INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CASE NO. ARB/13/36

BETWEEN:

EISER INFRASTRUCTURE LIMITED

ENERGÍA SOLAR LUXEMBOURG S.à r.l.

Claimants

v.

THE KINGDOM OF SPAIN

Respondent

APPLICATION PURSUANT TO ARTICLE 49(2) OF THE ICSID CONVENTION

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26 July 2020

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1. INTRODUCTION AND PRELIMINARY STATEMENT

1. Pursuant to Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules, Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. (the "**Claimants**" or the "**Eiser Parties**") hereby submit this Application (the "**Application"**) to the ICSID Secretary-General requesting the *ad hoc* Committee (the "**Committee**") to issue a supplementary decision determing certain questions it omitted to decide in its Decision on the Kingdom of Spain's ("**Spain**") Application for Annulment dated 11 June 2020 (the "**Decision**").[1] The Decision concerned the award rendered on 4 May 2017 in *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36 (the "**Award**").

2. Article 48(3) of the ICISD Convention, which applies to annulment proceedings,[2] provides that "[t]*he award shall deal with every question submitted to the Tribunal* […]" (emphasis added). The use of the word "*shall*" makes this provision mandatory on the Committee.

3. The Convention likewise provides a remedy to the parties if the Committee fails to comply with its mandate in Article 48(3). That remedy is found in Article 49(2) of the Convention, which provides that the Committee "*upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award*" (emphasis added).

4. As set out in more detail below, the Committee took approximately 15 months from the date of the hearing to issue the Decision, despite the fact that there were no post-hearing briefs and no post-hearing applications from either Party. However, despite the significant amount of time it took to issue the Decision, it failed to address four critical questions (identified below) that were put to it. As a result, the Committee has not complied with its ICSID Convention obligation to "*deal with every question submitted*" to it.

5. Although the reasons why the Committee failed to address these four key questions are currently unknown, the Claimants are gravely concerned by the President's own public

[1] The Claimants confirm that the fee for this Application has been lodged with ICSID.

[2] *See* Article 52(4) which provides that Article 48 (*inter alia*) "*shall apply* mutatis mutandis *to proceedings before the Committee.*"

statements regarding this case in the brief time since the Decision was rendered. Those statements suggest that the Decision was not necessarily driven by the facts of the case or by the legal standards found in the Convention. Rather, the President's public statements suggest a preoccupation with creating "*systemic*" change by imposing a new standard for disqualification specifically for those arbitrators who also act as counsel in investor-state cases. Indeed, the Decision itself focusses in numerous places on the issue of "*double-hatting*."

6. In particular, within days of the Decision being issued, the President and one of his law firm partners publicly described it as an "*iconic decision*"[3] which has "*great systemic implications.*"[4] Moreover, less than two weeks after the Decision was issued, the President hosted a marketing webinar (presumably in an attempt to secure further arbitral appointments and business for his law firm), at which the Decision was discussed at length.[5] Another of the President's law firm partners[6] publicly "liked" the LinkedIn announcement made by Spain's counsel in this case, Curtis Mallet, which touted the Decision as an "*historic annulment for Spain*".[7]

7. The President's recent public statements, and the apparent focus on creating "*systemic*" change, may provide some explanation as to why the Decision fails to address four critical questions that, if properly addressed, may have resulted in the Committee reaching a different conclusion. Against this background, the Eiser Parties request the Committee to decide the following four questions put to it that it omitted to decide:

   (i) Why the Committee failed to address the requirement that it find bias towards a party?

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[3] *See* **C-0388**, Twitter post and LinkedIn post by Hugo Romero (@hugoromero) regarding *Eiser v. Spain* Decision, 15 June 2020.

[4] *See* **C-0390**, Webinar by RRH Consultores, S.C., *Diálogos sobre comercio, Decisiones recientes en arbitrajes de Inversión y OMC* (Dialogues on trade, Recent Investment arbitration and WTO decisions), 25 June 2020. *See also* **C-0389**, LinkedIn post by Ricardo Ramirez (@ricardoramirezh) promoting the Webinar by RRH, Consultores, S.C. on 25 June 2020, 19 June 2020.

[5] The Eiser Parties will be seeking further information from the President in due course as to why he and his close associates have so quickly sought to profit financially from the Decision.

[6] The President has only three law firm partners, all of whom previously appeared before him as counsel in investor-state dispute settlement ("**ISDS**") cases for the very same party that appointed him as arbitrator in those cases.

[7] *See* **C-0387**, LinkedIn post by Samantha Atayde Arellano, liking post by Curtis Mallet's official LinkedIn account which announced the *Eiser v. Spain* Decision, June 2020.

(ii) Why the Committee failed to address the uncontested drafting history of the ICSID Convention and the relevant cases on the appropriate remedy available to Spain?

(iii) Why the Committee's findings regarding Dr. Alexandrov's alleged bias towards an independent quantum expert required it to annul the Award as a whole, including the Tribunal's findings on jurisdiction and liability?

(iv) Why the Committee failed to determine if Dr. Alexandrov's alleged predisposition towards an independent quantum expert may have had a material effect on the Award?

8. The failure to address these four questions is exacerbated by the Decision's failure substantively to address – or in one instance, its mischaracterisation of – the three separate decisions laid before it that reached the very opposite conclusion regarding whether Dr. Alexandrov's professional relationship with a non-party (The Brattle Group ("**Brattle**")) gave rise to a ground for disqualification under Article 57 of the ICSID Convention. Those three decisions were rendered by H.E. Hugo Hans Siblesz (Secretary-General of the Permanent Court of Arbitration), Lord Leonard Hoffmann and Prof. Dr. Klaus Sachs (the two unchallenged arbitrators in the ICSID case *Tethyan Copper v. Pakistan*) and Dr. Jim Yong Kim (then President of the World Bank and Chairman of the ICSID Administrative Council).

9. Applying the standards in the ICSID Convention, all three of those authorities determined that Dr. Alexandrov's professional relationship with Brattle *did not* give rise to a manifest appearance of bias towards a party. The Decision fails to address the latter two decisions in its analysis and, with respect to the Opinion of the PCA Secretary-General, although it is briefly addressed, the Decision ignores the key conclusions and mischaracterises its findings.

10. In addition, the Decision also contains several significant factual errors which go to the very heart of the Committee's conclusions. Some (but not all) of those errors are also highlighted in this Application.

11. As set out in more detail below, the Eiser Parties request the Committee to decide four specific questions that it omitted to decide in the Decision. Those questions, if properly decided, could lead to a substantially different result. In particular, the Committee may

determine that it is not appropriate to annul the Award at all or that it should only be annulled in part. Thus, the Committee should issue a supplementary decision addressing the four omitted questions and make any consequent adjustments to the Decision that may be necessary after having decided the omitted questions.

2. PROCEDURAL HISTORY

12. On 21 July 2017, the ICSID Secretary-General received the Spain's Application for Annulment of the Award (the "**Application for Annulment**").[8] Spain applied to have the Award annulled on the basis of ten separate grounds. Those grounds are listed in Annex 1 to this Application.

13. On 23 October 2017, the ICSID Secretary-General notified the Parties that an *ad hoc* Committee composed of Prof. Ricardo Ramírez Hernández (President), Ms. Teresa Cheng, and Judge Dominique Hascher had been constituted.[9] Following the resignation of Ms. Cheng on 4 April 2018[10], Mr. Makhdoom Ali Khan was appointed to the Committee on 20 April 2018.[11] None of the members of the Committee made any disclosures regarding the existence of facts which may give rise as to justifiable doubts as to their independence or impartiality (either at the time of their appointment or at any time since).

14. The annulment hearing was held on 14-15 March 2019 in Paris (the "**Annulment Hearing**").[12] There were no post-hearing briefs and no post-hearing applications or requests by either Party, save for cost submissions filed on 5 July 2019.[13] There was no fact or expert witness testimony (either written or oral).

15. On 30 September 2019, approximately six months after the Annulment Hearing, the Committee informed the Parties that the Decision would be issued in the autumn of

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[8] Decision, ¶ 8.

[9] *Id.*, ¶ 10.

[10] *Id.*, ¶ 26.

[11] *Id.*, ¶ 28.

[12] *Id.*, ¶ 42.

[13] *Id.*, ¶ 43.

2019.[14] The Committee also indicated that it would "*revert to the parties with a further update in early November at the latest.*"[15] The Committee did not provide the update that it indicated it would in early November 2019, and it also did not issue the Decision in the autumn of 2019, as it had indicated it would.

16. Subsequently, on 3 January 2020, the Committee informed the Parties that it was "*actively working on a draft text and hope*[d] *to be able to issue its decision in the first half of February*."[16] The Decision was not issued in February.

17. Subsequently, on 20 March 2020, the Committee told the Parties that, "*while it ha*[d] *made considerable progress,* [it was] *still working on its draft decision.*"[17] The Committee promised to "*revert to the Parties in the course of next week with the estimated time frame for the issuance of its decision.*" Again, the promised update (and Decision itself) did not materialise.

18. The Committee finally declared the proceedings closed on 14 April 2020.[18] In the cover email to this letter, the Committee informed the Parties that it had "*completed its deliberations and agreed on a text*."[19] It further explained that the "*Decision should be ready for dispatch to the Parties in the first half of May.*"[20] Once again, the timeframe indicated by the Committee elapsed without any sign of the promised Decision.

19. On 11 June 2020, *some 15 months* after the Annulment Hearing and nearly 3 years after Spain's Application for Annulment was filed, the Committee finally issued its Decision. The Decision addressed only two of Spain's ten annulment grounds. As set out in this Application, even on those two grounds, it failed to address four critical questions that were put to it. The reasons for the significant delay in issuing the Decision have never been explained by the Committee.

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[14] **C-0382**, Email from ICSID to the Parties, 30 September 2019.

[15] *Ibid.* (emphasis added).

[16] **C-0383**, Email from ICSID to the Parties, 3 January 2020 (emphases added).

[17] **C-0383**, Email from ICSID to the Parties, 20 March 2020.

[18] **C-0384**, Email from ICSID to the Parties, 15 April 2020, attaching Letter from the Committee to the Parties, 14 April 2020.

[19] *Ibid*.

[20] *Ibid*. (emphasis added).

3. THE *AD HOC* COMMITTEE'S FINDINGS

20. In its Decision, the Committee made the following findings, *inter alia*:

(i) Revision under Article 51 of the ICSID Convention is *not* the appropriate remedy in circumstances where grounds for disqualification of a tribunal member become known only after the award has been rendered.[21] The Committee can thus consider *de novo* a challenge to Dr. Alexandrov.[22]

(ii) The Claimants had the burden of proving that Spain had actual or constructive knowledge of the relationship between Dr. Alexandrov and Brattle[23] and although it was undisputed that there were documents on the record in the Arbitration that revealed that relationship, the Eiser Parties had "*failed to point out a clear instance where Spain either was, or reasonably ought to have been aware of this relationship and its extent before the Award was issued*" and thus did not waive their right to challenge Dr. Alexandrov.[24]

(iii) The relevant standard for assessing whether Dr. Alexandrov should be disqualified under the ICSID Convention is "*whether a third party would find an evident or obvious appearance of bias on the part of Dr. Alexandrov on an objective assessment of the facts in this case*."[25] The Committee also expressly found that "*impartiality refers to the absence of bias or predisposition towards a party*."[26]

(iv) The Committee was capable of performing the role of "*a fair minded and informed third party observer*"[27], and it determined, based on "*an objective assessment of the facts*", that there was an evident or obvious lack of impartiality on the part of Dr. Alexandrov.[28]

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[21] Decision, ¶¶ 171-174.

[22] *Id.*, ¶ 178.

[23] *Id.*, ¶¶ 189-190.

[24] *Id.*, ¶ 189.

[25] *Id.*, ¶ 207.

[26] *Id.*, ¶ 206 (emphasis added).

[27] *Id.*, ¶ 219.

[28] *Id.*, ¶ 229.

(v) That "[t]*here are multiple ways in which a conflict of interest may arise when an arbitrator also acts or has acted as counsel, in another dispute, albeit between different parties. The risks and possibilities of conflict of interest, inherent in double-hatting, dictate caution*."[29]

(vi) The Committee viewed itself as a "*guardian*[] *of the ICSID system and must set the bar high, with regard to disclosure obligations, in particular, and, in general, with respect to addressing conflict of interest of arbitrators who also choose to act as counsel in investment disputes*."[30]

(vii) In the light of its decision to annul the Award based on Dr. Alexandrov's undisclosed relationship, the Committee saw "*no need to address the other* [eight] *grounds for annulment raised by*" Spain.[31]

(viii) Although it only decided two of the ten grounds for annulment advanced by Spain, the Committee ordered the Claimants to pay the full costs of the annulment proceeding and to reimburse the full amount of Spain's legal fees and expenses.[32]

4. THE UNANSWERED QUESTIONS

4.1 The issue of "double-hatting" was <u>not</u> before the Committee

21. Before turning to the four questions that the Committee omitted to decide, it is worthwhile context to recall that any systemic concern that may exist regarding "double-hatting" in ISDS cases was not an issue before the Committee. Rather, once the Committee determined it could consider *de novo* whether Dr. Alexandrov should have been disqualified (a finding that is inconsistent with the drafting history of the Convention, as explained below), the Committee was required to apply the standards dictated by Articles 14 and 57 of Convention and only those standards. Those standards must be applied irrespective of whether or not Dr. Alexandrov has also acted as counsel in investor-state arbitration cases. It was not open to the Committee to depart from the

[29] *Id.*, ¶ 223.

[30] *Id.*, ¶ 242.

[31] *Id.*, ¶ 256.

[32] *Id.*, ¶¶ 270, 272, 273(b).

Convention standards in order to set down a new (and higher) standard for arbitrators who also act as counsel.

22. However, that appears to be exactly what the Committee sought to do. Indeed, as noted above, the Committee stated in the Decision that its role was to act as a "*guardian*[] *of the ICSID system*".[33] As a result, rather than applying the provisions of Articles 14 and 57 of the Convention in order to determine if there was a manifest appearance of bias towards a party, the Committee instead declared that it "*must set the bar high, with regard to disclosure obligations, in particular, and, in general, with respect to addressing conflict of interest of arbitrators who also choose to act as counsel in investment disputes*."[34]

23. The Committee also stated that "[t]*here are multiple ways in which a conflict of interest may arise when an arbitrator also acts or has acted as counsel, in another dispute, albeit between different parties. The risks and possibilities of conflict of interest, inherent in double-hatting, dictate caution*."[35]

24. The Decision therefore departs from the ICSID Convention standards and, instead, "*set*[s] *the bar high*" for arbitrators who also act as counsel in investor-state arbitration cases. Indeed, the Decision specifically differentiates between arbitrators who also act as counsel and those who do not, and holds those arbitrators who "double-hat" to a different – and higher – standard than that found in the ICSID Convention.

25. But the appropriateness (or not) of double-hatting was not "on trial" before the Committee. The Committee is bound to apply the standards dictated by Articles 14 and 57 of Convention *irrespective* of whether or not Dr. Alexandrov also acted as counsel in investor-state arbitration cases.

26. No better evidence exists that the Decision departs from the ICSID Convention standards than the three separate and independent authorities which, when addressing the very same question, found Dr. Alexandrov's professional relationship with Brattle did *not* give rise

[33] *Id.*, ¶ 255.

[34] *Ibid.* (emphases added).

[35] *Id.*, ¶ 223 (emphasis added).

to a ground for disqualification. As noted by the PCA Secretary-General in his Opinion on the very same issue:

> "[i]*t is important to emphasize that the language of Article 57 places a heavy burden of proof […] to establish facts that make it obvious and highly probable, not just possible, that [the arbitrator] is a person who may not be relied upon to exercise independent and impartial judgment.*"[36]

27. The Decision ultimately ignores this standard. The ICSID Convention does not allow, much less dictate, a Committee to apply uneven disqualification standards depending upon the characteristics of an individual arbitrator who is the subject of a challenge. Far from it, the Convention (as one might expect) requires annulment committees to treat all arbitrators equally and hold them to the same standard.

28. An ICSID annulment committee does not have the power to apply the Convention standards unequally, nor can it unilaterally impose new disqualification standards not found in the ICSID Convention. By doing exactly that, far from acting as a "*guardian*" of the Convention, the Decision *undermines* the Convention and its processes by imposing a new disqualification standard and then applying it retroactively to an existing ICSID award. By undoing an ICSID award in its entirety in circumstances where a unanimous ICSID tribunal found Spain to have committed serious violations of international law, not only does the Decision undermine the Convention, it undermines the rule of law.

29. It is true that the issue of "double-hatting" has received attention as an area for potential reform with respect to the ISDS system in recent years. In fact, the ICSID and UNCITRAL Secretariats released in May 2020 a Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement that raises numerous questions as to whether or not new rules are needed for arbitrators who also appear as counsel.[37]

30. However, that is exactly the point: double-hatting can be addressed through rule-making and reform *after* all interested parties have had an opportunity to debate these proposals

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[36] **CL-0289**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Opinion Pursuant to the Request by ICSID dated 28 July 2017 on the Respondent's Proposal for the Disqualification of Dr. Stanimir Alexandrov dated 7 July 2017, 31 August 2017 (Siblesz) ("***Tethyan Copper*, PCA Opinion**"), ¶ 69.

[37] **C-0386**, Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement, Secretariats of ICSID and UNCITRAL, 1 May 2020, Articles 4-9.

and consider their potential impact. Indeed, the Draft Code referred to above canvasses both the positive and negative impacts that new rules addressing double-hatting may have. Ultimately, those issues need to be debated and considered and, once that process of consultation is complete, any new restrictions can be set out in a new Code which would be well-known to ISDS users and applied *prospectively*.

4.2 Omitted Question #1: The failure to address the issue of bias towards a party

31. In order for an arbitrator to be disqualified under the ICSID Convention, Article 57 would require the Committee to find that there is a "*manifest lack of the qualities required by paragraph (1) of Article 14*". As the Committee readily acknowledged, Article 14 requires that arbitrators be both independent and impartial.

32. As set in paragraph 206 of the Decision, the Committee stated that in order to conclude that an arbitrator lacked impartiality within the meaning of Article 14, it must determine that the arbitrator was predisposed (or biased) towards a party. The Decision states:

> "*The Committee agrees that the appropriate standard is the one adopted by the Chairman of the ICSID Administrative Council in* Blue Bank *and numerous other cases:*
>
> > *Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control.*"[38] (emphasis added)

33. Thus, the Committee was required to determine, based on the objective evidence before it, whether there was an obvious ("*manifest*") appearance of bias on the part of Dr. Alexandrov towards *a party* to the case (*i.e.*, either the Claimants or Spain). The Decision makes no suggestion that Dr. Alexandrov was subject to some form of external control and, thus, not independent. Rather, the Decision focusses solely on whether Dr. Alexandrov was predisposed (or biased) towards Brattle.

34. But the Decision fails to address the key question as to whether Dr. Alexandrov was biased *towards a party*, despite the fact that this question was put squarely to the

[38] *See* Decision, ¶¶ 162 and 206 (internal citations omitted), where the Committee cites the *EDF* Committee and the Chairman of the ICSID Administrative Council in *Blue Bank* whose interpretation of Article 14 and the applicable standard of disqualification it fully adopts.

Committee[39] and despite the fact that the Committee confirmed that this was the legal standard it must apply. The Decision makes no finding that Dr. Alexandrov was biased towards any *party*. The Committee acknowledged that the question of bias towards a party *must* be addressed in order to find that Dr. Alexandrov should be disqualified under Articles 14 and 57, yet it failed to address this issue.

4.3 Omitted Question #2: The failure to address the drafting history of the Convention and relevant cases on the appropriate remedy

35. The Decision is further flawed for its failure to address two other key questions put to it: (*i*) the implications and significance of the uncontested drafting history of the Convention; and (*ii*) the previous ICSID annulment cases that squarely address the point as to the appropriate remedy for the discovery of a new fact giving rise to a challenge after an ICSID award has been issued.

36. The failure to address these issues meant that the Committee ignored the precise remedy the Convention provides for when a fact giving rise to an arbitrator challenge is (allegedly) discovered after the award is issued. This remedy is for revision under Article 51. By failing to address the relevance of the Convention drafting history, the Committee wrongly concluded that it had the authority to annul the Award.

37. The Eiser Parties had repeatedly emphasised the drafting history of the Convention and the specific ICSID annulment cases that explained, unequivocally, that *revision alone* was the appropriate remedy if a new fact is discovered post-award that raises doubts about an arbitrator's independence or impartiality.[40] The Eiser Parties therefore put these issues squarely before the Committee. The Committee, however, chose not to address these points.

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[39] *See* Claimants' Counter-Memorial on Annulment, 11 June 2018 ("**Claimants' Counter-Memorial on Annulment**"), ¶ 45, 108-109; Claimants' Rejoinder on Annulment, 6 November 2018 ("**Claimants' Rejoinder on Annulment**"), ¶¶ 26(b), 53-55; Spain's Reply on Annulment, 24 August 2018 ("**Spain's Reply on Annulment**"), ¶¶ 55-56.

[40] *See* Claimants' Counter-Memorial on Annulment, ¶¶ 36-38; Claimants' Rejoinder on Annulment, section II.A.1; Transcript, Day 1 of the Annulment Hearing (revised), 161:6-167:13 (Claimants' counsel); Transcript, Day 2 of the Annulment Hearing (revised), 406:9-411:3 (Claimants' counsel).

38. In particular, the Eiser Parties explained that,[41] during the Convention negotiations, the issue before the Committee (*i.e.*, whether a party could seek annulment if it discovered a fact giving rise to a challenge post-award) was specifically discussed. In fact, the drafting history confirms that the Costa Rican delegate even went so far as to propose that "*a provision should be added* […] *which would allow annulment of the award where a disqualification could have been possible had it been made before the award was rendered*".[42]

39. However, this proposal received "*little support*" from other Contracting States.[43] And, in a statement that could not be more unequivocal, the drafting history also recorded that Mr. Broches pointed out in response to Costa Rica's suggestion that "*the Convention did not leave the problem unsolved since if the grounds for disqualification only became known after the award was rendered, this would be a new fact which would enable a revision of the award*."[44] In other words, the drafting history made clear that the *sole remedy* in the situation facing Spain was revision under Article 51. Had that not been the intent, the Costa Rican proposal no doubt would have been accepted.

40. As if those passages were not clear enough, the drafting history also records that the French delegate "*proposed the addition of seeking annulment on the grounds that a member of the Tribunal lacked the qualities listed under Article 14(1)*".[45] That proposal was soundly defeated by a vote of 16 to 4.[46]

41. Yet, despite the drafters specifically rejecting a proposal that an annulment ground be added on the ground that a tribunal member lacked the qualities under Article 14(1), the Committee inexplicably concluded the very opposite:

> "*This Committee is not inclined to, therefore, accept the submission of the Eiser Parties that a failure to exercise 'independent judgment', as*

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[41] Transcript, Day 2 of the Annulment Hearing (revised), 406:21-407:18 (Claimants' counsel) (emphasis added).

[42] *See* **CL-0299**, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the settlement of Investment Disputes between States and Nationals of Other States, Vol. II-2 (ICSID: 2006) ("**History of the ICSID Convention**"), p. 872 (emphasis added).

[43] *Ibid*.

[44] *Ibid*. (emphases added).

[45] *Id.*, p. 852 (emphasis added).

[46] *Ibid*.

> *required by paragraph (1) of Article 14, cannot be a ground of annulment.*"[47]

42. The Committee's conclusion quoted above simply cannot be reconciled with the Convention drafting history put before the Committee. Yet, the Decision fails to even mention, let alone address, these key questions that were put to it by the Eiser Parties. Indeed, the Committee's analysis *makes no mention whatsoever* of the Convention drafting history.[48]

43. The Committee's failure to address the drafting history was then compounded by its failure to consider (let alone address) the relevance of the previous ICSID annulment cases which dealt precisely with the issue of whether revision was the only remedy available to Spain. Like the drafting history, those questions were also put squarely to the Committee by the Eiser Parties.[49]

44. The decisions by both the *Azurix* and *OIEG* committees confirmed (with reference to the express language and the drafting history of the Convention) that the *only* remedy available to Spain if it discovered a new fact giving rise to a challenge post-Award would be to seek revision under Article 51.[50] For example, the *Azurix* committee stated that:

> "*Article 52(1)(a) cannot be interpreted as providing the parties with a de novo opportunity to challenge members of the tribunal after the tribunal has already given its award.*

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[47] Decision, ¶ 167 (internal citations omitted).

[48] The Committee's failure to carry out its mandate to address the issues before it is further evidenced by its suggestion that the remedy of revision under Article 51 is only for "*re-adjudication of the merits of the dispute in light of new facts*" and, therefore, could not be used to raise a new fact to challenge an arbitrator. *See* Decision, ¶ 171. The Committee does not provide any textual or precedential basis for this claim; nowhere do the Convention, the ICSID Arbitration Rules or the Convention's drafting history limit the scope of revision to the exclusion of the scenario that was before the Committee. *See* **CL-0299**, History of the ICSID Convention, pp. 847-8. Having ignored the drafting history, the Committee then attempts to draw support for its conclusion that revision would not be the appropriate remedy on the basis that it would result in the challenged arbitrator being called upon to decide the very challenge brought against him or her. *See* Decision, fn. 218. That statement demonstrates an abject failure on the part of the Committee to understand even the most basic provisions of the ICSID Convention. Put simply, if a request for revision has been made and the new fact said to decisively affect the award gave rise to a challenge to one of the arbitrators, such a challenge could *only* be made pursuant to Article 58 of the Convention. Article 58 provides, unequivocally, that "[t]*he decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal* […]."

[49] *See* Claimants' Rejoinder on Annulment, ¶¶ 37-38; Transcript, Day 1 of the Annulment Hearing (revised), 163:6-167:13 (Claimants' counsel); Transcript, Day 2 of the Annulment Hearing (revised), 406:9-411:3 (Claimants' counsel).

[50] *See ibid.*

> *In the event that the party only became aware of the grounds for disqualification of the arbitrator after the award was rendered, this newly discovered fact may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in the Committee's view, such a newly discovered fact would not provide a ground of annulment under Article 52(1)(a).*"[51] (emphasis added)

45. Likewise, after closely examining the drafting history of the Convention, the *OIEG* committee stated that:

> "[c]*ontrary to the Applicant's contention, Article 52(1)(a) is not the proper means to address the disqualification of an arbitrator.* […]
>
> *The Applicant's claims of partiality and dependence are inadmissible as grounds for annulment under Article 52(1)(a) of the ICSID Convention.*"[52] (emphases added)

46. In other words, these annulment decisions reached the exact opposite conclusion to the one reached in the Decision.[53] These decisions are mentioned nowhere in the Committee's analysis.

47. That is not to say that these decisions were binding on the Committee. However, given their significance to the inquiry before the Committee and the Claimants' specific reliance on them, it was incumbent on the Committee to address them and, if it disagreed with the detailed analysis contained in those cases, explain why it disagreed. The Committee failed to do so and, thus, it failed to address critical questions put to it by the Parties.

4.4 Omitted Question #3: The failure to address the basis for annulling the award in its entirety

48. The Decision also fails to address why the Committee's findings regarding Dr. Alexandrov's alleged bias towards an independent expert required it to annul the Award *as a whole*.

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[51] **CL-0144**, *Azurix Corp v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009 (Griffith, Ajibola, Hwang), ¶¶ 280-281. *See* Claimants' Rejoinder on Annulment, ¶¶ 37-38; Transcript, Day 1 of the Annulment Hearing (revised), 163:7-13 (Claimants' counsel).

[52] **CL-0348**, *OI European Group BV v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Annulment, 6 December 2018 (Castellanos Howell, Bernardini, Pawlak), ¶¶ 99-109.

[53] *See* Decision, ¶¶ 171-174.

49. Having found that Dr. Alexandrov's predisposition towards an independent expert gave rise to a manifest appearance of bias, the Committee failed to explain how that finding (even if accepted as correct) could have impacted the Award's findings on, for example, the six separate jurisdictional objections advanced by Spain that were unanimously decided by the Tribunal.

50. Likewise, the Committee failed to explain how the alleged bias towards the Claimants' experts could have impacted the Tribunal's determination on liability. Indeed, given that the sole complaint made was that Dr. Alexandrov may be biased towards an independent expert, it is illogical that the Tribunal's findings on jurisdiction and liability should be annulled. The only statement offered in the Decision which may be seen as a justification for annulling the entire Award is the claim that:

> "[t]*he influence of Dr. Alexandrov on his co-arbitrators would have been perceived differently in every material respect, had they known the full facts and extent of his and Sidley Austin's longstanding relationship with the Brattle Group and Mr. Lapuerta.*"[54] (emphasis added)

51. This statement is not grounded on any objective evidence. Nor could it be. The Committee does not know (and cannot know) that this statement is correct. In fact, the Committee itself acknowledged in a separate passage in the Decision that "*it is impossible for an annulment committee to pierce the veil of a tribunal's deliberations or poll arbitrators*."[55]

52. Yet, despite the Committee's acknowledgement that it had no basis to know what influence, if any, Dr. Alexandrov may have had on his co-arbitrators, the Committee claims, as if it were a fact, that "[t]*he influence of Dr. Alexandrov on his co-arbitrators would have been perceived differently in every material respect*".[56] This statement is not a fact and it therefore does not (and cannot) support the Committee's conclusion that the entire Award must be annulled.

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[54] *Id.*, ¶ 250.

[55] *Id.*, ¶ 246.

[56] *Id.*, ¶ 250 (emphasis added).

53. The Decision specifically notes that Spain's central complaint regarding the alleged bias towards Mr. Lapuerta was that it may have impacted the Tribunal's determination on damages. The Decision states that "[t]*he Committee now turns to the damages section of the Award since there, in particular, the relationship of Dr. Alexandrov and Mr. Lapuerta is of particular significance.*"[57]

54. Unfortunately, when addressing the damages section of the Award, the Committee commits several inexplicable errors. In particular, the Committee states that "*the Tribunal adopted Mr. Lapuerta's model for damages in its entirety*."[58] That statement is wrong and indisputably so. Indeed, as both the Claimants' and Spain's submissions repeatedly pointed out (but which get no mention in the Decision), the Tribunal adopted only *part* of Brattle's damages model.[59] Had the Brattle model been adopted in its entirety (as the Decision claims), the Claimants would have been awarded €297 million in damages.[60] In fact, the Tribunal awarded the Eiser Parties €128 million. Moreover, as the Claimants also pointed out, the Award criticises Brattle in several places.[61]

55. Yet, the Committee then *repeats this error of fact* in the very next paragraph in order to suggest (once again, without any evidence) that Dr. Alexandrov may have had some undue influence over his co-arbitrators:

> "*It is not possible for the Committee to conclude that had the relationship between Dr. Alexandrov and Mr. Lapuerta and the Brattle Group been disclosed and the other arbitrators made aware of it, it would have had no significant effect on the deliberations between them and Dr. Alexandrov. The Committee also cannot ignore the fact that the Tribunal adopted the damages model proposed by Brattle with Mr. Lapuerta as the testifying expert.*"[62] (emphasis added)

56. The "*fact*" that the Committee says it "*cannot ignore*" is not a fact at all. It is undisputed that the Tribunal adopted *part* of the Brattle model, but it also accepted several of the

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[57] *Id.*, ¶ 247.

[58] *Ibid*.

[59] *See, e.g.,* Spain's Memorial on Annulment, 8 March 2018 ("**Spain's Memorial on Annulment**"), ¶¶ 63, 64, 176; Claimants' Counter-Memorial on Annulment, ¶ 135.

[60] *See* **C-0354**, The Expert Report of Mr. Carlos Lapuerta and Mr. Richard Caldwell of The Brattle Group, Rebuttal Report: Financial Damages to Eiser, 17 September 2015, ¶ 5.

[61] *See* Claimants' Counter-Memorial on Annulment, ¶¶ 135-136.

[62] Decision, ¶ 248.

criticisms of the Brattle model advanced by Spain and the other independent quantum expert (BDO) that appeared before it.[63] Thus, the Decision is predicated on an erroneous basis.

57. It is also notable that Spain did not argue that Dr. Alexandrov's professional relationship with Brattle would have caused him to lack impartiality on any point *other* than his judgment of Brattle's expert reports. Spain argued that:

> "[t]*he simultaneous collaboration between Mr. Alexandrov and Brattle (including Mr. Lapuerta) during key phases of the Eiser arbitration raises justifiable doubts regarding Mr. Alexandrov's ability to impartially assess Brattle's expert testimony and creates an appearance of bias.*"[64] (emphasis added)

58. Despite Spain's arguments being limited to Dr. Alexandrov's ability to judge the Brattle reports, the Decision goes substantially beyond what was pled by either Party (and, accordingly, the question that was properly before it). More significantly, it omitted to address the question as to why it was necessary to annul the entire Award (when it could annul in part[65]), given the alleged bias was not towards any party, but only towards an independent expert.

4.5 Omitted Question #4: The failure to address the question of whether the alleged departure from a fundamental rule of procedure had a material effect on the Award

59. As per the standard adopted by the Committee, in order to annul the Award under Article 52(1)(d), it must find that Dr. Alexandrov's alleged predisposition towards Brattle "*may have had a material effect on the Award*".[66] However, the Committee fails to make *any* conclusive findings that the alleged bias towards Mr. Lapuerta may have had a material effect on the Award. Thus, the question remains unanswered.

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[63] Award, ¶¶ 433-434, 451-453.

[64] Spain's Reply on Annulment, ¶ 83. Spain repeated this argument many times. For example, it also stated that "*Mr. Alexandrov and Brattle were working together on two other cases simultaneously with the Eiser case, manifestly gives rise to the appearance of bias, impairing Mr. Alexandrov's ability to impartially assess Brattle's opinions*." Spain's Reply on Annulment, ¶ 98 (emphasis added); *see also* Spain's Application for Annulment, 21 July 2017 ("**Spain's Application for Annulment**"), ¶¶ 17, 30.

[65] Article 52(3) of the Convention provides that an annulment committee shall have the authority to annul the award *or any part thereof*.

[66] Decision, ¶ 244.

60. The Decision makes clear (repeatedly) that the Committee simply could not reach a conclusion on whether, in fact, the alleged predisposition towards Mr. Lapuerta may have had a material effect on the Award. In particular, the Committee concluded that:

> "[t]*he Committee cannot determine the impact of the participation of Dr. Alexandrov on the other two arbitrators. It is not possible for the Committee to conclude that had the relationship between Dr. Alexandrov and Mr. Lapuerta and the Brattle Group been disclosed and the other arbitrators made aware of it, it would have had no significant effect on the deliberations between them and Dr. Alexandrov.*"[67] (emphasis added)

61. In other words, the Committee stated unequivocally that it *could not know* if Dr. Alexandrov's alleged bias towards Mr. Lapuerta had any material effect on the Award. Yet, it ultimately annulled the Award anyway, despite this key question remaining unanswered.

62. Numerous other statements also confirm that the Committee simply could not reach a conclusion on the point based on the objective evidence before it. For example, it also stated that:

> "[u]*pon examination of the Award, the Committee sees nothing there which could signal or suggest that Mr. Lapuerta's damages report had no material effect on the reasoning or findings in the Award* […]."[68] (emphasis added)

> "[i]*t is not possible for the Committee to conclude that, had the relationship been disclosed, the arbitrators would have remained unanimous in their adoption of the Brattle model. In any event, after such disclosures, the arbitrators would have arrived at their decision with full knowledge of the Alexandrov-Sidley Austin-Lapuerta-Brattle Group relationship, whatever the outcome.*"[69] (emphases added)

63. Thus, by its own admission, the Committee failed to identify *any objective evidence* that established that the alleged bias towards Mr. Lapuerta may have had a material effect on the Award. At best, the Committee concluded that the evidence was inconclusive. The Committee thus failed to address one of the key questions before it.

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[67] *Id.*, ¶ 248.

[68] *Id.*, ¶ 247.

[69] *Id.*, ¶ 251.

5. THE FACTUAL ERRORS AND OTHER FLAWS IN THE DECISION

5.1 The Committee's failure to distinguish the three authorities from the *Tethyan Copper* case

64. The Committee's failure to address the four key questions noted above are not the only critical flaws in the Decision. As explained below, the Decision contains several serious and significant factual errors regarding one of the three separate authorities laid before it which reached the very opposite conclusion regarding Dr. Alexandrov's relationship with Brattle. With respect to the other two authorities on point, the Decision fails to engage with them in any detail in its analysis.

65. As noted above, the issue before the Committee (whether Dr. Alexandrov's professional relationship with Brattle gave rise to a manifest appearance of bias) had already been rejected in three separate and independent decisions. Those three decisions, all of which found that Dr. Alexandrov's relationship with Brattle did *not* give rise to a manifest appearance of bias under the ICSID Convention, are summarised below.

66. First, in a decision dated 31 August 2017, the PCA Secretary-General, H.E. Mr. Hugo Hans Siblesz, issued his detailed and reasoned opinion (the "**PCA Opinion**") in the *Tethyan Copper* case. Unlike the conclusion in the Decision, Mr. Siblesz found that:

> "*it is not evident* […] *that such a working relationship* [between Dr. Alexandrov and Brattle] *would lead to a lack of the required qualities of an arbitrator. Pakistan has not shown that the relationship between Dr. Alexandrov and Brattle goes beyond a normal working relationship as is common between counsel and valuation experts involved in international arbitration cases.*"[70]

67. As a result, the PCA Opinion held that Pakistan had "*failed to prove the existence of any fact indicating a manifest lack of Dr. Alexandrov's impartiality or independence*" due to Dr. Alexandrov's so-called "*long-standing relationship with Brattle*."[71]

68. Second, following the PCA Opinion, the unchallenged members of the *Tethyan Copper v. Pakistan* tribunal, Lord Hoffmann and Prof. Sachs, also agreed that "*the earlier relationship* [with a Brattle expert] *is, in itself, insufficient to allow* [an inference that Dr.

[70] **CL-0289**, *Tethyan Copper*, PCA Opinion, ¶ 100.

[71] *Id*., ¶ 157.

Alexandrov cannot be relied upon to exercise an independent and impartial judgment on the evidence in this case] *to be drawn.*"[72] Accordingly, they rejected the disqualification challenge against Dr. Alexandrov, finding that Pakistan had failed to "*meet the standard set forth in Article 57 of the ICSID Convention for the disqualification of an arbitrator.*"[73]

69. Finally, the then President of the World Bank and Chairman of the ICSID Administrative Council, Dr. Kim, likewise rejected Pakistan's renewed efforts to disqualify Dr. Alexandrov. In reaching this conclusion, he found that "*a third party undertaking a reasonable evaluation of the factual framework alleged by the Respondent and the additional information it has provided would not conclude that Dr. Alexandrov manifestly evidences an appearance of lack of independence and impartiality with respect to the Respondent in this case.*"[74]

70. Given these clear and unequivocal authorities addressing the same point, one might expect the Decision to carefully distinguish each of these three authorities or at least explain why it wished to depart from them and reach the opposite conclusion. The Decision does not do so. It does not address two of these authorities at all. Although it does attempt to distinguish the PCA Opinion, the Decision makes several critical factual errors in the process.

71. First, in order to distinguish the PCA Opinion, the Decision suggests that Dr. Alexandrov's relationship with Brattle involved two concurrent cases where he was acting as counsel while he was sitting as arbitrator in *Eiser* and that, in contrast, there was no concurrency in the *Tethyan Copper* case.[75] In particular, the Decision states that:

> "[i]*t seems that the PCA's Secretary-General based his ruling on the same assumption, i.e. that in* Tethyan Copper *there was no 'concurrent service' with Dr. Alexandrov acting as arbitrator in* Tethyan Copper

[72] **CL-0290**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on Respondent's Request for Disqualification of Dr. Stanimir Alexandrov, 5 September 2017 (Sachs, Hoffmann), ¶ 78.

[73] *Id.*, ¶ 74.

[74] **CL-0291**, *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Decision on the Respondent's Proposal to Disqualify all Members of the Tribunal, 5 February 2018 (Kim) ("***Tethyan Copper*, Decision of ICSID Administrative Council Chairman**"), ¶ 128.

[75] Decision, ¶¶ 213-214.

> *and Dr. Alexandrov working as counsel with the damages expert in* Bear Creek."[76]

72. This statement is wrong. In fact, the PCA Opinion expressly states that "[i]*t is common ground between Parties that the* Bear Creek *arbitration has not been closed under ICSID Arbitration Rule 38(1).*"[77] Moreover, it is undisputed that the *Bear Creek* case ran from **18 August 2014**[78] to **30 November 2017**[79]. It is also undisputed that the *Tethyan Copper* case ran from **12 January 2012**[80] to **12 July 2019**.[81]

73. In other words, the two cases ran concurrently *for more than three years*. The Committee simply ignores this inconvenient (and indisputable) fact. Instead, the Committee claims that *Tethyan Copper* is distinguishable because:

> "[e]*ven though it could be said that the* Bear Creek *case…was concurrent with the* Tethyan Copper *case* […] *the fact is that as Prof. Davis stated, his '[…] engagement [in the Bear Creek case] ha[d] concluded.' This is confirmed by the fact that the Bear Creek case was almost over, with no filings pending, when the challenge was brought by Pakistan.*"[82] (emphases added)

74. But, "*the fact is*" that this statement is irrelevant to the issue of concurrency. While it is true that the *Bear Creek* case was nearly over as *at the time the challenge was brought by Pakistan*, those cases still ran concurrently for more than three years. The "*fact*" that the *Bear Creek* case was "*almost over*" by the time that "*the challenge was brought by Pakistan*" does not somehow make the *Tethyan Copper* case distinguishable from *Eiser*. Quite the contrary, both *Tethyan Copper* and *Eiser* involved issues of concurrency. The Committee never explains why the timing of the challenge was the relevant question as

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[76] *Id.*, ¶ 213.

[77] **CL-0289**, *Tethyan Copper*, PCA Opinion, ¶ 116.

[78] *See* Spain's Application on Annulment, ¶ 25.

[79] *See* Spain's Memorial on Annulment, ¶ 105 and fn. 185; *see also* **CL-0291**, *Tethyan Copper*, Decision of ICSID Administrative Council Chairman, ¶ 90.

[80] *See* **RL-0181**, Procedural Details of *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1 (submitted during the Annulment phase).

[81] *See ibid*. The Claimants note that a decision was rendered in *Tethyan Copper* on 12 July 2019 (after the *Eiser* Annulment Hearing), and an annulment application has since been registered. *See* **C-0391**, Procedural Details of *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, *available at*: https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/12/1 (accessed on 24 July 2020).

[82] Decision, ¶ 213.

to whether there was concurrency in *Tethyan Copper*, but that is not the approach it adopted to determine if there was concurrency in *Eiser*.

75. The issue of concurrency does not distinguish *Tethyan Copper* from *Eiser*. Nor does the fact that, in *Tethyan Copper,* the challenge was brought in the underlying arbitration while, in *Eiser*, it was brought on annulment, as the Committee also suggests.[83] The very same ICSID Convention disqualification standards apply *regardless* of the stage at which the challenge was brought. What distinguishes the two cases is that, in *Tethyan Copper*, three separate and independent authorities all concurred that Dr. Alexandrov's professional relationship with Brattle did not give rise to a ground for disqualification under Article 57, but in this case, the Committee reached the opposite conclusion.[84]

76. The Decision also makes other errors regarding the PCA Opinion. As noted above, the Committee suggests that the PCA Opinion assumed no concurrent service.[85] Leaving aside the fact that this is not true, the Committee attempts to attribute (incorrectly) this assumption to the PCA Secretary-General by citing a passage from paragraph 141 of the PCA Opinion.[86]

77. However, that paragraph of the PCA Opinion is actually dealing with the question of *issue conflicts*, not Dr. Alexandrov's relationship with Brattle. In particular, the PCA Secretary-General was addressing Pakistan's claim that the Brattle damages expert in the *Tethyan Copper* case was using the same innovative damages methodology that he had used in the *Bear Creek* case with Dr. Alexandrov as counsel, thus giving rise to an issue conflict.

78. Thus, the Decision refers to a passage in the PCA Opinion to highlight the PCA Secretary-General's supposed view on concurrency that did not, in fact, address the issue of concurrency. The passage from the PCA Opinion that actually dealt with the issue of concurrency states as follows:

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[83] *Id*., ¶ 212.

[84] The Decision also never explains how Dr. Alexandrov's alleged bias could possibly be "*manifest*" (*i.e.*, obvious) as required under Article 57, if three other independent authorities found there was no such bias.

[85] *Id*., ¶ 213.

[86] *Ibid*., *citing* **CL-0289**, *Tethyan Copper*, PCA Opinion, ¶ 141.

> "[C]*oncurrent service as an arbitrator and as counsel in an unrelated matter in which the same expert has been engaged does not automatically result in a conflict of interest warranting disqualification under the ICSID Convention. Objective evidence would be required that makes it 'manifest' that the appearance of the same expert in the two proceedings may in the specific case affect the arbitrator's decision-making. No such objective evidence has been presented to me in this case. Therefore, I find that Dr. Alexandrov's involvement as counsel and the relationship with the quantum expert in Bear Creek do not presently lead to a conflict of interest.*"[87] (emphases added)

79. Had the Committee followed the PCA Opinion and required that Spain present objective evidence that Dr. Alexandrov's relationship with Mr. Lapuerta may have affected his decision making, it would have been required to reject Spain's case. Indeed, as explained above in section 4.2, the Committee failed to identify *any* objective evidence that Dr. Alexandrov's relationship with Brattle may have affected his decision making. If such objective evidence existed, one would have expected the Decision to identify it.

80. Indeed, the Committee accepted that no such evidence was presented. The very next two sentences of the Decision reveal the inherent contradictions in the Committee's reasoning. While it claims that, on the one hand, "*the Committee is not suggesting that each arbitrator did not conduct its own assessment of the evidence*", the Committee states in the following two sentences that "[i]*t is not possible for the Committee to conclude that, had the relationship been disclosed, the arbitrators would have remained unanimous in their adoption of the Brattle model*."[88]

81. In other words, the Decision acknowledges that it "*was not possible*" to determine, based on the objective evidence, whether Dr. Alexandrov's professional relationship may have affected his decision making or, for that matter, had any impact on the Award.

82. In addition to the errors made in its attempt to distinguish the PCA Opinion, it is notable that the Decision does not even address, let alone attempt to distinguish, the further decision on the very same questions issued by the Chairman of the ICSID Administrative Council. In a ruling that also reaches the opposite conclusion to the Committee, Dr. Kim found that:

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[87] **CL-0289**, *Tethyan Copper*, PCA Opinion, ¶ 120.

[88] Decision, ¶ 250.

> "*a third party undertaking a reasonable evaluation of the factual framework* […] *would not conclude that Dr. Alexandrov manifestly evidences an appearance of lack of independence and impartiality with respect to the Respondent in this case*."[89]

83. Notably, unlike the Decision, Dr. Kim correctly focussed on the question of whether Dr. Alexandrov's relationship with Brattle evidenced an appearance of impartiality "*with respect to the Respondent*". In other words, Dr. Kim applied the standards of Article 14 of the Convention and considered whether there was any bias or predisposition towards a party. As noted above, the Decision does not address that question.

5.2 The factual errors regarding the *SolEs* case

84. The Committee also made a serious error when it sought to distinguish the *SolEs* case. In particular the Committee states that in *SolEs*, "*Dr. Alexandrov* ***was not simultaneously acting, as counsel,*** *with Mr. Lapuerta, as damages expert*", whereas "[c]*onversely,* […] *during the* [*Eiser*] *Arbitration, Dr. Alexandrov and Mr. Lapuerta were working simultaneously, as counsel and damages expert, for the same party, in two other pending arbitrations.*"[90] The bolded emphasis is in the original. This bolded emphasis suggests that the Committee thought this was a significant and important distinction between the *SolEs* and *Eiser* cases. The Committee's bolded statement is false.

85. As the undisputed evidence shows, Dr. Alexandrov submitted a letter in the *SolEs* case confirming that he *was* concurrently acting as counsel in an unnamed commercial arbitration (which was in abeyance) in which Mr. Lapuerta was also engaged as an expert.[91] In fact, Dr. Alexandrov's and Mr. Lapuerta's involvement in that unnamed commercial arbitration is recognised by the Committee as one of its "*uncontested facts*" that it lists in the Decision.[92] Yet, the Committee chose to ignore this uncontested fact when it attempted to distinguish *SolEs* from *Eiser*.

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[89] **CL-0291**, *Tethyan Copper*, Decision of ICSID Administrative Council Chairman, ¶ 128.

[90] Decision, ¶ 216 (emphasis in original).

[91] **R-0321**, Letter from Dr. Alexandrov to ICSID in *SolEs Badajoz v. Spain*, 12 October 2017; **C-0317**, Letter from Dr. Alexandrov to ICSID in *SolEs Badajoz v. Spain*, 18 August 2017, p. 3.

[92] Decision, ¶ 205(g)(ii).

86. To exacerbate this critical factual error, whilst the Committee ignored the existence of the unnamed commercial arbitration when concluding there was no concurrency in the *SolEs* case, it actually relied on the very same unnamed commercial arbitration for its finding that, in the *Eiser* case, Dr. Alexandrov and Mr. Lapuerta were working together concurrently.[93]

87. The Committee cannot, on the one hand, count the unnamed commercial arbitration as a case concurrent to the *Eiser* Arbitration but, on the other hand, *not* count it as a case concurrent to the *SolEs* arbitration. It is unclear why the Committee chose to use this fact to support its own findings against Dr. Alexandrov but then ignored this very same fact in an effort to distinguish *SolEs*.

5.3 The Committee's reversal of burden of proof on waiver

88. The Committee also failed to address the issue of constructive waiver by improperly reversing the burden of proof under the ICSID Rules. The Committee found that:

> "[t]*here is nothing on the record to prove that Spain had* [knowledge of the relationship between Dr. Alexandrov and Mr. Lapuerta]*, the burden has not been discharged by the Eiser Parties. The existence of the information in the public domain does not discharge the burden of the Eiser Parties to prove that Spain was aware of the relevant facts. The Committee is not satisfied that the Eiser Parties have proved that Spain had such knowledge*."[94] (emphasis added)

89. As is clear from the passage above, the Committee reversed the burden of proof and determined that the Claimants were required to prove that Spain had actual or constructive knowledge of the undisclosed relationship. The ICSID Rules do not place that burden on the Eiser Parties, however. Rather, it is Spain's burden to establish that it did not have constructive knowledge of the relationship and, thus, that it did not waive its right to challenge Dr. Alexandrov in the Arbitration.

90. Under ICSID Arbitration Rule 27, as the Claimants highlighted in their submissions, unless the moving party establishes that it had no opportunity to raise a challenge during the arbitration, an *ad hoc* committee cannot hear such a complaint during any review

[93] *See id.*, ¶¶ 53 (and fn. 22), 205(g)(ii), 214, 218.

[94] Decision, ¶ 190.

under Article 52(1)(a).[95] In other words, *Spain*—not the Claimants—had the burden to establish that it had no opportunity to raise the challenge before the Award was rendered.[96]

91. Had the ICSID Rules required the Claimants to "*discharge the burden of* […] *pro*[ving] *that Spain was aware of the relevant facts*",[97] the Claimants undoubtedly would have sought disclosure from Spain during the course of the annulment proceeding. Indeed, allowing disclosure would have been the best means for the Claimants to be able to "*prove*" that Spain had actual knowledge of the relevant facts.

92. On the issue of constructive knowledge, the Decision recognises (as it must) that there was *evidence on the record in the Arbitration* that Dr. Alexandrov had worked as counsel in the same case where Brattle (and Mr. Lapuerta in particular) acted as independent expert.[98] That this information was on the record in the Arbitration was never in dispute.

93. The Committee must have understood that it would be a step too far to suggest that Spain cannot be held to have constructive knowledge over the very documents on the record in the Arbitration itself. However, rather than determining that Spain had waived its right to challenge Dr. Alexandrov given that this information was on the record, the Decision moves the goal posts. The Decision suggests that, although Spain may have had knowledge of the professional relationship between Dr. Alexandrov and Brattle, Spain could not be said to have had knowledge of "*the extent*" of that relationship.[99]

94. But that misses the point. Once it had knowledge of the relationship, Spain could have sought further information from Dr. Alexandrov or it could have conducted its own due diligence on that relationship if it had any serious concerns. Indeed, Spain admitted that it *did* conduct its own due diligence once it (allegedly) first learned of the relationship

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[95] Claimants' Rejoinder on Annulment, ¶ 97.

[96] Spain's duty of continuing due diligence is further confirmed by the Explanation to General Standard 7(c) of the 2014 IBA Guidelines: "*any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence*." *See* Claimants' Rejoinder on Annulment, ¶ 99, *citing* **RL-0116**, IBA Guidelines on Conflicts of Interest in International Arbitration, 2014, p. 16.

[97] Decision, ¶ 190.

[98] *Id.*, ¶ 189.

[99] *Ibid*.

between Dr. Alexandrov and Brattle in July 2017 after the Award had been issued against it.[100] The Decision fails to explain why Spain could not have done that same due diligence during the course of the Arbitration.

95. In its Reply, Spain claimed that "[t]*he information surrounding this relationship <u>became publicly known only after the Award had been issued</u>.*"[101] But that claim, which the Committee now appears to have accepted, is demonstrably false. The Claimants cited to a plethora of publicly available documents and news articles which Spain could have (and should have) discovered, all of which were available for many years before the Arbitration.[102] The Decision simply side steps these arguments entirely by suggesting that although Spain may have had knowledge of the relationship, it did not have knowledge of "*the extent*" of the relationship.

5.4 The unprecedented decision on costs

96. Despite having only addressed two of the ten annulment grounds (and partially at that), the Committee also saw fit to order the Claimants to pay the full amount of Spain's legal fees and costs as well as the full costs of the annulment proceedings. The Committee ostensibly did this on the basis that "*costs follow the event*".[103] However, costs cannot "*follow the event*" when a Committee fails to even decide more than 80% of the issues before it.

97. The Eiser Parties were forced to spend millions of dollars addressing *all ten* of Spain's annulment grounds. Spain likewise spent millions of dollars pleading all ten grounds. The Committee has now ordered the Eiser Parties to pay the full amount of Spain's own legal fees for pleading those ten grounds, despite the fact that the Decision does not even deal with eight of those grounds.

98. By ordering the Eiser Parties to pay the full costs of the proceedings as well as the full amount of Spain's legal fees and expenses, the Committee has chosen to *punish* the Eiser Parties for simply responding to Spain's Application for Annulment and participating in

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[100] Spain's Application for Annulment, ¶¶ 26-27.

[101] Spain's Reply on Annulment, ¶ 25 (emphasis added).

[102] Claimants' Rejoinder on Annulment, ¶¶ 9, 89-94 (and documents cited therein). *See* Decision, ¶ 186.

[103] Decision, ¶ 267.

the proceeding. As noted above, the Award was annulled solely on the basis of Spain's complaints regarding Dr. Alexandrov's professional relationship with an independent expert. The Committee did not find that the Award was otherwise annullable or that the Eiser Parties behaved unreasonably in defending the Award. Yet, despite finding no fault with the Eiser Parties' conduct, the Committee still saw fit to punish them Parties by ordering them to pay in excess of $3.6 million to Spain.

99. The Committee's cost determination is at odds with longstanding ICSID annulment jurisprudence. In fact, there is not a *single* ICSID annulment decision that has annulled an award (either partially or fully) in which the annulment-respondent was ordered to pay both the full costs of the proceedings and the full amount of the annulment-applicant's legal fees and expenses.[104] The Decision offers no explanation as to why it believed the circumstances of this case required it to depart from all previous precedent and order the annulment-respondent to pay the full costs *and* full legal fees of the annulment-applicant.

6. THE IMPACT OF THE DECISION

100. As the Committee will be aware, no less than *fifteen* separate Energy Charter Treaty ("**ECT**") tribunals (excluding the *Eiser* Tribunal) have now found Spain to have violated international law for the very same measures at issue in the *Eiser* case. These arbitral tribunals include some of the most respected international jurists in the world.

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[104] Of the six annulment decisions in which an award was fully annulled, as listed in the Background Paper, there were only two cases in which the annulment-respondents were ordered to bear the administrative costs of the proceeding, and all six decisions ordered each party to bear their own legal fees and expenses (unlike the costs order made by the *Eiser* Committee). As for decisions which partially annulled an award, an annulment-respondent has never been ordered to pay more than one third of the costs of proceedings, with the prevailing practice being for the costs of the proceedings to be divided equally and for each party to bear its own legal fees and expenses. **C-0299**, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, table titled "Decisions on Allocation of Costs", pp. 26-29. *See also*, in particular, **CL-0267**, *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award, 17 December 1992, ¶ 10.01, where the committee gave consideration to the "*self-restraint, patience, and due diligence* [of both parties] *in co-operation with the Committee*" and issued a split costs decision accordingly; **RL-0148**, *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010, ¶ 283, whereby the committee suggested that, even though it had annulled the award, given that "*it was the Tribunal which seriously departed from a fundamental rule of procedure it would not be fair and reasonable*" for the annulment-respondent to bear the annulment-applicant's legal fees and expenses, and it ordered each party to bear its own legal fees, expenses and costs.

101. However, this Committee has now undone the Award in its entirety because, in its view (a view which was rejected by the Secretary-General of the PCA and the World Bank President), one member of the Tribunal had a manifest appearance of bias, not towards a party, but towards an independent expert.

102. It is notable that since losing its very first ECT case – the *Eiser* case – Spain has lodged no less than 13 separate challenges to the arbitrators sitting in judgment of its conduct. The very first of those was against Dr. Alexandrov.

103. Spain no doubt adopted this strategy of attacking jurists because it became aware that it would be repeatedly (and rightly) held responsible for its violations of international law. An article in the leading Spanish newspaper *Expansión* recently described Spain's litigation strategy as follows:

> "[Spain] *has launched its entire legal artillery in an attempt to put an end to the multi-million euro arbitration processes brought by tens of large investment funds and businesses over the cuts in renewable energy subsidies made over recent years, particularly at ICSID.* […] *These steps range from requesting full annulment of rulings, to suspending processes so as to submit further evidence, and even challenging previously agreed arbitrators.*"[105] (emphasis added)

104. The Decision not only countenances Spain's scorched earth litigation tactics, it has allowed Spain to escape (at least for now) the consequences of its serious violations of international law and the substantial harm that those violations caused to the Eiser Parties.

105. As previous annulment committees have made clear,[106] the purpose of annulment is neither to reward breaches of international law nor to allow parties to delay compliance with their obligations under international law. Yet, that is precisely what the Decision does. Spain, which was found to have violated international law by a unanimous ICSID tribunal, has now been excused from that breach in circumstances where the Decision

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[105] **C-0385**, Expansión*, España bloquea los pleitos millionarios de renovables* (Spain blocks multi-million lawsuits on renewables), 17 April 2020 (SPA) (Claimants' own translation).

[106] *See, e.g.,* **RL-0097** *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, ¶ 166: "*In ratifying the ICSID Convention, the member States recognize the finality of the award and accept the tribunals' determination of the (un-)lawfulness of their acts.*" *S*ee *also* **RL-0066**, *Hussein Nuaman Soufraki v. 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, ¶ 27: "*The* ad hoc *Committee believes that annulment is usefully reserved 'for egregious violations of … basic principles while preserving the finality of the decision in most other respects.*'"

reaches the very opposite conclusion of three separate authorities that addressed precisely the same issues before it.

7. QUESTIONS THAT THE *AD HOC* COMMITTEE FAILED TO DECIDE

106. In light of the above, the Claimants submit that the Committee omitted to decide the following four key questions that were put to it by the Parties:

(i) how its conclusions on Dr. Alexandrov's predisposition towards Mr. Lapuerta and Brattle constituted bias "*towards a party*" for the purposes of Article 14 of the ICSID Convention and thus required annulment under Article 52(1)(a);

(ii) how its interpretation of Articles 51 and 52(1)(a) of the ICSID Convention could possibly be consistent with the record of the Convention's drafting history and the previous annulment decisions regarding that drafting history;

(iii) how its conclusions on Dr. Alexandrov's alleged predisposition towards Mr. Lapuerta required annulment of the Award in its entirety and, in particular, the Tribunal's findings on jurisdiction and liability; and

(iv) how its conclusions on Dr. Alexandrov's alleged predisposition towards Mr. Lapuerta had a "*material impact*" on the Award so as to necessitate the annulment of the entire Award under Article 52(1)(d).

8. PROCEDURAL PROPOSAL

107. Given the Application is limited to the four narrow questions that the Committee omitted to address in its Decision, the Eiser Parties believe that an expedited procedural timetable is warranted.

108. The Eiser Parties thus propose the following procedure for this Application:

(i) within two weeks of the transmission of this Application, Spain to file any observations on the Application (the "**Observations**");

(ii) the Eiser Parties to file their response within one week of the filing of the Observations (the "**Response**");

(iii) Spain to file its reply (if any) within one week of the filing of the Response (the "**Reply**");

(iv) given the importance of the issues, the Committee to hold a telephonic or virtual hearing for a maximum of a half day within two weeks of the final written submission; and

(v) the Committee to issue its supplementary decision within a maximum of 30 days after the hearing.

9. REQUEST FOR RELIEF

109. Pursuant to Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules, the Eiser Parties request that:

(i) the Committee issue a supplementary decision addressing the four questions that it omitted to decide as set out in Section 7 above; and

(ii) as part of the supplementary decision, make any consequent adjustments to the Decision in light of the conclusions reached on the omitted questions.

Respectfully submitted, 26 July 2020.

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Counsel for the Claimants

ANNEX 1 – SPAIN'S TEN ANNULMENT GROUNDS

Spain sought annulment of the Award on the following grounds:

1. Dr. Alexandrov's professional relationship with one of the independent experts appearing in the case (Mr. Carlos Lapuerta of The Brattle Group) meant that the Tribunal was improperly constituted under Article 52(1)(a).

2. Dr. Alexandrov's professional relationship with Mr. Lapuerta also constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).

3. The Tribunal manifestly exceeded its powers under Article 52(1)(b) by allegedly awarding damages which exceeded the Tribunal's jurisdiction.

4. The Tribunal manifestly exceeded its powers under Article 52(1)(b) by allegedly failing to apply the proper law to its determination on liability.

5. The Tribunal's award of damages allegedly contradicted its determinations on jurisdiction and liability, which constituted a failure to state reasons under Article 52(1)(e).

6. The Tribunal's determination of liability for breach of the fair and equitable treatment obligation under Article 10(1) of the ECT was allegedly inconsistent and contradictory and thus constituted a failure to state reasons under Article 52(1)(e).

7. The Tribunal allegedly denied Spain its right to be heard by allowing the Claimants to submit new documents during the merits hearing, which constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).

8. The Tribunal allegedly denied Spain its right to be heard by denying Spain's document production requests relating to the amount invested by the Claimants in Spain, which constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).

9. The Tribunal allegedly denied Spain the benefit of the European Commission's intervention by conditioning the involvement of the Commission on the provision of a costs undertaking, which constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).

10. The Tribunal allegedly denied Spain its right to equal treatment by conditioning Spain's request to introduce the *Isolux a*ward into the record on Spain confirming it was not subject to confidentiality, which constituted a serious departure from a fundamental rule of procedure under Article 52(1)(d).