.* ¶¶ 212-213.

²⁵⁹ **AA-040**: RICHARD GARDINER, TREATY INTERPRETATION 37-38 (Oxford University Press, 2d ed. 2015).

²⁶⁰ **AA-007**: Award, ¶ 211.

²⁶¹ *Id.*

²⁶² **AA-041**: Chapter 23 of the TPA, Article 23.6.

for the Tribunal to (i) apply Article 31 to both versions and determine if there is a difference in meaning;²⁶³ (ii) decide whether that difference in meaning could be resolved through the application of Articles 31 and 32 of the Vienna Convention;²⁶⁴ and (iii) if the meaning remains unclarified, then adopt the meaning that best reconciled the texts considering the TPA's object and purpose.²⁶⁵ The Tribunal did not undertake this standard Vienna Convention analysis.

168. Put simply, the Tribunal failed to apply the accepted rules of treaty interpretation set forth in the Vienna Convention when forming its ruling on what became a dispositive issue. That failure to apply the proper law is a manifest excess of powers which justifies, in and of itself, the annulment of the Award.

(ii) To the extent the Tribunal offered any reasoning at all regarding its interpretation of the term “administrative adjudicatory proceedings,” that reasoning is so egregiously wrong as to amount to a failure to apply the proper law

169. The Tribunal's failure to apply the rules of the Vienna Convention is a manifest excess of powers. But putting that to one side, the Tribunal's reasoning was so egregiously wrong as to constitute a failure to apply the proper law.

170. As discussed above, the Tribunal formed its interpretation of the term “administrative adjudicatory proceedings” on three points, none of which

²⁶³ **RL-053:** Vienna Convention, Arts. 31, 33.

²⁶⁴ *Id.* Art. 33.4.

²⁶⁵ *Id.*

were part of the applicable legal standard for such interpretations: (i) its unsupported assertion that the Spanish term “*procedimiento contencioso administrativo*” unequivocally refers to a proceeding before a national court;²⁶⁶ (ii) Article 10.5.2(a) also refers to “criminal” and “civil” proceedings;²⁶⁷ and (iii) other TPA provisions refer to “administrative proceedings” and “administrative process” to refer to purely administrative proceedings.²⁶⁸ In short, the Tribunal adopted Colombia’s argument that “administrative adjudicatory proceedings” is a reference to Colombia’s “*jurisdicción de lo contencioso administrativo*” or “administrative contentious jurisdiction,” a specialized body of courts that hear disputes involving the Colombian government.²⁶⁹

171. The Tribunal’s reasoning is so egregiously wrong as to constitute a manifest excess of powers. As Foster Wheeler explained, the meaning of the term “administrative adjudicatory proceedings” is plain on its face: an adjudicatory proceeding before an administrative body. Foster Wheeler provided substantial legal authority in support of that proposition, none of which is referenced in the Award.²⁷⁰ In this case, the CGR, an administrative body of

²⁶⁶ **AA-007**: Award, ¶ 211.

²⁶⁷ *Id.* ¶ 212.

²⁶⁸ *Id.* ¶ 213.

²⁶⁹ **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶¶ 201, 208.

²⁷⁰ **AA-011**: Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 83. Foster Wheeler submitted copious authority in support of that proposition. *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent’s Expedited Preliminary Objections, ¶¶ 251, 253, 262 (May 31, 2016) (**RL-041**) (interpreting “administrative adjudicatory proceeding” as a proceeding before an administrative adjudicator that provides due process and is subject to review in court); *Indep. Producers Grp. v. Librarian of Cong.*, 792 F.3d 132, 134, 139 (D.C. Cir. 2015) (**CL-213**) (referring to the Copyright Royalty Board review process as an

Colombia, pressed charges against individual and corporate respondents, allowed the filing of defensive briefs, engaged in the taking of evidence, presided over hearings, and finally issued a Decision assessing hundreds of millions of dollars in damages. The Fiscal Liability Proceeding before the CGR was both “administrative” and “adjudicatory” in nature under every common definition of those terms.

172. The Tribunal’s reference to the Spanish version of the TPA makes even less sense in light of the TPA’s context and history. The phrase “administrative adjudicatory proceedings” comes from the US Model BIT. Article 5(2)(a) of the text of that model treaty uses the precise words found in Article 10.5.2(a) of the TPA.²⁷¹ Clearly, that provision, included in a model treaty used by the

“administrative adjudicatory proceeding”); *Peterson v. Johnson*, 714 F.3d 905, 914 (6th Cir. 2013) (CL-214) (finding that a major misconduct hearing was an “administrative adjudicatory proceeding”); *New York Civ. Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 300 (2d Cir. 2011) (CL-215) (“More recently, *Federal Maritime Commission v. South Carolina State Ports Authority* concluded that states retained the sovereign immunity they enjoyed in court when they were subject to an administrative adjudicatory proceeding that ‘walks, talks, and squawks very much like a lawsuit.’”); 2 Fla. Jur. Admin. Law § 273 (CL-216) (“The parties to an administrative adjudicatory proceeding are entitled to a fair hearing before an impartial tribunal and to a determination made without bias, hostility, or prejudgment.”); 2 N.Y. Jur. Admin. Law § 259 (CL-217) (“A party to an administrative adjudicatory proceeding may waive its right to cross-examine witnesses, such as by inaction or by refusing to participate in the proceeding.”); 9 CRR-NY 4.131 (1989) (CL-218) (Ordering all administrative agencies in New York to prepare adjudication plans for administrative adjudication); Consumer Financial Protection Bureau, Administrative adjudication proceedings, <https://www.consumerfinance.gov/administrative-adjudication-proceedings/> (accessed Feb. 9, 2022) (CL-219) (“Administrative adjudication proceedings are formal adversarial proceedings conducted by an administrative law judge, who issues a recommended decision to the CFPB direct. The director issues a final decision, either adopting or modifying the administrative law judge’s recommended decision.”); Harris G. (2016) Administrative Adjudications, in Farazmand A. (eds) *Global Encyclopedia of Public Administration, Public Policy, and Governance*. Springer, Cham., April 22, 2016, https://doi.org/10.1007/978-3-319-31816-5_953-1 (CL-220) (“Administrative adjudication refers to federal and state administrative agencies’ use of judicial powers granted to them by the legislative branch.”). The Tribunal did not refer to any of these authorities.

²⁷¹ CL-152: 2012 US Model Bilateral Investment Treaty, Article 5.2(a). This provision tracks, word for word, Article 10.5.2(a) of the TPA (CL-001).

US for negotiating bilateral investment treaties with other countries, is not, and could not be intended to be, a reference to Colombia's specialized administrative courts, as Foster Wheeler explained during oral argument.²⁷² Moreover, that precise phrase is used in other free trade agreements entered into by the US, including those with countries that are not Spanish-speaking and do not have a system of specialized administrative courts.²⁷³ There is simply no reason, nor did the Tribunal offer a plausible one, that the phrase should be taken to refer to Colombia's specialized administrative courts, even less so to conclude on a summary proceeding that it unequivocally does so.

173. The TPA's reference to administrative adjudicatory proceedings is part of a longer sentence, which reads as follows:

The obligation in paragraph 1 to provide:
(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]

174. The reference to "administrative adjudicatory proceedings" must be read in the context of "the concept of due process embodied in the principal legal systems of the world." The distinction between "adjudicatory" and "legislative" administrative proceedings is well-established in all modern legal systems.²⁷⁴ Even if the Tribunal's construction had any merit, that

²⁷² **AA-012**: Hearing on Preliminary Objections Transcript, Volume 1, at 195:5-20.

²⁷³ See, e.g., **AA-042**: US-Australia Free Trade Agreement, Chapter 11, Article 11.5(2)(a); **AA-043**: US-Republic of Korea Free Trade Agreement, Chapter 11, Article 11.5(2)(a).

²⁷⁴ In *Apotex*, the Tribunal addressed the applicability of requirements of procedural due process to administrative rule-making. In rejecting a due process challenge to the issuance of a rule by the

would not insulate the Fiscal Liability Proceeding from a denial of justice challenge. The words of the treaty are that FET “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world[.]” The Tribunal’s argument effectively reads “includes” to mean “limited to,” essentially rewriting the TPA and inverting its meaning.

175. The Tribunal’s interpretation is also contrary to the TPA’s object and purpose. According to its Preamble, the TPA’s stated purpose includes (i) promoting “broad-based economic development”; (ii) ensuring “a predicable legal and commercial framework for business and investment”; and (iii) promoting “transparency...in international trade and investment.”²⁷⁵ The Vienna

United States Food and Drug Administration, the tribunal reviewed at length the discussion of due process in international law, and concluded as follows:

In the Tribunal’s view, these inter-connected provisions of the Second Restatement indicate two things. First, the wording throughout emphasises criminal, civil or *administrative proceedings of a formal adjudicative character*. The alien is to be given information ‘with respect to the nature of the proceedings,’ given ‘reasonable opportunity to obtain and present witnesses’ and the like, all wording conveying the sense of adjudicatory proceedings. Indeed, the provisions requiring interpretation and translation into the alien’s language ‘at the states of the proceeding’ and the opportunity for the alien to meet a representative of the alien’s government ‘with respect to the proceedings’ only make sense in the context of such proceedings. *They do not make sense in the context of the regulatory decision-making at issue in this case.*

AA-061: *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, ¶ 9.22 (Aug. 25, 2014) [emphasis added].

²⁷⁵ **RL-002:** Preamble of the TPA. *See also AA-011:* Foster Wheeler’s Rejoinder on Preliminary Objections, ¶ 86.

Convention provides that a treaty's preamble is to be considered when determining its object and purpose.²⁷⁶

176. The Tribunal's interpretation does not meet the TPA's stated purposes. It accomplishes the complete opposite. Application of the Tribunal's interpretation leads to the absurd conclusion that a civil court ruling on a small claim would be subject to an obligation not to deny justice to foreign investors, but that the CGR ruling on a billion-dollar proceeding is not subject to the same, or, for that matter, any standard of due process.²⁷⁷ Such an illogical interpretation certainly does not "promote broad-based economic development" or provide a "stable and predictable" legal and economic framework. The TPA's object and purpose is best served by an interpretation under which the rights of foreign investors are protected in *all* adjudicatory proceedings, regardless of whether those proceedings are conducted by a court of competent jurisdiction or by an administrative body.²⁷⁸

177. The Tribunal's reliance on the fact that other provisions of the TPA refer to the terms "administrative proceedings" and "administrative process" is also unavailing. "Administrative process" is a broad term that encompasses different functions, both rulemaking and adjudication.²⁷⁹ Both can be involved in an investor-state claim, as is the case here. As discussed, the President of Colombia issued Decree 403 expanding the definition of fiscal

²⁷⁶ **RL-053**: Vienna Convention, Art. 31.2 ("The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...").

²⁷⁷ See **AA-007**: Award, ¶ 212.

²⁷⁸ **AA-011**: Foster Wheeler's Rejoinder on Preliminary Objections, ¶ 86.

²⁷⁹ **AA-012**: Hearing on Preliminary Objections Transcript, Volume 1, at 195:21-196:4.

management.²⁸⁰ Decree 403 is an administrative act of general application issued by the President purportedly as part of his rulemaking authority.²⁸¹ On the other hand, the CGR issued the CGR Decision, an administrative act applicable only to the parties to the Fiscal Liability Proceeding.²⁸² In short, both Decree 403 and the CGR Decision were the result of administrative processes, one involving rulemaking and the other involving adjudication. The point of the provision of the TPA is to include formal adjudicatory proceedings before administrative agencies and ensure that they observe the due process rights of foreign investors, not to limit those rights to proceedings before a particular set of administrative courts.

178. Moreover, the two TPA provisions that the Tribunal relied on that refer to “administrative proceedings” and “administrative process” are unrelated to Article 10.5.2(a)’s protection against denial of justice:

- Article 10.8.4(e) is a subpart of the provision titled “Transfers,” and it is about transfers of investment proceeds from one country to another.²⁸³

²⁸⁰ **CL-007**: Decree 403 of 2020.

²⁸¹ *Id.* Obviously, Foster Wheeler had no right to present evidence, cross-examine witnesses, advance legal arguments, or any of the other components of procedural due process in proceedings before the President because those administrative proceedings are not adjudicatory in nature, unlike proceedings before the CGR. As noted above, the Colombian Constitutional Court eventually struck down Decree 403 because the President exceeded his powers.

²⁸² **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 82.

²⁸³ **AA-007**: Award, ¶ 213, n. 292.

- Article 10.9.3(b)(ii) is a subpart of the provision titled, “Performance Requirements”, which deals with the prohibition of imposing performance requirements upon foreign investments.²⁸⁴

179. The administrative proceedings in those respective contexts (Transfers and Performance Requirements) obviously bear no resemblance to the type of administrative adjudicatory proceedings contemplated in the context of FET. At most, Articles 10.8.4(e) and 10.9.3(b)(ii) could support the unremarkable proposition that an administrative process is different from a judicial one. But neither provision speaks to whether a proceeding before the CGR is an “administrative adjudicatory proceeding,” nor does the Award explain how they could.

180. The Tribunal’s conclusion exempting administrative proceedings in which the rights of individual parties are adjudicated flies in the face of an unbroken line of scholarly and decisional authority. One recent example is *Finley Resources*, a case decided under the United States-Mexico-Canada Agreement (USMCA) and the North American Free Trade Agreement (NAFTA), both of which have substantially identical language as the one in the TPA referring to denial of justice in “administrative adjudicatory proceedings.” There, the challenge was to the actions of an administrative tribunal, the Mexican *Tribunal Federal de Justicia Administrativa* or TFJA. The tribunal surveyed the jurisprudence on the scope of the Minimum Standard of Treatment, which encompasses the guaranty of due process in administrative adjudicatory proceedings, and concluded that this standard

²⁸⁴ *Id.* ¶ 213, n. 293.

covers not only the actions of the judiciary, but also the actions of other public authorities:

Thus, the MST and FET standards should be understood as encompassing not only a “denial of justice” by local courts, but also acts of domestic public authorities which run afoul of those standards, including grossly unfair administrative decisions.

...

Finally, while “denial of justice” by domestic courts is indeed a typical breach of the FET standard, in the Tribunal’s view is clear that the FET standard may also be breached by acts of non-judicial authorities, including administrative authorities, when, of course, those acts can be attributed to the host State. Hence, the Tribunal will consider each of the two categories in turn.²⁸⁵

181. Scholarly authority is to the same effect. For example, Professor Paulsson concluded that: “In the past, some authors sought to define denial of justice in such a fashion as to limit it to the conduct of judicial officials. This approach is indefensible. If justice has been denied by officials whose conduct is imputable to the state, it makes no sense to exclude liability because those officials do not have a particular title as a matter of national regulation.”²⁸⁶

182. Finally, the Tribunal’s reasoning is inconsistent with Colombia’s now official interpretation of the TPA. During the arbitration, Colombia took the position

²⁸⁵ **AAIA-044:** *Finley Resources Inc., MWS Management Inc., and Prize Permanent Holdings, LLC v. United Mexican States*, ICSID Case No. ARB/21/25, Decision on Jurisdiction and Liability, ¶¶ 515, 521 (Nov. 4, 2024).

²⁸⁶ **AAIA-045:** JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 44 (Cambridge University Press 2009)

that fiscal liability proceedings before the CGR were not administrative adjudicatory proceedings and, therefore, were not covered by the TPA's protection against denial of justice, and the Tribunal agreed.²⁸⁷

183. After the conclusion of the arbitration, Colombia changed course and conceded what the TPA clearly provides: that proceedings involving administrative decision-making are subject to due process constraints.²⁸⁸ On January 20, 2025, Colombia and the US executed Decision No. 9 of the Free Trade Commission, which provided a joint interpretation of several TPA provisions. Decision 9 expressly recognizes that administrative proceedings are also subject to an international due process standard, albeit with the caveat that the standard is lower in administrative proceedings than in judicial ones in some undefined way.²⁸⁹ As explained above, Colombia took a different position in the arbitration and, regrettably, the Tribunal wrongly adopted Colombia's former position.²⁹⁰

184. In conclusion, to the extent the Tribunal offered any reasoning at all regarding its interpretation of the term "administrative adjudicatory proceedings," that reasoning is so egregiously wrong that it amounted to a failure to apply the proper law.

²⁸⁷ **AA-003**: Colombia's Memorial on Preliminary Objections, ¶ 201.

²⁸⁸ **AA-046**: Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement, ¶ 3(b).

²⁸⁹ *Id.* The assertion that administrative proceedings are subject to a lesser standard of due process is inexplicable, but the FTC decision does show that Colombia has repudiated its position that the Fiscal Liability Proceeding was subject to no due process constraints at all.

²⁹⁰ **AA-007**: Award, ¶ 214 ("Hence, the obligation not to deny justice established in the Treaty is limited to proceedings of a judicial nature before national courts and does not cover purely administrative proceedings.").

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

185. Under Article 52(1)(e) of the ICSID Convention, failure to state the reasons on which an award is based is another ground for annulment.²⁹¹ “[T]he obligation...to ‘deal with every question submitted to the Tribunal and [to] state the reasons upon which [the award] is based,’ can find its sanction in Article 52(1)(e) of the Convention. Failure to deal with one or more questions raised by the parties would entail annulment of the award where such omission amounts to ‘failure to state reasons upon which [the award] is based.’”²⁹² In this case, the Award effectively fails to state reasons in support of all the substantive determinations that led to the inadmissibility of Foster Wheeler’s claims.

1. The Award fails to state reasons for dismissing Foster Wheeler’s initial claims, except for part of the FET claim, as well as the ancillary claims

186. The only substantive ruling that the Tribunal made was its conclusion that the denial of justice violation of FET was inadmissible because Foster Wheeler should have exhausted judicial remedies in Colombia and because the Fiscal Liability Proceedings were not “administrative adjudicatory proceedings.” The Tribunal did not state reasons as to why those were grounds to dismiss the entire FET claim, which had three other independent violations, as well as the remaining TPA claims. Neither the three remaining FET violations nor

²⁹¹ **AALA-006**: ICSID Convention, Art. 52(1)(e).

²⁹² **AALA-012**: *Amco Asia v. Indonesia*, ¶ 32; *See also AALA-033*: *Soufraki v. United Arab Emirates*, ¶ 126 (“the *ad hoc* Committee considers that there may be a ground for annulment in the case of: - a total absence of reasons for the award, including the giving of merely frivolous reasons; - a total failure to state reasons for a particular point, which is material for the solution; - contradictory reasons; and - insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.”).

any of the other claims had an exhaustion of local remedies pre-condition, and the erroneous construction of “administrative adjudicatory proceedings” had no bearing on those claims. The Tribunal provided no explanation connecting the construction of that phrase to each claim that it dismissed. Finally, the Tribunal did not address the ancillary claims, even in a cursory manner, but they are included in the Award’s dispositive paragraph.

187. As held by the committee in *Soufraki*, “[p]erhaps the simplest form of an annullable failure to state reasons is that of a total failure to state reasons for a particular point...”²⁹³ That is precisely what happened here. The Tribunal offered no reasons whatsoever to explain why its findings on denial of justice applied to the other three FET violations or to any other claim asserted under the TPA. The Tribunal’s reference to a purported failure to exhaust remedies is obviously no reason to dismiss any of those other claims. As explained above, it is a basic principle of international investment law that exhaustion of local remedies is not a requirement unless expressly required by treaty.²⁹⁴

188. The TPA does not require exhaustion of local remedies as a precondition for an investor to bring a claim to arbitration, unlike other investment instruments of Colombia which expressly require exhaustion of local remedies as a precondition to arbitration. For instance, Colombia’s BIT with Switzerland requires that “domestic administrative remedies shall be exhausted” before submitting a claim to arbitration.²⁹⁵ Likewise, Colombia’s BIT with Japan

²⁹³ **AAIA-033**: *Soufraki v. The United Arab Emirates*, ¶ 122.

²⁹⁴ **AAIA-013**: RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 381 (Oxford University Press, 3rd ed. 2022).

²⁹⁵ **AAIA-047**: Colombia-Switzerland BIT, Protocol, Ad Article 11(3) (“With respect to Colombia, in order to submit a claim for settlement under the said Article, domestic administrative remedies

provides that the state party “may require that local administrative remedies shall be exhausted in advance” of submitting a claim to arbitration.²⁹⁶

189. The fact that exhaustion of local remedies is not a requirement for every claim is consistent with the only plausible reading of the TPA. Annex 10-G sets forth the TPA’s fork in the road provision.²⁹⁷ Under that provision, a claimant cannot commence an arbitration if it “elect[ed] to submit a claim of the type described in paragraph 1 to a court or administrative tribunal of a Party other than the United States.”²⁹⁸ As explained by the committee in *Vivendi I*, a fork in the road provision gives a claimant the choice of challenging a state measure either before the domestic courts of the host state or before an international tribunal.²⁹⁹ If exhaustion of local remedies were a prerequisite for every treaty claim, then no claim under the TPA could ever succeed. A claim would have to be dismissed either because of a failure to exhaust local remedies or because of a breach of the fork in the road provision, rendering the TPA’s arbitration provisions effectively null and void.

190. Despite these well-settled principles, the Tribunal in this case dismissed all of the TPA claims by doing no more than referring to its ruling on denial of

shall be exhausted in accordance with applicable laws and regulations.”). That treaty requires exhaustion only of administrative, and not judicial, remedies. *See also* **RL-043**: Colombia-Switzerland BIT. Colombia is a party to other investment instruments that expressly require or offer exhaustion of local remedies. *See* **AAIA-048**: Colombia-Israel Free Trade Agreement, Art. 10:12.1; **AAIA-049**: Colombia-Republic of Korea Free Trade Agreement, Chapter 8, Art. 8.18.2.

²⁹⁶ **CL-137**: Colombia-Japan BIT, Art. 27.1.

²⁹⁷ **CL-001**: Chapter 10 of the TPA.

²⁹⁸ *Id.*

²⁹⁹ **RL-133**: *Vivendi v. Argentina (I)*, ¶ 113.

justice, which turned on a supposed requirement to exhaust judicial remedies and the Tribunal's construction of the term "administrative adjudicatory proceedings." With respect to the ancillary claims, there was no ruling at all. The most the Tribunal could muster for an explanation of the claim that it did address was "[t]he fact that the Ruling with Fiscal Liability issued by the CGR is not an administrative adjudicatory proceeding as provided by the TPA and contemplates certain appeals or defences at the administrative judicial level is fatal to the admissibility of Claimants' claims."³⁰⁰ The Tribunal did not attempt to explain why the inadmissibility of the denial of justice violation was a basis for dismissing the entire FET claim, the other TPA claims, or the ancillary claims that had no connection to a possible requirement to exhaust local remedies. The Tribunal's formulaic reference to its ruling on denial of justice and the failure to address the merits of the remaining claims does not meet the Tribunal's obligation to state the reasons for its ruling and is a separate ground for annulment.

191. The Tribunal also failed to offer any reasons explaining why the actions the CGR took before it issued its Decision could not be breaches of the TPA. Without providing any supporting authority, the Tribunal took the position that "the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not."³⁰¹ Foster Wheeler explained at length that there were breaches of the TPA before the CGR issued its Decision, including the reputational harm for the CGR's improper naming of Foster Wheeler as a respondent and the campaign of adverse publicity that

³⁰⁰ AA-007: Award, ¶ 220.

³⁰¹ *Id.* ¶ 221.

ensued. Subsequent events then exacerbated those violations.³⁰² The Tribunal offered no reasons whatsoever justifying its refusal to analyze the TPA violations that had already crystallized in advance of the final administrative act issued by the CGR.

192. ICSID awards have been annulled in similar situations. In *Helnan*, the *ad hoc* committee held that imposing a non-existent requirement to exhaust local remedies is a basis for annulment. In that case, the investor was evicted from the management of a hotel in Cairo.³⁰³ The investor chose not to challenge the eviction in the Egyptian administrative courts, and the tribunal dismissed the claims partly on that ground.³⁰⁴ The *ad hoc* committee heavily criticized the tribunal's decision: "The Tribunal's findings on this issue...was a manifest excess of its powers. An ICSID tribunal may not decline to make a finding of breach of treaty on the ground that the investor ought to have pursued local remedies or otherwise validated the substance of its claims by recourse to the courts of the host State."³⁰⁵ As in *Helnan*, the Tribunal here held that all of Foster Wheeler's TPA claims were inadmissible because Foster Wheeler, as was its right, decided not to challenge the actions of the CGR before the

³⁰² **AA-009**: Foster Wheeler's Counter-Memorial on Preliminary Objections, ¶¶ 13-31.

³⁰³ **AA-031**: *Helnan v. Egypt*, ¶ 6.

³⁰⁴ *Id.* ¶ 28.

³⁰⁵ *Id.* ¶ 9. In *Glencore I*, Colombia argued that "apply[ing] an inapplicable legal framework" constitutes a failure to state reasons. **AA-050**: *Glencore International AG & CI Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Decision on Annulment, ¶ 204 (Sept. 22, 2021). That is what happened in the Award as the Tribunal applied the exhaustion of local remedies requirement to all the TPA claims. For the avoidance of doubt, Foster Wheeler alleges that the imposition of a non-existent requirement to exhaust local remedies is a serious departure from a fundamental rule of procedure, a manifest excess of powers, and a failure to state reasons.

Colombian courts and, instead, opted for international arbitration under the TPA.

193. The committee in *CMS* also annulled an award where the tribunal failed to state reasons in support of one of its substantive determinations. Like the Tribunal in *Foster Wheeler*, the *CMS* tribunal relied on a cross-reference to one of its separate, unrelated decisions. The committee held that the tribunal failed to state reasons for its finding that Argentina had breached the applicable treaty’s umbrella clause when it neglected to expressly address that point in its award.³⁰⁶ As the committee stated, the *CMS* tribunal “...repeatedly referred back to the Decision on Jurisdiction of 17 July 2003, where this specific matter (umbrella clause) was not dealt with at all.”³⁰⁷ The same is true here. The Tribunal formulaically referred back to its finding on denial of justice as a basis for holding that every claim was inadmissible, although neither the purported exhaustion requirement nor the construction of “administrative adjudicatory proceedings” has any bearing on the other claims.³⁰⁸ The Tribunal’s meaningless cross-reference is no substitute for expressly dealing with critical questions that the Tribunal was under an obligation to address.³⁰⁹

³⁰⁶ **AALA-051**: *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, ¶ 94 (Sep. 25, 2007).

³⁰⁷ *Id.*

³⁰⁸ **AA-007**: Award, ¶ 220.

³⁰⁹ **AALA-052**: *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, ¶ 218 (July 21, 2023) (“To avoid analysing a critical question and deciding it on the assumption that it was ‘common ground’ when that was not in fact the case is, in the opinion of the Committee, an excess of power.”).

194. In sum, without providing reasons, the Tribunal imposed on Foster Wheeler a non-existent requirement to exhaust local remedies as a precondition for the admissibility of every claim under the TPA, and not only of a denial of justice violation on which it actually, if erroneously, ruled. It also failed to explain how or why its interpretation of “adjudicatory administrative proceedings” was related to the other claims. These failures to state reasons in any meaningful sense are an additional basis for annulment.³¹⁰

2. The Award effectively fails to state reasons supporting the Tribunal’s construction of the term “administrative adjudicatory proceedings”

195. The Tribunal did not offer any actual reason as to why the Fiscal Liability Proceeding was not an “administrative adjudicatory proceeding[]” and therefore was not covered by the TPA’s obligation not to deny justice. The few reasons the Tribunal did offer were so egregiously baseless that they are no reasons at all.

196. ICSID Article 52(1)(e) covers both the total failure to state reasons and reliance on reasons that are so egregiously erroneous that they are frivolous or even not reasons at all.³¹¹ Frivolous reasons include reasons that are insufficient, inadequate, or contradictory.³¹² As summarized by the

³¹⁰ As explained in Section IV.B.2 of this Memorial, without offering any explanation, the Tribunal did not rule on Foster Wheeler’s Amended Request for Arbitration, which included Foster Wheeler’s ancillary claims. Foster Wheeler respectfully submits that this procedural defect is also an absolute failure to state reasons. For the avoidance of doubt, Foster Wheeler asserts that the Tribunal’s failure to address the claims before it is a serious departure from fundamental rules of procedure, a manifest excess of powers, and a failure to state reasons.

³¹¹ **AALA-033:** *Soufraki v. The United Arab Emirates*, ¶ 122; **RL-199:** *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 21 (Nov. 1, 2006).

³¹² *Id.*

committee in *Nachingwea*, these terms “...describe reasons which cannot be followed by a willing and intelligent reader.”³¹³

197. As explained in Section IV.B.3 of this Memorial, the Tribunal’s reasons for its interpretation of the TPA’s term “administrative adjudicatory proceedings” are so frivolous as to be no reasons at all. To avoid needless repetition, Foster Wheeler incorporates the arguments and allegations of that Section as if fully set forth herein. Put simply, the few reasons the Tribunal did offer in support of its findings are so insufficient and inadequate that they are tantamount to not offering any reasons at all.

3. The Award fails to address evidence regarding the futility and ineffectiveness of exhausting local remedies in Colombia

198. The Tribunal ignored evidence on the record that established that pursuing judicial remedies in Colombia would have been futile or ineffective. That amounts to a failure to state reasons in support of the dismissal of Foster Wheeler’s claims.

199. The committee in *Suez* determined that a tribunal’s failure to consider highly relevant evidence constitutes a failure to state reasons.³¹⁴ The committee explained that annulment proceedings are not the place to second guess a tribunal’s evaluation of the evidence. But if a tribunal is responsible for a total

³¹³ **AALA-053:** *Nachingwea U.K. Limited v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Decision on Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5), ¶ 60 (Feb. 2, 2024).

³¹⁴ **AALA-054:** *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Argentina’s Application for Annulment, ¶ 162 (May 5, 2017).

failure to address highly relevant evidence, then that amounts to a failure to state reasons, which justifies the annulment of an award.³¹⁵

200. For instance, in *TECO*, the committee annulled the award due to the tribunal's failure to address key evidence that was part of the record. The claimant in *TECO* submitted export reports to prove the losses incurred, but the tribunal ignored the reports when making its ruling. Because of the tribunal's failure to consider or address that evidence, the committee partially annulled the award:

While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.³¹⁶

201. Putting to one side that Foster Wheeler bore no burden of proof at all in these summary proceedings, the Tribunal did not consider highly relevant evidence that was part of the record, the same situation as in *TECO*. In support of its Application for Provisional Measures and Emergency Temporary Relief,

³¹⁵ *Id.*

³¹⁶ **AAIA-055**: *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 131 (April 5, 2016) ["*TECO v. Guatemala*"].

Foster Wheeler submitted the witness statement of Mr. César Torrente.³¹⁷ Mr. Torrente worked at the CGR for four years and occupied several senior positions, including General Vice-comptroller; Deputy Comptroller for Infrastructure, Telecommunications, Foreign Trade and Regional Development; Deputy Comptroller for Justice, Defense and National Security; and General Counsel.³¹⁸ He testified as follows: “Based on my experience, a Nullity Action [the judicial proceeding to challenge the CGR Decision before the Colombian courts] historically take[s] five years to twelve years to conclude (but in some cases, it can take longer).”³¹⁹ Mr. Torrente’s witness statement was referenced in Foster Wheeler’s written submissions on preliminary objections, and was included in the parties’ joint hearing bundle. Foster Wheeler referred to Mr. Torrente’s testimony several times at the hearing on preliminary objections, arguing that judicial remedies in Colombia were essentially unavailable.³²⁰

202. In its Award in this case, the Tribunal completely ignored this evidence, stating as follows: “Claimants, however, have not presented any evidence to substantiate their allegations that it would be obviously futile or manifestly ineffective to seek further review of the Ruling with Fiscal Liability.”³²¹

³¹⁷ **CWS-1 Torrente.**

³¹⁸ *Id.* ¶ 6.

³¹⁹ *Id.* ¶ 20.

³²⁰ **AA-012:** Hearing on Preliminary Objections Transcript, Volume 1, at 197:5-15.

³²¹ **AA-007:** Award, ¶ 217. As explained by the International Law Commission, “[t]hat the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decision and scholarly opinion.” **AALA-056:** Draft Articles on Diplomatic Protection

203. As explained above, Foster Wheeler did submit evidence establishing that pursuing judicial remedies in Colombia would have been obviously futile or manifestly ineffective. As the *TECO* tribunal, this Tribunal ignored both Mr. Torrente's witness statement and Foster Wheeler's written and oral argument on this point "...without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory."³²² The Award does not analyze Mr. Torrente's witness statement at all, despite the fact that, on its face, that statement is precisely the type of evidence that the Tribunal claimed was lacking.
204. In sum, without explanation or justification, the Tribunal ignored relevant evidence. This is not a case in which the Tribunal analyzed Mr. Torrente's witness statement and Foster Wheeler's oral argument and found the evidence unpersuasive. The Tribunal simply ignored the evidence and did not analyze it in the Award. This amounts to a failure to state reasons and is thus a ground for annulling the Award.

4. The Award states contradictory reasons regarding the ripeness of Foster Wheeler's claims

205. The Award contains contradictory and mutually exclusive reasoning, which also constitutes a failure to state reasons.³²³ According to the committee in *Daimler*: "Two tests must be satisfied before an *ad hoc* committee can annul an award based on contradictory reasons. First, the reasons must be genuinely

with commentaries, [2006] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/SER/A/2006/Add.1 (Part 2), at 48.

³²² **AALA-055**: *TECO v. Guatemala*, ¶ 131.

³²³ **AALA-057**: *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the Ad hoc Annulment Committee, ¶ 5.09 (Dec. 22, 1989).

contradictory in that they cancel each other out so as to amount to no reasons at all. Second, the point with regard to which these reasons are given is necessary for the tribunal's decision."³²⁴

206. In *Tidewater*, the committee annulled an award due to the tribunal's reliance on contradictory reasons. The tribunal held that the country risk premium used by claimants' expert to calculate damages was unreasonable.³²⁵ Despite that, the tribunal then relied on calculations made by claimants' expert that used the very same country risk premium that the tribunal had held was unreasonable.³²⁶ Consequently, the committee annulled that portion of the award, finding that "[t]he contradiction cannot be argued away or cured. It is evident and decisive for the outcome."³²⁷ The contradictory reasons—the determination that claimants' expert's country risk premium was unreasonable and the reliance on calculations made using that country risk premium—cancelled one another, justifying the annulment of the award.³²⁸

207. As in *Tidewater*, the Tribunal here relied on contradictory and mutually exclusive reasons. TPA Article 10.20.4(c) provides that, when deciding preliminary objections, "[t]he tribunal may also consider any relevant facts

³²⁴ **AAIA-058:** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, ¶ 77 (Jan. 7, 2015).

³²⁵ **AAIA-059:** *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, ¶ 186 (Dec. 27, 2016).

³²⁶ *Id.* ¶¶ 185-186,

³²⁷ *Id.* ¶ 193.

³²⁸ *Id.* ¶ 196.

not in dispute.”³²⁹ In this case, it was undisputed that during the course of the arbitration the CGR issued a first instance decision holding Foster Wheeler liable for hundreds of millions of dollars in damages.³³⁰ The CGR then affirmed that first instance decision in July 2021.³³¹ As such, there was a final administrative act in existence before the Tribunal issued its Award in December 2024.³³² The Tribunal acknowledged this: “...the Tribunal accepts that when the Fiscal Chamber formally rejected FPJVC’s appeal on 6 July 2021 and affirmed the Ruling with Fiscal Liability in its entirety, Claimants had exhausted their administrative appeals.”³³³ Those subsequent measures are described and challenged in the Amended Request for Arbitration, which was before the Tribunal.

208. Just a few paragraphs later, however, the Tribunal contradicted itself: “The Tribunal reiterates that the final administrative act had to be in existence at the time of the filing of the Request for Arbitration, and it was not.”³³⁴ These two statements cannot be reconciled with one another and with the relevant provisions of the TPA. The Tribunal was not limited to facts pled in the Request for Arbitration; it could also consider relevant facts not in dispute and facts pled in support of the ancillary claims under ICSID Rule 40, which

³²⁹ **CL-001**: Chapter 10 of the TPA. *See also AALA-062: Próspera v. Honduras*, ¶ 137 (holding that “...there is no reasons to exclude facts which have occurred between the commencement of the proceedings and the date of its decision. Respondent has not submitted any precedents or opinions in support of its thesis, nor has it advanced any reasoning which justify the exclusion.”).

³³⁰ **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 148.

³³¹ **AA-010**: Colombia’s Reply on Preliminary Objections, ¶ 29.

³³² **CWS-1 Torrente**, ¶ 11.

³³³ **AA-007**: Award, ¶ 208.

³³⁴ *Id.* ¶ 221.

were in the Amended Request for Arbitration. As the Tribunal itself recognized, it was undisputed that the CGR “affirmed the Ruling with Fiscal Liability in its entirety.”³³⁵ The Tribunal then contradicted itself by holding that the fact that the CGR Decision had not been issued at the time of commencement of the arbitration was fatal to the admissibility of Foster Wheeler’s TPA claims.³³⁶ This was no minor point. This was one of the primary reasons the Tribunal raised for ruling that all the claims were inadmissible.³³⁷

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

V. REQUESTS

210. Foster Wheeler respectfully requests that the Committee:

- (a) Annul the Award in its entirety for the reasons set forth in this Memorial;
- (b) In the alternative, annul the Award in its entirety, except for the dismissal of the denial of justice violation of FET;

³³⁵ *Id.* ¶ 208.

³³⁶ *Id.* ¶ 221.

³³⁷ *Id.*

- (c) Following annulment, remand the arbitration for further proceedings before a newly constituted tribunal, in accordance with Article 52(6) of the ICSID Convention;
- (d) Order Colombia to bear all costs of this proceeding, and reimburse Foster Wheeler for all of its costs and expenses, including its reasonable attorneys' fees; and
- (e) Grant such other and further relief in favor of Foster Wheeler that the Committee deems just and proper.

DATED:

January 19, 2026

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