
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

REPLY MEMORIAL ON ANNULMENT

August 17, 2026

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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 Reply Memorial in further 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/19/34.¹

Colombia's Defense Depends on Rewriting the Award

1. Colombia's Counter-Memorial confirms the central defect in the Award: Colombia recasts the Award's reasoning and supplies explanations that the Award itself does not contain, in effect defending an award that was never written rather than the one before this Committee. Colombia repeatedly asks the Committee to treat the Award as resting on a single, independent holding: that no measure capable of breaching the TPA existed when Foster Wheeler commenced the arbitration because at that time the CGR had only issued the charging document or indictment order. That reconstruction is not the Award at issue here. The Award dismissed five separate claims, including multiple independent FET violations and later-arising ancillary claims, based on reasoning that addressed, at most, why a denial of justice allegation was premature. That is an annulable failure to decide all the claims submitted to

¹ Capitalized terms have the meaning assigned to them in Foster Wheeler's Memorial on Annulment. The fact that Foster Wheeler does not restate all the arguments contained in its Memorial on Annulment in this Reply Memorial is not a waiver of any of those arguments.

the Tribunal and to state reasons for their dismissal. Those failures call for annulment under the grounds set forth in Article 52 of the ICSID Convention.

2. Article 52 of the ICSID Convention is a safety valve that provides for annulment in cases in which a tribunal fails to exercise the powers conferred on it, seriously departs from fundamental procedural protections, or fails to state the reasons upon which its decision is based. Foster Wheeler does not ask this Committee to choose between two plausible merits outcomes. Rather, Foster Wheeler asks the Committee to annul an Award that (i) disposed of claims the Tribunal did not analyze; (ii) imposed an exhaustion requirement not found in the parties' consent or in the treaties that govern this case (the ICSID Convention and the TPA); (iii) disregarded the mandatory factual presumption governing precisely the preliminary objections procedure Colombia invoked; and (iv) stated that no evidence existed on the question of futility even though the record contained evidence directly supporting Foster Wheeler on that point. Those defects call for annulment under Articles 52(1)(b), 52(1)(d), and 52(1)(e).
3. Colombia's principal defense is that those defects concern only a supposedly subsidiary portion of the Award and therefore cannot affect the result. That defense fails on the face of the Award. The Tribunal did not draw the distinction underlying Colombia's rewriting of the Award. The Tribunal held that the obligation not to deny justice was limited to judicial proceedings before national courts and that, because the judiciary had not intervened in the dispute, there could not be a denial of justice under international law. It then concluded that, even if subsequent events could ripen a claim after the arbitration commenced, there was no final decision before the Colombian courts of administrative review, and hence no possibility of a denial of justice. In sum, the Tribunal concluded that (i) the fact that the Fiscal Liability

Proceeding is not an “administrative adjudicatory proceeding” under the TPA and (ii) the fact that Foster Wheeler had not exhausted all available judicial remedies were “fatal to the admissibility of Claimants’ claims,” and not only to the denial of justice allegation. That was not subsidiary *dicta*. It was the way in which the Tribunal formulaically extended its findings on denial of justice to separate and distinct claims for which the exhaustion of local remedies is not, and never has been, a condition of admissibility or an element of the claim.

4. The problem is not merely that the Tribunal’s bridge between its holding dismissing the denial of justice claim and every other claim in the arbitration was legally wrong, although it was. The problem is that the Award never explains how that bridge reaches the other side. A denial of justice analysis cannot, without more, dispose of claims of national treatment, indirect expropriation, breach of an umbrella clause, breach of an investment agreement, and FET violations other than denial of justice. Those claims have different elements, different factual predicates, and different remedial consequences. The Award contains no reasoned explanation of why they were premature, inadmissible, or legally incapable of producing relief. It simply dismissed them because the denial of justice allegation was found to be premature. Colombia’s Counter-Memorial suggests various theories for why the Tribunal might have dismissed those other claims, but the Award itself does not. The absence of reasons connecting the Tribunal’s denial of justice analysis to the dismissal of all the claims is a fatal defect under Article 52(1)(e).
5. Colombia asserts the Award survives because Foster Wheeler supposedly does not challenge the Tribunal’s “primary” holding that no measure capable of breaching the TPA existed at the time of filing. That is simply false. Foster

Wheeler challenges that holding directly. It challenges the Tribunal's refusal to address actionable measures that existed before the Request for Arbitration was filed, including (i) the CGR's wrongful assertion of jurisdiction over Foster Wheeler; (ii) the initiation and public pursuit of the Fiscal Liability Proceeding; (iii) the naming of Foster Wheeler in that Proceeding; and (iv) the reputational and legal consequences of Colombia's conduct, including its public denunciations of Foster Wheeler. Foster Wheeler also challenges the Tribunal's refusal to adjudicate the ancillary claims contained in the Amended Request for Arbitration that the Tribunal admitted into the record but then completely failed to address even in the most cursory fashion.

6. A threshold ruling is dispositive only if it actually disposes of the claims submitted. The Award never explains why pre-decision CGR conduct could not itself constitute a breach of the TPA. It never analyzes whether the initiation and pursuit of the Fiscal Liability Proceeding could breach the treaty's protections regarding FET, national treatment, expropriation, the umbrella clause imported through the MFN clause, or the investment agreement. It never addresses whether the CGR's conduct caused compensable harm before the final CGR Decision. And it never explains why later measures, including the Decision itself and subsequent enforcement conduct, could be ignored after the Tribunal admitted Foster Wheeler's Amended Request into the record.
7. Colombia responds that the Tribunal did not need to address those matters once it found the claims premature. That answer simply assumes the conclusion the Award had to explain. The Tribunal first had to identify each claim submitted, identify the measure or measures alleged to support it, and explain why that claim could not proceed as a matter of law. A formulaic statement that Foster Wheeler's claims were inadmissible because of its

holding dismissing a separate claim cannot substitute for a reasoned decision on distinct claims with distinct legal elements. The point is not that the Tribunal's legal reasoning is not convincing, but that it does not exist.

8. This is why Colombia's attempt to divide the Award into a "primary" analysis and a "subsidiary" analysis does not work. Both analyses rely on the same premise that Foster Wheeler had not exhausted local judicial remedies. That premise may have relevance to a denial of justice claim, as a matter of the substance of the claim. But it does not automatically resolve claims that do not contain a denial of justice element. The Award never supplies that missing explanation. That unexplained extension of a denial of justice analysis to claims with different elements calls for annulment under Article 52(1)(e).

The Tribunal's Failure to Decide Submitted Claims Constitutes a Manifest Excess of Powers and a Failure to State Reasons Under Articles 52(1)(b) and 52(1)(e)

9. Article 48(3) of the ICSID Convention requires an award to address and dispose of every question submitted to the tribunal and to state the reasons upon which its decision is based. The Award failed to meet that requirement. Foster Wheeler pleaded five distinct TPA claims: national treatment, indirect expropriation, breach of the umbrella clause imported through the MFN clause, breach of an investment agreement, and FET based on multiple independent violations, only one of which was denial of justice, as well as the ancillary claims pleaded in the Amended Request for Arbitration. The Tribunal addressed only denial of justice in any meaningful way and then improperly dismissed all other claims by reference to its conclusion rejecting the denial of justice allegation for a failure to exhaust local remedies.

Strikingly, it did not even address the ancillary claims in the same cursory manner but left them entirely unaddressed.

10. That omission is critical and requires annulment of the Award. The national treatment claim required analysis of whether Colombia accorded less favorable treatment to Foster Wheeler than to similarly situated Colombian investors. That claim does not turn on whether the Colombian courts denied justice or whether Foster Wheeler failed to invoke local remedies. The indirect expropriation claim required analysis of whether Colombia's conduct substantially extinguished the economic value of Foster Wheeler's protected investment. That issue does not turn on the exhaustion of a domestic judicial process. The investment agreement claim required analysis of whether the PMC Contract is an investment agreement and of whether Colombia disregarded various commitments contained in the PMC Contract, [REDACTED]
[REDACTED]
[REDACTED]. The umbrella clause claim required analysis of whether those breaches of the undertakings in the PMC Contract were violations of the TPA. The remaining FET theories required analysis of arbitrariness, prejudgment, lack of transparency, and disregard of legitimate expectations, all separate elements from denial of justice. The Tribunal did not rule, in any meaningful sense, on any of those claims.
11. Colombia insists that tribunals need not address every argument or every item of evidence. Foster Wheeler does not dispute that proposition. But a tribunal must decide the claims submitted to it. A tribunal may omit analysis of minor or subsidiary arguments; it may not fail to address entire claims. That is the difference between non-reviewable choices in reasoning and an *infra petita* award like the one before the Committee.

12. The failure is even clearer regarding the ancillary claims. Foster Wheeler filed an Amended Request after the CGR had issued and affirmed its Decision and after additional CGR enforcement conduct had occurred. The Tribunal acknowledged that the Amended Request formed part of the record. But the Award contains no reasoning rejecting those claims: no jurisdictional decision, no admissibility decision, no Rule 40 analysis, no statement that the claims were barred for the same reasons as the original claims, and no explanation of why the ancillary pleading admitted to the record did not require the Tribunal's attention.
13. Colombia now says that the Amended Request created no independent procedural right or became moot after the preliminary ruling. Those arguments are meritless. And, most importantly, they are counsel's *post hoc* arguments aimed at supplying reasoning that is nowhere to be found in the Award itself. If the Tribunal believed Rule 40 did not permit the claims, it had to say so. If it believed Article 10.16.1 barred them, it had to say so. If it believed they were moot, it had to say so. The Tribunal said none of those things. Silence is not a reasoned award.
14. This failure supports annulment under both Article 52(1)(b) and Article 52(1)(e). A tribunal manifestly exceeds its powers when it refuses to exercise jurisdiction conferred upon it. And an award fails to state reasons when it does not explain why claims submitted to the tribunal were dismissed. Colombia cannot cure that defect by concocting after-the-fact explanations the Award did not give, in effect speculating on how the Tribunal could have explained its conclusions.

The Tribunal Seriously Departed from Fundamental Rules of Procedure Governing the Resolution of Preliminary Objections and Failed to State Reasons Under Articles 52(1)(d) and 52(1)(e)

15. Colombia invoked Article 10.20.4 of the TPA to obtain early dismissal before the merits phase through a series of preliminary objections. The TPA contains a critical procedural safeguard for such proceedings: when deciding a preliminary objection under Article 10.20.4, the tribunal must assume the truth of the claimant's factual allegations supporting claims in the notice of arbitration, while also permitting consideration of relevant facts not in dispute. That safeguard is the condition that makes early determination compatible with the right to be heard. Colombia cannot invoke the benefits of an abbreviated preliminary procedure and then defend an Award that disregards the procedure's mandatory procedural safeguards.
16. At the Article 10.20.4 stage, Foster Wheeler was not required to prove the truth of any factual allegations. The Tribunal nevertheless faulted Foster Wheeler for failing to prove that exhausting local judicial remedies in Colombia would have been futile or manifestly ineffective, based on Foster Wheeler's allegations of extraordinary delay in the Colombian system of judicial review. That was a dispositive factual finding the Tribunal made despite a treaty provision precluding fact-finding in the procedure that Colombia invoked.
17. Colombia's answer is that Foster Wheeler's futility allegations were legal conclusions and not assertions of fact. But the claim of futility rested on factual allegations concerning the practical availability and effectiveness of Colombian judicial review given the excessive delays plaguing Colombia's court system. That factual issue goes to whether recourse to local remedies, assuming that it was required, was available as a practical matter. Colombia

cannot avoid the TPA's mandatory factual presumption by relabeling those allegations as legal conclusions.

18. Moreover, even if evidence was required, although it was not, the record contained it. Foster Wheeler submitted the witness statement of Mr. César Torrente, former General Counsel of the CGR, who explained that a nullity action against a CGR decision historically takes five to twelve years and sometimes longer. Foster Wheeler relied on that evidence as the factual predicate for its claim of futility. Indeed, Colombia itself invoked Mr. Torrente's testimony on this precise point when it suited Colombia's position on an earlier application for provisional measures. Yet, the Award wrongly stated that Foster Wheeler "ha[d] not presented any evidence" to substantiate futility or manifest ineffectiveness, and never even mentioned Mr. Torrente's statement.
19. Foster Wheeler does not contend that the Tribunal had to discuss every piece of evidence. Here, however, the Tribunal made an affirmative statement that no evidence existed on what it identified as a potentially dispositive issue, when the record contained evidence on that very issue. If the Tribunal found the evidence insufficient, unpersuasive, or legally immaterial, it had to explain why. It did not. The result is both a serious procedural defect and a failure to state reasons. The Committee cannot follow the Tribunal's reasoning from the record to the conclusion because the Award misstates the record on this critical point. Those defects support annulment under Articles 52(1)(d) and 52(1)(e).
20. Colombia's reliance on the duration of the preliminary questions phase does not cure the defect. It is of course true that Foster Wheeler filed briefs, attended a hearing, and submitted evidence, but due process is not measured

by volume. The right to be heard includes the right to have material claims and evidence considered under the governing procedural standard on a fully developed record. A lengthy record followed by an award that fails to decide claims and disregards the procedural protections that allow an award to be made in a preliminary objections procedure is hardly a basis to deny annulment.

The Tribunal's Imposition of an Exhaustion Requirement Constitutes a Manifest Excess of Powers and a Failure to State Reasons Under Articles 52(1)(b) and 52(1)(e)

21. Colombia asserts the Tribunal did not impose an exhaustion requirement but merely assessed ripeness. The Award says otherwise. The Tribunal reasoned that because the Fiscal Liability Ruling could be reviewed by the Colombian courts, it could not constitute a denial of justice “or a breach of any of the other substantive obligations under the Treaty alleged by Claimants.” It then held that the availability of judicial remedies was “fatal to the admissibility” of Claimants’ claims. Whatever label Colombia now attempts to apply, the clear holding of the Award was to require local judicial review before any TPA claim could proceed.
22. That requirement is absent from the parties’ consent. Article 26 of the ICSID Convention, a critical part of the governing law, expressly provides that consent to ICSID arbitration excludes any other remedy unless the state party has required exhaustion of local remedies as a condition to its consent to arbitration under the Convention. That is universally understood to be a rejection of any requirement to exhaust local remedies. As Colombia itself concedes, it did not impose such a condition on its consent to arbitration in the TPA. And while a denial of justice claim is arguably subject to an exhaustion requirement—as an element of the claim, and not as a question of

admissibility—the non-denial-of-justice claims are not subject to that requirement. The Award gives no reasoned explanation for imposing that requirement on claims of national treatment, expropriation, breach of an umbrella clause, breach of an investment agreement, or non-denial-of-justice FET violations.

23. Colombia’s denial of justice authorities do not fill the gap. Some authorities suggest that a denial of justice claim requires recourse to domestic courts as a substantive element of the claim. But that does not explain why claims for national treatment, expropriation, breach of an investment agreement, breach of an umbrella clause, or non-denial-of-justice FET violations must await completion of judicial review. The Award moved from the former proposition to the latter without offering any reasons.
24. The annulable failing is that the Award imposed, across all claims, a condition that the TPA and governing law do not contain and then failed to explain how that condition applied to claims that are not subject to an exhaustion requirement. Those failures support annulment under Articles 52(1)(b) and 52(1)(e).

The Tribunal’s Construction of the TPA Term “Administrative Adjudicatory Proceedings” Is a Manifest Excess of Powers and a Failure to State Reasons Under Articles 52(1)(b) and 52(1)(e)

25. The same problem appears in the Tribunal’s interpretation of “administrative adjudicatory proceedings” in TPA Article 10.5.2(a). The Tribunal was required to apply the customary international law rules governing the interpretation of treaties. The Tribunal, however, failed to engage with the most basic element of treaty interpretation: consideration of the ordinary meaning of the terms at issue. The ordinary meaning of “administrative” and

“adjudicatory” encompasses proceedings in which an administrative agency acts in an adjudicatory, rather than rulemaking, capacity. The Fiscal Liability Proceeding was conducted by an administrative organ of the Colombian state, the CGR, and concerned the adjudication of alleged fiscal liability and the imposition of enormous monetary damages against the named respondents, including Foster Wheeler.

26. The Tribunal also failed to apply the rules governing the interpretation of treaties authenticated in two or more languages. It relied on its interpretation of the Spanish version of the TPA. It did not meaningfully analyze the ordinary meaning of “administrative” and “adjudicatory” in the equally authentic English text. It also failed to explain why a term derived from the US Model BIT and included in investment treaties with countries that are not Spanish-speaking and do not have specialized courts of administrative review should be read as an explicit reference to a specialized Colombian judicial jurisdiction.

Colombia’s Waiver and Parallel-Arbitration Arguments Do Not Defeat the Annulment Grounds Under Articles 52(1)(b), 52(1)(d), and 52(1)(e)

27. Colombia argues that Foster Wheeler waived procedural objections by not raising them before the Award was issued. That argument misunderstands the Application. Foster Wheeler does not challenge procedural rulings that were known and could have been challenged during the arbitration. Foster Wheeler challenges defects that became apparent only when the Tribunal issued the Award: the failure to decide submitted claims, the extension of denial of justice reasoning to claims that do not contain a denial of justice element, the statement that no futility evidence existed despite the record containing that

evidence, and the silence concerning the ancillary claims. Those defects could not have been raised before the Tribunal issued the Award.

28. Colombia also relies on the length of the preliminary phase. But the fact that the parties submitted briefing and evidence makes the Tribunal's omissions more serious, not less. After more than thirty months of deliberation on what was supposed to be a prompt preliminary determination, the Tribunal issued an Award that devoted only a brief portion of its analysis to the dispositive issues and did not decide most of the claims submitted.
29. Finally, Colombia's "third bite at the apple" theme is irrelevant. Foster Wheeler commenced a separate arbitration, covering measures that took place after the Request for Arbitration, as a protective measure after uncertainty arose concerning whether the Tribunal would address the ancillary claims. To avoid the risk of inconsistent outcomes, Foster Wheeler requested that Colombia agree to stay that arbitration pending the resolution of this annulment proceeding, and Colombia agreed. Ultimately, if this annulment proceeding is successful, Foster Wheeler will seek to consolidate any resubmitted case with the case that is currently stayed, preventing the possibility of parallel proceedings that could result in inconsistent outcomes. Given that there is no risk whatsoever of inconsistent outcomes, there is no reason for this Committee to decline annulment as an exercise of its discretion.
30. For the reasons further stated in this Reply Memorial, Foster Wheeler respectfully requests that the Committee annul the Award, order resubmission of the dispute to a newly constituted tribunal, and award Foster Wheeler its costs and fees in this annulment proceeding.

II. ARGUMENT

A. Colombia Mischaracterized the Tribunal's Reasoning

31. Colombia's Counter-Memorial mischaracterizes the Award and relies on *post hoc* reasoning that is nowhere to be found in the text of the Award itself. Colombia's efforts to reconstruct the Award do not, and cannot, cure its procedural defects.
32. As stated by the *Rumeli* committee, if there are conclusions that "do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal."² Similarly, while acknowledging that a committee has latitude to reasonably interpret an award, the *Flughafen* committee cautioned against "going to the extreme of supplementing it with arguments that cannot be reasonably inferred."³ Likewise, the *Soufraki* committee held that a committee may draw reasonable inferences, but it cannot "add[] new elements previously absent."⁴
33. In this case, Colombia attempts to recast the Award as providing two separate lines of analysis and argues that Foster Wheeler's Annulment Memorial challenges only the Tribunal's "subsidiary" analysis, while leaving intact the

² **RALA-013:** *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, ¶ 83 (March 25, 2010).

³ **RALA-037:** *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Annulment Decision, ¶ 97 (April 15, 2019) [free translation].

⁴ **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, ¶ 24 (June 5, 2007).

Tribunal’s “primary” holding.⁵ That is simply not so. There is nothing in the Award suggesting that the Tribunal followed the two-track analytical process now suggested by Colombia. To the extent one can identify two separate lines of analysis in the Award, both are premised on the same procedural defects challenged in the Annulment Memorial. The Tribunal first held that there could be no denial of justice because (i) the TPA did not guarantee investors due process before the CGR; (ii) the Fiscal Liability Proceeding was not an “administrative adjudicatory proceeding”; (iii) Foster Wheeler was required to exhaust its remedies before the Colombian courts before pursuing its rights under the TPA; and (iv) the Colombian judiciary had issued no final decision reviewing the CGR Decision. Without offering any reasons, the Tribunal then formulaically extended that holding to every other claim before it, even though those other claims were independent of denial of justice, have different elements, and are not subject to any supposed requirement to exhaust local judicial remedies.

34. Indeed, the Tribunal first held as follows: “In the present case, considering that the judiciary has not yet intervened, it cannot be considered that there could be a denial of justice under customary international law.”⁶ That is what Colombia now calls the “primary” analysis. The Tribunal, however, ruled only on denial of justice and failed to engage with any of Foster Wheeler’s other claims: national treatment, indirect expropriation, breach of an umbrella clause, breach of an investment agreement, and FET violations other than denial of justice.

⁵ Colombia’s Counter-Memorial on Annulment, ¶ 12.

⁶ AA-007: Award, ¶ 215.

35. The Tribunal then moved on to what Colombia, but not the Tribunal, calls the “subsidiary” analysis and held as follows:

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.⁷

36. In the supposed “subsidiary” analysis of the Award, the Tribunal simply asserted that every claim failed in light of the Tribunal’s holding on denial of justice. The Tribunal also failed to explain why the CGR’s conduct before the actual Decision was rendered—such as assuming jurisdiction over Foster Wheeler even though there was no colorable basis to do so, violating the guarantee of national treatment by declining to exercise jurisdiction over similarly situated Colombian investors, and failing to honor [REDACTED] of an investment agreement between Foster Wheeler and Colombia—could not violate the TPA.⁸
37. Ultimately, the Award’s purported “primary” and “subsidiary” analyses rest on the same procedural defect: a failure to engage with claims properly before the Tribunal. It is precisely that procedural defect that lies at the heart of the grounds for annulment invoked by Foster Wheeler in its Annulment

⁷ *Id.* ¶ 216.

⁸ There were extensive formal procedures before the issuance of the charging document, including the filing of defensive written submissions known in Spanish as *exposiciones libres y espontáneas*. Foster Wheeler’s Annulment Memorial, ¶ 41. The charging document was, in effect, the conclusion of that phase of the Fiscal Liability Proceeding.

Memorial. Colombia's argument that Foster Wheeler's Annulment Memorial did not challenge the totality of the Award is simply wrong and finds no support in the record.

38. In sum, Colombia's attempt to rewrite the Award does nothing to rebut Foster Wheeler's showing that the Award should be annulled because of a serious departure from fundamental rules of procedure, a manifest excess of powers, and a failure to state reasons.

B. Colombia Failed to Rebut Foster Wheeler's Showing that the Tribunal Seriously Departed from Several Fundamental Rules of Procedure

39. In this Section, Foster Wheeler first addresses Colombia's mischaracterization of the standard for finding that a tribunal has seriously departed from a fundamental rule of procedure. Foster Wheeler will then show that, contrary to Colombia's arguments, the Tribunal seriously departed from the fundamental rules of procedure governing (i) the resolution of preliminary objections; (ii) a party's right to be heard; and (iii) the admissibility of treaty-based claims.

1. Foster Wheeler need not establish that the result would have been different if the Tribunal had not seriously departed from several fundamental rules of procedure

40. Colombia argues that a departure is "serious" only if the applicant can show that the result would have been substantially different had the Tribunal followed the applicable procedural rules.⁹

⁹ Colombia's Counter-Memorial on Annulment, ¶ 163.

41. Several *ad hoc* committees have rejected Colombia's position. In *Pey Casado*, Chile took the same position as the one Colombia does now. Claimants, on their part, noted that adopting that standard "would impose[] an insurmountable hurdle that ignores the inherent value of the rule itself."¹⁰ The committee sided with claimants, holding that "[t]he applicant is not required to show that the result would have been different, that it would have won the case, if the rule had been respected."¹¹ The *Tulip* committee held to the same effect, noting that "[t]o require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome."¹² Ultimately, a committee just needs to assess whether the departure from a fundamental rule of procedure could have had a material

¹⁰ **AALA-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, ¶ 77 (Dec. 18, 2012).

¹¹ *Id.* ¶ 78.

¹² **RALA-005**: *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, ¶ 78 (Dec. 30, 2015). *See also* **RALA-053**: *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on Annulment, ¶ 99 (Feb. 21, 2014) (holding that "[t]he applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied"); **AALA-063**: *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain's Application for Annulment, ¶ 252 (June 11, 2020) (citing *Caratube*).

effect on the award, not whether the applicant would have prevailed in the arbitration but for the tribunal's procedural irregularities.¹³

42. Although Colombia cites a series of decisions that state in passing that the departure from a fundamental rule of procedure must have led to a substantially different result,¹⁴ none of those decisions explain how that standard would work in practice.¹⁵ Indeed, adopting such a standard would require a committee to speculate as to how the arbitration would have proceeded had the tribunal observed the fundamental rules of procedure in question. That is particularly so when, as here, the case was dismissed in its early stages without a fully developed record and without written and oral submissions on the merits. The committee would need to revisit all the evidence and legal authorities submitted by the parties to assess how the tribunal would have ruled in the hypothetical scenario in which it observed those fundamental rules of procedure. That is certainly outside the scope of an *ad hoc* committee's authority.¹⁶

¹³ **AALA-063**: *Eiser v. Spain* (Annulment), ¶ 251; **AALA-055**: *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, ¶ 85 (April 5, 2016).

¹⁴ Colombia's Counter-Memorial on Annulment, ¶ 163.

¹⁵ In contrast to the decisions Colombia relies on, the *Pey Casado*, *Tulip*, and *Eiser* committees carefully analyzed both positions and reasonably explained why they rejected a requirement to establish that the end result would have been different but for the tribunal's procedural irregularities.

¹⁶ **CL-098**: *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 31 (March 21, 2007) (holding that an annulment proceeding is not a re-trial); **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, ¶ 97 (Sept. 5, 2007) (holding that a committee should not "substitute its own views for those of the Tribunal.").

43. Second, Colombia itself has rejected the standard it now seeks to impose on Foster Wheeler. The committee in *Glencore v. Colombia (I)* noted that “Colombia maintains that an applicant for annulment is not required to establish that the departure had a determinative effect on the outcome of the case but only that it could potentially have affected the outcome.”¹⁷ Colombia rejected the standard it now advocates for due to its speculative nature: “Colombia asserts that it would be a highly speculative exercise to ‘attempt to divine the outcome’ of a case but for a fundamental procedural breach.”¹⁸ Strikingly, Colombia now takes a completely different position from the one it vigorously advanced in *Glencore (I)*.
44. The *Glencore (I)* committee accepted Colombia’s argument and disclaimed any requirement to prove that the arbitration’s result would have been different:

Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal’s compliance with a rule of procedure could potentially have affected the award.¹⁹

¹⁷ **AALA-050**: *Glencore International AG & CI Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Decision on Annulment, ¶ 203 (Sept. 22, 2021).

¹⁸ *Id.*

¹⁹ *Id.* ¶ 223 (citing **AALA-055**: *TECO v. Guatemala* (Annulment), ¶ 85).

45. Colombia's stated position in *Glencore (I)*, accepted by the committee in that case, is correct and consistent with ICSID practice on annulment. Colombia should not be allowed to repudiate a position it defended and prevailed on in a prior annulment proceeding.
46. In any event, the record shows that the Tribunal's many procedural violations were, in fact, outcome determinative. To cite only one particularly clear example, the Tribunal was required to accept Foster Wheeler's assertion regarding the futility of resorting to the Colombian courts. Had the Tribunal done so, the holding regarding denial of justice, the lynchpin of the entire Award, could not have been reached, Colombia's application would have been denied without prejudice to renewal on a full record, and the case would have proceeded to the merits phase in the ordinary course.

2. Foster Wheeler could not have raised serious departures from fundamental rules of procedure that only materialized when the Tribunal issued its Award

47. In addition to distorting the interpretation of the term "serious," Colombia attempts to impose on Foster Wheeler the impossible requirement of raising during the arbitration irregularities that only materialized upon issuance of the Award.²⁰
48. Colombia relies on ICSID Arbitration Rule 27, but that provision makes clear that a party only waives its right to object if it knew or should have known of a procedural irregularity and failed to object to it despite its actual or constructive knowledge.²¹ Similarly, Professor Schreuer notes that only a

²⁰ Colombia's Counter-Memorial on Annulment, ¶ 166.

²¹ **AAIA-002**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 27.

“party that has knowingly failed to challenge a serious irregularity before the tribunal” can be deemed to have waived its right to challenge that irregularity at the annulment stage.²²

49. In this case, Foster Wheeler only had knowledge of the Tribunal’s procedural irregularities upon issuance of the Award. Only at that time did it become apparent that the Tribunal had (i) failed to analyze and rule on most of the claims before it; (ii) failed to apply the rules for the resolution of preliminary objections set forth in the TPA; (iii) imposed a non-existent requirement to exhaust local judicial remedies for every TPA claim, and not just for denial of justice; (iv) failed to apply, or egregiously misapplied, the rules of treaty interpretation set forth in the Vienna Convention; (v) failed to state reasons supporting the dismissal of all of Foster Wheeler’s claims; (vi) failed to address relevant and probative evidence on which both parties relied; and (vii) stated contradictory reasons, which amounts to not offering any reasons at all.
50. The record also shows that all claims, and not just denial of justice, were vigorously briefed and argued. As part of that process, Colombia did not argue that every claim should be dismissed based solely on the absence of a denial of justice.²³ Foster Wheeler can hardly be criticized for not objecting that its claims should not have been dismissed based on a theory that Colombia did not raise.
51. Because Foster Wheeler did not have, and could not have had, knowledge of any of those irregularities during the arbitration, it simply could not have

²² **AALA-014:** CHRISTOPH S. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1246 (Cambridge University Press, 3rd ed. 2022).

²³ **AA-003:** Colombia’s Memorial on Preliminary Objections; **AA-010:** Colombia’s Reply on Preliminary Objections.

raised them before the Tribunal. As such, Colombia's argument that Foster Wheeler waived its right to challenge those irregularities through an annulment application lacks any basis.

3. The Tribunal seriously departed from the fundamental rules of procedure governing the resolution of preliminary objections

(i) The rules of procedure governing the resolution of preliminary objections are fundamental

52. Foster Wheeler now turns to the specific rules of procedure from which the Tribunal seriously departed, beginning with the rules governing the resolution of preliminary objections.
53. Colombia first argues that the rules governing the resolution of preliminary objections are not fundamental. Therefore, it claims, even if the Tribunal breached them, that should not lead to the Award's annulment.²⁴ As set out below, numerous awards have held that those rules are fundamental in every meaningful sense, because they establish the basis upon which a party can be deprived of its right to a full hearing on the merits and have its case decided in an abbreviated preliminary proceeding.
54. Foster Wheeler brought its claims under the TPA. Article 10.20.4 of that treaty allows the respondent, in this case Colombia, to raise 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."²⁵ Colombia invoked that provision and raised a series of preliminary objections

²⁴ Colombia's Counter-Memorial on Annulment, ¶¶ 181-182.

²⁵ CL-001: Ch. 10 of the TPA.

under Article 10.20.4. As Article 10.20.4 itself provides, (i) “the tribunal shall suspend any proceedings on the merits”; (ii) “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)”; and (iii) “The tribunal may also consider any relevant facts not in dispute.”²⁶ In effect, giving up the right to challenge the facts asserted by the claimant is a condition for seeking a preliminary determination under Article 10.20.4. In addition, tribunals that have interpreted provisions similar to Article 10.20.4 have uniformly held that preliminary objections are subject to a high bar and are not meant to be used to resolve complex matters of law, disputed factual issues, or mixed questions of law and fact.²⁷

²⁶ *Id.* The resolution of preliminary objections should also be prompt. That was indisputably not what happened here, given that 31 months passed between the close of the hearing and the issuance of the Award. As explained by Foster Wheeler, this violation of the procedural rules governing the resolution of preliminary objections merits the Award’s annulment. Foster Wheeler’s Memorial on Annulment, Section IV.A.5. Colombia disingenuously attempts to blame Foster Wheeler for that delay, pointing to Foster Wheeler’s submission of new documents that did not exist at the close of the written phase and Foster Wheeler’s assertion of ancillary claims under ICSID Arbitration Rule 40. Colombia’s Counter-Memorial on Annulment, ¶ 368. But the time the Tribunal took to resolve those requests was insignificant compared to the duration of the protracted deliberation period. Foster Wheeler requested the introduction of new documents on February 7, 2023 and the Tribunal granted that request on March 7, 2023. **AA-007**: Award, ¶ 54. Then, on June 21, 2024, Foster Wheeler submitted the Amended Request for Arbitration and the Tribunal confirmed that this pleading was part of the record on July 12, 2024, although it then ignored it in the Award. *Id.* ¶ 63. Colombia also cites the decision in *CDC v. Seychelles* as support for the proposition that delay in rendering an award is irrelevant, but that case is inapposite because the tribunal there was not subject to the time limitations that govern the resolution of preliminary objections.

²⁷ **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) (holding that “[t]he procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. 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 questions of fact or mixed questions of law and fact”); **CL-272**: *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34,

55. Considering that Article 10.20.4 is the only provision of the applicable treaty setting forth the ground rules for the resolution of preliminary objections, there is simply no basis for Colombia to argue that those rules are not fundamental in the particular context of this case. In any case, they would still be fundamental due to their inextricable relationship with other rules that do have that status. A breach of the standard set forth in Article 10.20.4 could, as it did here, result in a breach of the other fundamental rights of a claimant, including its rights to due process and to be heard, as well as the rules governing the allocation of the burden of proof.
56. Ultimately, provisions like Article 10.20.4 safeguard the parties' rights to due process and to be heard, while still allowing the dismissal of claims that have no legal basis. Colombia does not dispute that the rules protecting a party's rights to due process and to be heard are fundamental rules of procedure, and all committees that have analyzed that issue have so held.²⁸ For that reason,

Decision on Expedited Objections, ¶ 105 (Dec. 13, 2017) (adopting the *Pac Rim* standard); **AALA-064**: *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, ¶ 300 (Dec. 22, 2019) (also adopting the *Pac Rim* standard); **CL-273**: *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, ¶ 206 (Dec. 18, 2014) (holding that "...when addressing an Article 10.20.4 objection for legal insufficiency of a claim, a tribunal will be called to decide whether the claim is 'legally hopeless.'").

²⁸ **AALA-057**: *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *Ad hoc* Annulment Committee, ¶ 5.06 (Dec. 22, 1989) (holding that a rule giving a party a full opportunity to present its case is a fundamental rule of procedure); **AALA-007**: *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 57 (Feb. 5, 2002) (holding 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"). See also **RALA-030**: *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Excerpts of Decision on Annulment, ¶ 88 (May 22, 2013); **RALA-077**: *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment, ¶ 263 (July 8, 2013).

tribunals have acknowledged the relationship between a claimant's due process rights and the application of procedures for the summary disposition of claims, such as the ones laid out in Article 10.20.4 and ICSID Arbitration Rule 41. Examples include:

- *Brandes v. Venezuela*: "...the Tribunal is of the opinion that the new procedure of the preliminary objections under Rule 41(5) is intended to create the possibility to dismiss at an early stage such cases which are clearly unmeritorious. It is a summary proceeding to be conducted on an expedited basis. The rules of due process, however, should continue to be respected. A tribunal should therefore uphold such an objection and come to the final conclusion that all claims are without legal merit only if it concludes that this is 'manifestly' the case."²⁹
- *Global Trading v. Ukraine*: "Here, a balance evidently has to be struck between the right (however qualified) given to the objecting party under Rule 41(5) to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it, and the duty of the tribunal to meet the requirements of due process."³⁰
- *Fornan v. Spain*: The tribunal considered that there would not be a due process violation in summarily dismissing the claims because

²⁹ **AALA-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, ¶ 62 (Feb. 2, 2009).

³⁰ **RL-319**: *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award, ¶ 34 (Dec. 1, 2010).

“all the facts alleged by the Claimants have been assumed to be true and the Tribunal sees no additional facts that might be pleaded and proven, and that would alter its legal assessment.”³¹

57. As noted in these decisions, dismissing claims without affording the claimant the opportunity to present its case in a full arbitration proceeding raises serious due process concerns. For that reason, procedures for summary dismissal contain important safeguards, including the requirement to assume that the facts pleaded by the claimant are true. In response to that argument, Colombia takes issue with Foster Wheeler’s reliance on decisions made under ICSID Arbitration Rule 41 for the interpretation of provisions like TPA Article 10.20.4.³² Colombia’s argument has no basis. ICSID itself notes that “[s]ome investment treaties [like CAFTA, which in this regard is identical to the TPA] contain procedures similar to Rule 41(5), which are applicable to cases brought to ICSID under these instruments.”³³ Accordingly, several tribunals have acknowledged the clear relationship between ICSID Arbitration Rule 41(5) and similar provisions included in investment

³¹ **AALA-065**: *Nurhima Kiram Fornan and others v. Kingdom of Spain*, ICSID Case No. ARB/24/45, Award, ¶ 100 (Nov. 6, 2025). See also **AALA-066**: *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait*, ICSID Case No. ARB/18/2, Pascal Dévaud’s Dissenting Opinion on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules, ¶ 2 (Nov. 1, 2019) (“The award of the majority of the Tribunal gives respondents (and thus States) the undue privilege of obtaining, in ICSID arbitration proceedings, the dismissal of claimants in a summary way without that due process rights of claimants (i.e. of investors) be complied with.”).

³² Colombia’s Counter-Memorial on Annulment, ¶¶ 185-186.

³³ **AALA-019**: ICSID, Manifest Lack of Legal Merit - ICSID Convention Arbitration (2006 Rules). Compare **AALA-067**: United States-Dominican Republic Central America Free Trade Agreement (CAFTA), Ch. 10 with **CL-001**: Ch. 10 of the TPA.

protection treaties.³⁴ Finally, the relevance of those decisions is not that the precise provisions of Article 10.20.4 are identical to Rule 41(5), but that both provide for the accelerated and summary disposition of a case on an abbreviated record, and both contain an identical rule for the protection of a claimant's rights: that its factual allegations must be assumed to be true.³⁵ That is a fundamental rule of procedure in any conceivable sense and was grossly violated by the Tribunal in this case.

58. In addition to its relationship with the procedural rules safeguarding a party's rights to due process and to be heard, Article 10.20.4 is also closely related to the rules of procedure regarding the burden of proof. Article 10.20.4 is clear that, "[i]n deciding an objection under this paragraph, 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)." Consequently, a claimant

³⁴ See **CL-272**: *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, ¶¶ 115-117 (Dec. 13, 2017) (acknowledging the relationship between Article 10.20.5 of the US-Panama TPA and Rule 41). Colombia, for its part, relies on *Renco v. Peru (I)* to deny the relevance of Rule 41 decisions. Colombia's Counter-Memorial on Annulment, ¶ 187. Colombia, however, ignores the context of *Renco (I)*. In that case, the materials submitted by Peru did not address the specific issue in dispute, which was whether Article 10.20.4 can also include competence objections. That is why the tribunal ultimately decided not to rely on decisions on the record issued under Rule 41. Colombia relies on that specific discussion as purportedly supporting that no decision under Rule 41 can ever be relevant for the interpretation of provisions like Article 10.20.4, but that is not what the *Renco (I)* tribunal held. **CL-273**: *The Renco Group, Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Decision as to the Scope of the Respondent's Preliminary Objections Under Article 10.20.4, ¶¶ 232-238 (Dec. 18, 2014).

³⁵ See, e.g., **AALA-068**: *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), ¶ 26 (March 11, 2013) (holding that, for ruling on a Rule 41(5) objection, a tribunal "must ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true"); **AALA-069**: *Ricardo Filomeno Duarte Ventura Leitão Machado v. Republic of Angola*, ICSID Case No. ARB/24/8, Decision on the Respondent's Rule 41 Objection, ¶ 92 (May 29, 2025) (holding that "at this stage, [the tribunal] is only required to make a legal assessment of the legal merit of the Claimant's claims.").

defending against a 10.20.4 objection bears no burden to submit evidence to prove that its factual allegations are true, and the tribunal is not allowed to admit and weigh evidence contradicting those allegations.³⁶ *Ad hoc* committees have recognized that rules such as this one, which set forth the burden of proof, are of a fundamental character. The committee in *Klöckner v Cameroon (II)* was the first to recognize that “an erroneous reversal of the burden of proof could amount to a serious departure from a fundamental rule of procedure.”³⁷ The committee in *Lemire v. Ukraine* also identified “the treatment of evidence and burden of proof” as a paradigmatic example of a fundamental rule of procedure.³⁸

59. In response, Colombia relies on the decisions in *Tenaris v. Venezuela (II)* and *Cube v. Spain*.³⁹ In fact, although those decisions declined to annul the awards in question, both acknowledged that an erroneous reversal of the burden of proof could lead to an award’s annulment. In *Tenaris*, the Committee stated as follows:

The Committee agrees with the *Caratube* committee that ‘a reversal of the burden of proof could well lead to a violation of a fundamental rule of procedure’, if for instance the tribunal did not treat the parties equally or did not grant an opportunity to be heard on the issue. However, these are consequences of other

³⁶ **RL-036:** *Pac Rim v. El Salvador* (Preliminary Objections), ¶¶ 78, 87-89. *Pac Rim* was decided under Article 10.20.4 of DR-CAFTA, which is identical to Article 10.20.4 of the TPA.

³⁷ *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Second *ad hoc* Committee Decision on Annulment, ¶ 6.80 (May 17, 1990) (cited in **AALA-014:** Schreuer, Commentary at 1330).

³⁸ **RALA-077:** *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment, ¶ 263 (July 8, 2013).

³⁹ Colombia’s Counter-Memorial on Annulment, ¶ 283.

principles that have an impact in the treatment of the burden of proof but they are not principles themselves.⁴⁰

60. Likewise, the *Cube* committee acknowledged that “...allocating or applying the burden of proof may result in the breach of a fundamental rule of procedure (such as the equality of the parties).”⁴¹
61. In fact, it is difficult to think of a more fundamental procedural rule than the allocation of the burden of proof. That is particularly true here considering that the TPA contains an express provision requiring tribunals to assume that a claimant’s factual allegations are true as a condition for potentially depriving a claimant of its right to a full hearing on the merits. Colombia availed itself of the right under the TPA to raise an objection under Article 10.20.4. That, in turn, triggered the procedural rules and protections for Foster Wheeler set forth in that provision. It is disingenuous for Colombia to argue that those procedural rules—contained in the sole TPA provision governing the resolution of Colombia’s objections—are not fundamental in the specific context of this case. And even if this Committee were somehow to find that these rules are not fundamental in and of themselves, Foster Wheeler should still prevail. Those provisions are closely intertwined with other procedural rules that Colombia does not dispute are fundamental, like the ones protecting

⁴⁰ **RALA-018:** *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)*, ICSID Case No. ARB/12/23, Decision on Annulment, ¶ 93 (Dec. 28, 2018). Colombia omitted this statement from its citation of this decision. The *Tenaris* committee also rejected the arguments Colombia is raising now regarding the standard applicable to this ground for annulment: “an applicant must not and cannot be asked to prove in addition that such a substantively untenable result caused by a specific departure from the rules of procedure caused the tribunal to render a different award.” *Id.* ¶ 100.

⁴¹ **RALA-019:** *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, ¶ 448 (March 28, 2022).

a party's right to due process and to be heard and the ones setting forth the burden of proof. Consequently, a breach of the provisions set forth in Article 10.20.4 would likewise result in a breach of those fundamental rules of procedure.

(ii) The Tribunal repeatedly breached the rules of procedure governing the resolution of preliminary objections

62. Having established that the rules of procedure governing the resolution of preliminary objections are fundamental, this Section turns to the specific ways in which the Tribunal violated those rules: (i) the Tribunal failed to assume that the facts pleaded by Foster Wheeler were true; (ii) the Tribunal erroneously placed on Foster Wheeler the burden of proving those facts; and (iii) the Tribunal then compounded its error by falsely holding that no such proof had been offered on a critical issue: the futility of seeking relief from the Colombian courts following a final Decision by the CGR.
63. First, the Tribunal was required to assume that the facts pleaded by Foster Wheeler in its Request for Arbitration were true, but it failed to do so.⁴² Foster Wheeler pleaded that there was no requirement to exhaust local judicial remedies. But even if there was such a requirement, it would be inapplicable here because, as Foster Wheeler pleaded, exhausting local judicial remedies in Colombia would have been futile or ineffective.⁴³ Foster Wheeler's argument on this point was founded on its factual allegations that the Colombian legal system in general, and its system of courts of administrative

⁴² **CL-001**: Ch. 10 of the TPA, Art. 10.20.4(c) ("In deciding an objection under this paragraph, 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)...").

⁴³ **AA-001**: Foster Wheeler's Request for Arbitration, ¶ 110.

review in particular, were plagued by such extraordinary delay that any resort to those courts would be futile.⁴⁴

64. Instead of applying the TPA's mandatory factual presumption, the Tribunal held 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."⁴⁵ The procedural irregularity of the Tribunal's ruling is self-evident. It constitutes a miscarriage of justice and a violation of Foster Wheeler's due process rights because it shifted the burden of proof to Foster Wheeler in direct violation of Article 10.20.4(c) of the TPA. Foster Wheeler had a legitimate expectation that it bore no burden to submit evidence in support of the facts pleaded in the Request for Arbitration.⁴⁶ The Tribunal defeated that expectation when it refused to abide by the TPA's mandates and dismissed meritorious claims based on an alleged failure to submit evidence.⁴⁷
65. Colombia argues that Foster Wheeler's allegations regarding the futility exception to any exhaustion requirement were legal arguments and conclusory statements and thus not covered by Article 10.20.4(c).⁴⁸ That is simply not so. This is just another instance of Colombia relying on *post hoc*

⁴⁴ AA-012: Hearing on Preliminary Objections Transcript, Volume 1, at 197:5-15.

⁴⁵ AA-007: Award, ¶ 217.

⁴⁶ Despite bearing no burden of proof whatsoever, Foster Wheeler did submit supporting evidence in the form of a witness statement by the CGR's former General Counsel, Mr. César Torrente. The Tribunal compounded its error by ignoring that evidence. The fact that the Tribunal ignored relevant evidence on which both parties relied is a separate ground for annulment.

⁴⁷ AA-007: Award, ¶ 217.

⁴⁸ Colombia's Counter-Memorial on Annulment, ¶¶ 291 *et seq.*

reasoning to salvage a fundamentally defective Award. As previously noted, a committee may not rely on reasons not contained in the award itself to justify a tribunal's decision.⁴⁹ But that is precisely what Colombia is asking this Committee to do. Nowhere in the Award does the Tribunal decline to apply the Article 10.20.4(c) presumption on the ground that Foster Wheeler's allegations regarding the futility exception were conclusory or were legal arguments disguised as factual allegations. Instead, it accepted that any requirement to exhaust local remedies is inapplicable if recourse to domestic courts is futile and then ruled against Foster Wheeler based on the Award's fatally flawed holding that there was no evidence of futility.⁵⁰ None of the arguments Colombia now raises on this point appear in the Award.

66. In any case, Colombia's *post hoc* attempt to justify the Tribunal's decision lacks any rational basis. The application of the futility exception is a question of fact.⁵¹ Under the clear command of the TPA, the Tribunal was required to accept Foster Wheeler's allegations as true and then, as part of the proceedings on the merits, allow each party a full opportunity to present evidence bearing on whether exhausting local judicial remedies in Colombia

⁴⁹ **RALA-013**: *Rumeli v. Kazakhstan* (Annulment), ¶ 83; **RALA-037**: *Flughafen v. Venezuela* (Annulment), ¶ 97; **AALA-033**: *Soufraki v. United Arab Emirates* (Annulment), ¶ 24.

⁵⁰ **AA-007**: Award, ¶ 217.

⁵¹ See **CL-091**: *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 169 (June 26, 2003) (holding that "[a]vailability [of local remedies] is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy"); **AALA-056**: Draft Articles on Diplomatic Protection 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 (stating that, in deciding whether judicial backlog renders local remedies futile or ineffective, "[e]ach case must be judged on its own facts.").

would have been futile or ineffective.⁵² By violating Article 10.20.4 and depriving Foster Wheeler of the opportunity to prove its case, the Tribunal departed from a fundamental rule of procedure.

67. The Tribunal then compounded its error by ignoring that Foster Wheeler had in fact submitted the very evidence that the Tribunal erroneously required. Indeed, Foster Wheeler submitted a witness statement by Mr. Torrente, the former chief legal officer of the CGR.⁵³ The Tribunal ignored that evidence and wrongly stated that no evidence had been presented.
68. Second, in addition to disregarding the key Article 10.20.4 presumption, the Tribunal exceeded the permissible scope of the preliminary objections procedure. Article 10.20.4 is not designed to result in a mini-trial. As the Tribunal in *Pac Rim* observed:

The procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it. 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

⁵² The *Trans Global* decision, cited by Colombia in paragraph 293 of its Counter-Memorial, held that a summary disposition procedure is not the place to “weigh the credibility or plausibility of a disputed factual allegation.” **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, ¶ 105 (May 12, 2008).

⁵³ Although both Foster Wheeler and Colombia referred to Mr. Torrente’s witness statement, it is not even mentioned, let alone analyzed, in the Award.

dependent on complex questions of fact or mixed questions of law and fact.⁵⁴

69. The Tribunal departed from this procedural rule by (i) ruling on disputed issues of fact, such as whether exhausting local judicial remedies in Colombia would have been futile or ineffective; (ii) improperly shifting the burden of proof to Foster Wheeler;⁵⁵ and (iii) ruling on the question whether the Fiscal Liability Proceeding was an “administrative adjudicatory proceeding” under the terms of Article 10.5.2(a) of the TPA, even though this was a complex question of law and fact that could only be resolved on a full record.⁵⁶
70. In response, Colombia disputes whether the preliminary objections proceeding was a summary proceeding at all, and therefore subject to certain limitations as to the matters that could properly be decided at the arbitration’s early stages. In effect, Colombia is arguing not that the preliminary objections phase was a “mini-trial,” but that it was a full-blown hearing on the merits.⁵⁷ Colombia refers to the two rounds of written briefs, the two-day hearing, and

⁵⁴ **RL-036:** *Pac Rim v. El Salvador* (Preliminary Objections), ¶ 112. *See also* **CL-272:** *Bridgestone v. Panama* (Preliminary Objections), ¶ 105; **AALA-064:** *Mason Capital v. Korea* (Preliminary Objections), ¶ 300; **CL-273:** *Renco v. Peru (I)* (Preliminary Objections), ¶ 206.

⁵⁵ **RL-036:** *Pac Rim v. El Salvador* (Preliminary Objections), ¶ 111 (holding that “the burden of persuading the tribunal to grant the preliminary objection must rest on the party making that objection, namely the respondent.”).

⁵⁶ Colombia devotes several paragraphs of its Counter-Memorial to trying to justify the Tribunal’s frivolous interpretation of that treaty term, which further underscores the complexity of the issue and how it was unsuited to be resolved through a summary proceeding. Colombia’s Counter-Memorial on Annulment, ¶¶ 217-247.

⁵⁷ Colombia’s Counter-Memorial on Annulment, ¶¶ 203 *et seq.*

to an alleged opportunity for Foster Wheeler to request the production of documents.⁵⁸ Colombia's arguments are both wrong and irrelevant.

71. Regardless of whether one categorizes the procedure for ruling on Colombia's preliminary objections as a "summary proceeding" or not, the fact remains that it was a preliminary proceeding subject to the specific procedural rules and limitations set forth in TPA Article 10.20.4. The Tribunal's indisputable violation of those rules constitutes grounds for annulment, regardless of the number of briefs filed, although two rounds of briefing and an oral argument are not atypical for preliminary objections. Colombia cannot wipe away those procedural violations by noting that the Tribunal—as it was required to do under the most basic notions of due process—afforded both parties the opportunity to file written briefs and present oral argument on Colombia's preliminary objections.
72. Colombia also mischaracterizes counsel's comments at the end of the hearing that "the record is sufficiently developed."⁵⁹ Those comments were made in response to the President's question: "Mr. Sills, do you think we need the additional information *in the form of Post-Hearing Briefs?*"⁶⁰ Counsel responded that "there is an extensive record here" and there was no need for further briefing unless the Tribunal had specific questions.⁶¹ Colombia grossly mischaracterizes those comments, in an attempt to portray them as an authorization for the Tribunal to rule on issues that were unquestionably

⁵⁸ *Id.* ¶¶ 204, 206.

⁵⁹ *Id.* ¶ 177.

⁶⁰ **AA-013**: Hearing on Preliminary Objections Transcript, Volume 2, at 364:2-4 [emphasis added].

⁶¹ *Id.* at 364:10-365:5.

outside the scope of a proceeding to rule on preliminary objections or to weigh evidence in a proceeding that could only decide whether a claim fails “as a matter of law.” The Committee should reject such a blatant mischaracterization of the record.

73. Colombia also mischaracterizes Foster Wheeler’s reference to a “summary” proceeding. That term signifies only that a proceeding to rule on preliminary objections serves a limited purpose, based on a limited record. As noted above, “[t]he procedure under CAFTA Article 10.20.4 is clearly intended to avoid the time and cost of a trial and not to replicate it.”⁶²
74. Proper consideration of the history of Article 10.20.4 further confirms the seriousness of the Tribunal’s procedural violations. As Colombia concedes, Article 10.20.4 is based on a motion to dismiss under the procedures followed in the United States federal courts.⁶³ As noted by Professor Vandeveld, Article 10.20.4 “...is modeled in concept after Rule 12(b)(6) of the 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.”⁶⁴ The purpose is to “avoid[] the expense to the parties of collecting and presenting the evidence in any case where such determinations are not necessary.”⁶⁵

⁶² **RL-036:** *Pac Rim v. El Salvador* (Preliminary Objections), ¶ 112.

⁶³ Colombia’s Counter-Memorial on Annulment, ¶ 292.

⁶⁴ **RL-121:** KENNETH J. VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 608 (Oxford University Press 2009).

⁶⁵ *Id.*

75. Put simply, the preliminary objections phase was not the proper stage for the Tribunal to engage in an examination of the factual basis for Foster Wheeler’s claims, even though that is what the Tribunal did, or purported to do.⁶⁶ Such an evaluation is reserved for the merits phase of the arbitration. However, as Article 10.20.4 makes clear, once a respondent raises a preliminary objection, “the tribunal shall suspend any proceedings on the merits.”⁶⁷ Unsurprisingly, Procedural Order No. 1 did not contemplate an opportunity for Foster Wheeler to file a memorial on the merits, accompanied by all of the evidence Foster Wheeler intended to rely on throughout the arbitration.⁶⁸ Nor did the parties make arrangements for a multi-day hearing at which witnesses would be presented and cross-examined.⁶⁹
76. Moreover, contrary to Colombia’s contentions,⁷⁰ Procedural Order No. 1 did not allow Foster Wheeler to request the production of documents. Colombia relies on paragraph 15.3 of the Order, which allows a party to request the production of documents at an opportunity not set forth in the procedural timetable only upon a showing of “exceptional circumstances.”⁷¹ Accordingly, the timetable for the preliminary objections phase did not contemplate an opportunity for requests for the production of documents.⁷²

⁶⁶ **AA-007**: Award, ¶ 217.

⁶⁷ **CL-001**: Ch. 10 of the TPA, Art. 10.20.4(b).

⁶⁸ **AA-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021).

⁶⁹ *Id.*

⁷⁰ Colombia’s Counter-Memorial on Annulment, ¶ 38.

⁷¹ **AA-006**: Procedural Order No. 1, ¶ 15.3 (March 18, 2021).

⁷² **AA-005**: Procedural Order No. 1, Revised Annex A, Procedural Calendar (Oct. 7, 2021).

And there was no reason for Foster Wheeler to make that exceptional application. The proper scope of proceedings under Article 10.20.4 would make such document production irrelevant because disputed questions of fact—the ordinary basis for requests for the production of documents—have no role in preliminary objections proceedings in which the facts as pleaded must be assumed to be true. In sum, there was no reason for Foster Wheeler to make that exceptional request because it had a legitimate expectation that the Tribunal would dutifully apply, as it was bound to do, the factual presumption of Article 10.20.4(c). As discussed above, the Tribunal grossly violated that expectation.

77. In conclusion, the Tribunal departed from the fundamental rules of procedure governing the resolution of preliminary objections. The TPA makes clear that, in deciding a 10.20.4 objection, a tribunal must assume that the facts asserted by the claimant are true and limit its examination to whether a claim should be dismissed “as a matter of law.”⁷³ The Tribunal here disregarded those basic procedural rules and effectively turned this limited stage of the arbitration into a full-blown merits proceeding, dismissing meritorious claims due to a supposed failure to submit evidence, although such evidence had actually been submitted, and depriving Foster Wheeler of the most basic of all procedural rights: the right to present its case.

⁷³ CL-001: Ch. 10 of the TPA, Art. 10.20.4.

(iii) The Tribunal's departure from procedural rules was serious

78. The final requirement of Article 52(1)(d) of the ICSID Convention is that the departure from a fundamental rule of procedure be “serious.” That requirement is met here.
79. A departure from a fundamental rule of procedure is “serious” if it could have had a material effect on the award.⁷⁴ However, as noted above, there is no requirement to establish that, but for the departure from a fundamental rule of procedure, the end result would have been different, although here it would have been. For instance, the *Eiser* committee concluded that a violation of the rules on arbitrator disclosures was serious because the party affected by the nondisclosure “lost the possibility of a different award.”⁷⁵ In *Fraport (I)*, the tribunal did not afford the parties the opportunity to comment on evidence submitted after the close of the proceeding. The tribunal then partially based its decision on matters that related to the new evidence. The committee held that this procedural violation was serious because it “materially prejudiced” the losing party.⁷⁶
80. As in *Eiser* and *Fraport (I)*, the procedural violations here materially affected the Award and materially prejudiced Foster Wheeler. The Tribunal’s decision rested on Foster Wheeler’s purported failure to exhaust local judicial

⁷⁴ *Supra* Section II.1.

⁷⁵ **AAIA-063**: *Eiser v. Spain* (Annulment), ¶ 251.

⁷⁶ **AAIA-008**: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (I)*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶¶ 245-246 (Dec. 23, 2010).

remedies,⁷⁷ yet the Tribunal failed to comply with Article 10.20.4(c)'s requirement that it assume the truth of Foster Wheeler's factual allegations concerning the futility of pursuing those remedies.⁷⁸ Foster Wheeler need not establish that a different outcome was likely. In any event, had the Tribunal accepted Foster Wheeler's allegations as true—including the extraordinary delays afflicting Colombia's judicial system—a different outcome was virtually certain even under the Tribunal's flawed legal theory. The only record evidence on that issue, Mr. Torrente's witness statement, strongly supported Foster Wheeler's allegations, but the Tribunal ignored it and incorrectly stated that no evidence had been presented.⁷⁹ Had the Tribunal complied with Article 10.20.4(c), it would have rejected Colombia's preliminary objections or, at minimum, deferred the exhaustion issue until the merits phase. The Tribunal should have also deferred complex legal and mixed factual and legal questions—including whether proceedings before the CGR qualify as "administrative adjudicatory proceedings"—until that phase.

81. The prejudice to Foster Wheeler is evident. Foster Wheeler had a reasonable expectation that the Tribunal would follow the procedural safeguards of Article 10.20.4, and that it was not required to make a complete factual record on this point. The Tribunal trampled on those expectations when it disregarded the procedural provisions applicable to the resolution of preliminary objections under Article 10.20.4.

⁷⁷ AA-007: Award, ¶¶ 215-216.

⁷⁸ *Id.* ¶ 217 ("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.").

⁷⁹ *Id.*

82. Even if this Committee is inclined to analyze whether Foster Wheeler would have ultimately succeeded on its claims but for the Tribunal’s procedural irregularities—even though the only question before the Committee is whether there was a reasonable possibility that the outcome of the preliminary objections proceeding might have been different—Foster Wheeler would also meet that standard. One of Foster Wheeler’s main allegations was that the CGR violated the TPA by wrongly assuming jurisdiction over Foster Wheeler.⁸⁰ As described in detail in the Request for Arbitration, by the clear terms of its organic statute, the CGR only has jurisdiction over fiscal managers, defined as parties that have decision-making authority over the expenditure of public funds.⁸¹ The CGR named Foster Wheeler as a respondent in the Fiscal Liability Proceeding, even though there is overwhelming evidence that Foster Wheeler had no authority whatsoever over the expenditure of Colombia’s public funds in connection with the Project at issue.⁸² That wrongful assertion of jurisdiction was a state measure in breach of the TPA even in advance of any final decision. That wrongful assertion of jurisdiction, coupled with Colombia’s campaign to publicize that

⁸⁰ **AA-001**: Foster Wheeler’s Request for Arbitration, ¶¶ 76-92.

⁸¹ *Id.* ¶ 78.

⁸² *Id.* ¶ 6. A separate international tribunal analyzed that evidence and rightly concluded that Reficar and Ecopetrol, both arms of the Colombian state, not Foster Wheeler, managed the Project that led to the CGR investigation, validating the factual basis of Foster Wheeler’s claims after a full and fair hearing on the merits. **AALA-070**: *Refinería de Cartagena S.A.S. v. Joint Venture Foster Wheeler USA Corporation and Process Consultants Inc. for the PMDC et al.*, ICC Case No. 26339/JPA/AJP, Final Award, ¶ 351 (Feb. 9, 2026) (“As discussed, the Tribunal concludes from its analysis of the evidence that Reficar reduced the scope of the management obligations described in Appendix 8 [of the PMC Contract], as it was allowed to do under section 4 of the Contract, by creating a PMT led by itself and composed by employees of both Reficar and [Foster Wheeler] *but in which the authority was exclusively exercised by Reficar and Ecopetrol.*”) [Emphasis added] [free translation]. Foster Wheeler, of course, does not ask this Committee to make findings of fact.

decision and attack Foster Wheeler based on the allegations in the charging document, caused direct financial harm, including Foster Wheeler losing projects elsewhere in Latin America.

83. In sum, the Tribunal seriously departed from the fundamental rules of procedure governing the resolution of preliminary objections. The proper remedy is the complete annulment of the Award under Article 52(1)(d) of the ICSID Convention.

4. The Tribunal seriously departed from the most fundamental of all procedural rules: a party's right to be heard

84. Colombia concedes, as it must, that the right to be heard is a fundamental rule of procedure, stating that “[t]he right to be heard requires that a party have a fair opportunity to present its position *and that a tribunal consider it.*”⁸³ The Award violates that rule, because a simple reading of the Award makes clear that the Tribunal only considered one subpart of Foster Wheeler’s FET claim—denial of justice. The Tribunal did not consider any of the other claims properly before it—national treatment, indirect expropriation, breach of an umbrella clause, breach of an investment agreement, and FET violations other than denial of justice. The Tribunal also failed to analyze any of the ancillary claims from Foster Wheeler’s Amended Request for Arbitration.
85. Regarding the initial claims, Colombia’s response is that an individualized analysis and ruling on those claims was unnecessary. Colombia’s reasoning is as follows: “Having determined that Claimants failed to satisfy the requirements of Article 10.16.1 of the Treaty for the submission of a valid

⁸³ Colombia’s Counter-Memorial on Annulment, ¶ 343 [emphasis added].

claim to arbitration because their claims were premature, the Tribunal's threshold finding was necessarily dispositive of all remaining claims."⁸⁴ Once again, Colombia's *post hoc* reasoning finds no support in the text of the Award itself or in the decisions of prior annulment committees.

86. The Tribunal's finding that claims were premature was made only in reference to denial of justice and rested entirely on authorities dealing with that doctrine. The Tribunal first held as follows: "In the present case, considering that the judiciary has not yet intervened, it cannot be considered that there could be a *denial of justice* under customary international law."⁸⁵ The only authority cited in support of that statement is paragraph 392 of the award in *Flughafen v. Venezuela*, which likewise deals only with the relationship between denial of justice and the exhaustion of local remedies.⁸⁶ The Tribunal then went on to hold that, "[e]ven if one might argue that subsequent events could ripen a claim after the commencement of the arbitration," there still could not be a denial of justice.
87. Although the Tribunal referred solely to denial of justice, it then inexplicably extended that reasoning to every other TPA claim, although none of the other

⁸⁴ *Id.* ¶ 348.

⁸⁵ **AA-007**: Award, ¶ 215 [emphasis added].

⁸⁶ **RL-083**: *Flughafen Zurich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award, ¶ 392 (Nov. 18, 2014) ("A different matter is that the exhaustion of local remedies may constitute a substantive requirement to assess the existence of a *denial of justice*.") [Emphasis added] [free translation]. The Tribunal cites the *Flughafen* award, even though that award does not actually support the decisions taken by the Tribunal. The *Flughafen* tribunal clearly explained that a purported requirement to exhaust local judicial remedies as a precondition for the admissibility of claims would only apply, if anything, to denial of justice, not to other treaty-based claims. As previously discussed, the Foster Wheeler Tribunal imposed a non-existent requirement to exhaust local judicial remedies for every TPA claim, not just for denial of justice. Compare **AA-007**: Award, ¶¶ 215-216 with **RL-083**: *Flughafen v. Venezuela* (Award), ¶¶ 391-392.

claims were even arguably subject to a requirement to exhaust local judicial remedies, and the text of the ICSID Convention and of the TPA make it absolutely clear that there is no such requirement. Indeed, the Tribunal held as follows: “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.*”⁸⁷ That formulaic extension of the denial of justice findings was not accompanied by any analysis of the other claims raised by Foster Wheeler, all of which were independent from denial of justice and were not subject to any requirement to exhaust local judicial remedies.⁸⁸

88. Under Article 48(3) of the ICSID Convention, the Tribunal was obligated to “deal with every question” submitted to it by the parties.⁸⁹ Interpreting the English, Spanish, and French versions of the Convention, the *Daimler* committee held that “it seems without doubt that the words ‘every question’ in the English version refer to the heads of claim of the parties (*‘las pretensiones’* in the Spanish version, *les chefs de conclusions* in the French version).”⁹⁰ By not ruling on most of the heads of claim properly before it, the Tribunal in this case seriously departed from the fundamental rule of procedure protecting a party’s right to be heard. That right requires that a party be allowed to state its claims and have them resolved by an impartial

⁸⁷ **AA-007:** Award, ¶ 216 [emphasis added].

⁸⁸ As discussed below, the Tribunal did not even address the ancillary claims.

⁸⁹ **AA-006:** ICSID Convention, Art. 48(3).

⁹⁰ **AA-058:** *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, ¶ 87 (Jan. 7, 2015).

tribunal.⁹¹ The Tribunal did not afford Foster Wheeler that basic procedural safeguard.⁹²

89. The Tribunal's formulaic extension of its findings on denial of justice to every other claim was insufficient to cure this serious procedural irregularity. The International Court of Justice has considered and rejected precisely such a form-over-substance argument. For example, discussing the exercise of jurisdiction by the United Nations Administrative Tribunal, the Court stated as follows:

Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of the matter and not merely to the form. Consequently, 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.⁹³

⁹¹ **AALA-009:** *Pey Casado v. Chile* (Annulment), ¶ 184; **AALA-007:** *Wena Hotels v. Egypt* (Annulment), ¶ 57.

⁹² Colombia questions whether a violation of Article 48 could be a ground for annulment. But it is well-settled that it could, so long as a breach of Article 48 results in a failure to state reasons, a manifest excess of powers, or a serious departure from a fundamental rule of procedure. **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, ¶ 32 (May 16, 1986) ("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' (Art. 52(1)(e), Convention). Such an omission could, moreover, amount in particular situations to 'a serious departure from a fundamental rule of procedure' (Art. 52(1)(d)) and to a manifest excess of power (Art. 52(1)(b)).").

⁹³ **AALA-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 189-190.

90. The purported extension of the Tribunal’s findings on denial of justice to every other claim—without an individualized analysis or ruling—violated Foster Wheeler’s right to be heard.
91. Regarding the ancillary claims, Colombia argues that the Tribunal “...clearly conditioned any future consideration [of the ancillary claims] on the outcome of the Preliminary Questions Phase.”⁹⁴ That is incorrect. The Tribunal initially stated that “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.”⁹⁵ Foster Wheeler then asked the Tribunal to clarify the status of the Amended Request for Arbitration. In responding to that clarification request, the Tribunal confirmed that “...in accordance with ICSID Arbitration Rule 40, the Amended and Restated Request for Arbitration was part of the record in this case.”⁹⁶
92. If the ancillary claims were part of the record, as they were, the Tribunal was obligated under Article 48(3) of the ICSID Convention to rule on them. There is no justification whatsoever for a tribunal to refuse to rule on a set of claims—the ancillary claims—just because it granted a preliminary objection directed to a distinct set of claims—the initial claims. Neither the Award nor Colombia’s *post hoc* Counter-Memorial offer any justification for that patent procedural irregularity.⁹⁷

⁹⁴ Colombia’s Counter-Memorial on Annulment, ¶ 352.

⁹⁵ AA-007: Award, ¶ 62.

⁹⁶ *Id.* ¶ 63.

⁹⁷ Colombia tries to portray the ancillary claims as untimely. Colombia’s Counter-Memorial on Annulment, ¶ 352. But the Tribunal never actually held that to be the case. To the contrary, it

93. The Tribunal’s procedural irregularity of failing to rule on most of the initial claims and on all of the ancillary claims was serious. There were several distinct heads of claim before the Tribunal: (i) FET, including four separate violations: denial of justice, breach of legitimate expectations, failure to provide due process, and prejudgment of the case; (ii) national treatment; (iii) indirect expropriation; (iv) breach of an umbrella clause; and (v) breach of an investment agreement. The Tribunal, however, only ruled on denial of justice. The Tribunal also completely ignored the ancillary claims, which challenged measures that took place after the arbitration’s commencement. This was not an oversight by the Tribunal or a failure to rule on a minor issue. Instead, the Tribunal simply refused to rule on most of the claims before it, severely prejudicing Foster Wheeler and depriving it of the possibility of obtaining a favorable award.⁹⁸
94. The Tribunal’s violation of Foster Wheeler’s right to be heard is evident on the face of the Award, because the Tribunal failed to engage with virtually all of the case that was before it. The Tribunal did not consider Foster Wheeler’s allegation that the CGR’s conduct, even in advance of the CGR Decision, breached several different standards of protection set forth in the TPA, as Foster Wheeler pleaded in its Request for Arbitration. The notion that the Tribunal made a “threshold finding” of prematurity, obviating the need for an individualized consideration of every claim, is simply not consistent with the text of the Award or with the applicable standards. Any such finding of

confirmed that the claims were part of the record. **AA-007**: Award, ¶ 63. In any case, Colombia’s untimeliness argument is inconsistent with ICSID Arbitration Rule 40, which allows the filing of ancillary claims before the submission of a reply brief on the merits without prior tribunal authorization. **AA-002**: ICSID, Rules of Procedure for Arbitration Proceedings, Rule 40(2) (2006).

⁹⁸ See **AA-063**: *Eiser v. Spain* (Annulment), ¶ 251.

prematurity was made only in reference to Foster Wheeler's denial of justice allegation. And the purported extension of those findings to claims other than denial of justice—without any consideration or analysis—does not satisfy the requirements of due process. The Tribunal also failed to consider the ancillary claims at all, even though those claims related to facts that took place after the arbitration's commencement, including the issuance of the CGR Decision. Those claims directly contested Colombia's argument that, at the time of the arbitration's commencement, there was no measure capable of breaching the TPA.

95. The claims that the Award dismissed with a cursory reference to the Tribunal's conclusion on prematurity—that is, its conclusion that an allegation of denial of justice would not be ripe until Foster Wheeler had sought relief in the Colombian courts—did not depend in any way on the exhaustion of judicial remedies. By way of example, Foster Wheeler pleaded a national treatment claim. The gravamen of that claim was that the directors of Ecopetrol, a Colombian investor in the Project, were originally named in the CGR's opening resolution, but were not included in the charging document on grounds that they did not have final authority over the expenditure of public funds. In contrast, Foster Wheeler, a non-Colombian investor, was named as a respondent in the charging document, even though it lacked any authority at all. That disparate treatment had nothing to do with the supposed failure to pursue judicial remedies.
96. As a second example, Foster Wheeler pleaded a prejudgment claim based on statements by the CGR—in the media and in its own press releases—accusing Foster Wheeler of perpetrating a massive fraud on Colombia, with the consequential loss of business for Foster Wheeler. Again, Colombia's wrongful conduct was a measure taken by the state in violation of the TPA

and caused damage to Foster Wheeler, with no need to pursue judicial remedies before seeking relief in ICSID arbitration.

97. As a third example, Foster Wheeler sought relief under TPA Article 10.16.1(a)(i)(C), based on the PMC Contract, an investment agreement within the meaning of that provision, as well as the broader umbrella clauses imported from the Colombia-Switzerland and Colombia-Japan Bilateral Investment Treaties pursuant to the MFN clause in TPA Article 10.4. Among the provisions in the PMC Contract that Colombia breached is [REDACTED]
[REDACTED]
[REDACTED] by bringing claims against Foster Wheeler related to its performance of the PMC Contract in the Fiscal Liability Proceeding.

98. It is self-evident that [REDACTED] is violated by the commencement of proceedings anywhere else, and that the wronged party need not wait for the improperly commenced case to conclude before challenging that measure. Likewise, there is no requirement to pursue all available judicial remedies before resorting to international arbitration. The Award's conclusory assertion that each of these claims should be dismissed because of the Tribunal's findings on denial of justice is a complete *non sequitur*, and is, in any meaningful sense, equivalent to making no decision at all.

5. The Tribunal seriously departed from the fundamental rules of procedure regarding the admissibility of claims

99. In its Annulment Memorial, Foster Wheeler demonstrated that the Tribunal wrongly imposed a non-existent requirement to exhaust local judicial

remedies for every TPA claim, and not just for denial of justice, in violation of Article 26 of the ICSID Convention and general international law.⁹⁹ In response, Colombia argues that this is a matter of substance, not a fundamental rule of procedure,¹⁰⁰ and that the Tribunal was simply applying well-settled rules of customary international law.¹⁰¹ Both arguments are entirely unfounded.

100. First, a supposed requirement to exhaust local judicial remedies for claims other than denial of justice is a matter of admissibility, not of the merits. The sole authority the Tribunal relied on for its findings on denial of justice, the award in *Flughafen v. Venezuela*, confirms that.¹⁰² In that case, the tribunal held that, through Article 26 of the ICSID Convention, the parties to the Convention waived the requirement to exhaust local remedies “as a requirement of jurisdiction or admissibility”¹⁰³ and held that any purported requirement to exhaust local remedies is only an issue on the merits for the specific case of denial of justice.¹⁰⁴ For every other claim, it is an issue of admissibility, which is a matter of procedure, not of the merits.¹⁰⁵

⁹⁹ Foster Wheeler’s Memorial on Annulment, Section IV.A.2.

¹⁰⁰ Colombia’s Counter-Memorial on Annulment, ¶ 269.

¹⁰¹ *Id.* ¶ 263.

¹⁰² **AA-007**: Award, ¶ 215.

¹⁰³ **RL-083**: *Flughafen v. Venezuela* (Award), ¶ 391 [free translation].

¹⁰⁴ *Id.* ¶ 392.

¹⁰⁵ **AA-036**: *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, ¶ 412 (July 26, 2018); **AA-078**: *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, ¶ 63 (Sept. 24, 2008).

101. Likewise, the well-settled rule that an investor need not exhaust local judicial remedies for its claims to be admissible is fundamental in the context of investor-state arbitration. Under the pre-existing system of diplomatic protection, a claim that a host state violated the rights of a foreign investor was only admissible if the investor had exhausted all available local remedies.¹⁰⁶ One of the fundamental innovations of the system of investor-state arbitration was to do away with that requirement. As noted by Professors Dolzer and Schreuer, "...where there is consent to investor-State arbitration, there is generally no need to exhaust local remedies."¹⁰⁷ The reason for that innovation is that "[o]ne of the purposes of investor-State arbitration is to avoid the vagaries of proceedings in the host State's courts."¹⁰⁸ In sum, it is evident that the Tribunal's decision to impose a requirement to exhaust local judicial remedies for every claim, and not just for denial of justice, is a departure from one of the fundamental tenets of investor-state arbitration regarding the admissibility of claims, and hence a fundamental rule of procedure.
102. Colombia's second argument is that the Tribunal was simply applying customary international law when it applied the sweeping requirement to

¹⁰⁶ **AALA-056:** International Law Commission's Draft Articles on Diplomatic Protection with commentaries, Article 14 ("A State may not present an international claim in respect to an injury to a national or other person referred to in draft article 8 before the injured person has, subject to draft article 15, exhausted all local remedies.").

¹⁰⁷ **AALA-013:** RUDOLPH DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 381 (Oxford University Press, 3rd ed. 2022).

¹⁰⁸ *Id.* See also **AALA-045:** JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 108 (Cambridge University Press 2009) ("To repeat: states may, and do, enter into treaties that provide for direct access by foreigners to international tribunals without first having to exhaust local remedies. Such waivers give foreigners the assurance that internationally wrongful conduct will not be swept under the rug indefinitely.").

exhaust local judicial remedies for every TPA claim, and not just for denial of justice.¹⁰⁹ But here the parties agreed to a treaty provision that specifically does away with any requirement under customary international law to exhaust local judicial remedies. Indeed, the ICSID Convention contains an express provision regarding exhaustion of local remedies in Article 26:

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.¹¹⁰

103. Interpreting this provision, the *Flughafen* tribunal held as follows: “By virtue of this provision, in ICSID arbitrations States waived the exhaustion of local remedies as a requirement of jurisdiction or admissibility, except if a State so specifically demands as a condition of its consent to an ICSID arbitration.”¹¹¹ Professors Dolzer and Schreuer offer the same interpretation: “Article 26 of the ICSID Convention specifically excludes the requirement to exhaust remedies ‘unless otherwise stated.’”¹¹² Colombia readily concedes that it did not “impose such condition,” even though it now tries to apply it to Foster

¹⁰⁹ Colombia’s Counter-Memorial on Annulment, ¶ 263.

¹¹⁰ **AALA-006**: ICSID Convention, Art. 26 [emphasis added].

¹¹¹ **RL-083**: *Flughafen v. Venezuela* (Award), ¶ 391 [free translation].

¹¹² **AALA-013**: Dolzer & Schreuer, *Principles of International Investment Law* at 381. *See also* **AALA-045**: Paulsson, *Denial of Justice* at 108.

Wheeler through a blatant misrepresentation of customary international law.¹¹³

104. Unsurprisingly, all the authorities Colombia refers to on this point, the decisions in *Alps Finance*, *Flughafen*, and *Apotex*, and the US submission in *Lion*, deal with denial of justice and challenges to judicial, not administrative acts,¹¹⁴ and do not mention a purported requirement to exhaust judicial remedies for any other treaty-based claim.¹¹⁵ Colombia also refers to the US non-disputing party submission in this case, but that document does not help its case. The US said as follows: “It is well-established that the international

¹¹³ Colombia’s Counter-Memorial on Annulment, ¶ 264.

¹¹⁴ During the arbitration, Colombia conceded that the actions of the CGR are of administrative, not judicial, character. **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 82 (“The fiscal liability proceeding is also an administrative proceeding, not a judicial proceeding.”).

¹¹⁵ **RL-082**: *Alps Finance v. Slovak Republic*, UNCITRAL, Award, ¶ 250 (March 5, 2011) (“What international law prohibits is not a possible error in law, but a system of justice which falls below a minimum standard so as to lead to an inevitable *denial of justice*”) [emphasis added]; **RL-083**: *Flughafen v. Venezuela* (Award), ¶¶ 391-392 (disclaiming that the exhaustion of local remedies is a requirement for the admissibility of treaty-based claims, but holding that “[i]t is a different issue that the exhaustion of local remedies may constitute a substantive requirement to assess the existence of *denial of justice*”) [emphasis added] [free translation]; **RL-084**: *Apotex Inc. v. Government of the United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, ¶ 257 (June 14, 2013) (“...any claim under NAFTA which is based upon a *judicial act*, is subject to a requirement that all judicial remedies within the host State first be exhausted”) [emphasis added]; **RL-055**: *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Submission of the United States of America, ¶ 11 (June 21, 2019) (“It is well-established that the international responsibility of States may not be invoked with respect to *non-final judicial acts*, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.”) [Emphasis added]. Moreover, neither *Alps Finance* nor *Apotex* are ICSID cases, so they are not relevant to the application of Article 26 of the ICSID Convention. Colombia also refers to the US submission in *Lion* but fails to mention that the actual award supports Foster Wheeler’s position. The *Lion* tribunal confirmed that any purported requirement to exhaust local judicial remedies applies only to denial of justice allegations. **CL-068**: *Lion Mexico Consolidated L.P. v. United Mexican States*, ICSID Case No. ARB(AF)/15/2, Award, ¶ 549 (Sept. 20, 2021) (“...a claim for *denial of justice* only becomes ripe when the remedies available in the legal system of the host State to impeach the decision have been exhausted.”) [Emphasis added].

responsibility of States may not be invoked with respect to *non-final judicial acts*, unless recourse to further domestic remedies is obviously futile or manifestly ineffective.”¹¹⁶ But the acts of the CGR are administrative, not judicial, so the non-disputing party submission lends no support to Colombia’s attempt to impose a requirement to exhaust local judicial remedies for every treaty-based claim.¹¹⁷ Colombia’s attempt to pass off the Tribunal’s serious procedural irregularities as an application of customary international law has no basis. While the application of an exhaustion requirement to claims for denial of justice is a subject of debate, there is no award or jurisprudence supporting its application to other investor-state claims, and Colombia provides none.

105. Here, the measures complained of in the Request for Arbitration (with the arguable exception of the denial of justice allegation) were complete before any judicial act had taken place, and the fact that Foster Wheeler might theoretically have had a remedy before the Colombian courts is irrelevant, as Article 26 of the ICSID Convention makes clear.
106. This procedural irregularity also meets the seriousness requirement of Article 52(1)(d) of the ICSID Convention. Because of the Tribunal’s procedural errors, Foster Wheeler was deprived of an effective ruling on all but one of its initial claims and on all of its ancillary claims. As explained in detail in both the initial and amended requests for arbitration, and in Foster Wheeler’s written and oral submissions in response to Colombia’s application, those were meritorious claims that could, and should, have led to an award in favor

¹¹⁶ **RA-021**: Submission of the United States of America in the Underlying Arbitration, ¶ 5 (April 4, 2022).

¹¹⁷ **AA-003**: Colombia’s Memorial on Preliminary Objections, ¶ 82.

of Foster Wheeler. The Tribunal's failure to analyze those claims severely prejudiced Foster Wheeler and undermined the integrity of the arbitration.¹¹⁸

C. Colombia Has Failed to Rebut Foster Wheeler's Showing that the Tribunal Manifestly Exceeded Its Powers

107. In this Section, Foster Wheeler will first address Colombia's mischaracterization of the standard for finding that a tribunal has manifestly exceeded its powers. Foster Wheeler will then demonstrate how Colombia has failed to rebut Foster Wheeler's showing that the Tribunal in this case manifestly exceeded its powers by (i) failing to exercise its existing jurisdiction; (ii) imposing a non-existent requirement to exhaust local judicial remedies as a precondition for every TPA claim; and (iii) failing to apply, or egregiously misapplying, the proper law.

1. Foster Wheeler need not establish that the result would have been different if the Tribunal had not manifestly exceeded its powers

108. Unable to rebut Foster Wheeler's showing that the Tribunal manifestly exceeded its powers, Colombia attempts to create a non-existent requirement for Foster Wheeler to prove that, absent the manifest excess of powers in question, the final result would have been different.¹¹⁹ That position has no basis.

109. The overwhelming weight of authority supports the conclusion that the requirement that an excess of powers be "manifest" concerns whether it is

¹¹⁸ In addition to being a serious departure from a fundamental rule of procedure, the Tribunal's imposition of a non-existent requirement to exhaust local judicial remedies for every TPA claim is also a manifest excess of powers under Article 52(1)(b) of the ICSID Convention.

¹¹⁹ Colombia's Counter-Memorial on Annulment, ¶ 108.

obvious and perceived with ease, which is consistent with the plain meaning of the word. As such, there is no requirement to analyze the severity of the excess of powers or its influence on the award. Indeed, committees have repeatedly held that “manifest” means “perceived without difficulty,”¹²⁰ “self-evident,”¹²¹ and “plain on its face.”¹²² The *Dogan* committee aptly explained why this approach is consistent with the general rule of treaty interpretation expressed in Article 31 of the Vienna Convention:

[The committee] notes that the scope of the term “manifest” must not expand the concept beyond “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” as provided in the Vienna Convention. The dictionary meaning of “manifest” is “clearly apparent”, “obvious.”¹²³

110. Colombia, for its part, relies on the annulment decisions in *Soufraki*, *Libananco*, and *Standard Chartered Bank*.¹²⁴ Although those committees referred in passing to an excess of powers having to be “substantively serious” for it to be manifest,¹²⁵ none of them explained how such a requirement is to

¹²⁰ **AALA-034:** *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).

¹²¹ **AALA-007:** *Wena Hotels v. Egypt* (Annulment), ¶ 25.

¹²² **RALA-004:** *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, ¶ 41 (June 29, 2005).

¹²³ **AALA-071:** *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, ¶ 103 (Jan. 15, 2016).

¹²⁴ Colombia’s Counter-Memorial on Annulment, ¶ 108.

¹²⁵ **AALA-033:** *Soufraki v. United Arab Emirates* (Annulment), ¶ 40. The *Libananco* and *Standard Chartered Bank* committees simply referred to the findings of the *Soufraki* committee.

be applied in practice, nor did any of them impose on the moving party the burden of showing that the outcome of the underlying case would have been different absent the tribunal's error. Applying that requirement would require committees to speculate as to how the arbitration would have proceeded had the tribunal not exceeded its powers: in effect, to retry the case. Here, that would require the Committee to attempt to predict the outcome of this case on a never-developed full record. All that is before the Committee is the abbreviated record made in response to Colombia's preliminary objections application. Such speculation based on an incomplete record is surely outside a committee's scope of authority.¹²⁶

111. Strikingly, in *Glencore (I)*, Colombia rejected the very standard for which it now advocates. Recounting the parties' arguments in that annulment proceeding, the committee noted that, "[a]ccording to Colombia, the requirement that the excess be 'manifest' relates not to the gravity of the excess but to whether or not it can readily be determined."¹²⁷ The committee agreed with Colombia and held as follows: "The requirement that the excess of powers be 'manifest' refers to how readily apparent the excess is, rather than to its gravity."¹²⁸ Colombia should not be allowed to repudiate a position it defended and succeeded on in a prior case, particularly when its prior position was in accord with accepted principles of international law.

112. In conclusion, consistent with the plain meaning of the word "manifest," an excess of powers meets that requirement when it is easily discernible. To

¹²⁶ See *supra* Section II.1.

¹²⁷ AALA-050: *Glencore v. Colombia* (Annulment), ¶ 201.

¹²⁸ *Id.* ¶ 229.

succeed in an annulment application, an applicant need not prove that the final result would have been different but for the excess of powers in question.

2. The Tribunal failed to exercise its jurisdiction as to almost all of the claims before it

113. Nowhere in its Counter-Memorial does Colombia dispute that a tribunal exceeds its powers when it fails to exercise its existing jurisdiction and issues an *infra petita* award.¹²⁹ Foster Wheeler has already established that the Tribunal failed to rule in any meaningful sense on most of the initial claims and all of the ancillary claims that were properly before it.¹³⁰ Foster Wheeler also showed that Colombia's *post hoc* justifications for the Tribunal's failures lack any basis.¹³¹ To avoid repetition, Foster Wheeler incorporates those sections by reference.

114. In any case, for the sake of completeness, Foster Wheeler will rebut the curt response offered by Colombia to this ground for annulment. In its Counter-Memorial, Colombia claims that the Tribunal held that all the claims were "premature" and that "[t]he Tribunal grounded this conclusion in established principles of international law, citing *Flughafen v. Venezuela* for the proposition that a claim cannot ripen while local remedies remain available."¹³²

¹²⁹ In its Memorial on Annulment, Foster Wheeler referred to the annulment decisions that have held that a failure to exercise existing jurisdiction is a manifest excess of powers, including *Micula* (AALA-030, ¶ 126), *Lucchetti* (AALA-027, ¶ 99), *Orascom* (AALA-028, ¶ 155), and *Helnan* (AALA-031, ¶ 41).

¹³⁰ *Supra* Section II.4.

¹³¹ *Id.*

¹³² Colombia's Counter-Memorial on Annulment, ¶ 334.

115. Colombia, once again, mischaracterizes the Tribunal's reasoning. The Tribunal made those findings in relation to denial of justice only.¹³³ There was no individualized analysis, or effective ruling, regarding every other claim raised by Foster Wheeler. Indeed, the only authority the Tribunal cited, the award in *Flughafen v. Venezuela*, makes clear that any purported requirement to exhaust local judicial remedies applies solely, if at all, to an allegation of denial of justice, but not to every other treaty-based claim. In the words of the *Flughafen* tribunal:

By virtue of this provision [Article 26 of the ICSID Convention], in ICSID arbitrations States waived the exhaustion of local remedies as a requirement of jurisdiction or admissibility, except if a State so specifically demands as a condition of its consent to an ICSID arbitration. Venezuela did not include in any of its BITs, nor in any other document, the exception permitted by Article 26 of the ICSID Convention. *In consequence, the exhaustion of local remedies may not constitute a requirement of admissibility of the claim or for the jurisdiction of the Centre or for the competence of the Tribunal.*

*A different matter is that the exhaustion of local remedies may constitute a substantive requirement to assess the existence of a denial of justice. There cannot be international responsibility of a State for denial of justice if there is an effective internal remedy against the internal decision that is being challenged. But this condition, being inherent to the wrong of denial of justice, will be analyzed in the merits section...*¹³⁴

¹³³ **AA-007:** Award, ¶¶ 215-216.

¹³⁴ **RL-083:** *Flughafen v. Venezuela* (Award), ¶¶ 391-392 [emphasis added] [free translation].

116. As discussed above, Foster Wheeler raised claims other than denial of justice. The Tribunal, however, chose to analyze only the denial of justice allegations and ignore all the other components of Foster Wheeler’s case. This failure to rule on claims properly before the Tribunal—a paradigmatic example of an *infra petita* award—is readily apparent and therefore “manifest.” The Award has 296 paragraphs, only 32 of which, numbered 193 through 224, contain any substantive analysis of Colombia’s objections. In none of those 32 paragraphs does the Tribunal analyze in any meaningful sense claims other than denial of justice. And while there is no requirement for the excess of powers to be “substantively serious,” that standard is also met in this case. The Tribunal’s wrongful failure to engage with the case as it was presented prejudiced Foster Wheeler and deprived it of the possibility of obtaining a favorable award based on the meritorious claims set forth both in the initial and the amended requests for arbitration.

3. The Tribunal imposed a non-existent requirement to exhaust local judicial remedies as a precondition for every TPA claim

117. Foster Wheeler has already established that the Tribunal imposed a non-existent requirement to exhaust local judicial remedies as a precondition for every TPA claim, and not just for denial of justice.¹³⁵ Foster Wheeler also rebutted Colombia’s attempt to pass off that serious irregularity as an application of customary international law.¹³⁶ To avoid repetition, Foster Wheeler incorporates those sections by reference.

¹³⁵ *Supra* Section II.5.

¹³⁶ *Id.*

118. The fact that the Tribunal imposed this non-existent requirement to exhaust local judicial remedies is both a serious departure from fundamental procedural rules governing the admissibility of claims and a manifest excess of powers. For instance, the *Helnan* tribunal held that the measures at issue in that case could not constitute a treaty breach because the investor “never attempted to challenge the downgrading before the competent Egyptian administrative courts.”¹³⁷ That is precisely what the *Foster Wheeler* Tribunal held in this case.¹³⁸ In the subsequent annulment proceeding, the *Helnan* committee held that this specific finding was a manifest excess of powers and, therefore, a ground for annulment:

For the reasons set out below, arguments (a), (c) and (d) do not justify annulment of the Award. The position is different in relation to argument (b) (failure to challenge the decision in the Egyptian courts). The Tribunal’s finding on this issue (principally found in the Award at paragraph 148) 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.¹³⁹

119. Colombia’s Counter-Memorial does not explain why the same conclusion should not apply here, nor could it. *Foster Wheeler* had no obligation to pursue local judicial remedies in Colombia before resorting to an international

¹³⁷ **AALA-072:** *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, ¶ 148 (July 3, 2008).

¹³⁸ **AA-007:** Award, ¶¶ 215-216.

¹³⁹ **AALA-031:** *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, ¶ 9 (June 14, 2010).

arbitration. As in *Helnan*, the imposition of a requirement to exhaust local judicial remedies as a precondition for every treaty-based claim is a manifest excess of powers and calls for annulment. As discussed above, the ICSID Convention abrogated any such requirement, and Colombia's failure to take an exception to that, as allowed by the Convention, confirms that there was no such requirement for the admissibility of Foster Wheeler's claims.

120. That principle applies with even more force when dealing with a treaty like the TPA, which includes both a fork-in-the-road provision¹⁴⁰ and a waiver provision.¹⁴¹ Under the fork-in-the-road provision, Foster Wheeler had a choice of remedies: it could challenge the actions of the CGR either before the Colombian courts or before an international tribunal. The decision as to which forum would hear the claims is definitive. If Foster Wheeler elected to commence an international arbitration, under the waiver provision, it then had to waive any right to commence or continue with any local proceedings. Given the interplay between those two provisions, there cannot be a requirement to exhaust local judicial remedies because then no claim could ever succeed. If such a requirement existed, an investor would have to exhaust all local judicial remedies before commencing an arbitration. But that resort to local remedies would trigger the fork-in-the-road provision, rendering all the claims in the arbitration inadmissible because the investor elected to have

¹⁴⁰ **CL-001**: Chapter 10 of the TPA, Annex 10-G ("For greater certainty, if an investor of the United States elects 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, that election shall be definitive, and the investor may not thereafter submit the claim to arbitration under Section B.").

¹⁴¹ *Id.* Art. 10.18.2(b) (requiring the waiver "of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.").

the local courts hear its claims. Furthermore, if there were a requirement to exhaust all available judicial remedies, the waiver provision would become superfluous. At the time of commencing an arbitration, there would not be any local judicial remedies left to waive.

121. In response, Colombia argues that the fork-in-the-road provision is “entirely irrelevant to the Tribunal’s analysis” because “the election of a forum does not, in and of itself, guarantee that a court or arbitral tribunal will admit the claims submitted to it.”¹⁴² That completely misses the point. If an investor were to comply with this alleged requirement to exhaust local judicial remedies before commencing an international arbitration, its treaty claims would then be held inadmissible because of the fork-in-the-road provision. If that party instead pursued arbitration, its claims would fail for failure to exhaust local remedies. Under the reading adopted by the Tribunal, no treaty claim could ever succeed, rendering the right to commence an international arbitration under the TPA completely illusory.¹⁴³

122. This excess of powers is “manifest” because it is easily discernible from the face of the Award, which clearly imposes a non-existent requirement to

¹⁴² Colombia’s Counter-Memorial on Annulment, ¶ 265.

¹⁴³ This is how Colombia describes the Tribunal’s ruling: “The Tribunal’s finding that claims based on the Ruling with Fiscal Liability were not ripe—because the ruling remained subject to judicial review—derives directly from the admissibility requirements set forth in Article 10.16.1 of the Treaty, which demand the existence of a measure capable of constituting a breach at the time a claim is submitted to arbitration.” *Id.* This just underscores how the Tribunal’s ruling is a manifest excess of powers. Such a ruling is simply incompatible with the TPA’s fork-in-the-road and waiver provisions. Colombia’s argument would only make sense if the Tribunal had invoked a ground for admissibility other than a purported failure to exhaust local remedies, such as a failure to comply with a cooling-off period. But in a treaty like the TPA, which includes both a waiver provision and a fork-in-the-road provision, holding claims inadmissible due to a failure to exhaust local judicial remedies renders the right to pursue arbitration a nullity.

exhaust local judicial remedies for every TPA claim, and not just for denial of justice.¹⁴⁴

4. The Tribunal failed to apply, or egregiously misapplied, the proper law

(i) The Tribunal failed to apply the proper law governing the interpretation of treaties

123. Colombia does not dispute that a failure to apply the proper law constitutes a manifest excess of powers.¹⁴⁵ In its Annulment Memorial, Foster Wheeler established that the Tribunal did not apply one of the most fundamental bodies of law: the rules of customary international law governing the interpretation of treaties, as crystallized in the Vienna Convention.¹⁴⁶ Specifically, the Tribunal did not apply those rules to interpret the TPA term “administrative adjudicatory proceedings.”¹⁴⁷ Colombia’s sole response is that “...while not expressly referring to the Vienna Convention, the Tribunal interpreted Article

¹⁴⁴ **AA-007:** Award, ¶¶ 215-216. To the extent the Tribunal’s imposition of a non-existent requirement to exhaust local judicial remedies for every TPA claim may also be understood as a gross misapplication of law, amounting to a failure to apply the law at all, Foster Wheeler also invokes that ground for annulment.

¹⁴⁵ Colombia’s Counter-Memorial on Annulment, ¶ 111.

¹⁴⁶ Foster Wheeler’s Memorial on Annulment, Section IV.B.3(i). Foster Wheeler, of course, is aware that the US has not ratified the Vienna Convention. But, as Colombia itself concedes, that is irrelevant: The Vienna Convention embodies rules of customary international law that are applicable regardless of whether any given country has ratified the Convention or not. Colombia’s Counter-Memorial on Annulment, ¶ 219.

¹⁴⁷ **CL-001:** Chapter 10 of the TPA, Art. 10.5.2(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.”).

10.5.2(a) of the Treaty in accordance with the customary rules of treaty interpretation.”¹⁴⁸

124. A simple reading of the Award shows that Colombia’s argument lacks any basis. The Tribunal’s interpretation of that treaty term is contained in just five paragraphs, 210 to 214. In none of those five paragraphs did the Tribunal engage with the most basic element of a Vienna Convention analysis, namely, a consideration of the “ordinary meaning to be given to the terms of the treaty.”¹⁴⁹ Indeed, nowhere in the Award did the Tribunal consider the ordinary meaning of the terms “administrative” or “adjudicatory.” There is also no consideration whatsoever of the TPA’s object and purpose, another of the basic elements of the general rule of treaty interpretation.¹⁵⁰

125. Because the TPA was authenticated in two languages, English and Spanish,¹⁵¹ Article 33 of the Vienna Convention provides specific rules of interpretation.¹⁵² But there is nothing in the Award that even resembles an Article 33 analysis. The Tribunal asserted that it relied on its reading of the Spanish version of the TPA,¹⁵³ but it never engaged in a “comparison of the

¹⁴⁸ Colombia’s Counter-Memorial on Annulment, ¶ 218.

¹⁴⁹ **RL-053**: Vienna Convention, Art. 31.

¹⁵⁰ *Id.* Colombia contends that, if the terms are clear, there is no need for any further interpretation. Colombia’s Counter-Memorial on Annulment, ¶ 221. That is beside the point in a case like this one in which the Tribunal did not even analyze the ordinary meaning of the terms in question. In any case, a consideration of the “ordinary meaning” of the terms is just one of several components of the general rule of treaty interpretation set forth in Article 31. That provision does not prioritize any single element over the others.

¹⁵¹ **AA-041**: Chapter 23 of the TPA, Art. 23.6.

¹⁵² **RL-053**: Vienna Convention, Art. 33.

¹⁵³ **AA-007**: Award, ¶ 211.

authentic texts” to ascertain if there is a difference in meaning, as it was required to do,¹⁵⁴ and its conclusion regarding the Spanish text is simply an *ipse dixit*, without any analysis.¹⁵⁵ Colombia argues that the Tribunal considered that “the Spanish term *procedimiento contencioso administrativo* disclosed no such difference [in meaning]” obviating the need for an Article 33 analysis.¹⁵⁶ That statement, however, is nowhere to be found in the Award. The Tribunal never even analyzed the ordinary meaning of the terms in either Spanish or English. Nor did it analyze whether there was a potential difference in meaning in the two authentic versions of the TPA.

126. Colombia’s reliance on the annulment decisions in *Lucchetti* and *Continental Casualty* is equally unavailing. In *Lucchetti*, the Tribunal engaged in an extensive interpretation of the term “dispute.”¹⁵⁷ That interpretation was fundamental for the tribunal to determine whether it had jurisdiction *ratione temporis*.¹⁵⁸ The committee criticized the tribunal, noting that its reasoning was “somewhat simplified in relation to the Vienna Convention,” but the committee considered that this did not amount to an excess of powers.¹⁵⁹ Here, unlike the *Lucchetti* tribunal, the *Foster Wheeler* Tribunal did not even consider the ordinary meaning of the operative terms in either language. This

¹⁵⁴ **RL-053**: Vienna Convention, Art. 33.

¹⁵⁵ **AA-007**: Award, ¶ 211.

¹⁵⁶ Colombia’s Counter-Memorial on Annulment, ¶ 222.

¹⁵⁷ **AA-073**: *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, Award, ¶ 48 (Feb. 7, 2005).

¹⁵⁸ *Id.* ¶ 25.

¹⁵⁹ **AA-027**: *Lucchetti v. Peru* (Annulment), ¶ 116.

is not a case of a simplified Vienna Convention analysis; it is a case of a complete lack of analysis, as is evident from the few paragraphs of the Award that deal with this issue.

127. Similarly, the *Continental Casualty* tribunal also engaged in a comprehensive Vienna Convention analysis, considering both the ordinary meaning of the terms and the object and purpose of the treaty provision at issue.¹⁶⁰ The party seeking annulment there took issue with the way the tribunal applied the Vienna Convention, including the tribunal's reliance on a provision of the General Agreement on Tariffs and Trade (GATT) to interpret a provision from a different treaty.¹⁶¹ The committee rightfully held that those arguments were outside the scope of the provisions of the ICSID Convention on annulment.¹⁶² But that has nothing to do with this case, in which the Tribunal simply failed to conduct any analysis under the Vienna Convention. If anything, *Continental Casualty* supports Foster Wheeler's position because it accepts that an award may be annulled "if a tribunal fails to consider a specific provision of the applicable law."¹⁶³ That is the case here: the Tribunal failed to consider the rules of treaty interpretation embodied in Articles 31 and 33 of the Vienna Convention.

¹⁶⁰ **AAIA-074:** *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, ¶ 164 (Sept. 5, 2008).

¹⁶¹ **RALA-033:** *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, ¶¶ 89-90 (Sept. 16, 2011).

¹⁶² *Id.*

¹⁶³ *Id.* ¶ 93.

128. The Tribunal also failed to consider the background and the object and purpose of the treaty provision at issue. As explained below, the term “administrative adjudicatory proceedings” comes from the US Model BIT and has been included in treaties with countries that are not Spanish-speaking and do not have specialized courts of administrative review.¹⁶⁴ Moreover, the Tribunal’s reading means that administrative agencies hearing contested claims, like the CGR, are subject to no international standard of due process, a conclusion entirely at odds with the structure and purpose of the TPA, which includes among its goals to “ensure a predictable legal and commercial framework for business and investment.”¹⁶⁵ Had the Tribunal considered the ordinary meaning of the terms used, it would have had to conclude that the terms “administrative” and “adjudicatory” were meant to distinguish the adjudicatory functions of an administrative agency from its rulemaking functions.

129. In sum, the Tribunal’s failure to apply the proper law, particularly the Vienna Convention and the TPA itself, is a textbook example of a manifest excess of powers that warrants the Award’s annulment.

(ii) In the alternative, the Tribunal egregiously misapplied the proper law governing the interpretation of treaties

130. Foster Wheeler maintains that the Tribunal in this case failed to apply the proper law. However, if this Committee were to hold that the Tribunal did

¹⁶⁴ See, e.g., **AALA-042**: US-Australia Free Trade Agreement, Chapter 11, Article 11.5(2)(a); **AALA-043**: US-Republic of Korea Free Trade Agreement, Chapter 11, Article 11.5(2)(a).

¹⁶⁵ **RL-002**: Preamble of the TPA.

apply the rules governing the interpretation of treaties, the Tribunal so egregiously misapplied those rules that the Award should be annulled.

131. In response, Colombia questions whether an egregious misapplication of law is a ground for annulment¹⁶⁶ and argues that, in any case, the Tribunal’s interpretation of the term “administrative adjudicatory proceedings” was consistent with international law.¹⁶⁷ Colombia is wrong on both counts.

132. The principle that an egregious misapplication of law may lead to annulment is not a matter of two “isolated decisions,” as Colombia wrongly argues.¹⁶⁸ Rather, there is a well-settled line of cases holding that an egregious misapplication of law is equivalent to a complete failure to apply the proper law and is therefore a ground for annulment.¹⁶⁹ Colombia refers to a series of decisions that draw a distinction between not applying the proper law and a mere error in the application of the law.¹⁷⁰ But that is irrelevant here. Foster

¹⁶⁶ Colombia’s Counter-Memorial on Annulment, ¶ 111.

¹⁶⁷ *Id.* ¶¶ 228 *et seq.*

¹⁶⁸ *Id.* ¶ 114.

¹⁶⁹ **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, ¶ 51 (Oct. 19, 2009) (“An egregious violation of the law would assume that there is a departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations”); **RALA-053**: *Caratube v. Kazakhstan* (Annulment), ¶ 81 (“...in exceptional circumstances, a gross or egregious error of law, acknowledged as such by any reasonable person, could be construed to amount to a failure to apply the proper law, and could give rise to the possibility of annulment”); **AALA-033**: *Soufraki v. United Arab Emirates* (Annulment), ¶ 86 (“Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law”); **RALA-009**: *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Application for Annulment of the Award, ¶ 164 (June 29, 2010) (“As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.”).

¹⁷⁰ Colombia’s Counter-Memorial on Annulment, ¶ 113.

Wheeler is not arguing that every error in the application of the law should lead to annulment. Instead, as has been accepted by several committees, there are errors in the application of the law that are so egregious as to amount to a failure to apply the proper law.

133. Given the line of cases holding that an egregious misapplication of the law is equivalent to not applying the proper law, it is not surprising that Colombia raised that same argument in prior cases. In *Glencore (I)*, “Colombia assert[ed] that the Tribunal manifestly exceeded its powers by disregarding the proper legal framework for assessing the admissibility of evidence, and, in the alternative, that it committed such gross and egregious misapplications of the law as to amount to a failure to apply the applicable law.”¹⁷¹ The committee in that case accepted that this could lead to annulment under the proper circumstances.¹⁷²

134. Colombia’s reading of the drafting history of the ICSID Convention is also wrong and lends no support to Colombia’s arguments. Initially, there was a proposal that “suggested that revision should be available also where the award was manifestly erroneous in law.”¹⁷³ Mr. Broches, the World Bank’s General Counsel, “responded that the question of erroneous application of the law could be properly dealt with, if at all, *under the Article providing for annulment*.”¹⁷⁴ After this exchange, one of the delegates proposed including a specific provision in the annulment article referring to a “manifestly

¹⁷¹ **AALA-050**: *Glencore v. Colombia* (Annulment), ¶ 242.

¹⁷² *Id.* ¶ 312.

¹⁷³ **AALA-014**: Schreuer, Commentary at 1286.

¹⁷⁴ *Id.* [emphasis added].

incorrect application of the law,” but the proposal was rejected.¹⁷⁵ Properly understood, this drafting history shows that the drafters did contemplate that an erroneous application of the law could in certain cases constitute a ground for annulment, even if they declined to introduce a specific reference in that sense in Article 52. The lack of a specific reference is, in any case, not dispositive. For example, Article 52 does not include a specific reference to a failure to apply the law. Despite that, it is widely accepted that this failure constitutes a manifest excess of powers and is an annulment ground.

135. This is precisely one of those cases in which an error in the application of the law is so egregious that it amounts to not applying the law at all. The Tribunal’s interpretation of the term “administrative adjudicatory proceedings” is not simply wrong; it is wholly inconsistent with the TPA’s origin. As Foster Wheeler explained, and Colombia did not dispute, the phrase “administrative adjudicatory proceedings” comes from the US Model BIT.¹⁷⁶ That phrase, taken from a Model BIT used by the US to negotiate investment agreements with several countries, simply cannot be a reference to a specialized body of Colombian courts that hear disputes involving the Colombian government. But that is what the Tribunal held in this case. The Tribunal referenced Foster Wheeler’s “argument that the Ruling with Fiscal Liability is the result of an administrative adjudicatory proceeding falling within the ambit of Article 10.5.2(a) of the Treaty, thus allowing a claim for denial of justice.”¹⁷⁷ The Tribunal, however, held that “administrative adjudicatory proceedings” refers

¹⁷⁵ *Id.*

¹⁷⁶ **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**).

¹⁷⁷ **AA-007**: Award, ¶ 210.

to proceedings before the Colombian “administrative adjudicatory jurisdiction.”¹⁷⁸ In consequence, the Tribunal considered that the actions of the CGR were not subject to the standard protecting foreign investors from a denial of justice.¹⁷⁹

136. In response, Colombia notes that the acts of administrative agencies in the US are subject to judicial review.¹⁸⁰ In consequence, Colombia argues, “[t]he U.S. drafters of the U.S. Model BIT language accordingly understood ‘administrative adjudicatory proceedings’ as referring to proceedings before the reviewing court—the federal courts that exercise legality control of administrative acts—and not the agency proceedings themselves.”¹⁸¹ Colombia provides no authority or evidence in support of that statement, and there is none. In any case, such a reading would nullify the TPA’s fork-in-the-road or election of remedies provision, as noted above.¹⁸² The TPA affords Colombian investors in the US, as well as US investors in Colombia, the possibility of challenging the acts of administrative agencies either before

¹⁷⁸ *Id.*

¹⁷⁹ The Tribunal did not merely hold that the actions of the CGR could never be the subject of a claim under the TPA until all judicial remedies were exhausted but also held that the TPA provided no guarantee of due process at all before the CGR. *Id.* ¶¶ 210-214. That construction flies in the face of the purpose of the TPA and of accepted standards of due process in international law. As the tribunal in *Glencore (I)* held, “[t]he rule of law requires that in judicial proceedings (administered by a court of law or a tribunal) and in administrative proceedings (administered by the public administration) due process be respected...It is undisputed that a breach of due process, whether in judicial proceedings or in administrative proceedings, may result in the violation of the FET standard.” **CL-005: *Glencore Int’l A.G. and C.I. Prodeco S.A. v. Republic of Colombia***, ICSID Case No. ARB/16/6, Award, ¶¶ 1318-1319 (Aug. 27, 2019).

¹⁸⁰ Colombia’s Counter-Memorial on Annulment, ¶ 244.

¹⁸¹ *Id.*

¹⁸² **CL-001**: Chapter 10 of the TPA, Annex 10-G.

the local courts or before an international tribunal. Colombia's position reads that provision out of existence by requiring that investors always challenge the acts of administrative agencies before the local courts, which would then extinguish the right to pursue international arbitration. Colombia's strained *post hoc* arguments do not remedy the Tribunal's egregiously erroneous interpretation of the TPA.

137. Moreover, Colombia's official position on this issue is set out in a ruling of the joint US-Colombia Free Trade Commission, issued after the rendition of the Award. According to that official interpretation, the TPA does guarantee due process rights in administrative proceedings, albeit with the inexplicable qualification that such rights are not currently at "the same level" in administrative proceedings as in judicial proceedings.¹⁸³ Colombia's attempt to defend the Tribunal's reading of Article 10.5.2(a) of the TPA directly contradicts its official interpretation of the TPA.
138. In conclusion, this is one of the cases in which a tribunal commits an error in the application of the law that is so egregious as to constitute a failure to apply the law at all. The resulting Award constitutes a manifest excess of powers and should therefore be annulled under Article 52(1)(b) of the ICSID Convention.¹⁸⁴

¹⁸³ **AA-LA-046**: Decision No. 9 of the Free Trade Commission of the United States-Colombia Trade Promotion Agreement, ¶ 3(b) (January 15, 2025).

¹⁸⁴ To the extent that this gross misapplication of the law may also mean that the Tribunal offered frivolous reasons, which amounts to not offering any reasons at all, Foster Wheeler also invokes that ground for annulment.

D. Colombia Has Failed to Rebut Foster Wheeler’s Showing that the Award Fails to State the Reasons on Which It Is Based

139. In this Section, Foster Wheeler will show that Colombia has failed to rebut three points. The Tribunal (i) failed to state reasons supporting its decision to hold all of Foster Wheeler’s claims inadmissible; (ii) relied on contradictory and mutually exclusive reasons; and (iii) ignored relevant evidence on which both parties relied.

1. The Award fails to state any of the reasons leading to the dismissal of most of the claims raised by Foster Wheeler

140. Foster Wheeler has shown above that the Tribunal failed to meaningfully consider most of the initial claims and all of the ancillary claims.¹⁸⁵ To avoid repetition, Foster Wheeler incorporates those sections by reference. The Tribunal’s failure to engage with the case before it is a serious departure from the fundamental rule of procedure that guarantees the parties the right to be heard, a manifest excess of powers, and a failure to state reasons.¹⁸⁶

141. Colombia’s sole response on this point is to argue that a tribunal is not required to address every single argument.¹⁸⁷ But that is a mischaracterization of Foster Wheeler’s position. Foster Wheeler is not arguing that a tribunal must address every single argument and sub-argument raised by the parties. Foster Wheeler’s argument is that a tribunal is obligated, under Article 48(3)

¹⁸⁵ *Supra* Sections II.4 and II.2.

¹⁸⁶ Contrary to Colombia’s arguments, there is nothing improper in Foster Wheeler alleging that a single error constitutes several distinct grounds for annulment. *See AALA-014*: Schreuer, Commentary at 1259 (“Practice has demonstrated...that the same set of facts is often seen to amount to different grounds for annulment simultaneously.”).

¹⁸⁷ Colombia’s Counter-Memorial on Annulment, ¶ 338.

of the ICSID Convention, to “deal with every question submitted” to it.¹⁸⁸ The other authentic versions of the Convention help clarify the meaning of the word “question.” The Spanish version of the Convention uses the word “*pretensiones*.”¹⁸⁹ The French version uses the term “*chefs de conclusions*.”¹⁹⁰ Analyzing the different versions of the Convention, the *Daimler* committee held that “it seems without doubt that the words ‘every question’ in the English version refer to the heads of claim of the parties (‘*las pretensiones*’ in the Spanish version, *les chefs de conclusions* in the French version).”¹⁹¹

142. Here, Foster Wheeler submitted several questions or heads of claim to the Tribunal. Those heads of claim included: first, whether Colombia breached the FET standard of protection. That, in turn, included four separate alleged FET violations: (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.¹⁹² Second, whether Colombia breached the national treatment standard of protection.¹⁹³ Third, whether Colombia indirectly expropriated Foster

¹⁸⁸ AALA-006: ICSID Convention, Art. 48(3).

¹⁸⁹ AALA-075: ICSID Convention [Spanish version], Art. 48(3).

¹⁹⁰ AALA-076: ICSID Convention [French version], Art. 48(3).

¹⁹¹ AALA-058: *Daimler v. Argentina* (Annulment), ¶ 87.

¹⁹² AA-001: Foster Wheeler’s Request for Arbitration, ¶¶ 97-173.

¹⁹³ *Id.* ¶¶ 174-178.

Wheeler’s investment.¹⁹⁴ Fourth, whether Colombia breached an umbrella clause imported into the TPA through the TPA’s MFN provision.¹⁹⁵ And fifth, whether Colombia breached the PMC Contract, which constituted an investment agreement under the TPA.¹⁹⁶ Foster Wheeler also asserted ancillary claims challenging actions of the CGR that took place after the arbitration’s commencement.¹⁹⁷

143. Despite being under an obligation to analyze all of those questions or heads of claim, the Tribunal analyzed only the denial of justice component of the FET claim. Despite that limited analysis, and without offering any reasons at all, the Tribunal held all the claims, not just denial of justice, inadmissible.¹⁹⁸ That amounts to a complete failure to state reasons and is itself a ground for annulment.
144. To the extent that Colombia argues that the Tribunal’s findings on an alleged “prematurity” obviated the need for an individualized analysis of each question or head of claim, that argument lacks any plausible basis. As Foster Wheeler has already explained, the Tribunal’s finding of “prematurity” was made only in reference to denial of justice and rested on authorities dealing exclusively with that doctrine.¹⁹⁹ The fact that the Tribunal analyzed a single component of a single claim obviously did not relieve it of its obligation to

¹⁹⁴ *Id.* ¶¶ 179-187.

¹⁹⁵ *Id.* ¶¶ 188-200.

¹⁹⁶ *Id.* ¶¶ 201-205.

¹⁹⁷ **AA-014**: Foster Wheeler’s Amended and Restated Request for Arbitration.

¹⁹⁸ **AA-007**: Award, ¶ 296.

¹⁹⁹ *Id.* ¶¶ 215-216.

analyze all of the other claims, none of which turned on whether there had been a denial of justice. Colombia cites no support for that proposition and there is none.

145. Moreover, as to the ancillary claims, the Award does not even go through the formality of invoking its decision on denial of justice and then declaring the claims in question inadmissible. It is simply silent as to those claims, other than the statement in the Award's dispositive section that "the Claimants' claims are inadmissible."²⁰⁰

146. In sum, holding several claims inadmissible, without offering any supporting reasons, is precisely the type of case that calls for annulment under Article 52(1)(e) of the ICSID Convention.

2. The reasons contained in the Award regarding the ripeness of Foster Wheeler's claims are internally contradictory and therefore amount to no reasons at all

147. Colombia accepts that offering contradictory reasons may amount to not offering any reasons at all and therefore constitute a ground for annulment.²⁰¹ In its Annulment Memorial, Foster Wheeler demonstrated that the reasoning of the Tribunal regarding the ripeness of Foster Wheeler's claims was contradictory and internally inconsistent.²⁰² When ruling on preliminary objections, the TPA mandates that the tribunal "consider any relevant facts not in dispute."²⁰³ And indeed, "the Tribunal accept[ed] that when the Fiscal

²⁰⁰ *Id.* ¶ 296.

²⁰¹ Colombia's Counter-Memorial on Annulment, ¶ 146.

²⁰² Foster Wheeler's Memorial on Annulment, Section IV.C.4.

²⁰³ **CL-001**: Chapter 10 of the TPA, Art. 10.20.4(c).

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.”²⁰⁴ Only a few paragraphs later, the Tribunal said as follows: “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.”²⁰⁵ Those statements simply cannot be reconciled with one another.

148. Both the TPA and accepted practice in investor-state arbitration allow the Tribunal to consider facts not in dispute, regardless of whether they occurred before or after the time of filing of the Request for Arbitration. The Tribunal itself accepted that “evidence associated with the claims may, in certain instances, be made available only after the filing of the appropriate request for arbitration.”²⁰⁶ The Tribunal did caution that “this shall not be deemed a blank check allowing a claimant to introduce documents periodically throughout the arbitration.”²⁰⁷ But here, it was Colombia, not Foster Wheeler, that submitted a full copy of the final administrative act.²⁰⁸ It was clear, then, that the existence of a final administrative act was undisputed and established in the record by evidence submitted by Colombia.

149. Colombia attempts to explain away this contradiction by pointing to the Tribunal’s comments that Foster Wheeler could still challenge the CGR

²⁰⁴ **AA-007**: Award, ¶ 208.

²⁰⁵ *Id.* ¶ 221.

²⁰⁶ *Id.* ¶ 205.

²⁰⁷ *Id.*

²⁰⁸ Colombia introduced the CGR’s first instance decision into the record as Exhibits **R-071** to **R-083**. Colombia then introduced the CGR’s second instance decision into the record as Exhibits **R-101** to **R-105**.

Decision before the Colombian courts.²⁰⁹ As discussed before, those comments related, at most, only to denial of justice. They did not, and could not, relate to any of the other claims raised by Foster Wheeler, which did not turn on whether there had been a denial of justice or whether Foster Wheeler had exhausted local judicial remedies in Colombia.

150. The Tribunal's contradictory statements, which effectively cancel each other out, are the equivalent of not offering any reasons at all. The Tribunal acknowledged that, consistent with the TPA, it could consider undisputed facts. It then accepted, consistent with evidence Colombia itself introduced into the record, that the CGR had issued a final administrative decision. That cannot be reconciled with the Tribunal's decision to hold all the claims inadmissible partly because a final administrative act was not in existence when the Request for Arbitration was filed.

3. The Tribunal's failure to engage with highly relevant and probative evidence amounts to a failure to state reasons

151. As explained before, in deciding Colombia's preliminary objections, the Tribunal had to assume that the facts pleaded by Foster Wheeler were true, including the facts underlying the futility of exhausting local judicial remedies.²¹⁰ The Tribunal failed to do this, which is in and of itself a ground for annulment.²¹¹ But putting that to one side, the fact is that Foster Wheeler, although not bearing any evidentiary burden whatsoever, did submit evidence of futility in the form of the witness statement by the CGR's former General

²⁰⁹ Colombia's Counter-Memorial on Annulment, ¶ 325.

²¹⁰ **CL-001**: Chapter 10 of the TPA, Art. 10.20.4(c).

²¹¹ *Supra* Section II.3.

Counsel, Mr. César Torrente.²¹² By ignoring that evidence and falsely stating that Foster Wheeler had submitted none, the Tribunal failed to state reasons for its determination.²¹³ In response, Colombia questions (i) whether ignoring evidence could lead to annulment; (ii) whether the Tribunal ignored the evidence; and (iii) whether the evidence was material.²¹⁴ Those arguments lack basis.

152. First, Colombia argues that a tribunal is not under an obligation to analyze each piece of evidence submitted by the parties.²¹⁵ But that is not what Foster Wheeler alleged. As various committees have held, this ground for annulment is limited to a total failure to address highly relevant evidence.²¹⁶ Logically, if a tribunal may simply ignore highly relevant evidence, particularly evidence on which both parties relied,²¹⁷ then the obligation to state reasons becomes a hollow formality. Colombia itself sought annulment in *Glencore*

²¹² **CWS-1 Torrente**, ¶ 20 (stating 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).”).

²¹³ **AA-007: Award**, ¶ 217 (“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.”).

²¹⁴ Colombia’s Counter-Memorial on Annulment, ¶¶ 310 *et seq.*

²¹⁵ *Id.* ¶ 311.

²¹⁶ **AALA-055: *TECO v. Guatemala*** (Annulment), ¶ 131 (“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”); **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) (holding that this ground for annulment “concerned the exceptional case in which a total failure to address ‘highly relevant’ evidence amounted to a failure to state reasons under Article 52(1)(e).”) [Emphasis in the original].

²¹⁷ **AA-008: Provisional Measures Hearing Transcript**, at 63:16-64:2.

(I) because the tribunal there “closed its eyes to evidence” that could allegedly prove acts of corruption.²¹⁸ Here, the Tribunal closed its eyes to the only evidence before it regarding futility.

153. Second, Colombia argues that the Tribunal did not ignore the evidence, but that it implicitly considered it.²¹⁹ That argument is inconsistent with the plain text of the Award. The Tribunal did not even make a general statement that it considered the evidence submitted by Foster Wheeler to be unpersuasive. It plainly and falsely stated that Foster Wheeler had not submitted any evidence on this point: “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.”²²⁰ Colombia’s reference to *Pawłowski* is unavailing. That committee simply held that a tribunal need not expressly refer to an exhibit or a document that it does not deem to be material.²²¹ That decision does not support the proposition that a tribunal may state that no evidence was submitted when evidence exists, much less that silence concerning the only evidence offered proves that the tribunal considered the evidence and rejected it.

²¹⁸ **AALA-050**: *Glencore v. Colombia* (Annulment), ¶ 190.

²¹⁹ Colombia’s Counter-Memorial on Annulment, ¶ 312.

²²⁰ **AA-007**: Award, ¶ 217.

²²¹ **RALA-050**: *Pawłowski AG and Project Sever s.r.o. v. Czech Republic*, ICSID Case No. ARB/17/11, Decision on Annulment, ¶ 159 (March 7, 2025).

154. Colombia's reliance on *Suez* is equally unavailing.²²² That committee accepted the *TECO* standard but held that it had not been met in that case.²²³ The committee held that "[i]t can rather be reasonably inferred from the Tribunal's reasoning that it did consider the evidence before it and reached its conclusions on that evidentiary basis, albeit without discussing in detail any particular item filed by either Party."²²⁴ But the *Suez* committee distinguished that situation from a case in which the tribunal says there is insufficient evidence on a particular issue "without specifying why the expert reports submitted by the parties did not qualify as such evidence."²²⁵ The procedural irregularity is even more serious here because the Tribunal falsely stated that Foster Wheeler had not presented any evidence. Putting to one side that the TPA precluded any weighing of evidence on a 10.20.4 application, there is simply no way to conclude from the text of the Award that the Tribunal considered and rejected Mr. Torrente's witness statement.
155. Finally, Colombia tries to downplay the relevance of Mr. Torrente's witness statement. Colombia apparently takes issue with the number of times Foster Wheeler referred to the witness statement in its briefs.²²⁶ That has no basis. First, the number of times a piece of evidence is referred to does not determine its probative value or legal impact. Second, Colombia simply ignores the fact that counsel for Foster Wheeler specifically referred to the Torrente witness

²²² Colombia's Counter-Memorial on Annulment, ¶ 143.

²²³ **AALA-054**: *Suez v. Argentina* (Annulment), ¶ 299.

²²⁴ *Id.* ¶ 300.

²²⁵ *Id.*

²²⁶ Colombia's Counter-Memorial on Annulment, ¶¶ 314-315.

statement during oral argument and identified it as evidence that exhausting local judicial remedies in Colombia would have been futile.²²⁷ Finally, Colombia says nothing about the fact that it also relied on the Torrente witness statement in support of its own arguments in an earlier phase of the arbitration, which further underscores that this was material evidence that the Tribunal should not have ignored.²²⁸ In any event, there is no rule that only evidence that is repeatedly referred to in a party's submissions is to be taken into account.

156. Likewise, Colombia challenges the materiality of the evidence by arguing that it does not actually prove the fact that exhausting local judicial remedies would have been futile. Therefore, says Colombia, even if the Tribunal had considered the evidence, that would not have changed the end result.²²⁹ But that is not the relevant inquiry. As noted in the *TECO* decision, an annulment committee is not in a position to “determine whether the evidence that was ignored by the Tribunal would have had an impact on the Award or not.”²³⁰ The only thing that a committee may ascertain is whether “the Tribunal failed to observe evidence which at least had the potential to be relevant to the final outcome of the case.”²³¹ And that is precisely the case here. Excessive delay in the adjudication of cases, such as the one identified by Mr. Torrente in his witness statement, may lead to a finding that local judicial remedies are

²²⁷ **AA-012**: Hearing on Preliminary Objections Transcript, Volume 1, at 197:5-15.

²²⁸ **AA-008**: Provisional Measures Hearing Transcript, at 63:16-64:2.

²²⁹ Colombia's Counter-Memorial on Annulment, ¶¶ 317-319.

²³⁰ **ALA-055**: *TECO v. Guatemala* (Annulment), ¶ 135.

²³¹ *Id.*

effectively unavailable or futile.²³² Such a finding, in turn, leads to the inapplicability of any requirement to exhaust those remedies.²³³ The Tribunal should have reviewed and analyzed Mr. Torrente's witness statement and, based on that evaluation, assessed whether exhausting local judicial remedies in Colombia would have been futile, at least on a *prima facie* basis.²³⁴ The Tribunal, however, simply ignored the evidence and failed to provide any reasoning explaining whether it considered it insufficient or unpersuasive.

157. This undisputed failure to engage with highly relevant evidence on which both parties relied constitutes a failure to state reasons and is therefore an additional ground for the annulment of the Award.

E. If the Committee Finds that There Are Grounds for Annulment, It Should Decline Colombia's Invitation to Exercise Its Discretion to Refuse Annulment

158. Faced with the prospect of annulment, Colombia asks this Committee to take the unprecedented step of refusing to annul the Award as a matter of discretion even if there are grounds for annulment.²³⁵ The basis for that

²³² **AALA-056:** International Law Commission's Draft Articles on Diplomatic Protection with commentaries, at 48 ("That the requirement of exhaustion of local remedies may be dispensed with in cases in which the respondent State is responsible for an unreasonable delay in allowing a local remedy to be implemented is confirmed by codification attempts, human rights instruments and practice, judicial decisions and scholarly opinion."). *See also CL-068: Lion v. Mexico* (Award), ¶ 579 (applying the futility exception in a case in which "Claimant unsuccessfully pursued the *Amparo* Proceedings for three years before the two available instances, and withdrew such Proceedings at a time when continuation would have been obviously futile and no effective redress would be obtained.").

²³³ *Id.*

²³⁴ A final determination on this issue could only have been made at the merits stage.

²³⁵ Colombia's Counter-Memorial on Annulment, ¶¶ 99 *et seq.*

request is the fact that Foster Wheeler commenced a second arbitration against Colombia.²³⁶

159. There is no general principle allowing a committee simply to ignore the law and decline to annul an award that contains annulable errors. The *Tulip* committee held that “...once an *ad hoc* committee has established that a departure from a fundamental rule of procedure is serious, it no longer has the discretion not to annul.”²³⁷ The *Eiser* decision also notes that committees must consider the impact of the irregularity in question: “The impact will be material and require an annulment if the departure affects the legal right of the parties with respect to an outcome-determinative issue.”²³⁸ In consequence, in a case like this one, there is no discretion to refuse annulment of the Award. As Foster Wheeler has already established, the Tribunal seriously departed from several fundamental rules of procedure. Likewise, the remaining annulment grounds relate to irregularities that affected Foster Wheeler’s legal rights. Specifically, the irregularities here, which resulted in the Tribunal refusing to engage with meritorious claims, have severely affected Foster Wheeler’s right to be heard.

160. In any case, there is no reason for this Committee to refuse annulment due to the commencement of a new arbitration. Given the uncertainty regarding whether the Tribunal would analyze Foster Wheeler’s ancillary claims, and the possibility of those claims becoming time-barred, out of an abundance of caution, Foster Wheeler commenced a new arbitration, which ICSID

²³⁶ *Id.* ¶ 101.

²³⁷ **RALA-005**: *Tulip v. Turkey* (Annulment), ¶ 79. *See also* **AALA-009**: *Pey Casado v. Chile* (Annulment), ¶ 80.

²³⁸ **AALA-063**: *Eiser v. Spain* (Annulment), ¶ 254.

registered as Case No. ARB/25/16.²³⁹ To avoid the risk of any inconsistent outcomes, Foster Wheeler proposed that Colombia agree to stay that arbitration pending the resolution of this annulment proceeding. Colombia agreed, and that arbitration is currently stayed.²⁴⁰ If this annulment application succeeds, Foster Wheeler will seek to consolidate any resubmitted case with Case No. ARB/25/16. That consolidation will eliminate the risk of inconsistent outcomes. Under these circumstances, given that there is no risk whatsoever of parallel proceedings that may result in inconsistent outcomes, there is no reason for this Committee to exercise any discretion it may have to refuse to annul the Award.

F. Foster Wheeler Is Entitled to Its Attorneys' Fees and Costs

161. “Costs follow the event” is a well-settled principle in international arbitration, and it has increasingly been applied in the annulment context. For instance, the *Eiser* committee annulled the award and held that the parties opposing annulment “be responsible for the fees and expenses of the members of the Committee; the charges for the use of the facilities of the Centre made in advance by the Applicant; and the fees and expenses that the Applicant incurred in connection with these proceedings.”²⁴¹ The *Khudyan* committee

²³⁹ The Request for Arbitration that led to the Award in this case challenged actions by the CGR in advance of the final Decision. Like the ancillary claims the Tribunal ignored, the second arbitration concerns actions that postdate the filing of the initial Request for Arbitration, including the issuance of the CGR Decision and the CGR’s subsequent enforcement efforts.

²⁴⁰ **AA-017**: ICSID, Cases Database, *Amec Foster Wheeler USA Corporation, Process Consultants, Inc., and Joint Venture Foster Wheeler USA Corporation and Process Consultants, Inc. v. Republic of Colombia* (ICSID Case No. ARB/25/16), available at <https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/25/16> (last accessed July 9, 2026).

²⁴¹ **AA-063**: *Eiser v. Spain* (Annulment), ¶ 270.

took the same approach.²⁴² It is irrelevant whether the party opposing annulment caused the errors that led to the annulment. Indeed, it would go against the principle of equality to require an unsuccessful annulment applicant to bear costs and fees but not impose the same consequence on a party that unsuccessfully opposes annulment.

162. Moreover, Colombia's conduct in this proceeding also supports an adverse costs award. Colombia took positions in this case that are squarely at odds with positions it took in prior cases. Specifically, as shown in this Memorial, most of the arguments Colombia raised in this case are the complete opposite of the arguments it raised in *Glencore (I)*, where it was the party seeking annulment. That misconduct should be considered at the time of allocating the costs of this proceeding.²⁴³

III. REQUESTS

163. 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;

²⁴² **AALA-052:** *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, Decision on Annulment, ¶ 258 (July 21, 2023).

²⁴³ **AALA-077:** *Venezuela Holdings, B.V., et al. (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, ¶ 193 (March 9, 2017) (“As regards the allocation of the costs of these annulment proceedings, the Committee intends to follow the same approach as that of the Tribunal, and take into account *the conduct of the Parties* as well as the principle that costs should normally follow the event.”) [Emphasis added].

- 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:

August 17, 2026

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