



INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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CERTIFICATE

WEST AFRICAN AQUACULTURE LTD, [REDACTED] AND [REDACTED]

v.

REPUBLIC OF THE GAMBIA

(ICSID CASE NO. ARB/18/10) – ANNULMENT

I hereby certify that the attached document is a true copy of the *ad hoc* Committee's Decision on Annulment dated 17 July 2026.

[Signature]

Martina Polasek
Secretary-General



Washington, D.C., 17 July 2026

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WEST AFRICAN AQUACULTURE LTD , [REDACTED] AND [REDACTED]

Respondents on Annulment

and

REPUBLIC OF THE GAMBIA

Applicant

**ICSID Case No. ARB/18/10
Annulment Proceeding**

DECISION ON ANNULMENT

Members of the *ad hoc* Committee

Dr Veijo Heiskanen, President of the *ad hoc* Committee

Prof Githu Muigai, Member of the *ad hoc* Committee

Ms Erica Stein, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee

Mr Oladimeji Ojo

Date of dispatch to the Parties: 17 July 2026

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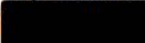
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TABLE OF SELECTED ABBREVIATIONS AND DEFINED TERMS

Applicant or The Gambia	Republic of The Gambia
Application	Application for Annulment filed on 19 July 2024
Award	Award rendered on 25 March 2024 between West African Aquaculture Ltd, ██████████ and ██████████ and the Republic of The Gambia (ICSID Case No. ARB/18/10)
A-[#]	Applicant's Exhibit
ALA-[#]	Applicant's Legal Authority
CA-[#]	██████████ Exhibit
CALA-[#]	Claimants' Legal Authority
Claimants or WAA	West African Aquaculture Ltd, ██████████ and ██████████
Committee	Dr Veijo Heiskanen, Professor Githu Muigai and Ms Erica Stein
Counter-Memorial	Claimants' Counter-Memorial dated 14 May 2025
GIEPAA 2015	The Gambia Investment and Export Promotion Act of 2015, which entered into force on 31 December 2015
GIEPAA 2010	The Gambia Investment and Export Promotion Act of 2010, which entered into force on 26 May 2010
Hearing	Hearing on Annulment held from 24 to 26 November 2025
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC Guiding Principles	International Law Commission's Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations
ICJ	International Court of Justice
Majority	Majority of the Tribunal that rendered the Award
Memorial	Applicant's Memorial on Annulment dated 12 February 2025
PO1	Procedural Order No. 1 dated 20 November 2024
PO2	Procedural Order No. 2 on the Applicant's Request for Leave dated 7 January 2025
Rejoinder	Claimants' Rejoinder dated 12 September 2025
Reply	Applicant's Reply on Annulment dated 15 July 2025
Request for Leave	Applicant's Request for Leave to introduce an expert report on Gambian law dated 29 November 2024
Tr. Day [#] [Speaker(s)] [page: line]	Transcript of the Hearing
Tribunal	Arbitral tribunal composed of Professor Céline Lévesque (President), Ms Melanie Van Leeuwen and Professor Pierre Mayer that rendered the Award

I. INTRODUCTION

1. This annulment proceeding concerns an application for annulment of the award rendered on 25 March 2024 between West African Aquaculture Ltd, [REDACTED] and [REDACTED] and the Republic of The Gambia (ICSID Case No. ARB/18/10) (the “**Award**”) by an arbitral tribunal composed of Professor Céline Lévesque (President), Ms Melanie Van Leeuwen and Professor Pierre Mayer (the “**Tribunal**”).
2. In this Decision, West African Aquaculture Ltd (“**WAA**”), [REDACTED] (or his estate) and [REDACTED] are referred to as the “**Claimants**,” as in the original proceeding, and the Republic of The Gambia is referred to as the “**Applicant**” or “**The Gambia**.” The Claimants and the Applicant are collectively referred to as the “**Parties**.” The Parties’ representatives and their details are listed above at page (i).
3. The Award was rendered in a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of The Gambia Investment and Export Promotion Act of 2015, which entered into force on 31 December 2015 (the “**GIEPAA (2015)**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
4. The dispute in the original proceeding related to the Claimants’ investment in a shrimp farming project, with prospect of selling products both locally and to Europe and the Middle East. The Claimants alleged that the then Gambian President, Yahya Jammeh, had long wished to expropriate the Claimants’ business. The Claimants’ alleged fears materialized in June 2015, when the Gambian military seized the [REDACTED] farm. After the taking, and following a change of government, WAA attempted to reach amicable settlement and to obtain reparation through discussions with the Gambian authorities. These discussions failed, and on 22 February 2018, WAA initiated arbitration proceedings and submitted their Request for Arbitration with ICSID, relying on the ICSID Convention and The Gambia Investment and Export Promotion Act of 2010 (the “**GIEPAA (2010)**”).

5. After further exchanges between the ICSID Secretariat and the Claimants, on 28 March 2018, the Secretary-General of ICSID registered the Request for Arbitration. In the course of the exchanges, the Claimants clarified that they relied on the GIEPAA (2015) and, alternatively, the GIEPAA (2010).
6. In the Award, the Tribunal decided that (i) it had jurisdiction over the dispute under Section 35 of the GIEPAA (2015); (ii) The Gambia had breached Schedule I Part I of the GIEPAA (2015) by unlawfully expropriating the Claimants' investment; and (iii) ordered The Gambia to pay compensation to the Claimants.
7. The Award was issued by majority, Professor Mayer dissenting from the Tribunal's findings on jurisdiction and, in part, on the merits.
8. The Applicant has applied for annulment of the Award under Article 52(1) of the ICSID Convention, invoking two separate grounds for annulment – (i) manifest excess of powers (Article 52(1)(b)) and (ii) failure to state the reasons (Article 52(1)(e)).

II. PROCEDURAL HISTORY

9. On 19 July 2024, ICSID received The Gambia's application for annulment dated the same day, 19 July 2024 (the "**Application**").
10. On 24 July 2024, pursuant to Rule 50(2) of the ICSID Arbitration Rules, the Acting Secretary-General of ICSID registered the Application.
11. By letter of 18 September 2024, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Dr Veijo Heiskanen, a national of Finland, appointed to the Panel of Arbitrators by Finland, and designated as President of the Committee, Professor Githu Muigai, a national of Kenya, appointed to the Panel of Arbitrators by Kenya, and Ms Erica Stein, a national of Belgium and the United States, appointed to the Panel of Arbitrators by the Chairman of the Administrative Council, had been constituted (the "**Committee**"). On the same date, the Parties were notified that Mr Oladimeji Ojo, Legal Counsel, ICSID, would serve as Secretary of the Committee.

12. By letter of 23 September 2024, the Committee proposed dates for the first session, to be held by videoconference, and requested that the Parties indicate their availability for the first session.
13. By emails of 24 September 2024, the Parties indicated their availability for the first session.
14. By letter of 30 September 2024, the Committee confirmed that the first session would be held on 15 November 2024 and circulated a draft Procedural Order No. 1 for the Parties to review and comment on.
15. By emails of 22 October 2024, the Parties circulated draft Procedural Order No. 1 with their comments to the Committee.
16. By letter of the same date, the Claimants requested leave for each Party to file a written submission on the outstanding issues in dispute relating to draft Procedural Order No. 1. The Respondent indicated that it would respond to the Claimants' request by 28 October 2024.
17. By email of 23 October 2024, the Committee granted the Claimants' request to file a written submission on the outstanding issues in dispute relating to draft Procedural Order No. 1 and directed the Parties to file simultaneous submissions on the points of disagreement. The Tribunal indicated that the Parties would be given an opportunity to comment on each other's positions at the first session.
18. By email of 8 November 2024, the Claimants submitted their observations on the outstanding issues in dispute relating to draft Procedural Order No. 1, together with factual exhibit CA-001 and legal authorities CALA-001 through CALA-013.
19. By email of the same date, the Applicant submitted its observations on the outstanding issues in dispute relating to draft Procedural Order No. 1, together with factual exhibits A-21 through A-25 and legal authorities ALA-025 through ALA-034. The Applicant's letter contained a request for leave to introduce an expert report on Gambian law.
20. By letter of 10 November 2024, the Claimants commented on the Applicant's observations set out in its letter dated 8 November 2024.

21. By letter of 11 November 2024, the Applicant commented on the Claimants' letter of 10 November 2024.
22. By letter of 12 November 2024, the Committee addressed the Parties' letters of 10 and 11 November 2024 and informed the Parties that the first session would be limited to discussion of draft Procedural Order No. 1. Once Procedural Order No. 1 was finalized and issued, the Applicant would be given an opportunity to confirm or amend its request for leave, or indeed to withdraw it if not required under the terms of Procedural Order No. 1 as adopted by the Committee. The Committee indicated that the Claimants would be given an opportunity to comment on the Applicant's request for leave before the Committee would issue its ruling.
23. In accordance with ICSID Arbitration Rules 53 and 13(1), the Committee held a first session with the Parties on 15 November 2024 by videoconference.
24. Following the first session, on 20 November 2024, the Committee issued Procedural Order No. 1 ("**PO1**") recording the agreement of the Parties on procedural matters and the decision of the Committee on the disputed issues. PO1 provides, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English, and that the place of proceeding would be London, United Kingdom. PO1 also sets out a procedural calendar for the proceeding.
25. By email of the same date, the Committee informed the Parties that the Applicant could submit a request for leave for any expert report it might wish to submit and invited the Claimants to submit their comments if such request were to be made. The Committee also requested that the Parties indicate their availability for the hearing in the annulment proceeding.
26. By emails of 22 November 2022, the Parties indicated their availability to hold the hearing.
27. By email of 26 November 2024, the Committee invited the Parties to confirm the number of days required to be reserved for the hearing.

28. By email of 27 November 2024, the Claimants provided their response to the Tribunal's query regarding the number of hearing days to be reserved.
29. By email of 28 November 2024, the Applicant provided its response to the Tribunal's query regarding the number of hearing days to be reserved.
30. By email of 29 November 2024, the Applicant submitted a request for leave to introduce an expert report on Gambian law, together with factual exhibits A-26 through A-28 and legal exhibits ALA-035 through ALA-036 (the "**Applicant's Request for Leave**").
31. By email of 2 December 2024, the Committee confirmed to the Parties that the hearing would be held on 24-26 November 2025, with 27 November 2025 to be held in reserve.
32. By email of 10 December 2024, the Claimants submitted their observations on the Applicant's Request for Leave, together with factual exhibits CA-002 through CA-004 and legal authorities CALA-014 through CALA-034 (the "**Claimants' Observations**").
33. By letter of 20 December 2024, the Committee granted the Applicant's Request for Leave in the form of a decision without reasons, in view of the impending holiday period and the upcoming time limit for the Applicant's memorial. The Committee indicated that a reasoned decision would follow in due course.
34. On 7 January 2025, the Committee issued Procedural Order No. 2 ("**PO2**") containing the Committee's reasoned decision on the Applicant's Request for Leave.
35. In accordance with PO1, on 12 February 2025, the Applicant submitted its Memorial on Annulment, together with Annexes A and B, the expert report of Mr [REDACTED], factual exhibits A-29 through A-47 and legal authorities ALA-035 through ALA-104 (the "**Memorial**").
36. By email of 1 May 2025, the Claimants submitted a request for leave to submit a legal expert report on Gambian law (the "**Claimants' Request for Leave**").
37. By email of 2 May 2025, the Committee invited the Applicant to provide its comments on the Claimants' request for leave to submit a legal expert report on Gambian law.

38. By email of 6 May 2025, the Applicant provided its comments on the Claimants' request for leave to submit a legal expert report on Gambian law (the "**Applicant's Comments**").
39. By email of 7 May 2025, the Committee granted the Claimants' Request for Leave to submit a legal expert report on Gambian law.
40. In accordance with PO1, by email of 14 May 2025, the Claimants submitted their Counter-Memorial on Annulment, together with the expert report of Ms [REDACTED] factual exhibits CA-004-CA-008 and legal authorities CALA-035 through CALA-107 (the "**Counter-Memorial**").
41. In accordance with PO1, by email of 15 July 2025, the Applicant submitted its Reply on Annulment, together with the second expert report of Mr [REDACTED], factual exhibit A-48 and legal authorities ALA-105 through ALA-113 (the "**Reply**").
42. By letter of 25 July 2025, the Committee invited the Parties to confer and seek agreement on the organization and logistics of the hearing.
43. Between 28 July 2025 and 1 August 2025, the Parties exchanged communications on the organization and logistics of the hearing.
44. By email of 5 August 2025, the Committee confirmed that the hearing would be held at the International Dispute Resolution Centre in London, United Kingdom, from 24 to 26 November 2025. The Committee invited the Parties to indicate their availability to hold the pre-hearing conference on 27 October 2025.
45. By email of 6 August 2025, the Applicant confirmed its availability to hold the pre-hearing conference on 27 October 2025.
46. By email of 8 August 2025, the Claimants confirmed their availability to hold the pre-hearing conference on 27 October 2025.
47. By email of 11 August 2025, the Committee confirmed that the pre-hearing conference would be held on 27 October 2025, at 2:00pm CET.

48. In accordance with PO1, by email of 12 September 2025, the Claimants submitted their Rejoinder on Annulment, together with the second expert report of Ms [REDACTED] and legal authorities CALA-108 through CALA-111 (the “**Rejoinder**”).
49. By email of 23 September 2025, the Committee circulated to the Parties a draft Procedural Order No. 3 regarding the organization and logistics of the hearing and invited the Parties to confer and provide their comments.
50. By email of 13 October 2025, the Parties provided their comments on draft Procedural Order No. 3.
51. In accordance with ICSID Arbitration Rules 53 and 21, on 27 October 2025, the Committee held a pre-hearing conference with the Parties by videoconference.
52. On 29 October 2025, the Committee issued Procedural Order No. 3 on the organization and logistics of the hearing.
53. A hearing on annulment was held in London, United Kingdom, from 24 to 26 November 2025 (the “**Hearing**”). The following individuals were present at the Hearing:

Committee:

Dr Veijo Heiskanen
 Prof Githu Muigai
 Ms Erica Stein

President of the *ad hoc* Committee
 Member of the *ad hoc* Committee
 Member of the *ad hoc* Committee

ICSID Secretariat:

Mr Oladimeji Ojo

Secretary of the Committee

For the Applicant:

Ms Cherie Blair CBE, KC
 Mr Ricardo Gerhard
 Mr James Palmer
 Ms Jessica Sblendorio
 Mr Rodrigo Vieira
 Mr Lucas Bastin, KC
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 Principal State Counsel of The Gambia

For the Claimants:

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Mr Thomas Innes
Ms Chloe Baldwin
Mr Michael Lee
Ms Lindsey Dimond
Ms Emily Jarman
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Steptoe International (UK) LLP
Steptoe International (UK) LLP
Steptoe International (UK) LLP

Court Reporter:

[REDACTED]

54. On 17 December 2026, the Parties submitted their agreed corrections to the transcript of the Hearing.
55. On 24 December 2026, the Court Reporter transmitted the revised transcript of the Hearing to the Parties and the Members of the Committee.
56. By email of 15 January 2026, the Claimants' counsel informed the Committee that [REDACTED] [REDACTED] one of the Claimants, had passed away on 6 January 2026, and that Mr [REDACTED]'s estate (represented by Ms [REDACTED]) had confirmed that Steptoe International (UK) LLP was authorized to act on behalf of Mr [REDACTED]'s estate in this annulment proceeding.
57. By email of the same date, the Members of the Committee conveyed their sincere condolences on the passing of Mr [REDACTED].
58. On 19 January 2026, the Claimants' counsel submitted to the Secretariat a power of attorney issued to Steptoe International (UK) LLP by Mr [REDACTED]'s estate.
59. The Parties filed their statements of costs on 23 January 2026.
60. On 8 June 2026, the Committee declared the proceeding closed.

III. ADMISSIBILITY OF THE APPLICANT'S EXPERT REPORTS

A. THE PARTIES' POSITIONS

(1) The Claimants' Position

61. The Claimants submit, as a preliminary matter, that the Applicant has breached both the general rules on annulment proceedings and the Committee's specific directions in relation to the Applicant's expert reports on Gambian law (the "**First [REDACTED] Report**" and the "**Second [REDACTED] Report**" and, together, the "**[REDACTED] Reports**"). The Claimants request that the Committee strike the [REDACTED] Reports and supporting exhibits KS-004, KS-005, KS-007, KS-008, KS-009, KS-010 and KS-013 from the record as inadmissible.¹

a. Counter-Memorial

62. The Claimants submit that annulment proceedings are not an opportunity for appeal or a retrial of the underlying dispute. They are only concerned with the legitimacy of the process of the decision rather than its substantive correctness. Furthermore, an annulment application must be determined on the basis of the evidence and submissions that were before the tribunal; an annulment proceeding is not an opportunity to raise new evidence or new arguments, or to seek to fill gaps.²
63. According to the Claimants, these principles also impact the admissibility and relevance of new evidence sought to be adduced in an annulment proceeding. To be admissible, new evidence (i) must be specifically relevant to the grounds for annulment set out in Article 52(1) of the ICSID Convention; (ii) cannot be used to complete or develop an argument which the applicant could have made in the arbitration proceeding or to retrospectively fill gaps in the argument; and (iii) there must be exceptional or special circumstances that warrant the introduction of new expert evidence in the annulment proceeding.³

¹ Rejoinder, para. 399(b).

² Counter-Memorial, paras. 79-81 (citing **CALA-048**, *Fraport AG v. Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, 23 December 2010, para. 45).

³ Counter-Memorial, para. 82.

64. The Claimants contend that, consistent with these principles, PO1 provides that, given the nature of an annulment proceeding, the Committee “*expects that the Parties will refer primarily to the evidentiary record from the arbitration proceeding*” and that “*it does not expect to receive new evidence;*” accordingly, “*without prejudice to each Party’s right to submit new legal authorities, no new evidence shall be admitted in this proceeding, except with leave from the Committee.*”⁴
65. The Claimants argue that the First [REDACTED] Report and the supporting new exhibits fail to meet these standards and are both irrelevant and inadmissible.⁵
66. The Claimants recall that, in PO2, the Committee granted the Applicant’s request to file expert evidence, but only insofar as
- “(i) the scope of the proposed legal expert report is limited to addressing [the] question of whether the arbitral tribunal’s interpretation in the underlying arbitration of Gambian law, specifically the GIEPAA (2010) and GIEPAA (2015), resulted in a manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention; and*
- (ii) the proposed expert report does not contain any new factual evidence.”*⁶
67. The Claimants contend that, contrary to what the Applicant represented when seeking leave, the First [REDACTED] Report is not an expert view on the legal issues under Gambian law that have already been raised in the arbitration; it seeks to introduce new arguments regarding the interpretation of domestic law that the Application did not present in the arbitration. According to the Claimants, the First [REDACTED] Report also does not comply with the Committee’s directions. In particular, the First [REDACTED] Report seeks to introduce new arguments regarding the interpretation of domestic law that the Applicant did not put forward in the underlying arbitration. This is “*readily apparent*” from the three new Gambian law exhibits – KS-004, KS-005 and KS-007 – which were not before the Tribunal.⁷

⁴ Counter-Memorial, para. 83 (citing Procedural Order No. 1, para. 15.4). See also Procedural Order No. 2, para. 3.1.1.

⁵ Counter-Memorial, paras. 85 *et seq.*

⁶ Procedural Order No. 2, para. 4.1.

⁷ Counter-Memorial, paras. 85-88.

68. The Claimants submit that the First [REDACTED] Report is also not compliant with PO2 as its scope is not limited to addressing the question of whether the Tribunal's interpretation of Gambian law resulted in manifest excess of powers, as directed by the Tribunal.⁸
69. The Claimants contend that the First [REDACTED] Report is an impermissible attempt at a *de novo* review of the underlying issues in the arbitration. The Applicant made strategic choices as to how to argue its case in the arbitration and which expert evidence to produce, and it was afforded "*every opportunity*" to make its case. The Applicant does not argue that its right to be heard was not respected. An annulment proceeding is not an opportunity for the applicant to seek to correct shortcomings in its arbitration strategy. For these reasons, the First [REDACTED] Report should be struck from the record.⁹
70. The Claimants further submit that the new exhibits filed by the Applicant with the First [REDACTED] Report are both irrelevant and inadmissible. The Applicant made no mention in its Request for Leave of any intention to file new legal authorities together with the legal expert report.¹⁰ While PO1 permits the filing of new legal authorities, these are limited to the annulment grounds; no new legal authorities concerning issues that were before the Tribunal are allowed. The Claimants rely, in support, on *Global Telecom Holding S.A.E. v. Canada* ("**Global Telecom**"), where the *ad hoc* committee held that new evidence in an annulment proceeding should be limited to "*very specific and uncommon circumstances, which should assist the ad hoc Committee in assessing whether the process was legitimate.*"¹¹
71. In conclusion, the Claimants request that the Committee find that the new legal authorities are inadmissible and strike them from the record.¹²

⁸ Counter-Memorial, para. 89.

⁹ Counter-Memorial, paras. 90-92.

¹⁰ Counter-Memorial, paras. 93-95.

¹¹ Counter-Memorial, paras. 96-97 (citing **CALA-012**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, 30 September 2022, paras. 65, 82-91; and **CALA-004**, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Annulment Proceeding, Procedural Order No. 2, 4 February 2021, paras. 14, 18, 25).

¹² Counter-Memorial, para. 98.

b. Rejoinder

72. In their Rejoinder, the Claimants argue that the [REDACTED] Reports are “*improper, inadmissible and unmeritorious*.”¹³ According to the Claimants, the reports do not address the question of whether the Tribunal engaged in a manifest excess of powers, in violation of the Committee’s directions in PO2. The Claimants raise four separate arguments in support of their position that the reports should be struck from the record as inadmissible.
73. First, according to the Claimants, the [REDACTED] Reports are based on the “*false premise*” that the Tribunal was conducting a pure Gambian law analysis.¹⁴ The Tribunal was conducting an international law analysis, based on argument put to it by the Parties. The Parties and the Tribunal agreed on this approach, and the Tribunal ultimately ruled on this basis. Indeed, the Applicant itself in the arbitration relied on ICSID jurisprudence, which adopted a framework for analysis that gave priority to international law. ICSID jurisprudence expressly rejects a restrictive, hierarchical approach to the interpretation of a domestic statute, and it is this approach that the Applicant commended to the Tribunal. The Applicant never argued that the requirements for establishing consent to ICSID arbitration were qualified by Gambian law. According to the Claimants, the Sanyang Reports and the Applicant’s reliance on them “*are nothing but an attempt to re-argue the issue of the Tribunal’s jurisdiction ratione voluntatis on a new basis, based upon evidence and related argument it never submitted to the Tribunal*.”¹⁵
74. Second, the Claimants submit that, in any event, the Applicant’s new evidence on Gambian law introduced with the [REDACTED] Reports “*contravenes the Committee’s directions in PO2, and is therefore inadmissible on this basis alone*.”¹⁶ According to the Claimants, it is “*axiomatic*” that the Tribunal’s award is to be assessed against evidence which was put before it in the underlying arbitration proceeding. Indeed, in international proceedings, domestic law is treated as a fact and, accordingly, a party is not allowed to supplement the record with new factual evidence that was not adduced in the underlying arbitration. This

¹³ Rejoinder, Section IV.

¹⁴ Rejoinder, para. 338.

¹⁵ Rejoinder, paras. 342-351 (emphasis in the original).

¹⁶ Rejoinder, para. 352.

was the position adopted by the committee in *Global Telecom* and, contrary to what the Applicant contends, the position was not limited to matters pertaining to evidence on applicable law. The Claimants note that the four new Gambian law exhibits introduced in the Second [REDACTED] Report were not introduced before the Tribunal and are therefore inadmissible. According to the Claimants, the Tribunal “*cannot be faulted on the basis of evidence (or arguments) that were not put to it.*”¹⁷

75. Third, the Claimants contend that the [REDACTED] Reports contravene the Committee’s PO2 by introducing inadmissible Gambian law arguments which had not been put to the Tribunal. Contrary to what the Applicant argues in its Memorial, the First [REDACTED] Report does put forward “*an extensive new argument*” on the intention and effect of Section 9 of the Gambian Interpretation Act. Mr [REDACTED] similarly makes comments on (i) the legal framework for the repeal of statutes in The Gambia; (ii) the obligation to notify the Claimants of the changes of the applicable law; and (iii) access to domestic court proceedings that were not presented in the arbitration. Insofar as Mr Sanyang repeats arguments made in the underlying arbitration, the Applicant’s efforts to flesh out its argument also amounts to new evidence.¹⁸
76. According to the Claimants, the Second [REDACTED] Report also introduces further new Gambian law arguments that were not put to the Tribunal in the underlying arbitration, in an effort to fill gaps in the Applicant’s original arguments. These include Mr [REDACTED]’s (i) new Gambian law argument about statutory interpretation based on the “*(inadmissible) United Democratic Party decision;*”¹⁹ and (ii) invocation of two new exhibits, KS-004 and KS-007, to advance a new Gambian law argument that Section 35 of the GIEPAA (2015) did not provide access to ICSID arbitration. To the extent that Mr [REDACTED] merely repeats and endorses contentions already made by the Applicant in the underlying arbitration or in the present proceedings, such new evidence is inadmissible as it “*seeks to provide a veneer*

¹⁷ Rejoinder, paras. 352-361.

¹⁸ Rejoinder, paras. 362-381.

¹⁹ Rejoinder, para. 383 (emphasis in the original).

*of Gambian law authority to arguments which the Tribunal has already considered and dismissed.”*²⁰

77. Fourth, the Claimants submit that, to the extent that Mr [REDACTED]’s evidence and argument is admitted, they are in any event unmeritorious. The Claimants rely on Ms [REDACTED]’s evidence, which in their view shows that Mr [REDACTED] *“has misunderstood the Tribunal’s reasoning or otherwise merely speculated about the proper construction of the 2015 Act.”*²¹ Furthermore, according to the Claimants, Mr [REDACTED]’s novel Gambian law arguments are also *“misconceived and do not assist the Applicant’s case.”*²² His arguments about (i) reference to repealed statutes and to Gambian courts’ alleged textual focus of statutory interpretation *“ignores their actual practice;”* (ii) the GIEPAA (2015) excluding consent to ICSID arbitration is based on *“an misapplication of a Gambian law authority as well as his misguided reliance on an inapplicable UK authority;”* and (iii) Gambian court proceedings for claims against the State and the supposed mandatory rule of statutory interpretation *“ignore the constitutional guarantee of ‘impartial and independent’ dispute resolution.”*²³

(2) The Applicant’s Position

78. The Applicant disputes the Claimants’ argument that the First [REDACTED] Report is inadmissible and irrelevant, and that it is simply an attempt to fill gaps in the Applicant’s case as presented to the Tribunal. The Applicant submits that the First [REDACTED] Report is intended to provide the Committee with an analysis of the specific provisions under Gambian law which were invoked by the Majority in the Award to assert jurisdiction over the dispute.²⁴
79. The Applicant submits that the First [REDACTED] Report complies fully with PO2 as it (i) discusses the key provisions of Gambian law central to the dispute and which the Majority failed to apply; and (ii) demonstrates that the Majority’s jurisdictional findings

²⁰ Rejoinder, paras. 382-395.

²¹ Rejoinder, para. 396 (footnote omitted).

²² Rejoinder, para. 397.

²³ Reply, paras. 396-397.

²⁴ Reply, paras. 247-249.

were not merely inconsistent with the plain text of the relevant provisions, but fundamentally incompatible with Gambian law as a whole.²⁵

80. The Applicant argues that the First [REDACTED] Report does not introduce new arguments or new factual evidence. The new legal authorities identified by the Claimants were not used to establish or support any new arguments; exhibit KS-004 was used to provide “*a general context on how statutes are generally repealed in The Gambia*,” exhibit KS-005 “*simply shows that the 2015 Act was published*,” and no arguments were developed on this basis; and exhibit KS-007 was relied upon by Mr [REDACTED] “*to observe that, in addition to the remedies provided under the 2015 Act, individuals and entities have a legal avenue for redress against The Gambia*.”²⁶
81. Finally, the Applicant submits that *Global Telecom* is “*inapposite*” because in that case the *ad hoc* committee rejected the new evidence on Canadian law because Canada had, for the first time in the annulment proceedings, argued that Ontario’s laws were the applicable law.²⁷
82. At the Hearing, the Applicant insisted that they had fully complied with PO2 and that the [REDACTED] Reports did not advance any new arguments; they provided “*an independent expert view on the legal issues of Gambian law that have already been raised in the arbitration*.”²⁸ Nor do the [REDACTED] Reports contain any new factual evidence, but rely on materials already on record. The few additional documents are legal authorities, not factual evidence, and therefore fall within the Committee’s directions.²⁹

B. THE COMMITTEE’S ANALYSIS

83. As summarized above, the Claimants request that the Committee strike the [REDACTED] Reports and the supporting exhibits identified in the request from the record as inadmissible. According to the Claimants, the [REDACTED] Reports are based on the premise

²⁵ Reply, paras. 250-252.

²⁶ Reply, paras. 253-257.

²⁷ Reply, para. 258.

²⁸ Tr. Day 1, 133: 12-14.

²⁹ Tr. Day 1, 133-135; Day 3, 70: 20-25; 71: 1-25; 72: 1-23.

that the Tribunal founded its jurisdiction on Gambian law, however, this is false since the Tribunal conducted an international law analysis and ultimately ruled on its jurisdiction on this basis. According to the Claimants, in an annulment proceeding, the Award must be assessed against the evidence which was put before the Tribunal in the underlying arbitration proceeding, and since “*in international proceedings, domestic law is treated as a fact,*” a party cannot be allowed to supplement the record with new factual evidence that was not adduced in the underlying arbitration.³⁰

84. The relevant rules for the purposes of determining the Claimants’ request are set out in paragraphs 15.3 and 15.4 of PO1, which provide:

“15.3 Given the nature of annulment proceedings, the Committee expects that the Parties will refer primarily to the evidentiary record from the arbitration proceeding and it does not expect to receive new evidence.

15.4 Therefore, without prejudice to each Party’s right to submit new legal authorities, no new evidence shall be admitted in this proceeding, except with leave from the Committee. Should either Party wish to introduce new evidence, other than legal authorities, it shall file a request to the Committee to that effect. The Committee will promptly decide on the admissibility of the new evidence, after hearing the other Party.”³¹

85. As summarized above, the Applicant filed its Request for Leave to introduce an expert report on Gambian law on 29 November 2024, after the issuance of PO1. After hearing the Parties, the Committee issued PO2, which granted the Applicant’s Request for leave insofar as:

“(i) the scope of the proposed legal expert report is limited to addressing [the] question of whether the arbitral tribunal’s interpretation in the underlying arbitration of Gambian law, specifically GIEPAA (2010) and GIEPAA (2015), resulted in a manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention; and

(ii) the proposed expert report does not contain any new factual evidence.”³²

³⁰ Rejoinder, para. 353.

³¹ Procedural Order No. 1, paras. 15.3-15.4.

³² Procedural Order No. 2, para. 4.1.

86. The Committee recalls that the Applicant seeks annulment of the Award on the basis, *inter alia*, that the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention. According to the Applicant, The Gambia had not given its consent in writing to ICSID arbitration, as required by Article 25(1) of the ICSID Convention, which defines the legal basis of ICSID jurisdiction. The Applicant contends that there is no consent “*under any plausible interpretation*” of Section 35 of the GIEPAA (2015), and Section 55 of the GIEPAA (2010), which did contain The Gambia’s consent, was revoked and ceased to exist when GIEPAA (2015) entered into force.³³ As noted above, the Committee granted the Applicant’s Request for Leave to produce an expert report on Gambian law in support of this specific ground for annulment.³⁴
87. The Committee further recalls that the Tribunal in the underlying arbitration founded its jurisdiction on Section 35 of the GIEPAA (2015).³⁵ The Tribunal summed up its reasoning as follows:

*“[T]he Tribunal considers that the offer of ICSID arbitration made in the GIEPAA (2010) was not revoked in the GIEPAA (2015) or otherwise in the behavior of the Respondent between 2015 and 2018. As such, the Claimants were able to formally accept the offer of ICSID arbitration when they submitted their Request for Arbitration under the GIEPAA (2015) in February 2018.”*³⁶

88. The [REDACTED] Reports and the evidence filed in support of the two reports relate to two legal instruments – the GIEPAA (2010) and the GIEPAA (2015) – both of which are (or were, in the case of the GIEPAA (2010) – domestic Gambian statutes but which were also relied upon by the Tribunal in founding jurisdiction under the ICSID Convention – an international treaty governed by international law. Thus, the relationship between Gambian domestic law (specifically, the GIEPAA (2010) and the GIEPAA (2015)) and international law (specifically, the ICSID Convention) is more complex than simply a relationship between law and facts, as suggested by the Claimants. While it is correct, as

³³ Memorial, para. 37. See also paras. 34-131.

³⁴ Procedural Order No. 2; Request for Leave, paras. 2, 23.

³⁵ A-001, *West African Aquaculture Ltd, [REDACTED] and [REDACTED] v. Republic of the Gambia*, ICSID Case No. ARB/18/10, Award, 25 March 2024 (“Award”), para. 767(1).

³⁶ Award, para. 427.

the Claimants state, that under international law domestic law may in certain circumstances be treated as a “fact,” this is right only insofar as it goes; specifically, the rule only applies in case of a conflict between international law and domestic law before an international court or tribunal. If such a conflict is found to exist, international law trumps domestic law, and an international court or tribunal must apply international law.³⁷ However, the rule does not mean that domestic law cannot be interpreted and applied, as a matter of law, by an international court or tribunal for the purposes of resolving preliminary issues such as – as in the present case – whether a domestic statute contains a consent of the host State to arbitrate a dispute with a foreign investor before an international tribunal. While the determination of whether an international court or tribunal has jurisdiction is ultimately a matter of international law, it may also be in certain circumstances, as a preliminary matter, a matter of interpretation of domestic law. In other words, insofar as the two domestic statutes – the GIEPAA (2010) and the GIEPAA (2015) – are said to contain The Gambia’s consent to arbitrate before an ICSID tribunal, their interpretation is governed both by domestic Gambian law (as a preliminary matter) and, ultimately, international law.

89. In the circumstances, the Committee is unable to accept the Claimants’ request that the [REDACTED] Reports and the supporting exhibits identified by the Claimants be stricken from the record as inadmissible. Such evidence, insofar as it relates to the domestic Gambian statutes on the basis of which the Tribunal established that it had jurisdiction, cannot be characterized exclusively as evidence of facts; it may also qualify as a legal authority, insofar as it is relied upon to establish the Applicant’s consent – or the lack thereof – to arbitrate.
90. In light of the above, the Claimants’ request that the Committee strike the [REDACTED] Reports and exhibits KS-004, KS-005, KS-007, KS-008, KS-009, KS-010 and KS-013 from the record as inadmissible, is rejected.

³⁷ The Claimants have not produced legal authorities in support of its argument that in international proceedings domestic law is treated as a fact. The Committee recalls that both the International Court of Justice and the Permanent Court of International Justice have produced extensive jurisprudence on the issue (often stated in terms of the State not being allowed to invoke its domestic law to avoid its international obligations). See also **ALA-108**, Vienna Convention on the Law of Treaties, 1969, Article 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”)

91. The Committee’s determination is limited to the issue of admissibility and, as such, is without prejudice to the question of whether the [REDACTED] Reports and the supporting exhibits listed above are relevant to the Committee’s determination of whether the Tribunal in the underlying arbitration manifestly exceeded its jurisdiction within the meaning of Article 52(1)(b) of the ICSID Convention. The Committee will address this issue, if and as required, when determining the merits of the Applicant’s Application.

IV. GROUNDS FOR ANNULMENT

92. The Applicant challenges the Award in its Application on two separate grounds: (i) manifest excess of powers within the meaning of Article 52(1)(b) of the ICSID Convention; and (ii) failure to state reasons within the meaning of Article 52(1)(e) of the ICSID Convention. Specifically, the Applicant requests that the Committee:³⁸

“a. ANNUL the Award in its entirety, in accordance with the grounds for annulment referred to in Articles 52(1)(b) and/or 52(1)(e) of the ICSID Convention; and

b. ORDER the Respondents on Annulment to pay the entirety of the costs and the legal fees incurred in connection with these annulment proceedings.”

93. The Committee considers it appropriate to deal first with the Applicant’s request for annulment under Article 52(1)(e) of the ICSID Convention (alleged failure to state reasons).

A. ALLEGED FAILURE TO STATE REASONS (ARTICLE 52(1)(e))

(1) The Parties’ Positions

a. The Applicant’s Position

(i) The Applicable Legal Standard

94. The Applicant submits that the Award should be annulled under Article 52(1)(e) of the ICSID Convention because it failed to state the reasons on which it is based. According to

³⁸ Memorial, para. 169; Reply, para. 259.

the Applicant, the relevant provision, Article 52(1)(e) of the ICSID Convention, is “*the corollary*” of the rule contained in Article 48(3) of the ICSID Convention, which provides that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.”³⁹

95. The Applicant argues, citing *Victor Pey Casado and Foundation “President Allende” v. Republic of Chile* (“**Pey Casado**”), that an ICSID tribunal’s obligation to state reasons becomes even more relevant when dealing with “*pivotal or outcome-determinative issues*.” The Applicant quotes *Pey Casado* verbatim, stating that “‘as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow, whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations’.” Furthermore, as held by the tribunal in *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, “‘a failure to deal with a question which would have altered an important finding of the tribunal’ is, of itself, a failure to state reasons.”⁴⁰
96. The Applicant argues that ICSID jurisprudence also shows that annulment under Article 52(1)(e) may be warranted when an award provides reasons but they are insufficient or inadequate. According to the Applicant, such reasons constitute an annulable error in the same way as non-existent reasons.⁴¹ The Applicant relies on *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais SA* (“**Klöckner**”) and *Maritime International Nominees Establishment (MINE) v. Government of Guinea* (“**MINE**” or “**MINE v. Guinea**”) to argue that, as held by the *ad hoc* committee in *Klöckner*, reasons must have “*some substance, allowing the reader to follow the arbitral tribunal’s reasoning, on facts and on law,*” and, as held by the *ad hoc*

³⁹ Memorial, para. 133 (footnote omitted).

⁴⁰ Memorial, paras. 134-135 (citing **ALA-024**, *Victor Pey Casado and Foundation “President Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 86, and **ALA-023**, *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *Ad Hoc* Committee, 25 March 2010, para. 81).

⁴¹ Memorial, para. 136 (citing **ALA-070**, *Mr Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para. 21; **CALA-067/ALA-038**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Applicant of Caratube International Oil Group, 21 February 2014, para. 102; **ALA-071/CALA-069**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, paras. 249-250).

committee in *MINE*, it is a “*minimum requirement*” that the award must “*enabl[e] one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion.*” The *MINE* committee noted that “*contradictory or frivolous reasons*” do not satisfy this requirement.⁴²

97. The Applicant further relies on *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (“*TECO*”), where the *ad hoc* committee explained that an “*insufficiency of reasons*” requires an annulment of the award when “*a tribunal did provide some explanations for its decision, but these are insufficient from a logical point of view to justify the tribunal’s conclusion,*” and that reasons are “*inadequate*” if they “*cannot logically explain the decision they are purportedly supporting.*” Similarly, the *Hussein Nuaman Soufraki v. The United Arab Emirates* (“*Soufraki*”) committee held that insufficient or inadequate reasons refer to “*reasons that cannot, in themselves, be a reasonable basis for the solution arrived at.*” An ICSID *ad hoc* committee must verify that reasons in an award are “*adequate and sufficient[ly] reasonabl[e] to bring about the result reached by the Tribunal.*”⁴³
98. The Applicant contends that, in the present case, the Award “*is marred with insufficient, frivolous and/or contradicting reasons which warrant its annulment.*”⁴⁴
99. In its Reply, the Applicant argues that in their Counter-Memorial the Claimants mispresent the Applicant’s case and mischaracterize the standard for annulment under Article 52(1)(e). Contrary to the Claimants’ argument, the Applicant has not claimed that tribunals have an obligation to deal with every single argument advanced by the parties, regardless of whether it is relevant to the outcome of the arbitration. Consistent with the case law of ICSID annulment committees, the Applicant’s position is that tribunals do not have a *carte*

⁴² Memorial, paras. 137-138 (citing **CALA-015**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais SA*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, para. 119; and **ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, para. 5.09).

⁴³ Memorial, paras. 139-140 (citing **ALA-071/CALA-069**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, paras.249-250; and **ALA-006/CALA-041**, *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, 5 June 2007, paras. 123, 131).

⁴⁴ Memorial, para. 141.

blanche to ignore arguments that could “have altered an important finding of the tribunal.”⁴⁵ The Claimants’ own legal authorities support this position, including *RWE Innogy GmbH and RWE Innogy Aersa SAU v. Kingdom of Spain* (“**RWE**”), *Total S.A. v. The Argentine Republic*, *Daimler Financial Services AG v. Argentine Republic* and *Alapli Elektrik B.V. v. Republic of Turkey* (“**Alapli**”), which stressed that annulment must follow if “the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous.”⁴⁶

100. The Applicant therefore considers that “there is apparent agreement between the Parties that a tribunal’s failure to address an outcome-determinative issue warrants annulment.”⁴⁷ In the Applicant’s view, in this case the Award fails to deal with relevant and indeed essential issues that were necessary for its decision and had an impact on the outcome. The Applicant cites recent case law, including *SolEs Badajoz GmbH v. Kingdom of Spain* (“**SolEs Badajoz**”), which in its view confirms the position. The Applicant stresses that it is not asking the Committee “to correct the Majority’s reasoning” or to act as a court of appeal; it asks the Committee to “adopt the same approach that has been adopted by prior annulment committees, and annul the Award if it finds that it is based on frivolous, insufficient or inadequate reasons.”⁴⁸
101. The Applicant rejects the Claimants’ insistence that the threshold for annulment in Article 52(1)(e) is “high.” According to the Applicant, the threshold is not low, but it is “neither

⁴⁵ Reply, paras. 159-163 (citing *inter alia* Counter-Memorial, para. 183; **ALA-023**, *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the Ad Hoc Committee, 25 March 2010).

⁴⁶ Reply, para. 166 (citing **CALA-051**, *RWE Innogy GmbH and RWE Innogy Aersa SAU v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, paras. 382, 384; **CALA-101**, *Total S.A. v. The Argentine Republic*, Decision on Annulment, para. 269; **CALA-094**, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 187; **CALA-039**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 202; **CALA-073**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina’s Application for Annulment, 29 May 2019, para. 210; **CALA-017**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, paras 198 and 233; **CALA-059**, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Annulment, 28 March 2022, para. 324).

⁴⁷ Reply, para. 167 (footnote omitted).

⁴⁸ Reply, paras. 167-172 (citing *inter alia*, **CALA-066**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022).

insurmountable nor toothless.”⁴⁹ The Applicant argues that, following *MINE*, subsequent annulment decisions have clarified the scope of the “*minimum requirement*” established in *MINE*. The Applicant cites *Soufraki*, where the committee held that there may be a ground for annulment in case of “*a total absence of reasons for the award, including the giving of merely frivolous reasons; a total failure to state reasons for a particular point, which is material for the solution; [and] insufficient or inadequate reasons which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.*” In the Applicant’s view, this is the case here.⁵⁰

102. The Applicant submits that the Claimants’ interpretation of Article 52(1)(e) would “*hinder this Committee’s ability to fulfil the mandate that has been bestowed upon it and deprive [the provision] of any content.*” The standard under Article 52(1)(e) requires a “*demonstrable, rational connection between the tribunal’s reasoning and its conclusions.*”⁵¹

(ii) The Majority Fails to State Reasons or Provides Wholly Inadequate Reasons in Relation to A Number of Outcome-Determinative Points

103. The Applicant argues that the Award fails to deal with a number of outcome-determinative points and the reasons underlying five of its findings in relation to the jurisdictional conclusion are “*either non-existent or so manifestly flawed that they fail to meet the standard under Article 52(1)(e) of the ICSID Convention.*”⁵²
104. The Applicant raises five separate arguments under this heading: (i) the Award does not explain how the “*consent in writing*” requirement of Article 25(1) of the ICSID Convention is satisfied in this case; (ii) the Award fails to provide adequate and sufficient reasons for the decision not to apply the International Law Commission’s Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations (the

⁴⁹ Reply, para. 173.

⁵⁰ Reply, paras. 173-175 (citing **ALA-006/CALA-041**, *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, 5 June 2007, para. 126).

⁵¹ Reply, paras. 176-177.

⁵² Memorial, para. 142.

“ILC Guiding Principles”) to interpret Section 35 of the GIEPAA (2015); (iii) the Award fails to state reasons for its conclusion that the Tribunal’s jurisdiction is based on Section 35 of the GIEPAA (2015); (iv) the Majority’s reasons for its conclusion that the Claimants were entitled to rely on Section 55 of the GIEPAA (2010) are, at best, insufficient and, at worst, non-existent; and (v) the Award’s failure to address the Claimants’ arguments on estoppel and vested rights creates a gap in the Award that warrants annulment under Article 52(1)(e) of the ICSID Convention.

105. Each of these arguments are summarized below.

a) The Award Does Not Explain How the “Consent in Writing” Requirement of Article 25 of the ICSID Convention is Satisfied in This Case

106. The Applicant notes that the Majority acknowledged that the core question that the Tribunal had to answer, “*considering the Claimants’ arguments in this case,*” was “*one of international law: whether the relevant provisions of the GIEPAA (2015) or alternatively GIEPAA (2010) constitute the State’s consent for the purpose of Article 25 of the ICSID Convention[.]*” According to the Applicant, the Award leaves this question unanswered, and it is “*impossible to discern*” whether the Tribunal’s jurisdiction rests on Section 35 of the 2016 Act or “*alternatively*” Section 55 of the 2010 Act.⁵³

107. The Applicant recalls that the Tribunal found that there was jurisdiction because (i) the Claimants relied on an alleged consent to jurisdiction included in Section 55 of the GIEPAA (2010); (ii) that consent was purportedly not revoked, despite the fact that the GIEPAA (2010) was repealed and Section 55 was replaced with another provision that eliminated any reference to ICSID; and (iii) consequently, The Gambia’s consent in the repealed provision “*somehow remained live*” and could be accepted by the Claimants to commence the ICSID arbitration.⁵⁴

108. The Applicant contends that the Award “*offers no explanation for how or why a repealed provision could remain operative, be effectively revived or be ‘formally’ and*

⁵³ Memorial, paras. 143-144 (referring to Award, para. 307).

⁵⁴ Memorial, para. 145.

*retrospectively ‘accepted’ by the Claimants for the purposes of consent under Article 25 of the ICSID Convention.”*⁵⁵ According to the Applicant, the Majority “*wrongly dismisses*” this point as a matter of appreciation of the facts, leaving one unable to identify the requisite evidence of consent under Article 25(1). The Claimants’ reliance on a consent allegedly given in a provision “*that was once, but no longer, in force in The Gambia*” is therefore, in the Applicant’s view, irrelevant. The Majority’s failure to provide “*any coherent analysis*” confirming the existence of “*consent in writing*” and its reliance instead on (i) a conflation of two different provisions (one of which was no longer in force); (ii) the Parties’ alleged conduct; and (iii) the Claimants’ detrimental reliance, represents, in the Applicant’s view, “*a failure to articulate a reasoned basis for its jurisdictional findings,*” rendering the Award subject to annulment.⁵⁶

b) The Award Fails to Provide Adequate and Sufficient Reasons for its Decision not to Apply the ILC Guiding Principles to Interpret Section 35 of the GIEPAA (2015)

109. The Applicant argues that the Majority decided that the ILC Guiding Principles were not relevant for the purposes of interpreting Section 35 of the GIEPAA (2015) because the provision was “*formulated in the framework of a treaty,*” *i.e.* the ICSID Convention.⁵⁷ The Applicant claims that the GIEPAA (2015) has not been “*formulated in the framework of a treaty.*” According to the Applicant, while “*this might arguably be the case*” for Section 35 of the GIEPAA (2010), which actually refers to the Centre and could therefore be interpreted as having formulated in the framework of the ICSID Convention, the same cannot be said about Section 55 of the GIEPAA (2015). The Applicant notes that the Majority even observed that the provision “*does not (even) mention ICSID arbitration.*”⁵⁸ According to the Applicant, it is therefore “*impossible to understand*” why Section 35 of the GIEPAA (2015) is “*formulated in the framework of a treaty*” and, specifically, in the framework of the ICSID Convention; and why the ILC Guiding Principles are not relevant to interpreting Section 35 of the GIEPAA (2015).⁵⁹ Moreover, “*all the decisions relied*

⁵⁵ Memorial, para. 146.

⁵⁶ Memorial, paras. 146-147.

⁵⁷ Memorial, para. 148 (citing Award, para. 296).

⁵⁸ Memorial, para. 149 (citing Award, para. 403).

⁵⁹ Memorial, para. 150.

*upon by the Majority to minimise the importance of the ILC Guiding Principles were based on a provision that, contrary to Section 35 of the 2015 Act, actually made an express reference to the ICSID Convention.”*⁶⁰

110. The Applicant submits that, “[t]o the extent that the ILC Guiding Principles had the potential of affecting the Majority’s decision on jurisdiction,” annulment is warranted.⁶¹

c) The Award Fails to State Reasons for its Conclusion that the Tribunal’s Jurisdiction is Based on Section 35 of the GIEPAA (2015)

111. The Applicant asserts that the Award does not include any analysis on whether Section 35 of the GIEPAA (2015), on its own, incorporates The Gambia’s consent to ICSID arbitration. Instead, the analysis in the Award is limited to confirming whether The Gambia’s consent to arbitrate in Section 55 of the GIEPAA (2010) was revoked when The Gambia repealed the law.⁶²

112. The Applicant contends that the question of whether The Gambia consented to ICSID arbitration under Section 35 of the GIEPAA (2015) is “*plainly outcome-determinative*” and the Majority’s failure to deal with it is “*patent and easily discernible*.” This is the case because, (i) while the Majority conducted an analysis of whether Section 55 of the GIEPAA (2010) contained The Gambia’s consent to arbitrate (which in the Applicant’s view is irrelevant because the law had been revoked), it failed to deal with Section 35 of the GIEPAA (2015) in the same way; and (ii) the Majority admitted that it did not consider this issue when stating that “*it [was] not called upon to decide whether Section 35 of the GIEPAA (2015) provides for consent to ICSID arbitration in the abstract*.”⁶³

113. The Applicant submits that the Majority’s failure to address this question in the Award “*creates a gap in the Award*,” making it impossible for a reader to understand why the Tribunal found jurisdiction under Section 35 of the GIEPAA (2015), in particular when

⁶⁰ Memorial, paras. 150-151 (emphasis in the original and footnote omitted).

⁶¹ Memorial, para. 152.

⁶² Memorial, para. 153.

⁶³ Memorial, para. 154 (citing Award, para. 329).

Section 35 “*does not (even) mention ICSID arbitration.*”⁶⁴ The Majority’s failure to explain how Section 35, on its own, created jurisdiction “*required the Majority to rule on the Claimants’ arguments on estoppel and vested rights, which were not addressed in the Award.*”⁶⁵

d) The Majority’s Reasons for its Conclusion that the Claimants Were Entitled to Rely on Section 55 of the 2010 Act are, at Best, Insufficient and Inadequate and, at Worst, Non-Existent

114. The Applicant argues that the Tribunal’s finding that Section 35 of the GIEPAA (2015) did not revoke The Gambia’s consent to ICSID arbitration in Section 55 of the GIEPAA (2010), and that the Claimants therefore could accept The Gambia’s consent is based on two premises: (i) the legal premise that The Gambia consented to ICSID arbitration in Section 55 of the GIEPAA (2010); and (ii) the factual premise that the Claimants actually relied on The Gambia’s consent allegedly included in Section 55.⁶⁶
115. The Applicant submits that, even assuming the Tribunal’s legal premise is correct, the Award fails to state adequate and sufficient reasons for the conclusion it reached on the factual premise – that the Claimants relied on the representations made in The Gambia’s domestic investment law and the behavior of its officials during the period 2015-2018. Indeed, the Tribunal itself acknowledged that it was required to “*determine in the specific circumstances of this case, whether an offer of ICSID arbitration was made in the GIEPAA (2010), that was relied upon by the Claimants and not revoked by the Respondent in the GIEPAA (2015) or otherwise in its behavior vis-à-vis the Claimants before it was formally accepted in the 2018 under the 2015 Act.*”⁶⁷ According to the Applicant, it was therefore “*clear*” to the Tribunal that, “*confirming whether the Claimants had relied on the alleged ‘offer of ICSID arbitration [...] made in’ the 2010 Act was outcome-determinative.*”⁶⁸ However, there is no evidence in the Award that (i) the Claimants relied on Section 55 of the GIEPAA (2015) or even planned to initiate an ICSID arbitration against The Gambia

⁶⁴ Memorial, para. 155 (footnote omitted)

⁶⁵ Memorial, para. 156.

⁶⁶ Memorial, para. 157.

⁶⁷ Memorial, para. 158 (footnote omitted).

⁶⁸ Memorial, para. 159 (footnote omitted).

when that provision was still in force; and (ii) The Gambia made any representation that would enable the Claimants to rely on the availability of the alleged consent to ICSID arbitration in Section 55 or committed not to change the GIEPAA (2010), or to repeal the alleged consent to ICSID arbitration contained in Section 55.⁶⁹

116. The Applicant submits that the Tribunal’s failure to identify any evidence that the Claimants relied on a purported consent to ICSID arbitration in Section 55 of the GIEPAA (2010), or to identify specific representations or conduct by The Gambia that could have induced such reliance “*leaves a significant gap in a critical linchpin in its decision on jurisdiction.*”⁷⁰
117. The Applicant asserts that, even assuming that the factual record supported the Majority’s conclusion that the Claimants relied on Section 55 of the GIEPAA (2010), the Majority “*fails to explain why the Claimants could invoke [Section 55] after it had been repealed to assert ICSID jurisdiction.*”⁷¹ Specifically, the Tribunal fails to explain why The Gambia’s conduct in response to the Claimants’ letters of 2016 and 2017, when the Claimants mistakenly asserted a right to ICSID arbitration, “*enabled the Claimants to effectively enforce that purported right.*” The Tribunal merely concluded that, because The Gambia did not correct the Claimants, they could continue to rely on the declaration in the GIEPAA (2010). However, the Tribunal fails to explain (i) on what basis the Claimants could rely, in 2016, on a provision that had been revoked in 2015 and had not been invoked when it was still in force; and (ii) why the Respondent’s responses in 2017, when it stated that it would review the matter and revert to the Claimants in due course, “*could result in any sort of procedural rights for the Claimants*” and allow the Claimants to accept an alleged consent to arbitrate included in a provision that had already been repealed.⁷²
118. The Claimants allege that, in the circumstances, “*it is impossible to discern*” (i) why the Claimants’ mistaken belief as to the applicable law had any bearing on the procedural

⁶⁹ Memorial, paras. 158-159.

⁷⁰ Memorial, para. 160 (footnote omitted).

⁷¹ Memorial, para. 161.

⁷² Memorial, para. 161; **A-012**, Letter from Cooley to The Permanent Secretary at the Ministry of Agriculture, December 22, 2016, paras. 2, 15 and 18.

remedies available to them or could serve as a basis for jurisdiction; (ii) why the Claimants' ignorance on the law entitled them to enforce an alleged consent to ICSID arbitration that had already lapsed; and (iii) why the Claimants were not estopped from advancing a case under Section 55 of the GIEPAA (2010) having confirmed in the Request for Arbitration that they "*rely solely*" on Section 35 of the GIEPAA (2015).⁷³

119. The Applicant argues that the Tribunal's decision to allow the Claimants to rely on Section 55 of the GIEPAA (2010) is also contradicted by the Tribunal's own findings elsewhere in the Award that the acquisition of the Claimants' investment was made under the GIEPAA (2015) and that, pursuant to Section 88 of the GIEPAA (2015), the statute contained its own dispute resolution clause "*applicable at the relevant time.*" According to the Applicant, these conclusions "*cancel each other out.*" If the acquisition was made under the GIEPAA (2015), the only applicable dispute resolution provision at the relevant time was the GIEPAA (2015) itself and the GIEPAA (2010) was irrelevant and the Claimants could not rely on it. Nor could the Tribunal apply it to its jurisdictional analysis. According to the Applicant, the Tribunal's contradictory reasoning meets the standard of annulment under Article 52(1)(e) of the ICSID Convention.⁷⁴

e) The Award's Failure to Address the Claimants' Arguments on Estoppel and Vested Rights Creates A Gap in the Award that Warrants Annulment Under Article 52(1)(e) of the ICSID Convention

120. The Applicant recalls that the Tribunal elected not to rule on the Claimants' arguments in relation to estoppel and vested rights because they had determined that jurisdiction existed on the basis of Section 35 of the GIEPAA 2015.⁷⁵ The Applicant contends that the Tribunal's decision "*flies in the face of the fact that the Majority did not in fact conduct any serious analysis on the basis of Section 24 of the 2015 Act by itself.*"⁷⁶ In the Applicant's view, because the Tribunal's finding that jurisdiction existed on the basis of Section 35 was itself predicated on the finding that Section 35 did not revoke the consent

⁷³ Memorial, para. 162.

⁷⁴ Memorial, paras. 163-164; Award, paras 328, 329, 384, 424 and 427.

⁷⁵ Memorial, para. 167 (citing Award, para. 432).

⁷⁶ Memorial, para. 167 (footnote omitted).

to arbitrate in Section 55 of the GIEPAA (2010), it was “*crucial*” for the Tribunal to explain why The Gambia’s conduct entitled the Claimants to rely on a repealed provision.⁷⁷

121. The Applicant claims that, in the circumstances, the Tribunal had to explain why The Gambia was estopped from asserting that the Claimants could no longer rely on Section 55 of the GIEPAA (2010) as a basis for ICSID jurisdiction, and why The Gambia’s conduct entitled the Claimants to certain “*vested rights*” regarding dispute resolution. According to the Applicant, as a result of the Tribunal’s failure, “*it is impossible to understand*” why the Claimants’ alleged detrimental reliance allowed them to enforce a repealed provision.⁷⁸
122. In its Reply, the Applicant reiterates its position on the Tribunal’s failure to state reasons in relation to the five outcome-determinative points, as set out in the Memorial, and responds to the Claimants’ argument in the Counter-Memorial that the Tribunal did provide reasons for its determinations.⁷⁹

f) The Award Does Not Explain How the “*Consent in Writing*” Requirement of Article 25(1) of the ICSID Convention is Satisfied in this Case

123. The Applicant submits that the Claimants confuse different arguments that The Gambia raised in relation to two separate outcome-determinative points, specifically (i) how the “*consent in writing*” requirement in Article 25 of the ICSID Convention was satisfied; and (ii) stating reasons for the dispositive part of the Award finding that the Tribunal’s jurisdiction was based on Section 35 of the GIEPAA (2015). According to the Applicant, “*these points constitute two distinct and self-standing grounds for annulment.*”⁸⁰
124. The Applicant contends that the Claimants are “*unable to identify a single passage in the Award confirming that the Majority found The Gambia’s ‘consent in writing’ to ICSID arbitration in Section 35 of the 2015 Act, in and of itself.*”⁸¹ The Applicant notes that the Claimants focus on paragraph 420 of the Award, where the Tribunal concluded that

⁷⁷ Memorial, paras. 165-167.

⁷⁸ Memorial, para. 168.

⁷⁹ Reply, paras. 178, 180-194.

⁸⁰ Reply, paras. 180-182.

⁸¹ Reply, para. 184.

*“Section 35 of the GIEPAA (2015) did not revoke or repeal the offer of ICSID arbitration made in the 2010 Act and relied on by the Claimants.”*⁸² Indeed, the Tribunal did not opine on whether Section 35 *“in the abstract”* or *“in its own terms”* provides for consent in advance to ICSID arbitration.⁸³

125. The Applicant submits that the Claimants attempt to defend the Award on this issue fails. According to the Applicant, *“it is impossible to understand”* how the Tribunal went (i) from point A, *i.e.* agreeing that The Gambia’s consent could not be presumed but *“must be clearly demonstrated”* and *“expressed in a manner that leaves no doubts;”* (ii) to point B, *i.e.* finding that Section 35 of the GIEPAA (2015) was the *“dispute resolution clause applicable at the relevant time”* (*i.e.* when the Claimants submitted their Request for Arbitration); (iii) to point C, *i.e.* finding that Section 35 of the GIEPAA (2015) *“does not (even) mention ICSID arbitration;”* (iv) to the conclusion that *“the offer of ICSID arbitration made in the GIEPAA (2010) was not revoked in the GIEPAA (2015) or otherwise in the behavior of the Respondent between 2015 and 2018. As such, the Claimants were able to formally accept the offer of ICSID arbitration when they submitted their Request for Arbitration under the GIEPAA (2015) in February 2018.”*⁸⁴
126. Specifically, in the Applicant’s view, the Tribunal failed to explain why or how the Claimants could accept, in 2018 and under the GIEPAA (2015), a repealed consent to arbitrate given in the GIEPAA (2010), to satisfy the requirement of written consent in Article 25(1) of the ICSID Convention. The Claimants’ attempt to justify the Tribunal’s approach on the basis of the approach adopted by the International Court of Justice (the **“ICJ”**) in *Fisheries Jurisdiction (Spain v. Canada)* (***“Fisheries Jurisdiction”***) fails because here, the Tribunal adopted an *“inverted approach”* which *“never sought to interpret or apply the declaration ‘in existence’,” i.e.* Section 35 of the GIEPAA (2015);

⁸² Award, para. 420.

⁸³ Reply, paras. 183-186.

⁸⁴ Reply, paras. 187-188 (citing *inter alia*, Award, para. 427).

the Tribunal rather relied upon Section 35 “*as an interpretive aid to confirm whether it revoked a consent that they had already deemed to exist under the 2010 Act.*”⁸⁵

g) The Majority Failed to Provide Any Reasons for Their Decision that Section 35 of the GIEPAA (2015) Was Formulated in the Context of the ICSID Convention

127. The Applicant contends that this is an outcome-determinative issue, which has not been challenged by the Claimants. Moreover, according to the Applicant, while the Claimants do challenge the Applicant’s position that it is not possible to follow the Tribunal’s reasoning on this issue, they only refer the sole paragraph in the Award (paragraph 296) which deals with the issue and which, in the Applicant’s view, does not provide any reasons for the conclusion that Section 35 was “*formulated in the framework of a treaty.*” Nor do the cases cited by the Tribunal provide any support; in each of them, the relevant provision dealt with an express reference to the ICSID Convention.⁸⁶
128. The Applicant asserts that the Claimants’ attempt to justify the Tribunal’s finding is beside the point because the Applicant’s point is precisely that the Tribunal does not provide any reasons for the finding. The fact that Section 35 refers to “*the provisions of any international treaty to which The Gambia is a party*” is, in the Applicant’s submission, “*untenable*” under international law because “[w]herever an ICSID tribunal or the ICJ has found that an instrument was ‘*formulated in the framework of a treaty*’, such instrument has invariably referred – explicitly and specifically – to either the ICSID Convention or Article 36 of the Statute.”⁸⁷ Contrary to the Claimants’ assertion, The Gambia never abandoned its position that the ILC Guiding Principles applied, as recognized by the Tribunal in the Award.⁸⁸

⁸⁵ Reply, paras. 189-192 (referring to **CALA-035/ALA-059**, *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction), Judgment, 4 December 1998, I.C.J. Reports 1998).

⁸⁶ Reply, paras. 193-201.

⁸⁷ Reply, para. 203 (footnotes omitted).

⁸⁸ Reply, paras. 202-206.

h) The Majority Failed to State Reasons for Their Conclusion That Jurisdiction Was Based on Section 35 of the GIEPAA (2015)

129. The Applicant claims that the three arguments that the Claimants make in response to the Applicant's case on this issue are without merit.⁸⁹
130. First, the Claimants' contention that the Majority provided a detailed analysis of Section 35 of the GIEPAA (2015) is incorrect. The Majority did not engage in any "*substantive analysis*" of whether Section 35, by itself, embodies The Gambia's consent to ICSID arbitration. Indeed, the Majority held that it was "*not called upon*" to decide whether Section 35 provides consent in advance to ICSID arbitration "*in the abstract*" and that it would "*not opine on that question.*" The only analysis that the Majority performed was whether Section 35 revokes the consent the Tribunal found in Section 55 of the GIEPAA (2010). According to the Applicant, the Claimants' attempt to defend the Award by way of a step-by-step analysis rather highlights the critical gaps and contradictions in the Majority's reasoning. In short, it shows that the Majority failed to apply and interpret Section 35 of the GIEPAA (2015) and instead conflated it with Section 55 of the GIEPAA (2010) "*to find some sort of justification to assert jurisdiction.*"⁹⁰
131. In conclusion on this point, the Applicant asserts that the Award does not allow an informed reader to understand how the Majority went from (i) point A, *i.e.* accepting that Section 35 of the GIEPAA (2015) was the only applicable provision for the purposes of determining whether there was a consent to ICSID arbitration that the Claimants could accept; to (ii) point B, *i.e.* accepting that Section 35 of the GIEPAA (2015) "*does not (even) mention ICSID arbitration;*" to (iii) point C, *i.e.* observing that this was irrelevant because they did not intend to and in fact did not analyze whether Section 35 of the GIEPAA (2015), in and of itself, comprised The Gambia's consent to ICSID arbitration; to their conclusion of (iv) asserting jurisdiction under Section 35 of the GIEPAA (2015).⁹¹

⁸⁹ Reply, paras. 207-208.

⁹⁰ Reply, paras. 209-213.

⁹¹ Reply, para. 213 (footnote omitted).

i) The Counter-Memorial Ignores the Substantive Arguments Highlighting the Majority's Failure to Provide Reasons for its Finding that the Claimants Could Accept the Consent in Section 55 of the GIEPAA (2010)

132. The Applicant rejects the Claimants' attempt, by way of seven separate arguments, to downplay the Majority's absence of reasons in relation to this issue.⁹²
133. First, the Applicant denies that it is asking the Committee to revisit the Tribunal's findings of fact; it is rather asking the Committee to assess whether the Award evidences a logical chain of reasoning that leads to the conclusions that were reached by the Majority.⁹³
134. Second, contrary to the Claimants' argument, the Majority did not treat the GIEPAA (2010) as a mere contextual backdrop; they treated it "*as the principal foundation of jurisdiction,*" including as a primary source of consent. This deviates from the interpretive methodology adopted by the ICJ in *Fisheries Jurisdiction* and by other ICSID tribunals. The Majority found consent, as stated in paragraph 396 of the Award, in Section 55 of the GIEPAA (2010), which had been revoked, and not in Section 35 of the GIEPAA (2015). The Majority did not explain how the earlier consent could be validly accepted under the new Act.⁹⁴
135. Third, according to the Applicant, the Claimants' effort to find factual support for the Majority's finding that the Claimants relied on The Gambia's consent to arbitrate in the GIEPAA (2010) is unavailing. There is no such support in the record, as noted by Professor Mayer in his Dissenting Opinion. The correspondence in the record deals only with payment of compensation and does not make any reference to ICSID. The Applicant submits that the Majority's failure to state reasons for its finding "*goes to the heart of the jurisdictional determination.*"⁹⁵
136. Fourth, the Applicant rejects the Claimants' argument that The Gambia failed to correct the Claimants' misapprehension that the GIEPAA (2010) was still in force. According to

⁹² Reply, paras. 215-216.

⁹³ Reply, para. 217.

⁹⁴ Reply, paras. 218-221.

⁹⁵ Reply, paras. 222-223 (footnote omitted).

the Applicant, The Gambia’s responses from 2017 “*could not result in any sort of procedural rights for the Claimants.*”⁹⁶ By the time, the GIEPAA (2010) had already been repealed and as noted by the Tribunal, “*ignorance of the law is not an excuse.*” The Gambia also had no obligation to inform the Claimants of a change in their laws, and not doing so could not have any jurisdictional implications: it would not change the applicable law and did not allow the Claimants to accept a consent included in a repealed provision. In the absence of evidence of “*any clear, positive representations from The Gambia, and any timely assertions of a right to initiate an ICSID arbitration under Section 55 of the 2010 Act from the Claimants,*” it is not possible to understand, in the Applicant’s view, how the Majority could conclude that the Claimants “*in all appearance in good faith, relied on what they saw as a unilateral offer of ICSID arbitration in the GIEPAA (2010) and acted accordingly.*”⁹⁷

137. Fifth, the Applicant notes that the Claimants reject the Applicant’s argument in the Memorial relating to the Majority’s failure to explain how the Claimants could accept a consent to arbitration contained in a repealed provision, as a “*red herring.*” Contrary to what the Claimants argue, the Majority’s approach is “*fundamentally at odds with Fisheries Jurisdiction.*”⁹⁸ Instead of starting the analysis of the provision “*in existence,*” as required by *Fisheries Jurisdiction*, they began with a repealed provision that was no longer in force. Their engagement with Section 35 of the GIEPAA (2015) was also “*perfunctory and derivative.*” The Majority did not analyze Section 35 “*in the abstract,*” as required by *Fisheries Jurisdiction*; they treated the provision as a “*contextual aid*” to support their prior conclusion that The Gambia had given its consent in Section 55 of the GIEPAA (2010).⁹⁹
138. Sixth, the Claimants’ attempt to justify the weight given by the Majority to the Claimants’ reliance on Section 55 by reference to *Fisheries Jurisdiction* is misplaced. There is no evidence in the record showing that the Claimants ever relied on Section 55 or even considered commencing ICSID arbitration prior to its revocation. According to the

⁹⁶ Reply, para. 255 (footnote omitted).

⁹⁷ Reply, paras. 224-227 (citing *inter alia*, Award, para. 382).

⁹⁸ Reply, para. 230 (emphasis in the original and footnote omitted).

⁹⁹ Reply, paras. 228-231 (footnote omitted).

Applicant, *Fisheries Jurisdiction* does not, in any event, stand for the proposition that the subjective reactions of a third party can alter the meaning of a unilateral declaration.¹⁰⁰

139. Seventh, the Applicant rejects the Claimants’ suggestion that The Gambia had itself taken the position in the arbitration that the reactions to which a unilateral declaration gave rise were part of the process of interpretation. The Gambia rather argued that the Tribunal should focus on the State’s intention when enacting the GIEPAA (2015), not on the Claimants’ reactions or expectations. According to the Applicant, “*the intentions of a State when carrying out a unilateral act cannot be, and never have been, determined based on the reactions of a third, private party.*”¹⁰¹ The Claimants also ignore that the Tribunal decided not to apply the ILC Guiding Principles so they cannot rely on them in an attempt to justify the Tribunal’s findings.¹⁰²

j) The Majority’s Failure to State Reasons in Relation to the Estoppel and Vested Rights Arguments Creates A Gap in the Award

140. The Applicant reiterates its position that it is not possible to discern from the Award “*what precise acts of the State were held to confer upon the Claimants the right to accept, in 2018 and under the new Act, an offer of consent supposedly contained in legislation that ceased to exist in 2015.*”¹⁰³ According to the Applicant, the Claimants do not engage with this argument at all, or the arguments made by Professor Mayer in his Dissenting Opinion. The Majority’s failure to identify and analyze the specific State conduct that allegedly gave rise to the entitlement warrants annulment under Article 52(1)(e) of the ICSID Convention.¹⁰⁴

b. The Claimants’ Position

141. The Claimants submit that the Applicant simply seeks to challenge the substantive correctness of the Award, inviting the Committee “*to act as a court of appeal, to reopen the Tribunal’s interpretation of the law and the facts, and to substitute the Tribunal’s*

¹⁰⁰ Reply, paras. 232-234.

¹⁰¹ Reply, para. 237 (footnote omitted).

¹⁰² Reply, paras. 235-238.

¹⁰³ Reply, para. 241 (footnote omitted).

¹⁰⁴ Reply, paras. 239-246.

findings with its own.”¹⁰⁵ According to the Claimants, the threshold for annulment under Article 52(1)(e) of the ICSID Convention is high, and the Applicant has failed to discharge its burden to overcome the threshold.¹⁰⁶

(i) The Applicable Legal Standard

a) The Threshold Under Article 52(1)(e) is High

142. The Claimants submit that the Applicant’s arguments, even assuming they had merit as a matter of fact, do not meet the “*high threshold*” for annulment under Article 52(1)(e) of the ICSID Convention.¹⁰⁷
143. According to the Claimants, the starting point on this issue is *MINE v. Guinea*, in which the committee held that the duty to state reasons requires only that an award “*enable the reader to follow the reasoning of the Tribunal on points of fact and law.*”¹⁰⁸ According to *MINE*, “*the adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e) [...].*”¹⁰⁹
144. The Claimants note that other *ad hoc* committees have followed the *MINE* committee’s approach. Thus, the *Wena Hotels Ltd. v. Arab Republic of Egypt* (“*Wena*”) committee agreed with *MINE*, finding that Article 52(1)(e) “*refers to a ‘minimum requirement’ only*” and that “*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.*”¹¹⁰ According to the Claimants, the *Compañía de Aguas del Aconquija SA (formerly Aguas del Aconquija) and Vivendi*

¹⁰⁵ Counter-Memorial, para. 100.

¹⁰⁶ Counter-Memorial, paras. 99-103.

¹⁰⁷ Counter-Memorial, paras. 101, 146.

¹⁰⁸ Counter-Memorial, para. 101 (citing **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, para. 5.08).

¹⁰⁹ Counter-Memorial, paras. 101, 147 (citing **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, para. 5.08).

¹¹⁰ **CALA-075**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, para. 79 (emphasis added).

Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (I) (“**Vivendi I**”) committee concurred, stressing that annulment under Article 52(1)(e) “*should only occur in a clear case*” and must meet “*two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision.*”¹¹¹ Similarly, in *Alapli*, the *ad hoc* committee stressed that “[a]n award is not to be annulled merely because an annulment Committee forms the view that, on the same facts and evidence, it would have reached a different conclusion.”¹¹²

145. The Claimants further refer to *OperaFund Eco-Invest Sicav Plc and Schwab Holding AG v. Kingdom of Spain*, *RWE and RENERGY S.à r.l. v. Kingdom of Spain* to argue that “*the review under Article 52(1)(e) does not concern ‘the failure of to state correct or convincing reasons’*” while the Applicant “*has sought to lower the standard of review in four ways.*”¹¹³ Each of these four ways is unfounded: (i) “*the adequacy or correctness of the tribunal’s reasons are irrelevant;*” (ii) “*contradiction and frivolity do not allow for a correctness review;*” (iii) “*the Tribunal’s Award was detailed, specific and explained;*” and (iv) “*Article 52(1)(e) concerns outcome-determinative points only.*”¹¹⁴

b) Adequacy and/or Correctness Are Not Relevant Under Article 52(1)(e)

146. The Claimants submit that the Applicant’s approach is incorrect insofar as it seeks to assess the adequacy, quality, correctness or comprehensiveness of the Tribunal’s reasoning. Citing *MINE v. Guinea*, the Claimants reiterate that the adequacy of reasoning is not an appropriate standard of review under Article 52(1)(e). The cases cited by the Applicant – *Patrick Mitchell v. Democratic Republic of the Congo*, *Caratube International Oil*

¹¹¹ Counter-Memorial, paras. 147-149 (citing **ALA-13/CALA-057**, *Compañía de Aguas del Aconquija SA (formerly Aguas del Aconquija) and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 64).

¹¹² **CALA-039**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, para. 210.

¹¹³ Counter-Memorial, paras. 153-154 (citing **CALA-003**, *OperaFund Eco-Invest Sicav Plc and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment, 2 March 2023, para. 397; **CALA-051**, *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 383; **ALA-028/CALA-052**, *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Decision on Annulment, 14 August 2024, paras. 123, 126).

¹¹⁴ Counter-Memorial, Section V.B.

Company LLP v. Republic of Kazakhstan (“**Caratube**”) and *TECO* – do not support the Applicant’s position, as each of them endorsed the approach adopted in *MINE* or made clear that correctness is not the appropriate standard.¹¹⁵

147. In the Claimants’ view, the issue is simply “*whether the parties can understand what the tribunal decided;*” the question of “[w]hether those reasons are correct or persuasive is irrelevant.”¹¹⁶ The award is thus to be assessed from the perspective of a well-informed reader, and the award “*should be read as a whole*” as “*the premises leading to a decision may be implicit in the reasoning.*”¹¹⁷ Indeed, annulment committees have discretion “*to further explain, clarify or infer the tribunal’s reasoning rather than annul an award.*”¹¹⁸ The Claimants argue that the Award clearly meets this standard as the Tribunal explained (i) its reasoning regarding the legal principles governing jurisdiction *ratione voluntatis*; (ii) the reasons for its conclusion that it had jurisdiction under Section 35 of the GIEPAA (2015); (iii) the role of the GIEPAA (2010) in the Tribunal’s contextual analysis; and (iv) the Tribunal’s exercise of judicial economy regarding arguments relating to estoppel and vested rights.¹¹⁹

c) Contradiction and frivolity do not allow for a correctness review

148. The Claimants submit that the notion of “*contradictory and frivolous reasons*” is limited in scope and does not permit a committee to review the adequacy or correctness of the tribunal’s reasons.¹²⁰

¹¹⁵ Counter-Memorial, paras. 155-163 (referring to *inter alia*, **ALA-070**, *Mr Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006; **CALA-067/ALA-038**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Applicant of Caratube International Oil Group, 21 February 2014; **ALA-071/CALA-069**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016).

¹¹⁶ Counter-Memorial, para. 164.

¹¹⁷ Counter-Memorial, paras. 164-167 (footnote omitted).

¹¹⁸ Counter-Memorial, paras. 168-169 (citing **CALA-060**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal 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, 10 August 2010, para. 248).

¹¹⁹ Counter-Memorial, para. 169.

¹²⁰ Counter-Memorial, para. 170.

149. The Claimants contend that their position is supported by case law, citing *Caratube* (holding that “*the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion*”), *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (holding that “*only a total absence of reasons or a tribunal’s reasoning which is genuinely contradictory, or a reasoning that is so lacking in coherence that a reader cannot follow it, warrants annulment*”), *Continental Casualty Company v. Argentine Republic* (“***Continental Casualty***”) (holding that “*for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision*”) and *Alapli* (holding that “*if possible, an interpretation which confirms an award’s consistency as opposed to its alleged inner contradictions should be preferred*”).¹²¹
150. The Claimants submit that the Award comes “*nowhere near*” this standard; on the contrary, it sets out a “*principled and careful analysis*.”¹²²

d) The Tribunal’s Award Was Detailed, Specific and Explained

151. The Claimants reject the Applicant’s contention that the Award did not (i) identify specific representations or conduct that would support its factual determinations; (ii) provide a detailed analysis of the GIEPAA (2015); (iii) adequately explain its decision to not apply the ILC Guiding Principles; and (iv) justify its decision by reference to cases cited by the Applicant against Venezuela or Egypt.¹²³

¹²¹ Counter-Memorial, paras. 171-175 (citing **CALA-067/ALA-038**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Applicant of Caratube International Oil Group, 21 February 2014, para. 102; **CALA-063**, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, para. 110; **ALA-034/CALA-065**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103; and **CALA-039**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, paras. 200-201).

¹²² Counter-Memorial, para. 176.

¹²³ Counter-Memorial, para. 177.

152. The Claimants submit that, even assuming the Applicant’s assertions were true, an ICSID *ad hoc* committee “cannot annul an award because the reasoning was terse or implicit in other parts of the award.” The Claimants rely, in support, on *NextEra Energy Global Holding B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, Soufraki, TECO and Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (“**ConocoPhillips**”).¹²⁴ According to the Claimants, the Award meets this standard.¹²⁵

e) Article 52(1)(e) Concerns Outcome-Determinative Points Only

153. The Claimants reject the Applicant’s suggestion that annulment could be justified where the alleged failure to state reasons concerns issues that are not outcome-determinative. Citing *ConocoPhillips*, the Claimants argue that this is reflected in the very language of Article 52(1)(e), which refers to reasons on which the award “*is based*.”¹²⁶ In the Claimants’ view, it follows that issues that are not salient to the outcome of the arbitration are “*beyond the scope of annulment*.” The Claimants rely, in support, on *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, where the committee held that lack of reasons on issues that have no impact on the eventual decision “*should not be a basis for annulling an award [...]*.”¹²⁷

¹²⁴ Counter-Memorial, paras. 178-180 (citing *inter alia*, **CALA-058**, *NextEra Energy Global Holding B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment, 18 March 2022, para. 132; **ALA-006/CALA-041**, *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, 5 June 2007, para. 131; **ALA-071/CALA-069**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, paras. 88 and 249; **CALA-053**, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 496).

¹²⁵ Counter-Memorial, para. 181.

¹²⁶ Counter-Memorial, paras. 182-183 (citing **CALA-053**, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para 203).

¹²⁷ Counter-Memorial, para. 184 (citing **CALA-056**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 134).

154. Accordingly, in the Claimants’ view, the Tribunal’s decision not to pursue the analysis of alternative jurisdictional arguments based on estoppel or vested rights cannot provide a basis for annulment under Article 52(1)(e).¹²⁸
155. In their Rejoinder the Claimants reiterate their position that the requirement to provide reasons is a minimum requirement and annulment is warranted only where it is impossible to follow the tribunal’s reasoning from point A to point B. According to the Claimants, the issue is “*simply whether an informed reader can understand what the tribunal decided.*” Annulment committees must also interpret the award as a whole and in the context, “*appreciating that reasons may be implicit, and may even be stated tersely.*”¹²⁹
156. The Claimants agree with the Applicant’s argument that threshold for annulment under Article 52(1)(e) is “*neither insurmountable nor toothless,*” but note that only ten awards have been annulled on that basis, with a success rate of just 8.7% for applications invoking this ground. According to the Claimants, the statistics confirm that the threshold for annulment is high.¹³⁰
157. The Claimants note that the Applicant agrees that “*correctness*” is not the appropriate standard and suggest that the difference between the Parties “*appears to be one of terminology and not one of substance.*”¹³¹ Notably, the Applicant frames its complaint in terms of the *MINE* test, which was endorsed by ICSID *ad hoc* committees in *SolEs Badojaz*, *El Paso Energy International Company v. Argentine Republic* and *RWE*.¹³²

¹²⁸ Counter-Memorial, para. 185.

¹²⁹ Rejoinder, para. 25 (footnote omitted).

¹³⁰ Rejoinder, paras. 26-27.

¹³¹ Rejoinder, para. 28.

¹³² Rejoinder, paras. 28-32 (citing **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, paras. 5.08-5.09; **CALA-066**, *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, 16 March 2022, para. 83; **ALA072/CALA-108**, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 217; and **CALA-051**, *RWE Innogy GmbH and RWE Innogy Aersa SAU v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Annulment, 20 March 2024, para. 383).

158. However, according to the Claimants, the Applicant is “*wrong*” to ignore that the approach adopted in Article 52(1)(e) is “*highly deferential to the tribunal*.” In support of their position, the Claimants rely on *Wena, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* and *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*. The Claimants submit that these cases establish important principles, including that (i) Article 52(1)(e) expresses a minimum standard only; (ii) when assessing whether the tribunal has met the minimum requirement, the award must be considered in its entirety; (iii) it is sufficient for the tribunal’s reasons to be implicit, provided they can be reasonably inferred from the terms used in the decision; (iv) the analysis must be done from the perspective of a well-informed reader who is familiar with the arguments, evidence and legal authorities put to the tribunal; (v) the mere fact that the award’s reasons are unclear or imperfectly expressed, or that it contains errors, omissions or inconsistencies or contradictions does not justify annulment if the award meets the minimum standard; and (vi) tribunals are not required to address all the parties’ arguments individually. Accordingly, in the Claimants’ submission, awards should be interpreted, whenever possible, in a way that results in consistency.¹³³
159. The Claimants submit that, while the Applicant is right that contradictory reasons can warrant annulment, it “*overlooks the high threshold to arrive at such a conclusion*.” According to the Claimants, the contradiction must be “*genuine*” in the sense that the reasons cancel each other and result in the reader not being able to understand the tribunal’s motives. The failure must also be critical to the Tribunal’s decision; failure to provide

¹³³ Rejoinder, paras. 33-40 (citing *inter alia*, **CALA-075**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002; **CALA-073**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Argentina’s Application for Annulment, 29 May 2019; **ALA-027/CALA-050**, *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, 30 July 2021).

reasons for a “*minor and inconsequential issue*” is not sufficient to require annulment. In support, the Claimants rely on *Continental Casualty* and *Alapli*.¹³⁴

160. The Claimants note that the Applicant now agrees that Article 52(1)(e) concerns outcome-determinative points only and does not extend to each and every argument raised by the parties.¹³⁵

161. Finally, as to the standard of annulment, the Claimants argue that the Applicant is wrong to argue that “*annulment must follow if ‘the reasoning of the tribunal on a point that is essential for the outcome of the case is either absent, unintelligible, contradictory or frivolous.’*”¹³⁶ According to the Claimants, there is no support for the underlined words. ICSID *ad hoc* committees have consistently taken the view that even if a violation of one of the grounds in Article 52(1) is discovered, annulment is not necessary in all circumstances.¹³⁷

(ii) The Majority Gave Ample, Cogent and Persuasive Reasons for Their Decision To Establish Jurisdiction Under Section 35 of the GIEPAA (2015)

162. In their Counter-Memorial, the Claimants respond to the five specific arguments related to the Tribunal’s alleged failure to state reasons raised by the Applicant in its Memorial.¹³⁸

a) The Award Provided Persuasive and Cogent Reasons for the Tribunal’s Decision Not to Apply the ILC Guiding Principles, to Interpret Section 35 of the GIEPAA (2015), and the Applicant Effectively Abandoned Its Position On This Issue

163. The Claimants submit that the Applicant’s argument that the Majority failed to state reasons for their conclusion that the ILC Guiding Principles were not relevant to the

¹³⁴ Rejoinder, paras. 41-43 (citing *inter alia*, **ALA-034/CALA-065**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103; **CALA-039**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014).

¹³⁵ Rejoinder, para. 45.

¹³⁶ Rejoinder, paras. 46 (emphasis in the original and footnote omitted).

¹³⁷ Rejoinder, paras. 46.

¹³⁸ Counter-Memorial, paras. 105-106.

interpretation of Section 35 of the GIEPAA (2015) because the provision is a unilateral declaration made in the framework of a treaty, is without merit. According to the Claimant, the Applicant is “*simply wrong*” to argue that it is impossible to understand the Tribunal’s reasoning.¹³⁹

164. The Claimants explain that the Tribunal identified and expressly followed the reasoning of the tribunals in *Venezuela Holdings BV and others (formerly known as Mobil Corporation Venezuela Holdings, BV and others) v. Bolivarian Republic of Venezuela* (“**Mobil**”), *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela* (“**Cemex**”) and *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela* (“**Tidewater**”), each of which involved the interpretation of domestic legislation and tribunals who elected not to apply the ILC Guiding Principles, as did the Majority in this case. To the extent that the Tribunal’s reasoning on this point is unclear, the Claimants assert that it may be inferred from these decisions, none of which applied the restrictive approach adopted in the ILC Guiding Principles. Indeed, the Award should be read from the perspective of a well-informed reader, and as a whole and in context.¹⁴⁰
165. The Claimants also reject the Applicant’s argument that the Tribunal could not conclude that Section 35 of the GIEPAA (2015) was made in the framework of the ICSID Convention when that provision does not mention the ICSID Convention. The Claimants submit that the Applicant’s arguments are untimely as they were not put forward before the Tribunal. According to the Claimants, they are also irrelevant since they “*do not constitute proper grounds for seeking annulment under Article 52(1)(e)*,” in the Claimant’s view, the Applicant seeks to reargue an issue considered and decided by the Tribunal.¹⁴¹ The Claimants submit that the Tribunal’s view of Section 35 as being a unilateral

¹³⁹ Counter-Memorial, paras. 107-110.

¹⁴⁰ Counter-Memorial, paras. 111-114 (citing *inter alia*, **ALA-068/CALA-036**, *Venezuela Holdings BV and others (formerly known as Mobil Corporation Venezuela Holdings, BV and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; **ALA-073/CALA-037**, *CEMEX Caracas Investments BV and CEMEX Caracas II Investments BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010; and **ALA-058/CALA-038**, *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013); Award, paras. 296-297.

¹⁴¹ Counter-Memorial, para. 117.

declaration made in the framework of a treaty and therefore not subject to the ILC Guiding Principles, “*is a matter of interpretation and appreciation of the facts,*” which falls outside the scope of the Committee’s review under Article 52 of the ICSID Convention.¹⁴²

166. According to the Claimants, the Applicant’s arguments are in any event unfounded since Section 35(c) of the GIEPAA (2015) does refer to “*the provisions of any international treaty to which The Gambia is party*” and thus qualifies as a declaration formulated within the framework of a treaty.¹⁴³ Indeed, as it refers to all international treaties to which The Gambia is a party (and not only to the ICSID Convention), it in fact broadens the scope of the Applicant’s consent, when compared with Section 55 of the GIEPAA (2010). The Claimants submit that the Applicant’s arguments are also misplaced considering that in the course of the arbitration the Applicant itself dropped any reference to or reliance on the ILC Guiding Principles.¹⁴⁴

b) The Award Explained How the “Consent in Writing” Requirement of Article 25 of the ICSID Convention Was Satisfied and Why the Tribunal’s Jurisdiction Was Based on Section 35 of the GIEPAA (2015)

167. The Claimants reject the Applicant’s argument that it is impossible to discern from the Award whether the Tribunal’s jurisdiction rests on Section 35 of the GIEPAA (2015) or Section 55 of the GIEPAA (2010).¹⁴⁵

168. The Claimant submit that the Tribunal concluded, after an analysis of the text, context and preparatory history of the GIEPAA (2015), as well as of the GIEPAA (2010), that the language of Section 35 of the GIEPAA (2015) was broad enough to encompass an offer of ICSID arbitration and concluded that it had jurisdiction under Section 35 of the GIEPAA (2015).¹⁴⁶

¹⁴² Counter-Memorial, paras. 115-116.

¹⁴³ Counter-Memorial, para. 118.

¹⁴⁴ Counter-Memorial, paras. 117-123.

¹⁴⁵ Counter-Memorial, para. 124.

¹⁴⁶ Counter-Memorial, para. 125.

169. The Claimants assert that the Award itself defeats the Applicant’s suggestion that it does not contain a detailed analysis of Section 35. The Claimants outline the Tribunal’s reasoning in the Award as follows:¹⁴⁷
- a. First, the Tribunal considered the overarching principles of law relating to the analysis of its jurisdiction and determined *inter alia* that the instrument of consent in Section 35 of the (GIEPAA (2015) was to be interpreted following ICSID precedents and the ICJ’s decision in *Fisheries Jurisdiction*. Thus, the Tribunal’s interpretation of Section 35 of the GIEPAA (2015) is based on its “*text, context, circumstances of drafting, the terms of predecessor legislation and any reactions to [it].*”
 - b. Second, the Tribunal considered Article 25 of the ICSID Convention and concluded that it only required that consent be in writing, “*without any requirement that any such instrument explicitly mention ICSID.*”
 - c. Third, the Tribunal “*applied this legal framework to the facts.*”
 - d. Fourth, the Tribunal recalled the factual context of its analysis, *i.e.* the circumstances of the claim being submitted to ICSID and the need to consider whether Section 35 of the GIEPAA (2015) provided consent to jurisdiction taking into account the specific context of this case. This step involved applying the framework of *Fisheries Jurisdiction*, “*including by considering the 2010 Act as part of the interpretive context.*”
 - e. Fifth, the Tribunal considered whether Section 55 of the GIEPAA (2010) contained an offer of ICSID arbitration, analyzing “*the language used in that Act, the Applicant’s BIT practice, and the purpose of the domestic provision in light of the Act as a whole and the Gambian Constitution.*” On this basis, the Tribunal concluded that Section 55 of the GIEPAA (2010) did contain the State’s consent to arbitration.

¹⁴⁷ Counter-Memorial, paras. 126-127 (emphasis in original).

- f. Sixth, the Tribunal considered, following the *Fisheries Jurisdiction* framework, whether the Claimants had relied on the State's consent in good faith, concluding that they had.
 - g. Seventh, the Tribunal turned to an analysis of whether the applicable dispute resolution provision, Section 35 of the GIEPAA (2015), contained consent to ICSID arbitration, considering its text, purpose and context. The Tribunal concluded that Section 35 was broad enough to encompass an offer of ICSID arbitration on its own terms.
 - h. Eighth, the Tribunal considered whether the Claimants had accepted the offer of arbitration which it had found to be contained in Section 35 of the GIEPAA 2015 and found that they had done so by submitting to arbitration under the Act.
 - i. Ninth, having concluded that jurisdiction was established under the GIEPAA (2015), the Tribunal stated that it did not need to rule on the Claimants' alternative arguments relating to estoppel and vested rights.
 - j. Tenth, "*a valid arbitration agreement arising from the 2015 Act was therefore perfected by the Claimants submitting to arbitration thereunder, such that the Tribunal had jurisdiction ratione voluntatis.*"
170. The Claimants argue that, contrary to the Applicant's argument, the Tribunal "*did not revive or resurrect a defunct provision,*" i.e. Section 55 of the GIEPAA (2010), "*but rather considered the previous provisions of the 2010 Act as one of several contextual elements helpful to interpreting the terms of the applicable 2015 Act.*"¹⁴⁸ The Tribunal's analysis was conducted in accordance with the framework developed by the ICJ in *Fisheries Jurisdiction*, "*as the Applicant itself advocated in the underlying proceedings.*"¹⁴⁹ While the Applicant may disagree with the Tribunal's reasoning, this does not mean that the

¹⁴⁸ Counter-Memorial, para. 128 (emphasis in the original).

¹⁴⁹ Counter-Memorial, para. 128.

Award fails to state reasons on which it is based. The Tribunal's analysis is "*clear, consistent and rigorous*," and capable of being understood by an informed reader.¹⁵⁰

c) The Applicant Misrepresents the Reasoning of the Award Regarding the Claimants' Reliance on Section 55 of the GIEPAA (2010)

171. The Claimants disagree with the Applicant's argument that the Tribunal failed to state adequate and sufficient reasons for its premise that the Claimants relied on Section 55 of the GIEPAA (2010).¹⁵¹
172. The Claimants contend that the Applicant's arguments under this heading are an attempt to reopen the case and to revisit the Tribunal's assessment of the evidence on record. According to the Claimants, there is no basis in Article 52(1)(e) of the ICSID Convention to review whether the Tribunal drew the correct inferences from the evidence, and even less to examine whether the reasons given were adequate and sufficient. This is not admissible in the context of annulment proceedings.¹⁵²
173. The Claimants submit that the Applicant also misrepresents the Tribunal's analysis of the evidence. The Tribunal specifically highlighted that, prior to the entry into force of the GIEPAA (2015), the media release issued by the Gambian Government on 12 June 2015 "*expressly mentioned that The Gambia would 'in accordance with section 42 of The Gambia Investment and Export Promotion Agency Act 2010, duly compensate the West African Aquaculture in line with the provisions of the stated section of the Investment Act 2010.'*"¹⁵³ The Applicant also reassured in the Parties' correspondence that "*in line with the provisions of Section 42 of [the GIEPAA (2010)], the process to justly and adequately compensation you, at a value that will be determined by a jointly agreed valuer, will be set in motion as soon as possible.*"¹⁵⁴ The Tribunal also noted that the letter from the President's office dated 26 October 2015 invited the Claimants to a meeting to discuss

¹⁵⁰ Counter-Memorial, paras. 128-129.

¹⁵¹ Counter-Memorial, para. 130.

¹⁵² Counter-Memorial, para. 131.

¹⁵³ Counter-Memorial, para. 133.

¹⁵⁴ Counter-Memorial, para. 133 (footnote omitted).

modalities of compensation. According to the Claimants, this was “*an implicit reference to the 2010 Act.*”¹⁵⁵

174. The Tribunal also noted that after the entry into force of the GIEPAA (2015), the Applicant made no reference to the new Act, including its dispute resolution clause. In its subsequent correspondence, the Claimants suggested that WAA “*was entitled to resort to ICSID arbitration ‘without further notice’ (in December 2016) and ‘without further delay’ (in November 2017).*”¹⁵⁶ The Government did not protest nor corrected the Claimants’ misapprehension that the GIEPAA (2010) was still in force. The Tribunal concluded that the Claimants, “*in all appearance in good faith, relied on what they saw as a unilateral offer of ICSID arbitration in the GIEPAA (2010) and acted accordingly.*”¹⁵⁷ In reaching the conclusion that the Claimants were entitled to rely on the GIEPAA (2010), the Tribunal “*reviewed the evidence and found that the Claimants had in good faith relied on the representations made by the Applicant that the procedure set out in the 2010 Act would be followed.*”¹⁵⁸ According to the Claimants, the Tribunal’s analysis “*is supported by the evidence and enables the reader to understand the facts and the law applied by the Tribunal in coming to its conclusions.*”¹⁵⁹
175. The Claimants submit that the Applicant also “*misrepresents the manner in which the Tribunal’s finding as to the Claimants’ reliance were relevant to its decision.*”¹⁶⁰ The Applicant’s argument regarding the Tribunal’s alleged failure to explain on what legal grounds the Claimants can assert a procedural right derived from a provision that was not relied upon when it was in force, is a “*red herring*” and misrepresents the Tribunal’s reasoning. According to the Claimants, the Tribunal did not treat Section 55 of the GIEPAA (2010) or the Claimants’ reliance thereon as the basis of jurisdiction. Instead, the Tribunal considered Section 35 of the GIEPAA (2010) and the Claimants’ reliance thereon as part of the interpretive analysis under *Fisheries Jurisdiction*. Indeed, according to the

¹⁵⁵ Counter-Memorial, paras. 132-133.

¹⁵⁶ Counter-Memorial, para. 134.

¹⁵⁷ Counter-Memorial, para. 135 (footnote omitted).

¹⁵⁸ Counter-Memorial, para. 136.

¹⁵⁹ Counter-Memorial, para. 136.

¹⁶⁰ Counter-Memorial, para. 137.

Claimants, the Applicant itself had argued that the reactions of third parties were part of the process of interpretation. This is why the Tribunal considered the Claimants' reactions and their reliance on the GIEPAA (2010).¹⁶¹

d) The Tribunal Did Not Have to Take A Position on the Claimants' Arguments on Estoppel and Vested Rights

176. The Claimants disagree with the Applicant's argument that the Majority's failure to rule on the arguments as to estoppel and vested rights creates a gap in the Award which warrants its annulment. The Claimants submit that the Tribunal established jurisdiction under the GIEPAA (2015), and not under the GIEPAA (2010); as such, the premise for the submission has no basis. In any event, there is no basis to annul an award where the alleged annulment ground relates to an ancillary argument that was not part of the *ratio* of the decision. This is the case here: the alleged lack of reasons pertains to an issue that has no impact on the eventual outcome and therefore cannot give rise to annulment.¹⁶²

e) The Applicant's Mischaracterization of the Award Should Be Rejected

177. In the Rejoinder, the Claimants submit that the Applicant's Request "*is based on a fundamental misrepresentation of the Award and the Tribunal's actual reasoning.*" For the reason, the Claimants state that they provide in the Rejoinder "*a more exhaustive account of the specific process of analysis that the Tribunal undertook*" to determine that it had jurisdiction *ratione voluntatis* under the GIEPAA (2015), "*incorporating by reference Part II.B of its Counter-Memorial.*"¹⁶³

178. The Claimants make six separate arguments on this point.

179. First, the Claimants recall that the Tribunal made clear from the outset that it would apply international law principles to determine whether The Gambia's domestic law provided its consent to jurisdiction for ICSID arbitration. The Tribunal also expressly determined that it would follow the ICJ precedents, specifically *Fisheries Jurisdiction*, and ICSID's

¹⁶¹ Counter-Memorial, paras. 137-140.

¹⁶² Counter-Memorial paras. 141-145 (citing Award, paras. 428-432).

¹⁶³ Rejoinder, paras. 47-50.

jurisprudence, and “*adopted the international law rules governing the interpretation of unilateral declarations formulated in the framework of a treaty.*”¹⁶⁴

180. Second, the Claimants recall that the Tribunal considered the requirements of Article 25(1) of the ICSID Convention, concluding (by reference to ICSID case law) that the ICSID Convention does not specify the modalities for party consent, other than it be in writing. The Tribunal rejected the Applicant’s argument that the Claimants must prove the State’s consent be “*voluntary and indisputable,*” “*clear and unambiguous*” and “*beyond any doubt.*” The Tribunal also rejected the Applicant’s argument that there is a hierarchy between the various elements of the *sui generis* rules of interpretation and adopted the “*wholesome*” approach endorsed in *Fisheries Jurisdiction* and by ICSID tribunals. This required the comparison of the terms of successive unilateral declarations in the framework of a treaty.¹⁶⁵
181. Third, the Claimants note that the Tribunal considered issues common to the GIEPAA (2010) and the GIEPAA (2015), as relevant to the question of whether The Gambia had provided consent in writing to ICSID arbitration under the two Acts. In this connection, the Tribunal specifically confirmed that the reasons it provided for its decision in respect of the GIEPAA (2010) equally applied to the GIEPAA (2015). The Tribunal also specifically addressed issues such as whether Section 55 and Section 35 were merely declaratory or whether they contained the State’s consent to ICSID arbitration.¹⁶⁶
182. Fourth, the Claimants state that the Tribunal considered “*the Claimants’ reliance on the Act in force at the time of the expropriation, i.e., the 2010 Act,*” concluding that the Claimants did rely on “*what they saw as a unilateral offer of ICSID arbitration in the GIEPAA (2010) and acted accordingly.*”¹⁶⁷ According to the Claimants, the Tribunal did not infer from the Claimants’ reliance on the GIEPAA (2010) that an arbitration agreement

¹⁶⁴ Rejoinder, paras. 48-54.

¹⁶⁵ Rejoinder, paras. 55-56.

¹⁶⁶ Rejoinder, paras. 57-59.

¹⁶⁷ Rejoinder, para 60 (footnotes omitted).

had been formed under the GIEPAA (2010); it rather considered that such reliance “*was a relevant consideration under the ICJ Fisheries Jurisdiction framework.*”¹⁶⁸

183. Fifth, according to the Claimants, the Tribunal noted that the GIEPAA (2015) contained its own dispute resolution clause applicable at the relevant time and considered that its jurisdiction depended ultimately on how the GIEPAA (2015) should be interpreted and, in particular, whether the GIEPAA (2015) foreclosed the possibility for the Claimants to bring an international arbitration, specifically, whether it revoked the offer given in the GIEPAA (2010). The Tribunal concluded that it did not. The Claimants set out a detailed analysis of the Tribunal’s decision to demonstrate how the Tribunal reached that conclusion.¹⁶⁹
184. Finally, the Claimants stress that the Tribunal assessed the circumstances of the Claimants’ acceptance of The Gambia’s offer and concluded that the Claimants were able to formally accept it “*when they submitted their Request for Arbitration under the GIEPAA (2015).*” Having determined it had jurisdiction under the GIEPAA (2015), the Tribunal determined that it “*does not need to rule*” on the Claimants’ alternative arguments based on estoppel and vested rights.¹⁷⁰

(iii) The Applicant Fails to Meet the High Burden Required to Satisfy the Standard for Annulment under Article 52(1)(e) of the ICSID Convention

185. In their Rejoinder, the Claimants submit that the Applicant’s argument that the Tribunal failed to state reasons on five separate outcome-determinative issues “*all stem from the same issue: the Applicant’s distorted reading of the Tribunal’s analysis and its wilful refusal to follow the step-by-step reasoning set out by the Tribunal.*”¹⁷¹ The Claimants then proceed to address the Applicant’s arguments on the five issues identified by the Applicant.

¹⁶⁸ Rejoinder, para. 60.

¹⁶⁹ Rejoinder, paras. 61-65.

¹⁷⁰ Rejoinder, paras. 66-67.

¹⁷¹ Rejoinder, paras. 68-69.

a) The Tribunal Set Out Its Analysis for the GIEPAA (2015) As the Basis for ICSID Jurisdiction

186. The Claimants note that the Applicant accuses the Claimants of confusing different arguments advanced by The Gambia, contending that the Claimants present an “*omnibus response*.” The Claimants argue that the Applicant’s effort to distinguish between its two allegations – first, the Tribunal failed to explain how the “*consent in writing*” requirement in Article 25 of the ICSID Convention was satisfied and second, the Tribunal failed to state reasons for its decision that jurisdiction was established under Section 35 of the GIEPAA (2015) – do not advance the Applicant’s position as it “*fails to grapple with the actual reasoning of the Tribunal in its Award*.” Nonetheless, in order to aid the Committee, the Claimants address the Applicant’s two arguments.¹⁷²
187. The Claimants contend that the Applicant “*effectively admits*” that its arguments relating to Article 25 of the ICSID Convention “*are premised on its (distorted) reading of the Award*.”¹⁷³ The Claimants submit that the Tribunal “*clearly considered, and at great length*,” whether it had consent to jurisdiction under the GIEPAA (2015) for the purposes of Article 25(1) of the ICSID Convention, “*concluding that it did*.”¹⁷⁴ In response to the Applicant’s complaint that the Tribunal considered Section 35 of the GIEPAA (2015) only in the abstract, in the Claimants’ view, the Applicant “*fails to acknowledge the Tribunal’s adoption of the ICJ framework derived from Fisheries Jurisdiction*.” This framework “*prompted the Tribunal to consider the text of Section 35 itself and also a range of contextual factors*.”¹⁷⁵ In particular, the Tribunal conducted a “*consolidated analysis*” of the Parties’ argument regarding consent under both the GIEPAA (2010) and the GIEPAA (2015), and “*expressly confirmed that its analysis applied to both*.”¹⁷⁶ The Claimants

¹⁷² Rejoinder, paras. 71-75.

¹⁷³ Rejoinder, para. 76.

¹⁷⁴ Rejoinder, para. 79.

¹⁷⁵ Rejoinder, para. 80.

¹⁷⁶ Rejoinder, para. 81(a).

submit that the Applicant's allegation that the Tribunal failed to give reasons "*cannot stand where it relies on a refusal to acknowledge the actual analysis of the Tribunal.*"¹⁷⁷

188. The Claimants also reject the Applicant's argument that the Tribunal based its findings of consent to ICSID jurisdiction on the GIEPAA (2010). The Claimants recall that the Tribunal specifically held that Article 25(1) of the ICSID Convention merely requires a consent "*in writing,*" and that "*it would be both unnecessary and inappropriate to add an additional standard.*" The Tribunal then specifically concluded that Section 55 of the GIEPAA (2015) was "*broad enough to encompass an offer of ICSID arbitration,*" which in the Claimants' view satisfies the requirements of Article 25(1) of the ICSID Convention. The Committee should review the analysis set out by the Tribunal based upon the Parties' submissions in the arbitration, from the perspective of a well-informed reader. This approach "*enables the reader to follow [the Tribunal's] reasoning.*"¹⁷⁸

189. The Claimants disagree with the Applicant's contention that the Tribunal's use of the *Fisheries Jurisdiction* framework does not explain its decision. According to the Claimants, the Applicant's arguments are premised on a "*misunderstanding (wilful or otherwise) of the Tribunal's analysis.*" Specifically, the Tribunal did not adopt an "*inverted approach;*" it focused on Section 55 of the GIEPAA (2015), including the predecessor Act, in accordance with the *Fisheries Jurisdiction* framework. In any event, according to the Claimants, ICSID tribunals are allowed to organize their reasons as they see fit, so long as an informed reader can follow their reasoning. The Applicant's complaint is in fact an attempt to appeal from the Tribunal's decision in substance.¹⁷⁹

b) The Tribunal Explained Its Decision to Apply the *Fisheries Jurisdiction* Framework of Analysis

190. The Claimants reiterate their position on this issue, as set out in the Counter-Memorial, and respond to the Applicant's rebuttal, as set out in its Reply.¹⁸⁰

¹⁷⁷ Rejoinder, paras. 77-82.

¹⁷⁸ Rejoinder, paras. 83-87.

¹⁷⁹ Rejoinder, paras. 88-91.

¹⁸⁰ Rejoinder, paras. 92-95.

191. The Claimants reject the Applicant’s attack on the Tribunal’s reliance on ICSID jurisprudence, specifically *Tidewater*, *Cemex* and *Mobil*. According to the Claimants, the Applicant never raised the argument that the *Fisheries Jurisdiction* analysis was inapplicable and cannot now attack the Tribunal’s decision for alleged failure to address arguments that were never made to it. In any event, the Tribunal’s reasons for applying the *Fisheries Jurisdiction* framework are “*clear on the face of the Award*,” and indeed, the Applicant itself had invited the Tribunal to apply the *Fisheries Jurisdiction* framework. The Applicant’s attempt to argue that the Tribunal should have applied the ILC Guiding Principles is misplaced as the Committee “*is not called upon the judge the importance or potential impact of counter-factual submissions*.”¹⁸¹
192. The Claimants then deal with, and reject, the Applicant’s three arguments to justify its position regarding the appropriate framework for interpretation of Section 35 of the GIEPAA (2015).
193. As to the Applicant’s argument that the Tribunal failed to provide any reasons for its conclusions that (i) Section 35 was formulated within the framework of a treaty and that (ii) the ILC Guiding Principles were not relevant, the Claimants note that they have already addressed the issue in their prior submissions and the Applicant’s “*refusal to accept the Tribunal’s reasoning does not amount to a violation of Article 52(1)(e)*.”¹⁸²
194. As to the Applicant’s denial that “*its efforts to reargue its case is ‘untimely’*” (citing its prior argument that Section 35 expressly excludes the ICSID Convention), the Claimants argue that such attempt to restate the Applicant’s original argument “*finds no place under Article 52(1)(e)*.” The argument also ignores that the Tribunal made a separate determination that Section 35 of the GIEPAA (2015) was in fact “*broader*” than Section 55 of the GIEPAA (2010). The Claimants reject the Applicant’s argument that it can argue the point about the interpretation of Section 35 since it could not predict that Tribunal would fail to give reasons on this specific issue. According to the Claimants, the Tribunal’s

¹⁸¹ Rejoinder, paras. 96-99.

¹⁸² Rejoinder, paras. 101-103.

reasons are “*certainly sufficient*,” and the Tribunal cannot be faulted for having followed the precedents that the Applicant itself had relied upon.¹⁸³

195. As to the Applicant’s argument that the Tribunal failed to provide reasons for its interpretation of Section 35, the Claimants contend, in response, that the Applicant cannot now make an argument that they never raised in the underlying arbitration – that the instrument of consent must make an express reference to the relevant treaty. According to the Claimants, substantive arguments against a specific finding have no place in annulment proceedings, “*a fortiori when they conflict with an applicant’s own submissions before the original tribunal.*” While the Applicant may have proposed an alternative framework for the Tribunal’s consideration, it “*cannot deny the content of its own submissions.*”¹⁸⁴

c) The Tribunal explained how Section 35 of the GIEPAA (2015) established consent to ICSID jurisdiction.

196. The Claimants contend that the Applicant’s argument that the Tribunal failed to explain how Section 35 of the GIEPAA (2016), “*on its own*,” established consent to ICSID jurisdiction is “*an attempt at rearguing the Award, and not a valid basis for challenge under Article 52(1)(e).*” According to the Claimants, the Applicant simply refuses to accept the Tribunal’s reasoning, however, the Tribunal was not “*bound to follow a particular interpretative approach in providing its reasons, to comply with Article 52(1)(e).*” The Claimants submit that it is clear on the face of the Award that the Tribunal analysed Section 35 “*in a contextual fashion, including by reference to the 2010 Act*,” and applied its analysis of Section 55 of the GIEPAA (2010) to Section 35 of the GIEPAA (2015) *mutatis mutandis*. In any event, the Tribunal also conducted an extensive analysis of Section 35, including “*the words actually used.*”¹⁸⁵

¹⁸³ Rejoinder, paras. 104-106.

¹⁸⁴ Rejoinder, paras. 107-110.

¹⁸⁵ Rejoinder, paras. 111-121.

d) The Tribunal Did Not Find that the Claimants Could Accept Consent Under the GIEPAA (2010)

197. According to the Claimants, the Applicant’s argument that the Tribunal found that the Claimants could accept The Gambia’s consent given in the revoked Section 55 of the GIEPAA (2015) is “*again premised on a misstatement of the Award.*” In the Claimants’ view, Section 55 was merely a contextual element in the Tribunal’s analysis of Section 35. The Tribunal’s determination of the Claimants’ reliance on Section 55 was a “*factual conclusion, based upon the Tribunal’s review of relevant exchanges between the parties.*” The Applicant cannot challenge the Tribunal’s factual conclusions in the context of an annulment proceeding. Contrary to the Applicant’s argument, the Tribunal also did not conclude that the Claimants were entitled to rely on the GIEPAA (2010) when accepting The Gambia’s offer in 2018; the Tribunal “*clearly confirmed on the basis of its ‘wholesome’ analysis of the 2015 Act that it was the latter (standing) offer that the Claimants were entitled to and did accept in 2018.*”¹⁸⁶
198. Similarly, according to the Claimants, the Applicant misstates the Tribunal’s reliance on the GIEPAA (2010). Contrary to what the Applicant claims, the Tribunal did not treat the GIEPAA (2010) as a “*principal foundation of jurisdiction.*” The Applicant fails to appreciate that the Tribunal’s analysis of the GIEPAA (2010) was “*part of its overall application of the Fisheries Jurisdiction framework,*” which allows a consideration of a predecessor act in order to determine whether the subsequent act maintained or revoked the consent given in the earlier act.¹⁸⁷
199. The Claimants contend that the Applicant’s attempt to undermine the Tribunal’s finding that the Claimant “*in all appearance in good faith, relied on what they saw as a unilateral offer of ICSID arbitration in the GIEPAA (2010) and acted accordingly*” is an “*attempt to second-guess the Tribunal’s finding of fact under the guise of an Article 52(1)(e) challenge.*” According to the Claimants, the Applicant’s argument that the Tribunal’s

¹⁸⁶ Rejoinder, paras. 122-128.

¹⁸⁷ Rejoinder, paras. 129-131.

finding “*goes to the heart of the jurisdictional determination*” is an attempt to “*elevate this one issue to a centrality it does not hold in the Tribunal’s reasoning.*”¹⁸⁸

200. The Claimants submit that the Applicant’s repeated argument that any statements made by it in the exchanges between the Parties in 2016-2017 concerning compensation could not give rise any procedural rights for the Claimants, simply amounts to a “*wilful refusal to understand the Tribunal’s reasoning on its face,*” including the role of the exchanges. According to the Claimants, the Applicant’s argument “*amounts to an undisguised and impermissible invitation to the Committee to review de novo the Tribunal’s factual findings on the exchange between the parties in 2016-2017.*”¹⁸⁹
201. The Claimants contend that the Applicant’s critique of the Tribunal’s application of the *Fisheries Jurisdiction* framework is a “*transparent attempt to relitigate issues addressed before the Tribunal.*” The Tribunal’s reasoning meets the minimum standard of intelligibility, and it is not the Committee’s role to review the substantive correctness of the Tribunal’s decision. Nor did the Tribunal demote Section 35 of the GIEPAA (2015) to mere contextual aid, as alleged by the Applicant. The Tribunal clearly found that “*the 2015 Act itself offered consent to ICSID jurisdiction.*”¹⁹⁰
202. The Applicant’s attempt to reargue what *Fisheries Jurisdiction* stands for is equally misplaced. The Tribunal rightly considered the Claimants’ factual reliance on the original offer as part of its overall contextual analysis of the GIEPAA (2015), in application of the *Fisheries Jurisdiction* framework. Indeed, according to the Claimants, the Applicant cannot “*deny that it had itself invited the Tribunal to consider the Claimants’ reliance on an offer of ICSID arbitration in its submissions in the underlying proceedings.*”¹⁹¹

¹⁸⁸ Rejoinder, paras. 132-133.

¹⁸⁹ Rejoinder, para. 134.

¹⁹⁰ Rejoinder, paras. 135-138.

¹⁹¹ Rejoinder, paras. 140-141.

e) The Tribunal Did Not Have to Rule on the Alternative Estoppel Argument or Jurisdiction Under the GIEPAA (2010)

203. The Claimants reiterate their position that the Tribunal was not required to opine on this issue as it had already found consent to jurisdiction under the GIEPAA (2015). This decision cannot be challenged.¹⁹²
204. According to the Claimants, the Applicant is wrong to argue that the Tribunal's position creates a gap in the Award; the Tribunal did not find jurisdiction under the GIEPAA (2010). Article 52(1)(e) is concerned with a situation where the award fails to state the reasons on which it is based and not regarding alleged lack of reasons for an issue that was not even decided. Nor did the Tribunal rely on a theory of estoppel or vested rights to accept consent to ICSID arbitration under the repealed GIEPAA (2010) because it found that jurisdiction was established under the GIEPAA (2015).¹⁹³ The Applicant cannot also rely on Professor Mayer's Dissenting Opinion on this issue since he found that there is no jurisdiction under the GIEPAA (2015) and therefore it was necessary for him to address arguments on estoppel and vested rights.¹⁹⁴
205. In conclusion, the Claimants argue that the Applicant has failed to establish a basis for annulment under Article 52(1)(e) of the ICSID Convention. The requirement to provide reasons is regarded as a "*minimum requirement*" and annulment is warranted "*only where it is impossible to follow the tribunal's reasoning, how it got from point A to point B.*" This high threshold is not met in this case. The Claimants argue, quoting *Wena*, that "[i]f the *ad hoc* Committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the *ad hoc* Committee itself."¹⁹⁵

¹⁹² Rejoinder, para. 144.

¹⁹³ Rejoinder, paras. 145-148.

¹⁹⁴ Rejoinder, paras. 149-150.

¹⁹⁵ Rejoinder, para. 151 (citing **CALA-075**, *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment, 5 February 2002, para. 83).

(2) The Committee's Analysis

206. The Committee will first deal with the legal standard applicable under Article 52(1)(e) of the ICSID Convention and then consider whether the Applicant's case under this provision meets the applicable standard.

a. The Applicable Legal Standard

207. The Applicant seeks annulment of the Award under Article 52(1)(e) of the ICSID Convention, which provides:

“(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

[...]

(e) that the award has failed to state the reasons on which it is based.”

208. As summarized above, the Parties broadly agree that the applicable standard for determining whether the Award “*has failed to state the reasons on which it is based*” is set out in *MINE* and in the subsequent decisions of other ICSID committees that have endorsed and elaborated on the legal standard adopted by the *MINE* committee. The relevant passages of the *MINE* committee's decision state as follows:

“5.08 The Committee is of the opinion that the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. 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, disregard of the exclusion of the remedy of appeal by Article 53 of the Convention. A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment.

5.09 In the Committee's view, 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. [...] This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.”*¹⁹⁶

209. The *MINE* committee thus made clear that the requirement to state the reasons on which the award is based is a “*minimum requirement*,” it “*must enable the reader to follow the reasoning of the Tribunal on points of fact and law*.” The standard is not met if the tribunal’s reasoning is contradictory or based on frivolous reasons, however, it does not allow a review of the adequacy of the tribunal’s reasoning and examination of the substance of the decision, including whether the tribunal correctly applied the law.
210. As noted above, other ICSID annulment committees have elaborated on the *MINE* standard. The *Vivendi I* committee summarized the jurisprudence of ICSID committees under Article 52(1)(e) in these terms:

“64. [...] [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 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.

65. In the Committee’s view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal’s decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually

¹⁹⁶ **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, paras. 5.07-5.13.

*expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.”*¹⁹⁷

211. Both Parties also cite approvingly the committee's decision in *Pey Casado*, in which the committee determined that the failure to state reasons must relate to a “*pivotal or outcome-determinative*” issue, and that both “*a complete absence of reasons*” and “*frivolous or contradictory explanations*” qualify as an annulable error:

*“The Committee believes that as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow, whether the lack of rationale is due to complete absence of reasons or the result of frivolous or contradictory explanations.”*¹⁹⁸

212. The Parties cite a number of other ICSID annulment committee decisions that have adopted the *MINE* standard, with the same or essentially similar line of reasoning.¹⁹⁹ The Committee agrees with and adopts the *MINE* standard, as elaborated by other ICSID annulment committees.
213. The Committee recalls, in this connection, that Article 52(2)(e) is related to Article 48(3) of the ICSID Convention, which provides that “[t]he award shall deal with every question

¹⁹⁷ **ALA-13/CALA-057**, *Compañía de Aguas del Aconquija SA (formerly Aguas del Aconquija) and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 64-65 (emphasis in the original and footnote omitted.)

¹⁹⁸ **ALA-024**, *Victor Pey Casado and Foundation “President Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012, para. 86. See also **CALA-053**, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Annulment, 22 January 2025, para. 203 (“*The arbitral tribunal should deal with all issues that have a conclusive nature, rather than each and every argument made by the parties.*”); **CALA-056**, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para. 134 (“[A] lack of reasons for an aspect that has no impact on the eventual outcome, such as obiter dictum, should not be a basis for annulling an award or part thereof. [...] Annulling awards on points that do not alter the eventual outcome would invite frivolous applications curated to forestall enforcement of the award and constitute an abuse of process.”)

¹⁹⁹ See, e.g., **CALA-063**, *Tenaris SA and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, 28 December 2018, exhibit, paras. 110, 113-114; **CALA-043-SPA/ALA-026-SPA**, *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on Sociedad Anónima Eduardo Vieira's Application for Annulment, 10 December 2010, para. 357; **CALA-067/ALA-038**, *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Applicant of Caratube International Oil Group, 21 February 2014, para. 102; **CALA-065**, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company, and the Application for Partial Annulment of the Argentine Republic, 16 September 2011, para. 103; **CALA-039**, *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, 10 July 2014, paras. 200-201 (citing **CALA-014**, *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005, para. 81).

submitted to the Tribunal, and shall state the reasons upon which it is based.” As the *MINE* committee observed, while the second part of Article 48(3) is made an explicit ground for annulment in Article 52(2)(e), the first part is not so made “*in so many words.*”²⁰⁰ Having considered whether there were circumstances in which failure to “*deal with every question submitted to the Tribunal,*” as required by Article 48(3), might be a ground for annulment “*as a species of failure to state reasons,*” the *MINE* committee accepted that in circumstances where it could not be cured by supplementing the award pursuant to the procedure in Article 49(2) of the ICSID Convention, the tribunal’s failure to deal with a particular question submitted to it “*may render the award unintelligible and thus subject to annulment for failure to state reasons.*”²⁰¹

214. To summarize, an award fails to state the reasons on which it is based within the meaning of Article 52(1)(e) if:

- a. Insufficient, inadequate, frivolous or contradictory reasons, or no reasons at all, are provided in the award for the tribunal’s decision on a particular question submitted to it;
- b. The question at issue is outcome-determinative; and
- c. The tribunal’s decision is unintelligible in the sense that it is not possible to follow how the tribunal proceeded from point A to point B in its decision-making on an outcome-determinative issue.

215. The Committee will determine the Applicant’s Application on the basis of this standard.

b. Whether the Award Has Failed to State the Reasons on Which It Is based

216. The Applicant’s case is that the Tribunal failed to provide reasons for a number of its findings on outcome-determinative issues that led the Tribunal to conclude that it had

²⁰⁰ **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, paras. 5.07.

²⁰¹ **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, paras. 5.07, 5.13.

jurisdiction *ratione voluntatis* under Article 25(1) of the ICSID Convention. Specifically, according to the Applicant (as summarized in the Reply), the Tribunal failed to:

“a. Explain how the consent in writing requirement of Article 25 of the ICSID Convention was satisfied in this case [...];

b. Provide reasons in support of their conclusion that Section 35 of the 2015 Act was made in the framework of the ICSID Convention and that the ILC Guiding Principles were not applicable to its interpretation [...];

c. State reasons for their conclusions that the Tribunal’s jurisdiction is based on Section 35 of the 2015 Act [...];

d. Explain why the Claimants were entitled to ‘formally accept’ a consent to ICSID arbitration supposedly contained in Section 55 of the 2010 Act – i.e., a repealed provision [...]; and

e. Even consider the Claimants’ estoppel and vested rights arguments [...].”²⁰²

217. The Claimants reject the Applicant’s case in its entirety, summarizing their position as follows:

“The Tribunal confirmed its jurisdiction under Section 35 of the 2015 Act through detailed analysis, and carefully considered (and largely rejected, with compelling reasons) the Applicant’s extensive arguments to the contrary. The Applicant therefore fails to meet the high burden required to annul an award under Article 52(1)(e) of the ICSID Convention. [...] Annulment is only warranted where it is impossible to follow the Tribunal’s reasoning, and how it got from point A to point B. This is clearly not the case here. Disagreement with the tribunal’s analysis does not constitute a failure to state reasons.”²⁰³

218. While the Parties disagree on whether the Tribunal provided sufficient or adequate – or indeed any – reasons for some of its outcome-determinative findings, it is common ground that the relevant legal provisions for the purposes of the Tribunal’s jurisdiction *ratione voluntatis* are Article 25(1) of the ICSID Convention, Section 35 of the GIEPAA (2015) and Section 55 of the GIEPAA (2010). These provisions set out the requirement and form of consent to ICSID arbitration (Article 25(1) of the ICSID Convention) and (in the

²⁰² Reply, para. 178 (footnotes omitted).

²⁰³ Counter-Memorial, para. 9.

Applicant’s view, allegedly) the actual consent (Section 35 of the GIEPAA (2015) or, alternatively, Section 55 of the GIEPAA (2010)).

219. The Committee notes, in this connection, that the Tribunal acknowledged in the Award that the “*main jurisdictional issue*” faced by it in the case was “*whether The Gambia has consented to the jurisdiction of the Centre via an offer of arbitration made in its domestic investment law, that was subsequently accepted by the Claimants.*”²⁰⁴ Specifically, the Tribunal had to determine whether the GIEPAA (2015) or, alternatively, the GIEPAA (2010) established its jurisdiction.²⁰⁵

220. Article 25(1) of the ICSID Convention provides:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

221. Section 55 of the GIEPAA (2010) (“Dispute resolution”) provides:

“55. (1) Where a dispute arises between investors or between an investor and the Government, the parties to the dispute shall settle their difference amicably through conciliation or mediation.

(2) Where the parties fail to resolve the matter through conciliation or mediation, they may resort to:

(a) arbitration under the Alternative Dispute Resolution Act of The Gambia;

(b) the [I]nternational Centre for the Settlements of Investments Disputes [sic]; or

*(c) the provisions of any existing Bilateral Investment Treaty between The Gambia and the country the investor originates from.”*²⁰⁶

222. Section 35 of the GIEPAA (2015) (“Dispute resolution”) further provides:

²⁰⁴ Award, para. 220.

²⁰⁵ Award, para. 223.

²⁰⁶ Award, para. 330.

“35. *Dispute resolution*

Where a dispute arises between investors or between an investor and the Government, the parties to the dispute shall endeavor to settle their difference amicably through conciliation or mediation, and where the parties fail to resolve the matter through conciliation or mediation they may resort to arbitration using any of the following mechanisms –

- (a) the Alternative Dispute Resolution Act of The Gambia;*
- (b) the provisions of any existing Bilateral Investment Treaty between The Gambia and the investor’s country of origin; and*
- (c) the provisions of any international treaty to which The Gambia is party.”²⁰⁷*

223. The Tribunal’s findings on jurisdiction *ratione voluntatis* are premised on Article 25(1) of the ICSID Convention, which, as the Tribunal noted, requires that “*the parties to the dispute consent in writing to submit [the dispute] to the Centre.*”²⁰⁸ The Tribunal considered that, on this issue, “*each party bears its own burden,*” and that “[t]he Claimants have the primary burden to establish jurisdiction, while the Respondent bears the evidentiary burden regarding its objections to jurisdiction.”²⁰⁹ On this basis, the Tribunal held that its jurisdiction “*depends on the existence of consent to arbitration by the Parties,*” which the Tribunal indicated it would address “*as a matter of fact.*”²¹⁰ As to the standard of proof, the Tribunal stated that it would approach the issue of consent “*objectively and neutrally, according to principles regarding unilateral declarations of States.*”²¹¹
224. The Tribunal’s analysis of the basis of its jurisdiction *ratione voluntatis* is set out in Section V.D(1) of the Award. The issue is addressed under three headings – (i) “*Overarching Principles of Law Applicable to Determining Consent to Jurisdiction;*” (ii) “*Consent in*

²⁰⁷ **A-010**, The Gambia Investment and Export Promotion Agency Act of 2015, Section 35.

²⁰⁸ Award, para. 218.

²⁰⁹ Award, para. 287.

²¹⁰ Award, para. 289.

²¹¹ Award, para. 291 (referring to **ALA-058/CALA-038**, *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, paras. 79-102; **ALA-042**, *PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015, paras. 250-269).

Writing Under Article 25 of the ICSID Convention;” and (iii) “*The Law Applied to the Facts on Jurisdiction Ratione Voluntatis.*”

225. The Committee considers that, in accordance with the test set out in paragraph 214 above, it must, as a first step, identify among the Tribunal’s findings in Section V.D(1) those that must be considered outcome-determinative in the sense that they led the Tribunal to the conclusion that it had jurisdiction *ratione voluntatis*.
226. Having reviewed the Parties’ arguments and the Tribunal’s reasoning in Section V.D(1) of the Award, the Committee considers that the Tribunal’s outcome-determinative findings on the issue of jurisdiction *ratione voluntatis* are, broadly, the following:
- a. In determining whether Section 35 of the GIEPAA (2015) or, alternatively, Section 55 of the GIEPAA (2010) contains The Gambia’s consent to ICSID arbitration, the Tribunal decided to apply “*international law principles governing unilateral declarations of States,*” formulated in the framework of a treaty, as interpreted in accordance with the *sui generis* method adopted by the ICJ in *Fisheries Jurisdiction* and subsequently endorsed by ICSID tribunals dealing with unilateral declarations of the Contracting States to the ICSID Convention, as well as the domestic law of The Gambia.²¹²
 - b. When considering the “*consent in writing*” requirement under Article 25 of the ICSID Convention, the Tribunal “*generally agree[d]*” with the finding of the *ConocoPhillips* tribunal that “*consent is not to be presumed and ‘must be clearly demonstrated’.*”²¹³
 - c. When considering the relevant facts, the Tribunal recalled that the nationalization of WAA took place on 12 June 2015, when the GIEPAA (2010) was still in force, whereas the GIEPAA (2015) entered into force on 31 December 2015. In 2018, the Claimants sought to accept the offer of ICSID arbitration in the GIEPAA

²¹² Award, paras. 296-317.

²¹³ Award, para 321 (citing **ALA-002**, *Conocophillips Petrozuata B.V., Conocophillips Hamaca B.V. and Conocophillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, para. 254).

(2010), “*being unaware of the entry into force of the 2015 Act.*” The Claimants subsequently, in 2018, confirmed that they would rely on the GIEPAA (2015) and, in the context of the proceedings, submitted arguments in the alternative based on the GIEPAA (2010).²¹⁴

- d. The Tribunal considered that “*it is not called upon to decide whether Section 35 of the GIEPAA (2015) provides for consent in advance to ICSID arbitration in the abstract,*” and that it “*does not opine on that question.*” Rather the Tribunal had to determine “*in the specific circumstances of this case*” whether an offer of ICSID arbitration was made in the GIEPAA (2010) “*that was relied upon by the Claimants and not revoked by the Respondent in the GIEPAA (2015) or otherwise in its behavior vis-à-vis the Claimants, before it was formally accepted in 2018 under the 2015 Act.*”²¹⁵
- e. The Tribunal concluded that, when interpreted according to the *sui generis* methodology of interpretation of unilateral declarations, Section 55 of the GIEPAA (2010) provided The Gambia’s consent to ICSID arbitration.²¹⁶
- f. When considering the Claimants’ reliance on the Respondent’s consent to ICSID arbitration, the Tribunal recalled that, following the nationalization of WAA on 12 June 2015, the Parties exchanged correspondence, starting on 17 June 2015 and resuming in early 2016, “*without any reference to the new Act [the GIEPAA (2015), which had entered into force on 31 December 2015], changes in the law or in regard to dispute resolution.*”²¹⁷ The Claimants submitted in the course of the arbitration that they only became aware that the GIEPAA (2010) was no longer in force at the time of filing the Request for Arbitration in 2018. The Tribunal considered that “*the point here is not whether the Claimants should have been aware of changes in the law earlier (indeed ignorance of the law is not an excuse),*”

²¹⁴ Award, paras. 326, 375-378 (referring to **A-44**, Complete Media Release of the Government of the Gambia concerning nationalization of the assets of WAA, published in the Daily Observer, 12 June 2015).

²¹⁵ Award, para. 329. (emphasis in the original).

²¹⁶ Award, para. 373.

²¹⁷ Award, paras. 375-379.

but rather that “*the Claimants, in all appearance in good faith, relied on what they saw as a unilateral offer of ICSID arbitration in the GIEPAA (2010) and acted accordingly.*”²¹⁸ The Tribunal found that, in the course of the Parties’ negotiations, the Claimants relied on the GIEPAA (2010) both “*substantively (i.e., the right to compensation for an expropriation) and procedurally (i.e., the right of access to arbitration).*” According to the Tribunal, “*unless the GIEPAA (2015) forecloses the possibility for the Claimants to bring an international arbitration claim in relation to the expropriation of their investment in The Gambia, this Tribunal can validly exercise jurisdiction over such a matter.*”²¹⁹ The relevant question therefore was “*whether the offer of ICSID arbitration was revoked in the 2015 Act or otherwise.*”²²⁰

- g. The Tribunal noted that the Respondent “*never signaled*” during the period 2015-2018 to the Claimants that the process they had engaged in under the GIEPAA (2010) “*was not continuing or was being undertaken under a different set of rules.*”²²¹ In view of the Claimants’ reference in the context of the process to ICSID arbitration, “*one would have expected the Respondent to protest, or at least to correct the Claimants’ misapprehension that the GIEPAA (2010) was still in force.*”²²² In the absence of any such protest or correction, “*the Claimants continued to rely on the declaration from the GIEPAA (2010) Act providing for ICSID arbitration.*”²²³ The question therefore arose “*whether the GIEPAA (2015) could be interpreted as revoking the offer of ICSID arbitration.*”²²⁴
- h. The Tribunal considered that, “*where an offer is made under an Act that was later repealed and replaced by a new Act, which on its face does not revoke the previous*

²¹⁸ Award, paras. 374-382.

²¹⁹ Award, para. 384.

²²⁰ Award, para. 385.

²²¹ Award, para. 386.

²²² Award, para. 387.

²²³ Award, paras. 388-389.

²²⁴ Award, para. 390. (emphasis in the original).

*offer of consent, the offer can (potentially) be validly accepted under the new Act. It becomes a matter of appreciation of the facts.”*²²⁵

- i. When considering whether the GIEPAA (2015) “*effectively revoke[d] the offer of ICSID arbitration made in the 2010 Act, such that it could not be validly accepted by the Claimants in February 2018,*” the Tribunal noted that, “[o]n its face, Section 35 [of the GIEPAA (2015)] *does not revoke the offer of consent to ICSID arbitration.*”²²⁶ If The Gambia had intended to foreclose the possibility of ICSID arbitration without further consent on its part, “*it could have done so clearly.*”²²⁷ The Tribunal recalled that, as it had stated earlier in the Award, the question that the Tribunal had to answer “*is not whether the GIEPAA (2015) in the abstract provides for a right of access to ICSID arbitration,*” “[t]he relevant question here is whether Section 35 of the GIEPAA (2015) revokes or forecloses the option of ICSID arbitration for the Claimants in particular.”²²⁸ The Respondent having not provided any evidence of parliamentary discussions, government policy papers or witness evidence that would support the argument of deliberate omission or reference to ICSID,²²⁹ or any evidence supporting a broader withdrawal strategy regarding consent to ICSID arbitration,²³⁰ the Tribunal concluded that “*Section 35 of the GIEPAA (2015) did not revoke or repeal the offer of ICSID arbitration made in the 2010 Act and relied on by the Claimants.*”²³¹ The words actually used at paragraph (c) of Section 35 of the GIEPAA (2015) (“*the provisions of any international treaty to which The Gambia is party*”), “*in context and considering the relevant circumstances do not support such an interpretation [i.e. the interpretation that the offer of ICSID arbitration made in the 2010 Act and relied*

²²⁵ Award, para. 396.

²²⁶ Award, paras. 398-400.

²²⁷ Award, para. 401.

²²⁸ Award, para. 403. (emphasis in the original).

²²⁹ Award, para. 408.

²³⁰ Award, para. 412.

²³¹ Award, para. 420.

on by the Claimants had been revoked or repealed] *and are broad enough to encompass an offer of ICSID arbitration.*”²³²

j. The Tribunal noted that, while the Claimants became aware in 2018, in the course of its exchanges with the ICSID Secretariat, that the GIEPAA (2010) was no longer in force and had been replaced by the GIEPAA (2015), they argued that they held this belief in good faith (due to the fact that the GIEPAA (2010) was the version of the Act on the Agency’s website).²³³ Rejecting the Respondent’s argument that the Claimants were estopped from relying on the GIEPAA (2010) (because during the registration process they had stated that they would “*solely*” rely on the GIEPAA (2015)), the Tribunal concluded that, in any event, “*the offer of ICSID arbitration made in the GIEPAA (2010) was not revoked in the GIEPAA (2015) or otherwise in the behavior of the Respondent between 2015 and 2018. As such, the Claimants were able to formally accept the offer of ICSID arbitration when they submitted their Request for Arbitration under the GIEPAA (2015) in February 2018.*”²³⁴

k. The Tribunal concluded that, “*for all the reasons mentioned in current Section B, the Tribunal holds that it has jurisdiction ratione voluntatis over this case.*”²³⁵

227. The Committee must determine, in accordance with the test set out in paragraph 214 above, whether an informed reader can follow the Tribunal’s reasoning in Section V.D(1) of the Award from its premise that jurisdiction *ratione voluntatis* under Article 25(1) of the ICSID Convention requires “*consent in writing*,” to its conclusion that jurisdiction is established on the basis of Section 35 of the GIEPAA (2015). If the Award is unintelligible because the reasons provided for the Tribunal’s decision on an outcome-determinative issue are insufficient, inadequate, frivolous or contradictory, or no reasons are provided at all, the Award has failed to state the reasons on which it is based within the meaning of Article 52(1)(e) of the ICSID Convention. However, as noted by the *MINE* committee, in making this determination, the Committee cannot review the adequacy of the Tribunal’s reasoning

²³² Award, para. 420.

²³³ Award, para. 423.

²³⁴ Award, paras. 426-427.

²³⁵ Award, para. 433.

or examine the substance of the decision, including whether the Tribunal correctly applied the law.²³⁶

228. As set out above, when considering whether it had jurisdiction *ratione voluntatis* under Article 25(1) of the ICSID Convention (see paragraphs 226.a-226.k above), the Tribunal proceeded through a series of findings and supporting reasoning, concluding that (i) it would apply international law principles governing unilateral declarations of States and, specifically, the *sui generis* method adopted by the ICJ in *Fisheries Jurisdiction*, as well as the domestic law of The Gambia (see paragraph 226.a above); (ii) the “consent in writing” requirement in Article 25(1) of the ICSID Convention “generally” meant that consent was not to be presumed but had to be clearly demonstrated (see paragraph 226.b above); (iii) it was not required to decide whether Section 35 of the GIEPAA (2015) contained The Gambia’s consent to ICSID arbitration in the abstract but rather whether the GIEPAA (2010) contained consent to ICSID arbitration that the Claimant relied upon (see paragraphs 226.c-226.d above); (iv) Section 55 of the GIEPAA (2010) contained The Gambia’s consent to ICSID arbitration (see paragraph 226.e above); (v) the Claimants relied on the consent to ICSID arbitration in Section 55 of the GIEPAA (2010) in their exchanges with the Government of The Gambia during the period 2015-2018 (see paragraph 226.f above); (vi) the Respondent did not correct the Claimant’s misunderstanding that the GIEPAA (2010) continued to be in force during this period (see paragraph 226.g above); (vii) the GIEPAA (2015) did not revoke the consent to ICSID arbitration given in the GIEPAA (2010) (see paragraphs 226.h-226.i above); and (viii) the wording of Section 35 of the GIEPAA (2015), in the context and in the circumstances, was broad enough to cover ICSID arbitration (see paragraph 226.i above).
229. Thus the Tribunal did not approach the issue whether it had jurisdiction *ratione voluntatis* under Article 25(1) of the ICSID Convention directly, *i.e.* in terms of whether Section 35 of the GIEPAA (2015), as interpreted in accordance with the criteria set out in *Fisheries Jurisdiction* and ICSID jurisprudence, contained The Gambia’s consent to ICSID arbitration. The Tribunal rather approached the issue indirectly, in terms of whether

²³⁶ See paras. 208-209 above.

Section 55 of the GIEPAA (2010) contained The Gambia's consent to ICSID arbitration and, if it did, whether Section 35 of the GIEPAA (2015) revoked that consent, in light of the Claimants' reliance on Section 55 of the GIEPAA (2010) during the period 2015-2018 and the Gambian Government's failure to correct the Claimants' misunderstanding that the GIEPAA (2010) continued to be in force, even if it had been revoked at the end of 2015. This is how the Tribunal explained its approach in paragraph 329 of the Award:

*"In the Tribunal's view, it is not called upon to decide whether Section 35 of the GIEPAA (2015) provides for consent in advance to ICSID arbitration in the abstract. The Tribunal does not opine on that question. Rather, it must determine in the specific circumstances of this case, whether an offer of ICSID arbitration was made in the GIEPAA (2010), that was relied upon by the Claimants and not revoked by the Respondent in the GIEPAA (2015) or otherwise in its behavior vis-à-vis the Claimants, before it was formally accepted in 2018 under the 2015 Act."*²³⁷

230. In adopting this approach, the Tribunal considered that it was not required to interpret Section 35 of the GIEPAA (2015) "*in the abstract*," based on its wording and the methodology set out in *Fisheries Jurisdiction*, in order to determine whether The Gambia had given its consent to ICSID arbitration in general terms, to any qualifying investor – which indeed would have required the interpretation of Section 35 "*in the abstract*." Instead, the Tribunal approached the interpretation of Section 35 in terms of whether an offer of ICSID arbitration was made in the GIEPAA (2010) "*that was relied upon by the Claimants and not revoked by the Respondent in the GIEPAA (2015) or otherwise in its behavior vis-à-vis the Claimants*;"²³⁸ according to the Tribunal, "[t]he relevant question here is whether Section 35 of the GIEPAA (2015) revoked or foreclosed the option of ICSID arbitration for the Claimants in particular."²³⁹ Indeed, in paragraph 396 of the Award, the Tribunal specifically confirmed that it would, in the first place, approach the issue of whether Section 35 of the GIEPAA (2015) contained The Gambia's consent to ICSID arbitration as a matter of fact rather than as a matter of interpretation of the terms of Section 35:

²³⁷ Award, para. 329.

²³⁸ Award, para. 329.

²³⁹ Award, para. 403.

*“Returning to the circumstances of this case, the Tribunal is of the view that where an offer is made under an Act, that was later repealed and replaced by a new Act, which on its face does not revoke the previous offer of consent, the offer can (potentially) be validly accepted under the new Act. It becomes a matter of appreciation of the facts.”*²⁴⁰

231. When stating the issue of its jurisdiction in terms of whether Section 35 of the GIEPAA (2015) “revoked or foreclosed” the consent given by The Gambia in the GIEPAA (2010), the Tribunal effectively created the presumption that Section 35 of the GIEPAA (2015) would contain such consent unless it revoked “*on its face*” the earlier offer. Apart from referring to the “*the circumstances of th[e] case*,” the Tribunal did not provide any reasons for the presumption, which also contradicted its holding earlier in the Award that consent is not to be presumed but must be clearly demonstrated.²⁴¹ Nevertheless, having “recall[ed]” the specific language of Section 35, the Tribunal determined that the provision did not “*on its face*” revoke The Gambia’s consent to ICSID arbitration:

“400. On its face, Section 35 does not revoke the offer of consent to ICSID arbitration.

401. In the opinion of the Tribunal, if the Respondent had really intended to foreclose the possibility of ICSID arbitration without further consent on its part, it could have done so clearly.

[...]

*403. Yet, as stated in the introduction, the question this Tribunal must answer is not whether the GIEPAA (2015) in the abstract provides for a right of access to ICSID arbitration. Indeed, as emphasized by the Respondent throughout these proceedings, the provision does not (even) mention ICSID arbitration. The relevant question here is whether Section 35 of the GIEPAA (2015) revokes or forecloses the option of ICSID arbitration for the Claimants in particular.”*²⁴²

232. Having considered and rejected the Respondent’s evidence in support of its position that The Gambia did not intend to provide consent to ICSID arbitration in Section 35 of the GIEPAA (2015), the Tribunal determined that the provision did not revoke the consent

²⁴⁰ Award, para. 396. See also Award, para. 289 (“*The Tribunal’s jurisdiction in this case depends on the existence of consent to arbitration by the Parties, and it will be discussed as a matter of fact below.*”)

²⁴¹ Award, para. 321.

²⁴² Award, paras. 400-403.

contained in Section 55 of the GIEPAA (2010). According to the Tribunal, the wording of the provision was “*broad enough*” to cover ICSID arbitration “*in context and considering relevant circumstances:*”

*“Back to the specific question the Tribunal must answer in this case, the Tribunal concludes that Section 35 of the GIEPAA (2015) did not revoke or repeal the offer of ICSID arbitration made in the 2010 Act and relied on by the Claimants. The words actually used at paragraph (c): ‘the provisions of any international treaty to which The Gambia is party’ [emphasis added], in context and considering relevant circumstances do not support such an interpretation and are broad enough to encompass an offer of ICSID arbitration.”*²⁴³

233. The Tribunal’s conclusion implies that it construed the existence of consent on the basis of the Parties’ conduct – the Claimants’ reliance, during the Parties’ exchanges during the period 2015-2018, on The Gambia’s consent to arbitrate that the Tribunal found in Section 55 of the GIEPAA (2010) and the Respondent’s failure to communicate to the Claimant that the GIEPAA (2010) had been revoked in the meantime, on 31 December 2015 – rather than on the basis of a “*consent in writing*” as required by Article 25 of the ICSID Convention. Indeed, the Award does not contain any proper analysis of whether Section 35 of the GIEPAA (2015) contains a “*consent in writing*” to ICSID jurisdiction within the meaning of Article 25(1) of the ICSID Convention, even if this was the very premise of the Tribunal’s analysis (see paragraph 219 above), and even if the Tribunal held that under Article 25(1) of the ICSID Convention, consent was not to be presumed but had to be clearly demonstrated (see paragraph 226(b) above).²⁴⁴ The Tribunal merely determined that, “*in context and considering relevant circumstances,*” Section 35 “*did not revoke or repeal the offer*” given Section 55 of the GIEPAA (2010) and that the “[t]he words actually used in paragraph (c) [of Section 35] are broad enough to encompass an offer of ICSID arbitration.”²⁴⁵

234. In light of the above, the Committee concludes that there is a gap in the reasoning of the Award. An informed reader is not able to follow the reasoning of the Award from its

²⁴³ Award, para. 420.

²⁴⁴ Award, para. 321.

²⁴⁵ Award, para. 420.

premise (Article 25(1) of the ICSID Convention requires a “*consent in writing*” as a basis of jurisdiction *ratione voluntatis*) to its conclusion (the Tribunal’s jurisdiction is established under Section 35 of the GIEPAA (2015)) because the Tribunal’s intervening findings and the supporting reasoning do not connect the dots between the two. While the Tribunal does conclude that its jurisdiction *ratione voluntatis* is founded on Section 35 of the GIEPAA (2015) (which implies that it contains a “*consent in writing*” to ICSID jurisdiction), it is not possible to follow on what basis it reached this conclusion. Indeed, the Tribunal stresses – twice – in the Award that “*it does not opine*” on the question of “*whether Section 35 of the GIEPAA (2015) provides for consent in advance to ICSID or arbitration in the abstract*” and further that “*the question [it] must answer is not whether the GIEPAA (2015) in the abstract provides for a right of access to ICSID arbitration.*”²⁴⁶ While the Tribunal notes that Section 35 “*does not (even) mention ICSID arbitration,*” it considers that “[t]he relevant question” is not whether Section 35 contains The Gambia’s consent to ICSID arbitration that can be invoked by any qualifying investor, but rather “*whether Section 35 of the GIEPAA (2015) revokes or forecloses the option of ICSID arbitration for the Claimants in particular.*”²⁴⁷ The Tribunal does not explain how the requirement of “*consent in writing*” in Article 25(1) of the ICSID Convention can be reconciled with its position that it does not even opine on whether Section 35 of the GIEPAA (2015) contains an advance consent to ICSID arbitration “*in the abstract,*” or with its finding that Section 35 of the GIEPAA (2015) contains a consent to arbitrate addressed to “*the Claimants in particular*” – or indeed how the Parties’ conduct in relation to the GIEPAA (2010) can be relevant to determining whether Section 35 of the GIEPAA (2015) contains a “*consent in writing*” to ICSID arbitration within the meaning of Article 25(1) of the ICSID Convention in the first place. The gap in the Tribunal’s reasoning constitutes an annulable error, and since the error relates to the Tribunal’s determination of its jurisdiction *ratione voluntatis*, it calls for annulment of the Award in its entirety.²⁴⁸

²⁴⁶ Award, paras. 329, 403 (emphasis in the original).

²⁴⁷ Award, para. 403 (emphasis in the original).

²⁴⁸ While one could also say that the reasoning in the Award is contradictory because, on the one hand, the Tribunal determines that it does not opine on whether Section 35 of the GIEPAA (2015) contains “*a consent in advance to ICSID arbitration in the abstract,*” it finds, on the other hand, that the wording of paragraph (c) of Section 35 is “*broad enough to encompass an offer of ICSID arbitration.*” However, since in the words of the *Klöckner committee*,

235. The Committee notes, in this connection, the Claimants' argument that the Tribunal's analysis of the Claimants' reliance on the GIEPAA (2010) and the Gambian Government's failure to correct the Claimants' misunderstanding is to be understood in terms of the *sui generis* methodology of interpretation set out in *Fisheries Jurisdiction*. According to the Claimants, pursuant to this methodology, both a comparison of successive declarations of consent and the reactions of third parties to such declarations are part of the process of interpretation, and therefore the Tribunal rightly considered the terms of both the GIEPAA (2010) and the GIEPAA (2015), as well as the Claimants' reactions and their reliance on the GIEPAA (2010) when interpreting Section 35 of the GIEPAA (2015).²⁴⁹ However, while the ICJ in *Fisheries Jurisdiction* did consider that, "[w]here [...] an existing declaration has been replaced by a new declaration which contains a reservation, as in this case, the intentions of the Government may also be ascertained by comparing the terms of the two instruments,"²⁵⁰ the Court concluded that "it is the declaration in existence that alone constitutes the unity to be interpreted, with the same rules of interpretation applicable to all its provisions."²⁵¹ The Tribunal's approach did not focus on the interpretation of the "declaration in existence," i.e. Section 35 of the GIEPAA (2015); it rather focused on the revoked declaration in the GIEPAA (2010) and the Parties' conduct. Nor does *Fisheries Jurisdiction* mention the reactions of third parties as a relevant

contradictory reasons "cancel each other out," the net result is a gap in the reasoning – one cannot follow reasoning that is contradictory. This was effectively also the position of the *MINE* committee ("In the Committee's view, 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. [...] This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.") **CALA-018/ALA-022**, *Maritime International Nominees Establishment (MINE) v. Government 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, 14 December 1989, para. 5.09. See also **CALA-015**, *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais SA*, ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, para. 116 ("As for 'contradiction of reasons,' it is in principle appropriate to bring this notion under the category 'failure to state reasons' for the very simple reason that two genuinely contradictory reasons cancel each other out. Hence the failure to state reasons. The arbitrator's obligation to state reasons which are not contradictory must therefore be accepted.") (emphasis in the original).

²⁴⁹ Counter-Memorial, paras. 137-140.

²⁵⁰ **ALA-059/CALA-035**, *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction), Judgment, 4 December 1998, I.C.J. Reports 1998, para. 50

²⁵¹ **ALA-059/CALA-035**, *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction), Judgment, 4 December 1998, I.C.J. Reports 1998, para. 45.

consideration in the interpretation of unilateral declarations, and the Tribunal did not say that it does.²⁵² The Claimants' argument thus has no basis in the Award.

236. In view of its conclusion that the annullable error in the Award relates to the Tribunal's determination of its jurisdiction *ratione voluntatis*, the Committee does not consider it appropriate to exercise the discretion it may have to decide whether or not to annul the Award. As noted by the committee in *Vivendi I*, in determining whether or not to exercise any such discretion, "*it is necessary for an ad hoc committee to consider the significance of the error relative to the legal rights of the parties.*"²⁵³ Failure to state reasons for an outcome-determinative finding relevant to jurisdiction *ratione voluntatis* is necessarily "*significant*" and there is therefore no basis for any exercise of discretion.
237. For the avoidance of doubt, the present decision only addresses the question of whether the Award contains an annullable error within the meaning of Article 52(1)(e) of the ICSID Convention. The Committee takes no view on the proper interpretation of Section 35 of the GIEPAA (2015). This is not a matter that falls within the ambit of an annulment committee under Article 52(1)(e) of the ICSID Convention.

B. ALLEGED MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(b))

238. Having determined that the Award stands to be annulled in its entirety for failure to state the reasons on which it is based, the Tribunal finds it unnecessary to consider the Applicant's second ground of annulment under Article 52(1)(b) of the ICSID Convention (manifest excess of powers). The Committee considers that this approach is not only in the interest of judicial economy but also appropriate in circumstances where the Award is annulled on the basis that it fails to state the reasons on which its determination of jurisdiction *ratione voluntatis* is based. In the absence of reasoning on this particular issue that an informed reader can follow, it is not appropriate and indeed not feasible for the

²⁵² See Award, paras. 314, 315 and 374.

²⁵³ **ALA-013/CALA-057**, *Compañía de Aguas del Aconquija SA (formerly Aguas del Aconquija) and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic (I)*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 66.

Committee to determine whether the Tribunal has manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention.

239. The Committee recalls that other ICSID *ad hoc* committees have applied judicial economy in similar circumstances. Thus, the committee in *Sempra v. Argentina* stated:

*“Once an ad hoc committee has concluded that there is one instance of manifest excess of powers (or any other ground for annulment), which warrants annulment of the Award in its entirety, this will be the end of the ad hoc committee’s examination. Since annulment of an award in its entirety necessarily leads to the loss of the res judicata effect of all matters adjudicated by the Tribunal, it is unnecessary to consider whether there are other grounds – whether in respect of the same subject or other matters – that may also lead to annulment.”*²⁵⁴

240. The committee in *Eiser v. Spain* similarly held that “[i]n view of its decision to annul the Award on the aforementioned grounds, the Committee sees no need to address the other grounds for annulment raised by the Applicant.”²⁵⁵

241. The Committee agrees with the prudent approach adopted by these Committees.

V. COSTS

A. THE PARTIES’ POSITIONS

(1) The Applicant’s Position

242. In its Statement of Costs dated 23 January 2026, the Applicant seeks an order awarding it the full costs incurred in connection with this annulment proceeding. The Applicant states that it is content for any such order to be expressed in the three currencies in which the costs were originally incurred. The Applicant’s costs total GBP 6,935.17, USD 3,289,842.42 and GMD 595,986.00.²⁵⁶

²⁵⁴ **ALA-011/CALA-049**, *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, para. 78.

²⁵⁵ *Eiser Infrastructure Ltd and Energia Solar Luxembourg S.à.r.l. r.l. v Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on the Kingdom of Spain’s Application for Annulment, 11 June 2020, para. 256.

²⁵⁶ Applicant’s Statement on Costs, pp. 1-2.

243. The Applicant sets out the breakdown of its legal and other costs (excluding advances made to ICSID) in the form of the following table:

Item	Amount (GBP)	Amount (USD)	Amount (GMD)
Fees for legal services			
Omnia Strategy LLP	N/A	\$1,611,359.30	N/A
Mr Lucas Bastin KC	N/A	\$359,950.00	N/A
Edi M.O. Faal & Associates	N/A	\$852,300.80	N/A
Legal expert	N/A	\$23,000.00	N/A
Subtotal	N/A	\$2,846,610.10	N/A
Expenses for legal services			
Omnia Strategy LLP	£6,935.17	N/A	N/A
Edi M.O. Faal & Associates	N/A	\$17,346.06	N/A
Legal expert	N/A	\$886.26	N/A
Subtotal	£6,935.17	\$18,232.32	N/A
Expenses for the Applicant's representatives			
Expenses incurred by the Applicant's representatives	N/A	N/A	D595,986.00
Subtotal	N/A	N/A	D595,986.00
Administrative costs			
Administrative payments made by the Applicant to ICSID	N/A	\$425,000.00	N/A
Subtotal	N/A	\$425,000.00	N/A
Total	£6,935.17	\$3,289,842.42	D595,986.00

(2) The Claimants' Position

244. In their Counter-Memorial and Rejoinder, the Claimants request that the Committee order the Applicant to reimburse the Claimants all costs of this annulment proceeding, with interest, at an amount to be determined at a subsequent stage.²⁵⁷
245. In their Statement of Costs dated 23 January 2026, the Claimants set out the legal fees and disbursements incurred in connection with this annulment proceeding, totaling GBP 1,537,589.00 (legal fees) and GBP 45,528.75 (disbursements).²⁵⁸

²⁵⁷ Counter-Memorial, para. 341(c); Rejoinder, para. 399(c).

²⁵⁸ Claimants' Statement of Costs, para. 3.

246. The Claimants set out their legal and other costs (excluding advances made to ICSID) in the form of the following table:

Table 1: Claimants' Legal Fees

Cost Item	Hours	Fees
Applicant's Application for Annulment, Applicant's Application for Submission of Expert Evidence and Memorial on Annulment (including initial review of Applicant's Application for Annulment; review of Applicant's Application for Submission of Expert Evidence; review of Memorial on Annulment; review of expert report; review of accompanying exhibits and legal authorities; related legal research regarding standards of review on annulment; preliminary contact with potential expert witness on Gambian law; consideration of Applicant's arguments in light of the contents of the Award and of related arguments made in the underlying proceedings, either orally or in writing)	140	£74,563.00
Annulment Committee (including reviewing the proposed members of the Annulment Committee in light of standards of impartiality and independence; related factual investigation into one of ICSID's initial proposed candidates, leading to successful challenge of that candidate, and preparation of related correspondence with ICSID)	58.4	£29,784.00
Claimants' Reply to Applicant's Submission of Expert Evidence and Claimants' Counter-Memorial on Annulment (including drafting Claimants' Reply to Applicant's Submission of Expert Evidence and Claimants' Counter-Memorial on Annulment; engaging in related research into the record and into legal authorities; identifying and reviewing related supporting documents; engagement with expert on Gambian law to support preparation of her report; assembly of	668.1	£371,171.00

accompanying expert report exhibits; preparation of consolidated index; preparation of fact exhibits and legal authorities; and filing of submission)		
Applicant' Reply on Annulment (including initial review and analysis of Applicant's Reply on Annulment, supporting documents and legal authorities; engagement in related legal research and review of the record of the underlying proceedings, both written and oral submissions; review of reply expert report and of its accompanying exhibits and legal authorities; and further exchanges with Claimants' expert witness to seek her views on the reply expert report)	44.9	£31,030.00
Claimants' Rejoinder on Annulment (including drafting and filing Claimants' Rejoinder on Annulment; engagement in related document review and legal research; preparation of consolidated index; preparation of fact exhibits and legal authorities; preparation of expert report, and accompanying exhibits)	741	£420,340.50
Preparation for Hearing (including preparation of Opening Presentation; preparation of cross-examination of Applicant's expert; work with Claimants' expert to prepare for her testimony and to support the preparation of her presentation; preparation of hearing bundle; preparation of hearing related logistics; preparation of cross-examination bundle)	775.7	£396,722.00
Take Part in Hearing (and related workstreams during Hearing)	254.4	£132,821.50
Hearing Transcript Review	26.6	£9,344.00
Statement of Costs (Estimated)	29.8	£12,719.00

General Case Management (including preparation for procedural hearings; revision of procedural orders; internal correspondence; correspondence with client; correspondence with ICSID and the Committee; and general administrative tasks over the course of 2024-2026)	102.5	£59,094.00
TOTAL:	2841.4	£1,537,589.00

Table 2: Claimants' Disbursements

Description	Stephoe	Claimants
Hearing in London		
Hotel Accommodations	£5,005.66	
Travel	£1,941.10	
Other Expenses	£816.17	
Expert Assistance		
Ms. [REDACTED]		£16,170.62
Other		
Courier / Delivery Charges	£139.61	
IMS Legal Services	£19,639.93	
Hearing EPE (Epiq)	£825.00	
Taxi Fares	£990.66	
Totals:	£29,358.13	£16,170.62
OVERALL TOTAL:	£45,528.75	

B. THE COMMITTEE’S ANALYSIS

247. According to Article 52(4) of the ICSID Convention, Chapter VI of the Convention, titled “Cost of Proceedings,” *“shall apply mutatis mutandis to proceedings before the Committee.”*

248. The relevant provision of Chapter VI is Article 61(2), which provides:

“In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.”

249. ICSID Arbitration Rule 53 provides that “[t]he provisions of these Rules shall apply mutatis mutandis to any procedure relating to the [...] annulment of an award and to the decision of the [...] Committee.” Rule 47(1)(j) further provides that “the [decision of the Committee] shall be in writing and shall contain [...] any decision of the [Committee] regarding the cost of the proceeding.”

250. The Committee considers that Article 61(2) of the ICSID Convention provides it with broad discretion to allocate the cost of the proceeding and the Parties’ legal and other costs between the Parties as it deems appropriate.

251. The cost of the proceeding, including the fees and expenses of the Committee, ICSID’s administrative fees and direct expenses, amount to (in USD): USD 426,090.34

Committee Members’ fees and expenses

Dr. Veijo Heiskanen	USD 118,417.30
Ms. Erica Stein	USD 67,592.48
Professor Githu Muigai	USD 74,628.50
ICSID’s administrative fees	USD 104,000.00
Direct expenses	USD 61,452.06
Total	<u>USD 426,090.34</u>

252. The above costs have been paid out of the advances made by the Applicant pursuant to ICSID Administrative and Financial Regulation 14(3)(e).
253. The Tribunal notes that ICSID *ad hoc* committees have taken a nuanced approach to allocation of costs in annulment proceedings. While there is a continuing trend, as noted in the ICSID Updated Background Paper on Annulment (2024), of *ad hoc* committees deciding that the applicant should bear all or the majority of the cost of the proceeding when the application for annulment is rejected, in the vast majority of cases where the award is annulled in whole or in part, *ad hoc* committees have decided that each party bear equally the cost of the proceeding and fully its own costs.²⁵⁹ The Committee agrees that there are good reasons for taking this more nuanced approach. If an award is not annulled, the applicant is in a sense “at fault,” having failed in its attempt to annul the award; however, if an award is annulled, neither party is “at fault” (although the applicant is successful) and accordingly, there is no basis to shift the entirety of the cost of the proceeding or the applicant’s legal and other costs to the party that defended the award, except for a portion of the cost of the proceeding, to ensure that these costs are also divided equally between the parties (as the applicant is responsible for paying all advances requested by ICSID). Accordingly, in view of the outcome of the case, the Committee considers that there is no basis to shift either the entirety of the cost of the proceeding or the Applicant’s legal and other costs to the Claimants, except for the Claimants’ share (50%) of the cost of the proceeding, to ensure that that the cost of the proceeding is divided equally between the Parties.
254. In view of the above, the Tribunal determines that costs should lie where they fall and that each Party shall bear its share (50%) of the cost of the proceeding and fully its own legal and other costs. Accordingly, the Claimants are ordered to reimburse to the Applicant 50% of the cost of the proceeding, in the amount of USD 213,045.17.

²⁵⁹ ALA-025, ICSID, Updated Background Paper on Annulment, March 2024, para. 72.

VI. DECISION

255. For the reasons set forth above, the *ad hoc* Committee decides as follows:

- (1) The Claimants' request that the [REDACTED] Reports and the supporting exhibits referred to in the Claimants' request be struck from the record as inadmissible is dismissed;
- (2) The Award is annulled in its entirety for failure to state the reasons on which it is based, within the meaning of Article 52(1)(e) of the ICSID Convention; and
- (3) Each Party shall bear in equal shares the cost of the proceeding, in the amount of USD 426,090.34, and fully their own legal and other costs; accordingly, the Claimants are ordered to reimburse the Applicant for 50% of the cost of the proceeding, in the amount of USD 213,045.17.

[Signature]

~~Ms. Erica Stein~~
Member of the *ad hoc* Committee
Date: 17 July 2026

[Signature]

~~Professor Githu Muigai~~
Member of the *ad hoc* Committee
Date: 17 July 2026

[Signature]

~~Dr. Veijo Heiskanen~~
President of the *ad hoc* Committee
Date: 17 July 2026