INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Commerce Group Corp. and San Sebastian Gold Mines, Inc.	)	
Claimants/Applicants,	)	**ICSID Case No. ARB/09/17**
v.	)	**(Annulment Proceeding)**
Republic of El Salvador	)	
Respondent.	)	

EL SALVADOR'S COUNTER-MEMORIAL IN OPPOSITION TO CLAIMANTS' APPLICATION FOR ANNULMENT

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I. INTRODUCTION

1. Annulment is an exceptional recourse under the ICSID Convention. It is one of the rare exceptions to the fundamental principle of finality of ICSID Awards enunciated in Article 53 of the Convention. Consistent with the principle of finality, applications for annulment should be reserved for extraordinary situations where there is a legitimate and well-founded concern that the integrity of the proceedings has been violated because the most vital procedural safeguards required by the Convention—listed as grounds for annulment in Article 52—have not been followed in the tribunal's award.

2. Clearly, annulment is not an appeal, and the ICSID system is undermined by the misuse of the annulment process. The annulment mechanism does not allow for the examination of the correctness of the decision, and it does not afford a losing party a second opportunity to argue its case to try to overturn an award it does not like. Yet that is precisely what Applicants are attempting to do with their application for annulment: they are impermissibly attempting to use the annulment mechanism to appeal an Award that does not suit their purposes. They are asking the Committee to assess the correctness of the Tribunal's holdings and overturn the Award based on arguments that challenge the substance of the Tribunal's Award. Applicants go even further and seek to relitigate their case and in the process distort the Tribunal's findings and ignore the record the Tribunal had before it. It is telling that Applicants provide no analysis of the nature of annulment or the limited grounds set forth in Article 52.

3. In light of this, El Salvador believes it is useful to begin by discussing the standards for the grounds of annulment Applicants are advancing in this proceeding. El Salvador will then

demonstrate that Applicants have failed to show that any of the Tribunal's findings in the Award are subject to annulment under these standards.

4. El Salvador will first show that the Tribunal's primary finding—that the waiver requirement in CAFTA obligated Applicants to terminate their domestic judicial proceedings in El Salvador before initiating arbitration under CAFTA—was fully within the Tribunal's powers to determine its own jurisdiction under Article 41 of the Convention. El Salvador will also demonstrate that the Tribunal substantiated its decision, even if Applicants are unwilling or unable to understand it.

5. From the Tribunal's primary finding it ineludibly follows that Applicants violated the CAFTA waiver requirement because they did not terminate their domestic proceedings before initiating their CAFTA arbitration. It then follows that because the waiver requirement is a condition to consent (a fact that Applicants first denied but were forced to concede in their Rejoinder on the Preliminary Objection), Applicants' violation of the waiver requirement meant that there was no consent for arbitration under CAFTA. Without consent there was no jurisdiction, and without jurisdiction Applicants' arbitration under CAFTA could not proceed.

6. Finally, El Salvador will demonstrate that, similar to Applicants' main allegations concerning the waiver issue, Applicants' other allegations in their Memorial are without merit. Their attempt to overturn a unanimous, well-reasoned Award issued in exercise of the Tribunal's powers under Article 41 of the Convention, and supported by the relevant jurisprudence and the interpretations of the State Parties to CAFTA, must fail on all grounds.

II. STANDARDS FOR ANNULMENT UNDER THE ICSID CONVENTION

A. The limited and exceptional nature of annulment proceedings

7. It is universally acknowledged that annulment under Article 52 of the ICSID Convention is an exceptional remedy, and that *ad hoc* committees have a well-defined, limited role in reviewing ICSID awards.[1] As the *M.C.I. v. Ecuador ad hoc* committee recognized, Article 52 strictly limits the role of *ad hoc* committees:

> *Ad hoc* committees are . . . not courts of appeal. Their mission is confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the Washington Convention. It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires. This was reaffirmed by many committees . . . . Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness.[2]

8. An *ad hoc* committee's mandate to ensure the legitimacy of the award does not involve the review of the substance of the award or reconsideration of the probative value of the evidence adduced by the parties in the arbitration.[3] The second *AMCO ad hoc* committee warned that *ad*

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[1] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, Dec. 14, 1989, para. 4.04 (**Authority RL-1**) ("Article 52(1) makes it clear that annulment is a limited remedy."); *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, Jan. 8, 2007, para. 81 (**Authority RL-2**) ("The purpose of the grounds for annulment under Article 52 of the Convention is to allow a limited exception to the finality of ICSID awards"); *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, Sept. 25, 2007, para. 44 (**Authority RL-3**) ("At the outset, the Committee must recall that, in the ICSID system, annulment has a limited function."). For ease of reference, El Salvador is starting from RL-1 and R-1 for numbering its Legal Authorities and Exhibits in this Counter-Memorial, and will continue the numbering in its Rejoinder.

[2] *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, Oct. 19, 2009, para. 24 (**Authority RL-4**) (emphasis added).

[3] *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, Mar. 25, 2010, para. 96 (**Authority RL-5**) ("An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties."). *See also Patrick Mitchell v. Democratic*

hoc committees should not overstep the mandate of Article 52 by reviewing the merits of a tribunal's decision: "Annulment is not a remedy against an incorrect decision. An Ad Hoc Committee may not *in fact* review or reverse an ICSID award on the merits under the guise of annulment under Article 52."[4]

9. Likewise, committees recognize that Article 53 of the ICSID Convention excludes the possibility of substituting their own judgment for the judgment of the tribunal:

> As unambiguously expressed in Article 53 of the Convention, an award is not subject to an appeal. Annulment must therefore be different from appeal. It is well settled in international investment arbitration that an *ad hoc* committee may not substitute its own judgment on the merits for that of a tribunal.[5]

10. Annulment under Article 52 of the Convention is concerned with the fundamental integrity of the tribunal's decision and the fulfillment of basic procedural guarantees, not with the merits of the award. Because of this focus on procedural legitimacy, "annulment is an extraordinary remedy for unusual and important cases."[6]

11. Indeed, the nature of the ICSID annulment remedy is so exceptional that, even if an *ad hoc* committee finds an annullable error, annulment is not automatic. As explained by an early

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Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, Nov. 1, 2006, para. 19 (**Authority RL-6**) ("No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award.").

[4] *Amco Asia Corporation and others v. Republic of Indonesia* ("*Amco II*"), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, Dec. 3, 1992, para. 1.17 (**Authority RL-7**) (emphasis added).

[5] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, para. 15 (**Authority RL-8**). *See also Duke Energy International Peru Investments No. 1 Limited v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, Mar. 1, 2011, para. 144 (**Authority RL-9**) ("An *ad hoc* committee, which is not an appellate body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal.").

[6] *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, June 29, 2005, para. 34 (**Authority RL-10**) (internal citation omitted). *See also Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, Sept. 1, 2009, para. 41 (**Authority RL-11**) ("In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee . . . cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).").

ad hoc committee: "The Ad Hoc Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards."[7] An *ad hoc* committee's discretion to uphold awards, even after finding an annullable error, has been affirmed by several additional committees.[8] For example, the committee in *Vivendi II* exercised its discretion in considering the applicant's allegations concerning the improper constitution of the tribunal. Considering all the arguments and circumstances, the committee decided that the concerns about the constitution of the tribunal were not sufficient to annul the award. The committee noted that it would be unfair to deny the benefits of the award to the prevailing party where there would be "no demonstrable difference in outcome."[9]

B. Standards for the specific grounds for annulment alleged by Applicants

12. Applicants in this case allege that the Tribunal exceeded its powers, and that it did so manifestly. They also allege that the Tribunal has failed to state reasons for its decisions in the Award.

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[7] *Amco II* Decision on Annulment, para. 1.20 (RL-7).

[8] *MINE* Decision on Annulment, para. 4.10 (RL-1); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ("*Vivendi I*"), ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, para. 66 (AL-1) ("it appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found. . . . Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties."); *CDC* Decision on Annulment, para. 37 (RL-10); *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the ad hoc Committee on the Application for Annulment of Consortium R.F.C.C., Jan. 18, 2006, para. 226 [this decision is not publicly available; we attach a French excerpt available *in* Emmanuel Gaillard, La Jurisprudence du CIRDI 241 (vol. II, 2010) and an English summary available *in* Richard Happ and Noah Rubins, Digest of ICSID Awards and Decisions: 2003-2007 170 (2009) as **Authority RL-12**]; *Patrick Mitchell* Decision on Annulment, para. 19 (RL-6); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ("*Vivendi II*"), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, Aug. 10, 2010, para. 252 (**Authority RL-13**); *Rumeli* Decision on Annulment, para. 75 (RL-5); *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, June 5, 2007, para. 24 (**Authority RL-14**) ("An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process and may not, therefore, simply determine which party has the better argument. This means that . . . even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances.").

[9] *Vivendi II* Decision on Annulment, para. 240.

13. Pursuant to the Vienna Convention on the Law of Treaties, the Committee must interpret the grounds for annulment in good faith in accordance with the ordinary meaning to be given to the terms of the ICSID Convention in their context and in light of the Convention's object and purpose. As recently described by the *AES ad hoc* committee, the terms of the ICSID Convention confirm that annulment is a limited remedy:

> The text of the ICSID Convention is the result of long and profound debates. With respect to Articles 52 and 53 the drafters have taken great care to use terms which clearly express that annulment is an exhaustive, exceptional and narrowly circumscribed remedy and not an appeal. The interpretation of the terms must take this object and purpose into consideration and avoid an approach which would result in the qualification of a tribunal's reasoning as deficient, superficial, sub-standard, wrong, bad or otherwise faulty, in other words, a re-assessment of the merits which is typical for an appeal.[10]

1. Manifest excess of powers

14. Article 52(1)(b) provides a dual requirement: there must be an excess of powers, and it must also be manifest. Therefore, this ground for annulment demands the analysis of both requirements.

a. "Excess of Powers"

15. A party may request annulment under Article 52(1)(b) of the ICSID Convention on the ground that "the Tribunal has manifestly exceeded its powers." There is an excess of powers where a tribunal acts outside of what it was authorized to do based on the parties' consent.[11]

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[10] *AES* Decision on Annulment, para. 17 (RL-8).
[11] *CDC* Decision on Annulment, para. 40 (RL-10).

16. As described by the *Helnan ad hoc* committee, the tribunal's mandate and powers in investment treaty arbitration are defined by the investment treaty, the ICSID Convention, and the investor's notice of arbitration:

> The question whether an ICSID arbitral tribunal has exceeded its powers is determined by reference to the agreement of the parties. It is that agreement or *compromis* from which the tribunal's powers flow, and which accordingly determines the extent of those powers. In the case of an investment treaty claim, this agreement is constituted by the [treaty] and by the ICSID Convention . . . as well as by the filing of the investor's claim. Read together, these three elements constitute the arbitration agreement and therefore prescribe the parameters of the Tribunal's powers.[12]

17. A tribunal exceeds its powers by acting outside of its mandate.[13] Thus, an excess of powers will be found where the tribunal exercises jurisdiction it does not have.[14]

18. An excess of powers also exists when a tribunal disregards the applicable law (although incorrect application of the applicable law is not an excess of powers).[15] For example, as discussed below, the majority of the *MHS ad hoc* committee found an excess of powers for refusing to apply the definition of "investment" in the BIT and instead applying an extraneous interpretation of "investment" under Article 25(1) of the ICSID Convention.

19. In addition, committees in two cases have found excess of powers where a tribunal determines that it has jurisdiction but refuses to decide a particular claim falling within that jurisdiction. For example in the *Vivendi I* case, the *ad hoc* committee decided that "the Tribunal,

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[12] *Helnan International Hotels A/S v. Arab Republic of Egypt,* ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, June 14, 2010, para. 40 (**Authority RL-15**).
[13] *AES* Decision on Annulment, para. 17 (RL-8).
[14] *CMS* Decision on Annulment, para. 47 (RL-3) ("Clearly, an arbitral tribunal's lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an 'excess of powers' under Article 52 (1)(b).") (quoting *Klöckner I*, para. 4).
[15] *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic,* ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, July 30, 2010, paras. 67-68 (**Authority RL-16**).

faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it."[16] The committee thus concluded "that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction over the Tucumán claims, failed to decide those claims."[17] The *Helnan ad hoc* committee reached a similar conclusion where the tribunal found that it had jurisdiction,[18] but refused to consider certain claims when it required claimant "*as a matter of substance rather than jurisdiction,* to pursue local remedies in order to sustain a valid claim for breach of treaty."[19]

20. These two cases indicate that a tribunal may exceed its powers by failing to decide claims over which the tribunal has determined that it has jurisdiction. The decisions do not address the bedrock arbitration principle, incorporated in Article 41 of the Convention, that a tribunal is the judge of its own competence, according to which an ICSID tribunal must ensure that the requirements of Article 25 of the ICSID Convention, as well as the requirements provided for in the parties' arbitration agreement, are met. A tribunal fulfilling its mandate must dismiss claims where the jurisdictional requirements are not met.

b. "Manifest"

21. If an excess of powers is found, it will only lead to annulment if it is manifest. *Ad hoc* committees have interpreted "manifest" to mean obvious, clear, or self-evident.[20] Thus, to be manifest, the excess of powers must be easily recognizable without deeper analysis, *i.e.*, it must

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[16] *Vivendi I* Decision on Annulment, para. 112 (AL-1).
[17] *Vivendi I* Decision on Annulment, para. 115.
[18] *Helnan* Decision on Annulment, para. 7 (RL-15).
[19] *Helnan* Decision on Annulment, para. 34 (emphasis in original).
[20] *See, e.g.*, *CDC* Decision on Annulment, para. 41 (RL-10) ("clear or 'self-evident'"); *Repsol* Decision on Annulment, para. 36 (RL-2) ("obvious by itself"); *Azurix* Decision on Annulment, para. 68 (RL-11) ("obvious"); *Soufraki* Decision on Annulment, para. 39 (RL-14) ("obviousness"); *Rumeli* Decision on Annulment, para. 96 (RL-5) ("evident on the face of the award"); *Helnan* Decision on Annulment, para. 55 ("obvious or clear").

be "self-evident rather than the product of elaborate interpretations one way or the other."[21] If elaborate interpretation or analysis is required, any alleged excess of powers is not manifest.[22]

22. Furthermore, there can be no "manifest" excess of powers where a tribunal's decision is at least tenable. As an *ad hoc* committee explained, "[a] debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest.'"[23] A tribunal's good faith interpretation, based on the documents before it and the surrounding circumstances, will rarely give rise to a manifest excess of powers.[24]

23. Thus, a manifest excess of powers only exists where a tribunal obviously acted outside of its mandate, and not where a tribunal makes a decision that is tenable, even if it is not universally accepted, and even if the *ad hoc* committee disagrees with the decision.

c. Application of the standard by previous *ad hoc* committees with respect to awards on jurisdiction

24. Several *ad hoc* committees have considered allegations that a tribunal's decision on jurisdiction amounted to a manifest excess of powers under Article 52(1)(b). These *ad hoc* committees have been careful to avoid surpassing the limits of the annulment powers when applicants ask them to review tribunals' determinations on jurisdictional issues made in exercise of their express power under Article 41 of the ICISD Convention. They have confirmed that an

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[21] *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, Jan. 28, 2002, para. 25 (**Authority RL-17**). *See also Patrick Mitchell* Decision on Annulment, para. 20 (RL-6) (describing manifest as found "with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award"); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010, para. 213 (**Authority RL-18**) ("quite evident without the need to engage in an elaborate analysis"); *M.C.I.* Decision on Annulment, para. 49 (RL-4) ("the manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal.").

[22] *Wena Hotels* Decision on Annulment, para. 25; *CDC* Decision on Annulment, para. 41(RL-10) ("Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other,' is not manifest.").

[23] *Duke Energy* Decision on Annulment, para. 99 (RL-9).

[24] *Duke Energy* Decision on Annulment, para. 160.

excess of powers related to jurisdiction, like any other alleged excess of powers, must be manifest to be annullable.[25]

i. *MHS v. Malaysia*: Disregarding the applicable law is annullable

25. The case cited by Applicants, *MHS v. Malaysia*, is the only award declining jurisdiction that has been annulled for a manifest excess of powers.[26] But the excess of powers was not the finding of no jurisdiction. Rather, the majority of the *MHS ad hoc* committee found that the sole arbitrator manifestly exceeded his powers by not applying the applicable law chosen by the parties. The committee found that the sole arbitrator refused to apply the definition of "investment" in the parties' agreement (the BIT) and instead applied an extraneous interpretation of "investment" as used in Article 25(1) of the ICSID Convention even though the term was purposefully left undefined in the Convention.[27] According to the committee, the arbitrator ignored the parties' agreement and made a decision contrary to the intentions and specifications of the State Parties to the relevant treaty.[28] Therefore, the *MHS* award was annulled because the tribunal disregarded the applicable law, not because the tribunal declined jurisdiction or because the *ad hoc* Committee disagreed with the way the tribunal interpreted the treaty. In fact, the problem was that the tribunal failed to consider, much less interpret, the treaty, and instead applied an extraneous interpretation of Article 25 of the ICSID Convention with no basis for doing so, acting outside of the parties' agreement in a manifest manner.

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[25] *Soufraki* Decision on Annulment, paras. 118-119 (RL-14); *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, Sept. 5, 2007, para. 101 (**Authority RL-19**); *Rumeli* Decision on Annulment, para. 96 (RL-5); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, Mar. 21, 2007, para. 54 (**Authority RL-20**).

[26] *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, Apr. 16, 2009 (AL-3).

[27] *MHS* Decision on Annulment, para. 74.

[28] *MHS* Decision on Annulment, para. 62.

ii. *Lucchetti v. Peru*: a tenable treaty interpretation is not annullable; "treaty interpretation is not an exact science"

26. The *Lucchetti* committee, in denying the application for annulment, highlighted that, for issues of jurisdiction, "annulment should not occur easily," and *ad hoc* committees must take care to only annul based on "manifest" excesses of power.[29] In that case, the applicant argued that the tribunal had wrongly interpreted an article of the relevant BIT to preclude a measure based on the same subject matter as earlier measures from its jurisdiction *ratione temporis*.[30] The committee considered that the applicant for annulment made valid points in favor of its interpretation of the BIT, but the committee reiterated that it was not entitled to review the correctness of the tribunal's interpretation. The committee explained the limits of its role:

> the *Ad hoc* Committee does not consider it to be its task to determine whether the test employed by the Tribunal and the weight given by the Tribunal to various elements were 'right' or 'wrong'. In the Committee's view, treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several. It is no part of the Committee's function, as already indicated above, to purport to substitute its own view for that arrived at by the Tribunal. The interpretation of Article 2 adopted by the Tribunal is clearly a tenable one. Clearly also there are other tenable interpretations. The Committee is not charged with the task of determining whether one interpretation is 'better' than another, or indeed which among several interpretations might be considered the 'best' one.[31]

27. Thus, there was no excess of powers where the tribunal had adopted a tenable interpretation of the treaty provision in reaching its decision that it lacked jurisdiction.

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[29] *Lucchetti* Decision on Annulment, para. 101 (RL-19). *See also M.C.I.* Decision on Annulment, para. 55 (RL-4) ("It makes no difference that the issue in this case is about the Tribunal's jurisdiction, since jurisdiction does not give the ad hoc Committee a wider competence to assess the validity of the award under Article 52 but must be dealt with as any other issue.").
[30] *Lucchetti* Decision on Annulment, para. 31.
[31] *Lucchetti* Decision on Annulment, para. 112.

iii. *M.C.I. v. Ecuador*: a debatable treaty interpretation is not annullable

28. The *ad hoc* committee in *M.C.I. v. Ecuador* likewise emphasized that where different interpretations of a treaty provision are possible, the tribunal's choice of one is not an excess of powers.[32] In that case, the applicants argued that the tribunal had wrongly interpreted the principle of non-retroactivity to exclude a claim arising from a non-payment that occurred before the BIT entered into force, where the BIT did not exclude pre-existing disputes.[33] The committee found that the applicants were seeking a remedy that was unavailable under Article 52 of the ICSID Convention: the committee could not review the tribunal's interpretation of the treaty and decide whether or not it was "properly" applied.[34] Instead, the committee did not go further than determining that the tribunal's interpretation was "debatable."[35] The tribunal, therefore, had not departed from a clear provision that could only be interpreted one way and consequently had not exceeded its powers:

> The parties' competing contentions and the investment cases referred to in one way or another in support of their positions provide sufficient evidence that temporal applicability of consent to disputes that arose before the coming into force may be subject to debate. Moreover, the Applicants' interpretation of Article VI of the BIT is not the only reasonable interpretation of the Treaty. Other views are also possible and could not necessarily be discarded as being fundamentally wrong. The refusal of the Tribunal to exercise jurisdiction over the accounts receivable appears to the ad hoc Committee to be a debatable solution, and notwithstanding that another solution would have been possible, the Committee cannot find in this respect any egregious violation of the law on the part of the Tribunal.[36]

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[32] *M.C.I.* Decision on Annulment, para. 51 (RL-4).
[33] *M.C.I.* Decision on Annulment, paras. 26-28.
[34] *M.C.I.* Decision on Annulment, para. 54.
[35] *M.C.I.* Decision on Annulment, para. 52.
[36] *M.C.I.* Decision on Annulment, para. 52.

iv. *Fraport v. Philippines*: a tenable treaty interpretation is not annullable; factual findings are not reviewable

29. The *Fraport* committee likewise rejected the applicant's invitation to review the tribunal's interpretation of a treaty provision. The *ad hoc* committee commented, "[t]he task of the Committee is not to pronounce itself on which interpretation is better or more plausible."[37] The applicant argued that the tribunal had wrongly determined that the treaty's protections only extended to investments made in accordance with Philippine law and that the applicant had violated Philippine law. The committee noted that it had some reservations about how the tribunal interpreted the relevant BIT provision, but recalled that *ad hoc* committees must not substitute their own interpretation for the one adopted by the tribunal.[38] The committee concluded that as long as the tribunal's interpretation was tenable, the committee could not conclude that there was a manifest excess of powers.[39] Moreover, the *Fraport ad hoc* committee refused to review the tribunal's factual findings concerning Fraport's violation of Philippine law. According to the committee, to engage in such a review would be to impermissibly act as a court of appeal.[40]

d. Conclusion

30. This review of *ad hoc* committees' application of the standard for finding annullable error when a tribunal makes a decision regarding jurisdiction in exercise of its authority under Article 41 of the Convention shows that, to be successful on this ground, an applicant must demonstrate that the tribunal declined jurisdiction based on a clear, unquestionable, manifest, departure from the parties' agreement. An argument that the tribunal found that it lacked jurisdiction because it

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[37] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, Dec. 23, 2010, para. 76 (**Authority RL-21**).
[38] *Fraport* Decision on Annulment, para. 112.
[39] *Fraport* Decision on Annulment, para. 112.
[40] *Fraport* Decision on Annulment, paras. 116, 118.

adopted the wrong interpretation of a debatable provision, on the other hand, will not support annulment.

2. Failure to state reasons

31. The other ground for annulment on which Applicants base their application for annulment is "that the award has failed to state the reasons on which it is based" under Article 52(1)(e).

32. An *ad hoc* committee may find a failure to state reasons only if it cannot follow how the tribunal reached its decisions. The *MINE* committee described that there is no failure to state reasons if one can understand the tribunal's reasoning:

> the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.[41]

33. An *ad hoc* committee need only determine whether or not the tribunal's decision is reasoned; it is not a committee's role to judge the quality or adequacy of the tribunal's reasons. "Provided an *ad hoc* committee can follow the reasons, it is irrelevant what it thinks of their quality."[42]

34. The first *Vivendi* committee similarly explained that the requirement to avoid annulment on this ground is simply that one can follow the reasons for the decision:

> it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing

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[41] *MINE* Decision on Annulment, para. 5.09 (RL-1). Several subsequent committees have cited this description with approval. *See Wena Hotels* Decision on Annulment, paras. 77-79 (RL-17); *CMS* Decision on Annulment, paras. 55-57 (RL-3); *Enron* Decision on Annulment, para. 74 (RL-16); *CDC* Decision on Annulment, paras. 67-70 (RL-10); *AES* Decision on Annulment, paras. 110-111 (RL-8).

[42] Christoph H. Schreuer et. al., The ICSID Convention: A Commentary 1007, 1009 (2d. ed., 2009) (**Authority RL-22**).

> reasons. . . . Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.[43]

35. In fact, as long as a committee can surmise the tribunal's reasoning from the Award, the reasons do not have to be explicitly stated:

> the *ad hoc* Committee considers that, with regard to the reasoning of the award, if the Committee can make clear – without adding new elements previously absent – that apparent obscurities are, in fact, not real, that inadequate statements have no consequence on the solution, or that succinct reasoning does not actually overlook pertinent facts, the Committee should not annul the initial award. For example, as regards the ground that the award has failed to state the reasons on which it is based, if the *ad hoc* Committee can "explain" the Award by clarifying reasons that seemed absent because they were only implicit, it should do so.[44]

36. Likewise, the committee in *Wena Hotels* commented that this ground for annulment must have a very limited scope, and only requires that the parties be able to infer the tribunal's reasoning:

> The Tribunal's reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision. . . . The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the

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[43] *Vivendi I* Decision on Annulment, para. 64 (AL-1) (internal citation omitted). *See also AES* Decision on Annulment, para. 17 (RL-8) ("the ordinary meaning of a failure to state the reasons on which the decision is based is the absence of reasons or a presentation which is unintelligible in relation to the decision thus equating a lack of reasons.").

[44] *Soufraki* Decision on Annulment, para. 24 (RL-14). *See also Vivendi II* Decision on Annulment, para. 248 (RL-13); *CMS* Decision on Annulment, paras. 125-127 (RL-3); *Rumeli* Decision on Annulment, para. 83 (RL-5) ("In this Committee's view, if reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold.").

> Tribunal's conclusions can be explained by the *ad hoc* Committee itself.[45]

37. Therefore, there is only a failure to state reasons where a reasonable and careful reader cannot even infer how the tribunal reached its conclusions.

38. As the *Wena Hotels* committee recognized, annulment is not meant for situations where: 1) a tribunal may have inadvertently failed to address a question or 2) there is a dispute about the meaning or scope of an award. The committee explained:

> Any other than a limited scope given to this ground for annulment [failure to state reasons] would cause some confusion with other remedies provided by the Convention. Indeed, when the reasons stated in the award give rise to doubts about its meaning, either party may request interpretation of the award under Article 50. In the case where the Tribunal omitted to decide on a question or where the award contains an error, either party may request the award be rectified, according Article 49(2). These remedies confirm the understanding that any challenge as to the substance of reasons given in the award cannot be retained as a ground for annulment under Article 52(1)(e).[46]

39. Thus, Articles 49(2) and 50 of the ICSID Convention provide specific remedies for explaining or supplementing an award, limiting the situations in which parties should resort to the exceptional annulment remedy. Under these Articles, parties can request that the original tribunal, not an annulment committee, issue a supplementary decision or render an interpretation of the award. These provisions protect the finality of the award and further underscore the limited role for annulment under the ICSID Convention. As a result, a failure to address every question does not rise to the level of an annullable error unless the failure renders the award unintelligible.[47]

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[45] *Wena Hotels* Decision on Annulment, paras. 81, 83 (RL-17).
[46] *Wena Hotels* Decision on Annulment, para. 80.
[47] *CDC* Decision on Annulment, para. 71 (RL-10).

a. Application of the standard by previous *ad hoc* committees

40. Failure to state reasons has been alleged in nearly every application for annulment. After the earliest decisions were criticized for going too far in reviewing the merits of the tribunal's reasoning, the decision by the *MINE ad hoc* committee has been cited as striking the correct balance and has been followed by subsequent committees.[48]

i. *MINE v. Guinea*: no failure to state reasons for obvious truths, irrelevant arguments, or disguised appeals

41. In the *MINE* annulment proceeding, Guinea alleged a failure to state reasons for several findings related to the tribunal's decision concerning breach of contract. The committee noted, for example, that Guinea alleged that the tribunal's statement that a war did not make performance of the contract legally impossible was unreasoned and unsupported.[49] The committee dismissed these allegations, finding that nothing in the record before the tribunal suggested that there had been a legal impediment, and that the tribunal did not have to give reasons for "an obvious truth from which it drew no conclusions."[50] Guinea also alleged that the tribunal did not address its arguments about conditions the claimant imposed on the contract and the duty of good faith.[51] The committee determined that the tribunal was aware of Guinea's arguments, having summarized the parties' positions in the award, but that the tribunal did not

[48] Schreuer at 913 (RL-22) ("It may . . . be said that, after a difficult start, the system of annulment began to find its proper balance, particularly with the *MINE* Decision on Annulment. . . . The *CDC v. Seychelles* Decision was an express continuation of the more balanced approach evident in *MINE*, *Wena* and *Vivendi I*.").
[49] *MINE* Decision on Annulment, para. 6.45 (RL-1).
[50] *MINE* Decision on Annulment, para. 6.46.
[51] *MINE* Decision on Annulment, para. 6.47.

have to address each specific argument because these arguments had become irrelevant when the tribunal resolved the principal argument.[52]

42. Guinea also argued that the tribunal had failed to deal with Guinea's arguments related to its right to enter into an agreement with a third party. Noting that, contrary to the tribunal's finding, this argument presupposed that the claimant was in breach of the contract, the *ad hoc* committee rejected the argument as an attempted appeal of the tribunal's decision.[53] Consequently, the committee concluded that there was no failure to state reasons for the tribunal's decisions on breach of contract.

43. On the other hand, for the determination of damages, the *ad hoc* committee agreed with Guinea that the tribunal's failure to deal with questions that might have affected its conclusion constituted a failure to state reasons.[54] The *ad hoc* committee noted that the parties had briefed and presented evidence on two points argued by Guinea: that in the event that Guinea breached the agreement, the claimant could only be entitled to damages for one year according to the parties' agreement and that any award of interest should be reduced by the interest on a capital contribution which the claimant had previously withdrawn.[55] According to the *ad hoc* committee, acceptance of either of these arguments would have had a significant impact on the amount awarded, and therefore, the tribunal was obligated to address them.[56] The committee further found that the tribunal had contradicted itself in choosing the method to calculate

[52] *MINE* Decision on Annulment, paras. 6.49-6.53.
[53] *MINE* Decision on Annulment, para. 6.55.
[54] *MINE* Decision on Annulment, para. 6.99.
[55] *MINE* Decision on Annulment, para. 6.100.
[56] *MINE* Decision on Annulment, para. 6.101.

damages.[57] As a result, the *ad hoc* committee found that the damages portion of the award had to be annulled for failure to state reasons.[58]

ii. *Wena Hotels v. Egypt*: annullable only if relevant to the main dispute

44. Like the *MINE ad hoc* committee, the *Wena Hotels ad hoc* committee refused to fault the tribunal for not stating reasons for findings it considered irrelevant to the principal dispute. The applicant alleged that the tribunal failed to state reasons for finding that it did not need to determine the respective obligations under leases between the State-owned company and Wena.[59] According to the *ad hoc* committee, the tribunal's decision regarding the leases was not important to the main claim before the tribunal—Wena's expropriation claim against Egypt based on the BIT.[60] Thus, given that any finding about the leases was irrelevant to the tribunal's decision on expropriation, the committee considered the minimal explanation provided in the award as sufficient for understanding the tribunal's decision.[61]

45. The *Wena Hotels* committee also considered an alleged failure to state reasons for the legal basis for, and quantification of, damages. First, the committee found that the tribunal explicitly referred to the BIT article which set out the legal basis for damages.[62] The committee explained that the reasoning for the finding of expropriation and compensation "all becomes clear" given the tribunal's reliance on the specific article of the BIT that applies international law standards.[63] Second, the committee found that the tribunal explained that it accepted the amount

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[57] *MINE* Decision on Annulment, para. 6.107.
[58] *MINE* Decision on Annulment, para. 6.108.
[59] *Wena Hotels* Decision on Annulment, para. 85 (RL-17).
[60] *Wena Hotels* Decision on Annulment, para. 86.
[61] *Wena Hotels* Decision on Annulment, para. 86.
[62] *Wena Hotels* Decision on Annulment, para. 88.
[63] *Wena Hotels* Decision on Annulment, para. 89.

for damages claimed by Wena subject only to the reduction of an amount corresponding to probable double counting and rejected Egypt's other contentions about the amount.[64] The committee commented that further reasons for the tribunal's determination could be found in Wena's documentary evidence, and that it would be impermissible under Article 52 to argue that the tribunal erroneously evaluated the evidence.[65] As a result, the committee upheld the damages award. As for the allocation of interest, the committee noted that the parties had only referred to "appropriate interest," and that, therefore, the tribunal did not have to be more explicit than the parties; the committee refused to entertain arguments and submissions that were not developed before the tribunal.[66]

46. Finally, the *Wena Hotels* committee addressed an argument that the tribunal failed to deal with Egypt's argument that the lease agreements were null and void. Noting that the tribunal had given reasons, the *ad hoc* committee stated that this allegation was really a complaint about the merits of the reasons given, a subject which cannot be considered by an Article 52 committee.[67] The committee rejected an additional argument that the lease agreements were null and void for another reason not dealt with by the tribunal because the applicant could not demonstrate that the allegedly lacking decision would have had any effect on the result of the award.[68]

iii. *CMS v. Argentina*: annullable only if impossible to follow

47. In the *CMS* annulment proceeding, the *ad hoc* committee annulled a portion of the award for a failure to state reasons. The tribunal found that Argentina breached the treaty's so-called

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[64] *Wena Hotels* Decision on Annulment, para. 92.
[65] *Wena Hotels* Decision on Annulment, para. 93.
[66] *Wena Hotels* Decision on Annulment, para. 97.
[67] *Wena Hotels* Decision on Annulment, para. 103.
[68] *Wena Hotels* Decision on Annulment, paras. 104-105.

umbrella clause by breaching legal and contractual obligations related to the investment.[69] The tribunal did not provide its reasons and repeatedly referred back to its decision on jurisdiction where this matter was not dealt with at all.[70] According to the committee, it was "quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to [the license holder]."[71] The committee considered ways in which the tribunal may have reached the conclusion, but found that they were improbable or unsupported by the record.[72] As a result, the committee considered that it was impossible to follow or reasonably infer the tribunal's reasoning on this point, so this finding had to be annulled for failure to state reasons.[73] In spite of this, the committee determined that the tribunal's finding concerning the umbrella clause could be annulled without affecting the award as a whole.[74]

48. On the other hand, the *CMS* committee also considered and rejected an allegation of failure to state reasons for the tribunal's findings on the defense of necessity. The committee explained that the tribunal provided detailed reasons for its conclusion that the conditions for necessity under customary international law were not met and the committee added that it could not consider whether the tribunal made any error of fact or law in reaching its conclusion.[75] The committee then considered the tribunal's related decision based on Article XI of the BIT. The committee criticized the tribunal for not explicitly stating that the reasons for the finding on necessity also applied for the purpose of Article XI, but found that where both parties in fact

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[69] *CMS* Decision on Annulment, para. 86 (RL-3).
[70] *CMS* Decision on Annulment, para. 94.
[71] *CMS* Decision on Annulment, para. 96.
[72] *CMS* Decision on Annulment, para. 96.
[73] *CMS* Decision on Annulment, para. 97.
[74] *CMS* Decision on Annulment, paras. 99-100.
[75] *CMS* Decision on Annulment, para. 121.

understood the reasoning and a careful reader could follow the implicit reasoning, this portion of the award should be upheld.[76]

iv. *CDC v. Seychelles*: applicant's failure to understand the award does not support annulment

49. More recently, the *CDC ad hoc* committee found that the applicant's arguments concerning a failure to state reasons did not support annulment and were partially based on misunderstanding the award. Citing the applicant's arguments that the tribunal reached the wrong conclusion about obligations under the relevant contract, the *ad hoc* committee stated that such arguments did not support an application for annulment: "Nowhere in its discussion of this clause does the Republic cite to any authority indicating that erroneous conduct of the kind alleged against the Tribunal necessitates annulment of the Award."[77] The committee further recalled that the requirement is only for the tribunal to state reasons allowing the parties to follow the reasoning to the tribunal's conclusions, "not that it state any particular reasons or that the reasons be convincing to the Committee."[78] As long as the reasons were not "contradictory or frivolous," the committee found that annulment would be impermissible.[79]

50. The *ad hoc* committee considered that the applicant failed to understand the tribunal's award, noting that the applicant confused the tribunal's distinct findings about appraisal of a loan application and appraisal of the project.[80] Thus, the *ad hoc* committee rejected the argument that the tribunal ignored relevant evidence, and found instead that "it simply came to a conclusion, with which the Republic disagrees, about what the evidence means," and that this finding was

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[76] *CMS* Decision on Annulment, paras. 123-127.
[77] *CDC* Decision on Annulment, para. 73 (RL-10).
[78] *CDC* Decision on Annulment, para. 75.
[79] *CDC* Decision on Annulment, para. 76.
[80] *CDC* Decision on Annulment, para. 77.

not reviewable by the *ad hoc* committee under Article 52.[81] The committee further noted that the applicant's memorial demonstrated confusion about the difference between evidence offered to the tribunal and the tribunal's conclusions based on the evidence.[82] The applicant's allegations about inconsistencies were based on this confusion; according to the *ad hoc* committee the award was consistent and the witnesses' testimony was not.[83] The application for annulment was dismissed in its entirety.

b. Conclusion

51. This review of other *ad hoc* committees' treatment of the failure to state reasons ground for annulment reinforces that, to be successful, applicants must show that there is a complete lack of reasons or that it is impossible to follow or infer the tribunal's reasoning on a determinative finding. *Ad hoc* committees do not consider whether the reasons are right or wrong, but merely verify their existence. Allegations based on a disagreement with or misunderstanding of the tribunal's reasoning do not support annulment.

52. In sum, a review of decisions on annulment and commentary confirms that annulment should be reserved for exceptional cases where it is needed to correct violations of basic principles, and even then annulment is subject to the committee's discretion; in all other cases the finality of the award must be preserved.

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[81] *CDC* Decision on Annulment, para. 77.
[82] *CDC* Decision on Annulment, para. 83.
[83] *CDC* Decision on Annulment, para. 83.

C. Applicants have the burden of persuasion

53. Applicants bear the burden to establish before this Committee that one of the limited grounds for annulment applies.[84] Even if Applicants could meet the burden in this case (which they cannot), the Committee would still have discretion to decide whether or not this final and binding Award should be annulled in whole or in part.[85]

54. Applicants clearly have not met their burden. Nonetheless, because Applicants have initiated this proceeding by making misleading assertions and attacks on the Award, either deliberately or because they are unwilling or unable to understand the Tribunal's Award, El Salvador will address Applicants' assertions in detail and demonstrate why they provide no basis to annul a clear, well-reasoned Award issued in the exercise of the Tribunal's express power to judge its own jurisdiction.

III. EL SALVADOR'S PRELIMINARY OBJECTION AND THE TRIBUNAL'S AWARD

55. In its Award, the Tribunal agreed with El Salvador's Preliminary Objection that Applicants violated a condition to El Salvador's consent to submit disputes to international arbitration set out in CAFTA Article 10.18.2(b), and that as a result, there was no jurisdiction under CAFTA. The Tribunal also agreed with El Salvador that because Claimants did not make

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[84] *See Fraport* Decision on Annulment, para. 45 (RL-21) ("because the purpose of the inquiry is to determine the reasonableness of the Tribunal's approach, there is necessarily a heavy burden upon the applicant to establish a manifest excess of powers.").

[85] *MINE* Decision on Annulment, para. 4.10 (RL-1); *Vivendi I* Decision on Annulment, para. 66 (AL-1) ("it appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found."); *CDC* Decision on Annulment, para. 37 (RL-10); *Consortium R.F.C.C.* Decision on Annulment, para. 226 (RL-12); *Patrick Mitchell* Decision on Annulment, para. 19 (RL-6); *Vivendi II* Decision on Annulment, para. 252 (RL-13); *Rumeli* Decision on Annulment, para. 75 (RL-5); *Soufraki* Decision on Annulment, para. 24 (RL-14) ("even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances.").

any claims under the Investment Law, the dismissal of the CAFTA claims meant the end of the arbitration.

56. The relevant facts can be summarized as follows. Applicants had been granted an exploitation concession in El Salvador in 1987 but they had made little progress and stopped work altogether in 1999 because they lacked adequate financing to be able to rehabilitate and overhaul their plant and begin their planned open-pit mining project.[86] In spite of their inactivity, El Salvador transferred Applicants' concession under the old mining law into a new concession under the new mining law. Applicants still did not initiate exploitation activities after the conversion of the concession.

57. In September 2006, citing serious violations of the environmental permits with which Applicants were required to comply in spite of the lack of exploitation activities, El Salvador's Ministry of the Environment revoked Applicants' environmental permits for the San Sebastian Gold Mine exploitation concession and the San Cristobal Mill and Plant, "thereby effectively terminating Claimants' right to mine and process gold and silver."[87]

58. In December 2006, Applicants filed two complaints before the Supreme Court of El Salvador challenging the revocations of the environmental permits.[88] In those two cases before the Salvadoran Supreme Court, Applicants requested over $111 million in monetary damages,

[86] The Republic of El Salvador's Reply (Preliminary Objection Under CAFTA Article 10.20.5), Sept. 30, 2010 ("Reply (Preliminary Objection)"), para. 125.
[87] Award on Preliminary Objection, Mar. 14, 2011 ("Award"), para. 62.
[88] Award, para. 63.

and sought to have the environmental permits reinstated and to be able to proceed with their open-pit mining project.[89]

59. While those cases were pending before the Salvadoran Supreme Court,[90] Applicants initiated their CAFTA arbitration on July 2, 2009, very close to the expiration of the three-year period under CAFTA Article 10.18.1 to submit a dispute once a claimant knows or should know of an alleged breach of CAFTA.[91]

60. On August 14, 2009, El Salvador opposed registration of the Notice of Arbitration, notifying ICSID and Applicants that Applicants had violated the mandatory CAFTA waiver provision by filing their Notice of Arbitration without terminating the pending proceedings in El Salvador concerning the same measures.[92] There was no response from Applicants and no further question from the ICSID Secretariat prompted by El Salvador's letter. Instead, ICSID registered Applicants' Notice of Arbitration on August 21, 2009.

61. Following registration, El Salvador sent a second letter to ICSID on August 24, 2009, inviting Applicants to withdraw the arbitration because of the waiver violation and providing advance consent to discontinue the proceeding if Applicants would so request before constituting

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[89] The Republic of El Salvador's Preliminary Objection under Article 10.20.5 of the Dominican Republic – Central America – United States Free Trade Agreement (CAFTA), Aug. 16, 2010 ("Preliminary Objection"), para. 37; Award, para. 111.

[90] As the Tribunal noted in its Award, "Claimants have indicated (as they must) that they were aware when they filed their Request [for Arbitration] that the proceedings which they had initiated in El Salvador were on-going, but state further that they were unaware of the status of such proceedings because of communication difficulties with local counsel. In the Tribunal's view, this is no excuse. . . . Claimants knew the proceedings they had initiated and argued were pending a decision of the Court." Award, para. 102.

[91] *See* Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 115:2-6 ("So we're looking at this from our practical standpoint. Here we are in August of 2009. We certainly don't want to get into a statute of limitations question. This is three years after.").

[92] Award, para. 18.

the Tribunal.[93] El Salvador warned Applicants that if they insisted on the constitution of the Tribunal, El Salvador would be forced to file a jurisdictional objection under the expedited procedure of CAFTA Article 10.20.5 and would request an order for costs.

62. Applicants did not respond to El Salvador's letters about the waiver violation and kept their CAFTA arbitration open while waiting for the Supreme Court of El Salvador's decisions on their parallel domestic proceedings. El Salvador did not designate an arbitrator, consistent with its position that it was for Applicants to decide whether to discontinue the arbitration or proceed to the constitution of the Tribunal. Applicants did not take any action to invoke the CAFTA provisions for the constitution of the Tribunal, and the proceeding remained inactive for many months.

63. The ICSID Secretariat sent a letter to the parties on April 9, 2010, warning about the prolonged inactivity in the case. Applicants took action to invoke the provisions for the constitution of the Tribunal and El Salvador designated an arbitrator.

64. On April 28 and 29, 2010, the Supreme Court of El Salvador notified the parties of its decisions in the cases pursued by Applicants regarding the revocations of their environmental permits.[94]

65. The Tribunal was constituted on July 1, 2010. Shortly thereafter, on August 16, 2010, El Salvador filed its objection to jurisdiction under the expedited provisions of CAFTA Article 10.20.5. The Tribunal suspended the proceeding on the merits, as required by CAFTA, and ordered two rounds of pleadings. Two CAFTA non-disputing Parties, Costa Rica and Nicaragua,

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[93] Preliminary Objection, para. 11; Award, para. 21.
[94] Award, para. 64.

exercised their right under CAFTA Article 10.20.2 to submit written comments on issues of treaty interpretation related to the CAFTA waiver. The Tribunal held a one-day hearing with the parties on November 15, 2010.

66. On March 14, 2011, the Tribunal issued its Award finding that Applicants had failed to comply with the waiver provision by not discontinuing their proceedings before the Supreme Court of El Salvador before filing their CAFTA arbitration and that, therefore, Applicants had not perfected El Salvador's consent to CAFTA arbitration and, consequently, the Tribunal lacked jurisdiction.[95]

67. The Tribunal also found that, because Claimants did not make separate claims under El Salvador's Investment Law, the dismissal of the CAFTA claims for lack of consent meant the termination of the entire arbitration.

IV. THE AWARD MUST BE UPHELD

A. Applicants are using the ICSID annulment process as an appeal and are improperly attempting to relitigate their case before the *ad hoc* Committee

68. As described in Section II of this Counter-Memorial, it is impermissible to reexamine the merits of a tribunal's award under the guise of seeking annulment. But that is exactly what Applicants are trying to do. None of the grounds for annulment under Article 52 of the Convention apply to the Tribunal's Award in this case, and it is obvious that Applicants are seeking annulment because they do not like the result of the Award. Applicants' submissions on El Salvador's Application for Security for Costs made it abundantly clear that Applicants are erroneously convinced that this *ad hoc* Committee will review and decide, *de novo*, the "merits

[95] Award, paras. 107, 115.

of the claim."[96] Applicants apparently fail to grasp that this annulment proceeding is not an appeal, much less a new arbitration where claims are re-examined and decided.[97]

69. Applicants' motivation is clear from the letters and pleadings they have submitted to this Committee. In November 2011, when they wrote to inform the Committee that they could not make the required advance payment at that time, Applicants did not refer to the need to annul the award for an excess of powers or a failure to state reasons. Rather, they described their activities in El Salvador and their claims against El Salvador in the underlying arbitration and then explained that they were pursuing "annulment of an award that they believe is very unjust" and stated that their notice of arbitration was dismissed "on jurisdictional grounds, which are now being challenged."[98] An argument that an award is substantively unfair does not constitute a ground for annulment, and annulment is not a mechanism to "challenge" a tribunal's findings.

70. Applicants' arguments concerning their disagreement with the Tribunal's interpretation of the waiver provision further demonstrate that they see this proceeding as an opportunity to re-argue the issues decided by the Tribunal. In their Memorial, Applicants begin their discussion of why annulment is required by resubmitting their arguments based on past cases that they claim lead to a conclusion different from that reached by the Tribunal. They then describe the Tribunal's finding as "impractical" and "wholly inequitable when applied to dismiss the Claimants' Request."[99] They pepper this section with their arguments, considered and rejected

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[96] Claimants' Rejoinder to El Salvador's Application for Security for Costs, Sept. 5, 2012 ("Rejoinder (Security for Costs)"), paras. 3-4.
[97] Rejoinder (Security for Costs), para. 5.
[98] Letter from Applicants' Counsel to the *ad hoc* Committee, Nov. 17, 2011, at 1-2 (**Exhibit R-1**) (emphasis added).
[99] Memorial in Support of Claimants' Application for Annulment, Dec. 15, 2011 ("Memorial"), paras. 131, 134 (emphasis added).

by the Tribunal,[100] about how it fell upon El Salvador to invoke Applicants' waivers in the overlapping proceedings.

71. Applicants' arguments concerning their other claims also demonstrate their misuse of the annulment process. First, Applicants describe the Tribunal's finding that their allegations about an alleged ban on mining that allegedly began the same month that they were notified of the revocations of their permits would not give rise to a separate and distinct claim as "manifestly in error."[101] Even if the Tribunal had erred, which it did not, error is not listed in Article 52 as a ground for annulment. Calling an error "manifest" does not change this.

72. Second, Applicants impermissibly repackage their claims to try to present separate and distinct claims not presented to the Tribunal. This is wholly inappropriate in an annulment proceeding. In direct contradiction to the time sequence they presented to the Tribunal, Applicants now state: "After it declared the moratorium, El Salvador revoked the Claimants' permits for mining, processing and exploration."[102] They also attempt to put more emphasis on allegations about an alleged potential investment partner in 2008.[103] There is no reference to this investment partner in the Notice of Arbitration, which, in contrast, stated that the revocations of the environmental permits in 2006 effectively terminated their rights in El Salvador.[104]

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[100] Award, paras. 85-86.
[101] Memorial, para. 178 (emphasis added).
[102] Memorial, para. 1. *Cf.* Award, para. 111, n.66 (noting that "[t]he *de facto* mining policy was alleged to have emerged in the same month as the permit revocations were notified to Claimants" and that, "[i]n fact, the orders of revocation preceded their notification to Commerce/Sanseb by some two months.").
[103] Memorial, paras. 170-172.
[104] Notice of Arbitration, July 2, 2009 ("NOA"), para. 21 (C-5). *See also* Award, para. 111 ("when Claimants sought to challenge the revocation of the environmental permits before the El Salvador courts, they were not just hoping to have their permits reinstated – they were hoping to be able to mine again. The effect of the revocations, now upheld in Respondent's courts, was, to use Claimants' phrasing in their Notice of Arbitration, to 'effectively terminat[e] Commerce/SanSeb's right to mine and process gold and silver.'").

73. Third, Applicants describe the finding that they made no claims under the Investment Law as "arbitrar[y]",[105] implying that instead of providing no reasons, the Award provides reasons with which Applicants do not agree. Labeling reasons with which one disagrees "arbitrary" does not constitute a valid ground for annulment.

74. Finally, Applicants impugn the good faith decision-making of the Tribunal, suggesting that the Tribunal members reached their decision on jurisdiction because they "wanted to avoid a hearing on the merits."[106] They of course give no indication of why the Tribunal members would possibly have conspired to avoid a hearing on the merits. Applicants then include their self-serving account of the facts of the underlying dispute, implying that they hope the *ad hoc* Committee will adjudicate the merits of their claims.[107] Again, Applicants seem to confuse this annulment proceeding with an appeal.

75. It is clear from their own representations, therefore, that Applicants are impermissibly using the annulment process as a chance to challenge the Tribunal's findings, reargue their case before this Committee, and try to obtain their desired outcome on the merits. Applicants might be more careful in choosing their words in their Reply, to present their allegations as actual arguments for annulment, but that will not change the situation before the Committee—Applicants seek to overturn an Award that was not favorable to them, but they cannot demonstrate that any grounds for annulment under Article 52 apply to the Award.

[105] Memorial, para. 198.
[106] Memorial, para. 179.
[107] Memorial, para. 181.

B. Applicants' arguments are without merit and must be rejected

76. Before responding to Applicants' attacks on the Award, it is worth noting that the Tribunal made its decision based on the parties' written and oral submissions. As the Tribunal explained:

> The Tribunal has carefully reviewed the written and oral pleadings, evidence and legal authorities submitted by the Parties and has relied exclusively on those in the analysis below. To the extent arguments raised by the Parties are not referred to expressly in this Award, they must be deemed to be subsumed in the analysis. By contrast, the Tribunal will not address arguments that have not been raised by the Parties, as this Award is a decision only in the dispute as pleaded between them.[108]

77. Applicants' attempts to develop new arguments in this annulment proceeding or to present their claims to this Committee differently from how they presented them to the Tribunal must be rejected. The Tribunal cannot be faulted for the way Applicants pleaded their case.[109]

1. There is no basis to annul the Award with respect to the Tribunal's finding that Applicants violated the CAFTA waiver requirement

78. The Tribunal began its analysis of the CAFTA waiver requirement by determining what the waiver provision requires, interpreting the text of the provision in CAFTA Article 10.18(2)(b), which was the applicable law chosen by the parties.[110]

79. The text of CAFTA Article 10.18(2)(b) analyzed by the Tribunal is as follows:

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[108] Award, para. 68 (emphasis added).
[109] For ease of reference, El Salvador has organized its arguments in this section to mirror the structure used by Applicants in their Memorial.
[110] Award, para. 69.

> **Article 10.18: Conditions and Limitations on Consent of Each Party**
>
> . . . .
>
> 2. No claim may be submitted to arbitration under this Section unless: . . .
>
> (b) the notice of arbitration is accompanied,
>
> (i) for claims submitted to arbitration under Article 10.16.1(a), by the claimant's written 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.

80. After summarizing the parties' views, the Tribunal decided that the waiver must accomplish its intended effect, and that to do so, it must be more than just words.[111] Thus, the Tribunal interpreted that CAFTA Article 10.18(2)(b) required Applicants to file formal, written waivers, but that it also required them to materially comply with the waiver by ensuring that no other legal proceedings related to any measure subject to the arbitration were initiated or continued.[112]

81. The Tribunal then considered whether Applicants had violated the CAFTA waiver requirement. After summarizing the parties' positions and providing its analysis, the Tribunal concluded that Applicants violated the waiver provision by not discontinuing their domestic proceedings when they initiated their CAFTA arbitration related to the same measures.[113]

82. There is no basis on which to annul this finding.

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[111] Award, para. 80.
[112] Award, para. 84.
[113] Award, para. 107.

a. The Tribunal did not manifestly exceed its powers

83. Applicants cannot show that the Tribunal exceeded its powers, much less manifestly, when it interpreted the waiver provision and determined that Applicants violated it and as a result decided that there was no jurisdiction.

84. That an arbitration tribunal is the judge of its own jurisdiction is among the most fundamental principles of international arbitration. The language of Article 41 of the Convention could not be clearer in its endorsement of this principle and its grant of power to ICSID tribunals to decide questions of jurisdiction:

> (1) The Tribunal shall be the judge of its own competence,
>
> (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.[114]

85. There thus can be no doubt that the Tribunal acted within its authority when it interpreted the treaty upon which jurisdiction was based and came to a conclusion regarding its own jurisdiction in accordance with that interpretation. Applicants have absolutely failed to show that the Tribunal manifestly exceeded its powers when it exercised this express authority.

86. The Tribunal duly considered the text of CAFTA Article 10.18.2, the correct law applicable to the issue, and rejected Applicants' interpretation, which the Tribunal considered "would render [the waiver] devoid of meaning."[115]

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[114] ICSID Convention, Art. 41.
[115] Award, para. 80.

87. The Tribunal's interpretation of the CAFTA waiver provision as requiring not only the formal component of filing the waiver with the required text, but also a material component of acting in compliance with the text of the waiver, was supported by two non-disputing Party submissions, from Nicaragua and Costa Rica, which Applicants persistently ignore. These two States, having agreed to CAFTA and its dispute resolution mechanism, took the time to make submissions to the Tribunal in support of the correct interpretation of the waiver provision. As quoted by the Tribunal, both States submitted that interpreting the provision as only requiring the formality of a written waiver, regardless of compliance, would violate the purpose of the provision and deny it *effet utile*.[116]

88. As the Tribunal noted, the *Waste Management v. Mexico I* tribunal also determined that a waiver requirement under NAFTA, which is nearly identical to the requirement under CAFTA, included a material act of dropping or desisting from initiating parallel proceedings in addition to the formal requirement to submit the waiver.[117]

89. Applicants, rather than making any showing of how such a well-founded decision might possibly amount to excess of powers, present in their Memorial on Annulment the same arguments about *Waste Management* that they presented in the underlying arbitration.[118] The Tribunal, well aware of the statement in section 15 of the *Waste Management I* award that it is not for a tribunal to enforce the waiver before other courts or tribunals, but equally aware that this was not what El Salvador was asking the Tribunal to do, considered the *Waste Management I* tribunal's finding that a waiver includes a material requirement to be the relevant part of that

[116] Award, paras. 81-82.
[117] Award, para. 83.
[118] Memorial, paras. 100-109; Claimants' Response to the Republic of El Salvador's Preliminary Objection, Sept. 15, 2010 ("Response (Preliminary Objection)"), paras. 36-38, 44, 52-53; Claimants' Rejoinder to the Republic of El Salvador's Preliminary Objection, Oct. 15, 2010 ("Rejoinder (Preliminary Objection)"), paras. 27-35.

award applicable to its analysis in this case. Applicants' argument is, therefore, merely a distraction. El Salvador did not argue that the Tribunal should enforce Applicants' waiver by making the Supreme Court of El Salvador discontinue Applicants' proceedings, as Mexico did in *Waste Management I* with regard to some claims. El Salvador's only argument was that the Tribunal lacked jurisdiction to decide the claims because Applicants had failed to comply with the waiver, a necessary condition for El Salvador's consent to CAFTA arbitration. The Tribunal, acting within its mandate, agreed.

90. Applicants also suggest that the Award is confusing about what cases it relies on, but that is simply not true. For its finding that the waiver required more than the formal submission of a piece of paper, the Tribunal cited *Waste Management I*.

91. Contrary to Applicants' repeated assertion that they cannot tell whether or not the Tribunal relied on other cases, it is clear that for this particular point, the Tribunal did not rely on several cases mentioned in other arguments by the parties. As noted by the Tribunal, El Salvador cited "the decisions of tribunals in the *RDC*, *Thunderbird*, and *Loewen* cases" in its argument that the "same measures" were challenged in the domestic judicial proceedings and the CAFTA arbitration.[119] Based on this, Applicants introduce each of these cases into their Memorial with the unfounded assertion that "it is unclear how, if at all, this decision was used as a basis for the Tribunal's decision," and then devote fourteen paragraphs to discussing these cases and introducing new arguments about how these cases do not support the Tribunal's finding that it lacked jurisdiction because of the waiver violation.[120] Such arguments, which are of doubtful merit on the substantive issues they address, do not support any ground for annulment, but

[119] Award, para. 89 (internal citations omitted).
[120] Memorial, paras. 110-123.

attempt to challenge the substance of the Tribunal's Award. Moreover, as demonstrated above, the Tribunal did not rely on these cases for its Award.

92. In addition to presenting new arguments, Applicants likewise seize on the fact that the Tribunal referenced their argument based on *Vannessa Ventures v. Venezuela* in describing their submissions, and Applicants proceed to reargue the points for which they believe that BIT case stands.[121] Applicants made these arguments in the underlying arbitration,[122] and the Tribunal rejected them.[123]

93. The arguments in the Memorial about these cases, both those that are new and those previously submitted, are irrelevant to the Tribunal's finding, and in no way support an allegation of manifest excess of powers. The most relevant previous case, in which the tribunal needed to determine whether claimants must act in compliance with the waiver, was *Waste Management I*. The Tribunal relied on that case and, reasonably, agreed with the *Waste Management I* tribunal's interpretation of the similar NAFTA waiver provision instead of trying to extrapolate from a BIT case with very different circumstances.[124] Applicants' disappointment at not being able to convince the Tribunal to ignore the CAFTA and NAFTA authorities in favor of an unrelated BIT case with substantially different facts, which they claimed supported their view, does not support a ground for annulment.

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[121] Award, para. 94; Memorial, paras. 124-127.
[122] Response (Preliminary Objection), paras. 60-62.
[123] Award, para. 86.
[124] *See* Reply (Preliminary Objection), Part III.C (explaining that *Vannessa Ventures* was inapposite because 1) the claimant withdrew its claims before the domestic courts; 2) the arguments by the parties were about whether the termination of local proceedings was with or without prejudice in accordance with the law of Venezuela; and 3) the tribunal had before it a decision of the Venezuelan Supreme Court dismissing a new lawsuit because of the waiver).

94. Thus, the Tribunal's interpretation and application of the waiver provision, in accord with jurisprudence and the views of other CAFTA Parties, was well-founded and under no reading was it untenable. Therefore there is no "manifest" excess of powers. Applicants' arguments about other cases and about the result being "inequitable" to them[125] do not support their application for annulment.

b. The Tribunal did not fail to state the reasons

95. Applicants' assertion that the Tribunal failed to state reasons for its finding that Applicants violated the waiver is completely without merit.

96. The Tribunal explained that it found that the waiver had to have its intended effect because otherwise the provision would be "devoid of meaning."[126] The Tribunal explained that this finding was supported by the two non-disputing CAFTA Parties who made submissions to the Tribunal, and quoted from those submissions.[127] The Tribunal further noted that other tribunals had made similar findings, quoting from *Waste Management v. Mexico*.[128] The Tribunal then considered and rejected Applicants' argument that a respondent State has to seek discontinuance of overlapping proceedings itself.[129]

97. The Tribunal methodically proceeded to discuss its analysis and conclusion that Applicants failed to comply with the waiver requirement. First, the Tribunal considered and disposed of Applicants' inconsistent argument that although the relevant date for determining jurisdiction would be July 2, 2009, the date the Notice of Arbitration was filed, compliance with

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[125] Memorial, para. 134.
[126] Award, para. 80.
[127] Award, paras. 81-82.
[128] Award, para. 83.
[129] Award, paras. 85-86.

the waiver requirement should be judged as of July 1, 2010, the date the Tribunal was constituted.[130] The Tribunal then found that, as of the date of filing the Notice of Arbitration, there were proceedings before the Supreme Court of El Salvador relating to the same measures as those at issue in the CAFTA arbitration.[131] The Tribunal considered and rejected Applicants' arguments that 1) they were unaware of the status of the local proceedings, and 2) that they complied with the waiver by taking no positive action to continue the proceedings.[132] The Tribunal next explained its finding that Commerce Group Corp. acted and was acting on behalf of San Sebastian Gold Mines in the domestic proceedings and the CAFTA arbitration.[133] Finally, the Tribunal discussed its post-hearing question, regarding whether Applicants could have discontinued their proceedings in El Salvador without prejudice, and concluded, based on the parties' submissions, that discontinuance would have been without prejudice.[134]

98. Indeed, Applicants' only argument about an alleged failure to state reasons for the findings on the waiver provision relates to Applicants' misguided insistence on holding El Salvador responsible for Applicants' deliberate failure to discontinue the domestic proceedings. In their Memorial, Applicants suggest that the Tribunal mischaracterized the letter from the Attorney General of El Salvador alerting the Centre of the manifest jurisdictional defect in the Notice of Arbitration.[135] According to Applicants, "the Award suggests that El Salvador asked

[130] Award, paras. 96-97.
[131] Award, paras. 99-101.
[132] Award, para. 102.
[133] Award, para. 103.
[134] Award, paras. 105-106.
[135] Memorial, paras. 139-141.

the Claimants to discontinue court proceedings in El Salvador after the Claimants' Request was filed, which was never the case."[136]

99. Of course, the Tribunal did not suggest or think that El Salvador had asked Applicants to discontinue their court proceedings in El Salvador, because that is not what El Salvador's letter says. The Tribunal knew that the purpose of El Salvador's letter was to oppose registration by submitting to the Centre that the dispute was "manifestly outside ICSID's jurisdiction."[137] The fact that El Salvador did not advise Applicants in that letter on how to comply with the waiver requirement had absolutely nothing to do with the Tribunal's decision. The Tribunal mentioned the letter in the Procedural History of the case, accurately described one of the letter's contentions, and then, in Parts VII.A and VII.B of the Award, made its determination about Applicants' non-compliance with the waiver based on the reasons described in the Award.

100. Thus, the Tribunal's conclusion that, "[i]n light of the foregoing," Applicants were obliged to discontinue their proceedings in El Salvador and by not doing so, had failed to comply with the waiver requirement,[138] clearly followed from all of the reasons it had explained in detail. There is no doubt that a reasonable reader can follow the Award "from Point A. to Point B. and eventually to its conclusion"[139] and therefore, there is no annullable error under Article 52(1)(e).

2. There is no basis to annul the Award with respect to the exploration licenses

101. The Tribunal, after summarizing the parties' various arguments, and determining that Applicants had not complied with the waiver requirement, which was a condition to consent

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[136] Memorial, para. 140.
[137] Award, para. 18.
[138] Award, para. 107.
[139] *MINE* Decision on Annulment, para. 5.09 (RL-1).

under CAFTA, and that in fact, it had not been presented with claims that were separate and distinct from the claims regarding the revocation of the environmental permits, concluded that it had no jurisdiction for the entire CAFTA arbitration:

> As analyzed above, the waiver is required as a condition to Respondent's consent to CAFTA. As also analyzed above, the waiver is invalid as it lacks effectiveness due to Claimants' failure to discontinue the proceedings before El Salvador's Court of Administrative Litigation of the Supreme Court. If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute.[140]

102. This finding is not subject to annulment.

a. The Tribunal did not fail to state the reasons

103. Applicants' assertion that the Tribunal failed to state reasons for dismissing any additional CAFTA claims related to the exploration licenses does not withstand scrutiny.[141]

104. The Tribunal's reasoning is clear from the Award. First, the Tribunal concluded that the waiver violation meant that there was no jurisdiction with respect to Applicants' entire CAFTA claims.[142] The Tribunal expressly explained: "If the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute."[143] This was in line with El Salvador's arguments in the proceedings. A reasonable reader can certainly follow the Tribunal's reasoning from finding the failure to comply with the waivers, to noting that the waivers were a condition on consent and therefore necessary for jurisdiction, to a conclusion that there was no jurisdiction for any CAFTA claims because there was no consent to arbitration.

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[140] Award, para. 115.
[141] Contrary to the title of section III in Applicants' Memorial, the exploration licenses in question were not revoked. As Applicants alleged in their Notice of Arbitration, the Ministry of Economy denied their application to extend the exploration licenses. Memorial, para. 146; NOA, para. 23.
[142] Award, para. 113.
[143] Award, para. 115.

This determination alone would be sufficient reason to support the Tribunal's decision regarding all of Applicants' CAFTA claims, including their alleged claims related to the exploration licenses.

105. Second, while it would have been proper to do so, the Tribunal did not limit itself to the above-stated reasons. It explained why it considered that it had not been presented with any claims distinct from the claims based on the revocation of the environmental permits. The Tribunal's factual finding, which is not assailable in an annulment proceeding, was that any additional claims about the alleged mining ban, including the refusal to extend exploration licenses, were "part and parcel of their claim regarding the revocation of the environmental permits."[144] The Tribunal based this finding on the following facts: 1) when Applicants challenged the revocation of the environmental permits before the Supreme Court of El Salvador, they requested the right to mine again; 2) Applicants stated in their Notice of Arbitration that the revocations of their environmental permits "effectively terminat[ed] [their] right to mine and process gold and silver"; and 3) the environmental permits were revoked before the alleged ban was said to have begun.[145] The Tribunal noted that, whether or not there was a *de facto* mining ban, the revocation of the environmental permits was the "measure" that affected Applicants' rights in El Salvador.[146] Thus, the Tribunal determined, based on the facts presented by Applicants, that it was not "confronted with separate and distinct" claims.[147]

[144] Award, para. 111.
[145] Award, para. 111.
[146] Award, para. 112.
[147] Award, para. 111.

106. The Tribunal thus expressly articulated reasons sufficient for its determination that there were no separate claims, providing a second, independent and sufficient explanation for dismissing all CAFTA claims.

107. As it regards the exploration licenses, even more reasons can be reasonably inferred from the parties' arguments, the Tribunal's Award, and particularly from Applicants' own pleadings.[148] Applicants must have forgotten the exchanges they had with the Tribunal at the hearing on the Preliminary Objection when they decided to complain of a failure to state reasons with respect to alleged separate claims related to exploration licenses.[149]

108. The transcript of the hearing shows that Applicants did not plead any measures related to the exploration licenses as separate CAFTA violations. Indeed, upon questioning from the President of the Tribunal, Applicants were unable to identify where they had pleaded claims related to the exploration licenses at all. They resorted to arguing that any alleged claims related to the exploration licenses were in fact subsumed under their allegations related to the alleged ban on mining.

109. The President of the Tribunal directly asked Applicants at the hearing where they had pleaded claims related to the exploration licenses.[150] Counsel for Applicants replied that paragraph 24 of the Notice of Arbitration mentioned the alleged challenge in the courts to the

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[148] *Soufraki* Decision on Annulment, para. 24 (RL-14) ("if the *ad hoc* Committee can 'explain' the Award by clarifying reasons that seemed absent because they were only implicit, it should do so."); *Vivendi II* Decision on Annulment, para. 248 (RL-13); *CMS* Decision on Annulment, paras. 125-127 (RL-3); *Rumeli* Decision on Annulment, para. 83 (RL-5) ("In this Committee's view, if reasons are not stated but are evident and a logical consequence of what is stated in an award, an *ad hoc* committee should be able to so hold."); *Wena Hotels* Decision on Annulment, paras. 81, 83 (RL-17).

[149] Memorial, para. 151 ("The Tribunal did not explain why the Claimants' claims arising from El Salvador's refusal to renew their exploration permits were being dismissed. In the analysis section of the Award, ¶¶ 68 – 128, the Tribunal does not specifically refer to these claims.").

[150] Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 228:2-5.

Government's refusal to extend the exploration licenses, but President van den Berg pointed out that this assertion was factually inaccurate—there were no such legal proceedings.[151] The President repeated his question two more times, trying to find where Applicants had complained about measures related to the exploration licenses as breaches of CAFTA.[152]

110. At that point, counsel for Applicants identified language related to the alleged ban on mining in paragraph 26 of the Notice of Arbitration, and the President asked how the alleged ban and the exploration licenses were connected.[153] Counsel described that decisions about the exploration licenses were part of the alleged ban:

> that ban on the development of gold and silver mines, we say is -- is a de facto moratorium or practice. And this would include the decisions, regulatory decisions, not to approve exploration licenses, not to approve permits, environmental permits.
>
> And then in paragraph 30, there is a reference "by its conduct," conduct referring to the government's ban on the development of gold and silver mines, which includes the exploration licenses.
>
> I accept that . . . the [notice] of arbitration is -- does not set that -- set the issue clearly with respect to exploration licenses, but our submission is . . . one of the measures complained about is . . . the denial of the exploration license.
>
> . . . we're saying that this is a policy . . . a ban on development, development both of [exploitation] concessions and exploration licenses. The policy that's being referred to is the sort of . . . de facto moratorium.[154]

111. Therefore, when the Tribunal referred to additional claims related to the alleged ban on mining collectively without singling out the subset of those claims related to the exploration licenses, it was merely acting in accordance with the Applicants' pleadings. The parties can see

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[151] Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 228:10 – 229:17.
[152] Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 230:4-10; 232:13 – 233:2.
[153] Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 231:21 – 232:9; 233:1-2.
[154] Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 233:13 – 234:17.

how the Tribunal reached its conclusions. Applicants did not plead any measures related to the exploration licenses as distinct CAFTA violations in their Notice of Arbitration and, at the hearing, Applicants expressly told the Tribunal that their exploration license claims were included in their claims related to the alleged mining ban.[155] The Tribunal should not be expected to be more explicit than Applicants in distinguishing their claims, and the Committee cannot now entertain new arguments that were not developed before the Tribunal.

112. Moreover, if Applicants in fact believed that the Tribunal failed to mention how its determination that there were no separate and distinct claims included any allegations about the exploration licenses (which was not an omission in the circumstances of this case), the proper remedy would have been for Applicants to make a request to the Tribunal for a supplementary decision under Article 49(2) of the Convention or an interpretation under Article 50.[156] Any alleged failure to renew exploration licenses, on which Applicants did not even make CAFTA claims, was not a significant part of the case submitted by Applicants and it would not have changed the Tribunal's decision. Consequently, even if Applicants believed there had been an omission in the Award concerning these allegations, filing an application for annulment was not the proper recourse.

113. The Tribunal, for the reasons given in the Award and further explained by reference to the parties' pleadings, decided that any claims related to the alleged mining ban, including the non-extension of exploration licenses, were part and parcel of Applicants' other claims and that

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[155] Indeed, Applicants continue to mix the two. In their Memorial, when discussing the Tribunal's findings related to the alleged *de facto* ban, Applicants complain about the exploration licenses. (Memorial, paras. 176-178.) Thus, even now, Applicants recognize that their allegations about their exploration licenses not being renewed were subsumed in their allegations about El Salvador's alleged policy against mining.

[156] *See Wena Hotels* Decision on Annulment, para. 80 (RL-17).

the waiver violation resulted in a lack of jurisdiction for Applicants' entire CAFTA claims. There was no failure to state reasons.

b. In determining that it did not have jurisdiction with respect to the entire CAFTA arbitration, which included any claims related to the exploration licenses, the Tribunal did not manifestly exceed its powers

114. The Tribunal unquestionably had the power to judge whether it lacked jurisdiction because of the waiver violation. As explained earlier, that an arbitration tribunal is the judge of its own jurisdiction is among the most fundamental principles of international arbitration, and it is explicitly included in Article 41 of the Convention. In an ordinary exercise of this power, the Tribunal interpreted the waiver requirement based on the text of the provision set forth in the treaty that was alleged as the basis for jurisdiction:

> Article 10.18 is clear in relevant part: "No claim may be submitted to arbitration . . . unless . . . (b) the notice of arbitration is accompanied . . . (i) by the claimant's written waiver . . . of any right to initiate or to continue . . . any proceeding with respect to any measure alleged to constitute a breach referred to in Article 10.16.[157]

115. Based on the treaty text, the Tribunal found that without a valid waiver, there is no consent, and that without consent, the Tribunal did not have jurisdiction.[158]

116. Indeed, as noted by the Tribunal, Applicants had accepted that the waiver is a condition to consent and thus a jurisdictional requirement.[159] Thus, Applicants do not (as they could not) question the validity of a finding of no jurisdiction to hear claims based on a violation of the

[157] Award, para. 114.
[158] Award, para. 115.
[159] Award, para. 97 n.53.

waiver. Applicants only argue that it was a manifest excess of power for the Tribunal to find that it had no jurisdiction with respect to certain claims, but their argument fails for multiple reasons.

117. First, the Tribunal could reasonably find, as argued by El Salvador,[160] that it had no jurisdiction for any claims because of the invalid waiver. Given the wording of the waiver provision ("No claim may be submitted") and the fact that a claimant provides one waiver to initiate arbitration, it is a reasonable and certainly a tenable position to find that an invalid waiver means there is no consent, and without consent there is no jurisdiction for any claims that form part of the dispute submitted under CAFTA. Therefore, having found that Applicants failed to comply with their waivers, which they acknowledge was a condition to consent and a requirement for jurisdiction, it was not excess of powers for the Tribunal to find that "the dispute is not within its jurisdiction and competence pursuant to CAFTA" and therefore dismiss the entire CAFTA arbitration.[161]

118. El Salvador believes that this is in fact the correct interpretation of CAFTA; Applicants disagree. But it is not the role of an *ad hoc* committee to decide whether the Tribunal adopted the best interpretation of the waiver provision; the Committee need only verify that the Tribunal applied a tenable interpretation of the proper law, which it did.

119. Second, in this specific case, the facts of the case as pleaded cannot support any allegation of excess of powers. Given that Applicants admitted at the hearing that they did not plead separate claims related to the exploration licenses, it is absurd for them to now argue that "[t]he Tribunal manifestly exceeded its powers by failing to exercise jurisdiction over the

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[160] Preliminary Objection, paras. 77-87; Reply (Preliminary Objection), paras. 101-111.
[161] Award, para. 140.

Claimants' claims arising from El Salvador's refusal to renew their exploration permits."[162] Again, it bears emphasis that Applicants cannot use this annulment proceeding to rewrite their claims. At the hearing, they told the Tribunal that their claims related to decisions not to renew their exploration permits were part and parcel of their claims about the alleged ban on mining. The Tribunal had to take them at their word.

120. Finally, the Tribunal's finding that the claims related to the alleged ban on mining, including the allegations about the exploration licenses, were not separate and distinct from the claims about the revocation of the environmental permits was also required by the facts before it. The Tribunal reached this conclusion based on several facts as pleaded by Applicants: 1) the environmental permits were revoked before the alleged ban began; 2) the revocations of the environmental permits terminated all of Applicants' rights to mine and process gold in El Salvador; and 3) the damages sought in the domestic litigation based only on the revocations equaled or exceeded the damages sought in the CAFTA arbitration, meaning any alleged additional claims would have been already included in the main claims, or would have been insignificant.

121. El Salvador argued before the Tribunal that all CAFTA claims should be dismissed because Applicants failed to submit effective waivers and therefore failed to perfect El Salvador's consent to CAFTA arbitration. El Salvador also emphasized that the Tribunal should not hesitate to dismiss any alleged minor additional claims where "the damages sought in the domestic proceedings, $111 million, encompass all the damages sought in this proceeding, 'not

[162] Memorial, para. 158.

less than $100' million."[163] In other words, in the CAFTA arbitration, where Applicants allege they made claims based on the revocations of the environmental permits plus the alleged mining ban, including the alleged failure to renew their exploration licenses, Applicants did not allege that their damages had increased from the domestic proceedings, where the damages alleged were only related to the revocation of the environmental permits. Thus, Applicants did not allege before the Tribunal any more damages after those they had claimed as a result of the revocations of the environmental permits in 2006. Any alleged additional claims would have been already included in the main claims, or would have been insignificant. Based on the evidence before the Tribunal, no claims were made or could have been made regarding the exploration licenses. A CAFTA claim, by definition, must be based on an allegation that the respondent breached an obligation and that "the claimant has incurred loss or damage by reason of, or arising out of, that breach."[164]

122. Thus, in the case as pleaded before the Tribunal, all of the alleged harm to Applicants occurred before the alleged ban allegedly began and before their exploration licenses were not renewed. The Tribunal identified the measures that affected Applicants' investment as the revocations of their environmental permits.[165] It was clear to the Tribunal that, based on the evidence before it and the case as presented by Applicants, anything the Government did or did not do after September 2006, when Applicants no longer had rights to mine or process gold, did not cause loss or damage to Applicants. The Tribunal recognized that "it was th[e] revocation [of the environmental permits] which put an end to Claimants' mining and processing activities," and that Applicants pursued the domestic proceedings in 2006 because "they were hoping to be

[163] Reply (Preliminary Objection), para. 111 (internal citations omitted).
[164] CAFTA, Art. 10.16(a)(ii) (AL-11) (emphasis added).
[165] Award, para. 112.

able to mine again."[166] Thus, based on the facts that Applicants had already lost their rights to mine and suffered all the loss or damage they alleged as a result of the revocations of the environmental permits, the Tribunal reasonably determined that neither the alleged ban nor the alleged failure to renew exploration licenses was the basis of a CAFTA claim. Applicants did not allege any loss or damage suffered as a result of or arising out of the alleged ban or the alleged failure to renew the exploration licenses.

123. Based on Applicants' version of the facts, the Tribunal reached the reasonable conclusion that it was not faced with separate claims, and that the alleged ban could not have harmed Applicants because their rights were terminated before the alleged ban began and before the alleged failure to renew their exploration licenses. Applicants are not happy with this outcome, but they are wrong to assume that the Committee can act as a court of appeal and review the Tribunal's factual findings.

124. The Tribunal's decision that it did not have jurisdiction over the entire CAFTA arbitration falls squarely within its express authority under the ICISD Convention and was sound in light of the waiver violation and the facts before it. Therefore, the Tribunal did not exceed its powers; much less did it do so "manifestly."

[166] Award, paras. 111-112.

3. There is no basis to annul the Award with respect to the Tribunal's finding that the so-called *de facto* mining ban did not constitute a measure

a. The Tribunal did not exceed its powers by determining that in the case before it, the alleged *de facto* ban was not a measure on which claims could be based

125. The Tribunal's statement that even if it could tease apart separate claims based on the alleged mining ban, which it could not, it would not consider the alleged mining ban policy a "measure" for purposes of CAFTA does not constitute an excess of powers.

126. First, and most importantly, as noted above, the Tribunal determined that it did "not have jurisdiction over the Parties' CAFTA dispute" because of the waiver violation.[167] The parties' CAFTA dispute included any alleged claims based on the alleged mining ban policy. Moreover, the Tribunal had already determined that there were no separate and distinct claims based on the alleged mining ban. Therefore, an additional finding about whether or not the ban could be considered a measure was not necessary to and had no effect on its decision on jurisdiction. A different finding would not have had any effect on the result of the Award.[168] Therefore, the Tribunal's finding that it would not consider the alleged policy to be a "measure" in this case cannot be an excess of powers under Article 52(1)(b).

127. Additionally, no matter how much Applicants now try to repackage their claims and arguments, they cannot deny that they admitted in the Notice of Arbitration that their environmental permits were revoked before the alleged ban began, and that those revocations "effectively terminat[ed] Commerce/Sanseb's right to mine and process gold and silver." These

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[167] Award, para. 115.
[168] Award, paras. 111-112 (finding first, "the *de facto* mining ban policy claim is not separate and distinct," and then adding "even if the *de facto* mining ban policy and the revocation of the permits could be teased apart, the Tribunal is of the view that the policy does not constitute a 'measure' within the meaning of CAFTA.").

revocations were the measures they challenged before the Supreme Court of El Salvador and on which they based their CAFTA claims. An annulment proceeding is not the time to recast their dispute as resulting from the alleged mining ban in El Salvador.

128. The Tribunal stated that its determination that the alleged ban did not constitute a measure was specific to the circumstances of the case before it. As described above, the Tribunal decided that the "measure" that caused the alleged harm to Applicants was the revocations of their environmental permits, without which Applicants had no rights to mine or process gold in El Salvador. The Tribunal considered that Applicants had not identified, and could not identify, a "measure" taken by the Government as part of the alleged ban that harmed them.[169] As El Salvador had argued, "Calling the revocations, which the Supreme Court determined to be justified, part of an alleged ban does not negate the fact that without the environmental permits, the concession would be automatically terminated and Claimants would not have any rights to mine and no other claims to bring to this Tribunal."[170] The Tribunal, based on Applicants' pleadings, agreed, and this factual finding should not be reexamined by an *ad hoc* committee. This would be true even if such a finding were relevant to the outcome of the Award, which in this case it is not.

[169] Award, paras. 111-112.
[170] Reply (Preliminary Objection), para. 110.

b. Applicants' arguments that the Tribunal manifestly exceeded its powers and failed to state reasons with regard to claims for breach of National Treatment and Minimum Standard of Treatment are absurd and must be rejected

129. Applicants' bizarre assertion that the Tribunal exceeded its powers and failed to state reasons for dismissing their National Treatment and Minimum Standard of Treatment claims related to the alleged ban is unsupportable and based on a faulty reading of CAFTA.

130. The Tribunal found that because of the waiver violation, there was no consent, and without consent, it did not have jurisdiction "over the Parties' CAFTA dispute."[171] There is either jurisdiction to decide the CAFTA arbitration or not, and in this regard there is no distinction for allowing claims under some substantive provisions of CAFTA and not others.

131. Applicants' misunderstanding about this otherwise simple point appears to be caused by their confusion about the term "measure." In addition to finding that there were no separate and distinct claims, which by itself was sufficient for the Tribunal's decision, the Tribunal added that in this particular case, it would not consider the alleged mining ban policy a "measure" within the meaning of CAFTA. The Tribunal was referring to "measure" as used in Article 10.1 of CAFTA, defining the scope of the investment chapter, and not specifically to measures equivalent to expropriation under Article 10.7.[172]

132. Article 10.1 of CAFTA states that the investment chapter "applies to measures adopted or maintained by a Party . . . ." All CAFTA claims, therefore, must be based on identifiable "measures" that affect investors or covered investments. If there is no measure, there can be no claim under any of the provisions of Chapter 10, including Articles 10.3 and 10.5. When the

[171] Award, para. 115.
[172] Memorial, para. 183.

Tribunal said that the alleged mining policy was not a "measure" affecting Applicants, it meant that the policy could not be the basis of a claim of breach of any of the provisions of the investment chapter.

133. The Tribunal cannot be faulted because this alleged ground for annulment could only exist based on Applicants' strained and confused reading of the word "measure." The Tribunal did not differentiate between the different CAFTA provisions as Applicants incorrectly assumed. Given Applicants' misunderstanding of the Award and that this was the Tribunal's second, independent reason for rejecting claims based on the State's alleged policy, Applicants have failed to establish a ground for annulment in this subsection of their Memorial.

4. There is no basis to annul the Award with respect to the Tribunal's finding regarding the Investment Law

a. The Tribunal did not fail to state the reasons

134. Applicants' assertion that the Tribunal failed to state reasons for its finding that there were no claims under the Investment Law is without merit.

135. First, the Tribunal explained that a review of the submissions showed that Applicants had failed to submit claims under El Salvador's Investment Law:

> The Tribunal is not satisfied that Claimants have in fact raised any claims – *i.e.*, causes of action – under the Foreign Investment Law. Claimants have, at most, given explanations as to why they have not done so (*see* ¶ 122 above). Further, Claimants' "confirmation" that they have submitted a claim for breach of the Foreign Investment Law is unsupported by their submissions. Claimants have not articulated any claims; rather, as the following review of the submissions demonstrates, they have provided a perfunctory recital of the articles of the Foreign Investment Law, at most.[173]

[173] Award, para. 124.

136. The Tribunal then described how Claimants failed to refer to the Investment Law after the first paragraph of their Notice of Arbitration, "not even in ¶ 31 where they set forth their request for relief,"[174] and how they failed to specify any provisions of the Investment Law or any specific claims under the Investment Law in their Response to the Preliminary Objection.[175] Finally the Tribunal noted that "Claimants have not made reference to the specific provisions of any of these articles, nor have they indicated how the facts of this case apply to those specific provisions" in any of the documents.[176]

137. Ignoring this clear explanation of the Tribunal's reasons, Applicants argue that "[t]he Tribunal arbitrarily dismissed the Claimants' claims under the Foreign Investment Law."[177] First, the Tribunal did not "dismiss" claims, but rather found that there were none pleaded. Second, Applicants' disagreement with the Tribunal's reasoning does not negate the existence of reasons. The Tribunal provided details about its examination of the documents and its resulting conclusion; the Tribunal is not to be blamed for Applicants' failure to raise claims, and their disappointment with the result is not a ground for annulment.

138. As other committees have explained, this ground for annulment is not concerned with ensuring that the Tribunal provides the correct reasons:

> [I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be

[174] Award, para. 125.
[175] Award, para. 126.
[176] Award, para. 127.
[177] Memorial, para. 198.

> followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e).[178]

139. Thus, there is no room for Applicants to argue that the Tribunal, despite providing its reasons and analysis, did not provide a sufficient legal basis for its determination.[179] As described in the Award, based on the review of the documents, the Tribunal concluded that there were no claims under the Investment Law. Its reasons are clearly stated in the Award, and Article 52(1)(e), therefore, does not apply.

b. In deciding that there were no claims under the Investment Law, the Tribunal did not exceed its powers

140. The Tribunal did not exceed its powers by concluding that there were no claims under the Investment Law of El Salvador. As indicated above, the Tribunal carefully analyzed Applicants' submissions and concluded that it was "not satisfied that Claimants [had] in fact raised any claims – *i.e.*, causes of action – under the Foreign Investment Law."[180] This was primarily a factual determination by the Tribunal regarding what was and was not included in Applicants' submissions and is certainly a tenable interpretation of these documents. The Tribunal did not exceed its powers by making this determination, much less do so manifestly.

141. Applicants' complaint, while made in the context of an application for annulment, is really that they disagree with the Tribunal's factual determination and interpretation of the pleadings; they assert that they "did give notice of [their] Foreign Investment Law claim in

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[178] *Vivendi I* Decision on Annulment, para. 64 (AL-1). *See also MINE* Decision on Annulment, para. 5.08 (RL-1) ("The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention."); *Wena Hotels* Decision on Annulment, para. 79 (RL-17) ("The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the *ad hoc* Committee to reconsider whether the reasons underlying the Tribunal's decisions were appropriate or not, convincing or not.").
[179] Memorial, para. 192.
[180] Award, para. 124.

[their] Notice of Arbitration."[181] They ask the Committee to reverse the Tribunal's finding and replace it with their own interpretation. This is not a proper use of the annulment process.

142. As the Tribunal recognized, there is a difference between mentioning the Investment Law as a basis for jurisdiction and actually making claims of breach of the substantive provisions of the Investment Law. Because the Tribunal found that Applicants had not articulated any causes of action under the Investment Law, the Tribunal could only reach the decision that it did: that the dismissal of the CAFTA claims necessarily was a dismissal of the entire case.[182] The Tribunal has to act within the parties' consent and based on the parties' pleadings; it cannot decide claims that have not been submitted.

143. Applicants also assert that the question of whether Applicants made claims under the Investment Law was not before the Tribunal. This is patently incorrect. In its Preliminary Objection, El Salvador challenged the jurisdiction of the Tribunal with respect to the Investment Law claims.[183] Moreover, El Salvador clearly argued that there were no claims under the Investment Law and asked the Tribunal to decide this issue.[184] In fact, Applicants dedicated an entire subsection of their Rejoinder to their attempt to refute El Salvador's objection to jurisdiction on this ground.[185]

144. Applicants' argument in their Memorial would appear to be an attempt to create a ground for annulment by confusing this clear issue presented to, and decided by, the Tribunal with a potential alternative argument El Salvador reserved, also related to the Investment Law.

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[181] Memorial, para. 198.
[182] Award, para. 128.
[183] Preliminary Objection, para. 126 (requesting that the Tribunal dismiss the arbitration in its entirety).
[184] Reply (Preliminary Objection), para. 112; Transcript of Hearing on Preliminary Objection, Nov. 15, 2011, at 96:13-19.
[185] Rejoinder (Preliminary Objection), paras. 92-97.

Applicants base their request for annulment of the Tribunal's decision that Applicants made no claims under the Investment Law on a quote from El Salvador's presentation at the hearing repeated at paragraph 199 of the Applicant's Memorial. But this quote does not refer to the issue decided by the Tribunal. Rather, it refers to a potential alternative argument and a reservation of rights by El Salvador.

145. It was El Salvador's belief that, in the event the Tribunal were to decide, against all evidence, that there were indeed claims under the Investment Law of El Salvador, the very filing of those claims would have constituted a separate and independent violation of the CAFTA waivers, which would have required a separate jurisdictional objection. However, because El Salvador believed that there were no claims presented to the Tribunal under the Investment Law, El Salvador understood that it would have been premature for the Tribunal to address the still hypothetical question of the effect of the waiver provision on any Investment Law claims. El Salvador therefore simply made the reservation that if (and only if) the Tribunal decided that there were Investment Law claims, the issue of the effect of the waiver provision on the Investment Law claims should not be decided without hearing from the parties in a subsequent jurisdictional objection phase of the arbitration. The quote at paragraph 199 of Applicants' Memorial, which is the crux of their argument for annulment, is nothing more than the statement of this reservation. It does not address the issue of Applicants' failure to make claims under the Investment Law that was decided by the Tribunal.

146. The Tribunal understood that El Salvador had unequivocally asserted that there were no claims under the Investment Law and separately reserved its position with regard to the waiver provision. The Tribunal explained:

> Respondent's position is, first and foremost, that the Tribunal cannot accept jurisdiction under the Investment Law because Claimants have failed to assert any claims thereunder. Respondent's alternative position, as articulated in ¶ 120 above, is that in the event the Tribunal decided that such claims have been asserted, the Parties should be invited to brief the Tribunal as to whether those claims are subject to the Waiver Provision.[186]

147. The issue of whether or not there were claims under the Investment Law was thus clearly and properly before the Tribunal, and Applicants' assertion to the contrary is frivolous.

148. In sum, the Tribunal reasonably determined that Applicants had not raised any claims under the Investment Law. This determination is clearly within its powers and the issue was properly before the Tribunal. Consequently, there was no excess of power related to alleged Investment Law claims, and the Tribunal's finding is not subject to annulment.

V. EL SALVADOR SHOULD BE REIMBURSED FOR ITS COSTS FOR THE ANNULMENT PROCEEDING

149. According to Article 61 of the ICSID Convention, which applies *mutatis mutandis* to annulment proceedings under Article 52(4), and as confirmed by Administrative and Financial Regulation 14(3)(e), the Committee shall decide how and by whom the costs of the proceeding shall be paid.

150. Other committees have determined that respondents in annulment proceedings deserve to be reimbursed in full when the application is found to be meritless. The *AES ad hoc* committee awarded full costs to Hungary, noting that the application for annulment "was clearly without merit" and that "Hungary was forced to go through the process and should not be burdened

[186] Award, para. 121.

further by having to pay for its defence."[187] Likewise, the *CDC ad hoc* committee awarded full costs to the respondent for an annulment application "fundamentally lacking in merit."[188]

151. The *CDC ad hoc* committee noted that committees may order parties to share costs where the dispute raised "a set of novel and complex issues not previously addressed in international arbitral precedent" and "both parties had prevailed to some extent."[189] Where that was not the case, on the other hand, the respondent to the application for annulment had to be reimbursed its costs and expenses in full.[190]

152. This case does not involve novel or complex issues. In fact, El Salvador identified as early as in its letter to the ICSID Secretariat opposing registration, the very jurisdictional issues that eventually resulted in the Award. The Tribunal, after two rounds of written submissions and a hearing, issued a complete, reasoned Award, in which it agreed with previous tribunals that had considered waiver requirements. Applicants, therefore, have attacked a binding and final ICSID Award with little or no probability of success. Moreover, in this case, awarding costs to El Salvador is even more justified because Applicants: 1) delayed and put the proceedings in doubt by starting proceedings they could not fund and without even a plan on how to fund it,[191] and 2) complicated the proceedings by presenting slanted and incorrect information about the Award and the underlying dispute.

153. El Salvador reserves the right and requests the opportunity to file a complete submission on costs before the Committee closes the proceeding.

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[187] *AES* Decision on Annulment, para. 181(RL-8).
[188] *CDC* Decision on Annulment, para. 89 (RL-10).
[189] *CDC* Decision on Annulment, para. 90.
[190] *CDC* Decision on Annulment, para. 90.
[191] *See* El Salvador's Application for Security for Costs, Aug. 10, 2012.

VI. CONCLUSION

154. Applicants lost their rights to mine and process gold in El Salvador in 2006 when their environmental permits were revoked. They immediately initiated proceedings before the Supreme Court of El Salvador requesting more than $100 million and the right to mine again. In 2009, as the three-year limit for initiating claims under CAFTA approached, and they did not yet have decisions from the Supreme Court, Applicants initiated their CAFTA arbitration. Applicants did nothing to discontinue the proceedings they had pending before the Supreme Court of El Salvador, even though CAFTA requires a waiver of the right to continue any proceedings related to the same measures as the CAFTA claims as a condition to the State's consent to CAFTA arbitration. Before the arbitration was even registered, and again immediately after it was registered, El Salvador alerted Applicants to the fatal jurisdictional defect they had caused by trying to preserve multiple opportunities for a favorable outcome. Applicants ignored the warnings and insisted that a Tribunal be constituted. El Salvador promptly filed its objection to jurisdiction, and the Tribunal agreed, dismissing the arbitration for lack of jurisdiction because Applicants failed to comply with the CAFTA waiver requirement.

155. Now Applicants attack that Tribunal's unanimous, clear, well-reasoned Award, issued pursuant to its authority under Article 41 of the ICSID Convention and supported by legal authority and the submissions of non-disputing CAFTA Parties. Similar to their attempt to initiate claims while refusing to comply with treaty requirements, they present arguments for annulment completely disregarding the limited scope of annulment under the ICSID Convention. Applicants have utterly failed to demonstrate that the exceptional remedy of annulment is required in this case. They have simply acknowledged that they do not like the Award and consider it unfair, profusely repeated arguments heard and reasonably rejected by the Tribunal,

and then impermissibly sought to present new and modified arguments about the merits of their arbitration claims to this Committee. Applicants cannot show that the Tribunal failed to state reasons or exceeded its powers, because neither is true. Their claims for annulment are without merit and the principle of finality of ICSID Awards enshrined in Article 53 of the Convention must be respected, and this Award upheld.

VII. REQUEST

156. For the foregoing reasons, El Salvador respectfully requests that the Committee: 1) reject all the alleged grounds for annulment; 2) uphold the Tribunal's Award in full; and 3) order Applicants to pay all the costs and expenses of this annulment proceeding, including the fees for the Centre, the costs and fees of the Committee, and El Salvador's legal fees and expenses. To this end, El Salvador requests the opportunity to submit a separate application for costs immediately before the proceeding is closed.

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