Enron Creditors Recovery Corp.
Ponderosa Assets, L.P.
(Claimants)

v.

The Argentine Republic
(Respondent)

(ICSID Case No. ARB/01/3)
(Annulment Proceeding)

Decision on the Application for Annulment of the Argentine Republic

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Members of the *ad hoc* Committee

Dr. Gavan Griffith Q.C., President
Judge Patrick L. Robinson
Judge Per Tresselt

Secretary of the *ad hoc* Committee: Mr Gonzalo Flores

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From 27 January 2010:
Dr. Joaquín Pedro da Rocha
Procurador del Tesoro de la Nación
Argentina

Date of dispatch to the parties: **30 July 2010**

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Wintershall Award	*Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008

Other references

Ancillary claim	See paragraph 80 of this Decision
Application for Annulment	The application for annulment initiating the present annulment proceedings, filed by Argentina on February 21, 2008
Argentina	The Argentine Republic (the Respondent)
Award	The Award to which the Application for Annulment in the present proceedings relates: *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007
BIT	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, signed November 14, 1991; entered into force October 20, 1994
Centre	International Centre for Settlement of Investment Disputes
CIESA	See paragraph 42 of this Decision
Claimants	The Claimants in the present proceedings: see paragraphs 1, 23 and 25 of this Decision
Committee	See paragraph 8 of this Decision
Edwards Report	See paragraph 364 of this Decision
Emergency Law	See paragraphs 48-50 of this Decision
the fair and equitable treatment clause	The provision in the BIT (*q.v.*) that investments shall at all times be accorded fair and equitable treatment (Article II(2)(a) of the BIT)
First Jurisdiction Decision	*Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, January 14, 2004

ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 575 U.N.T.S. 159
ILC Articles	International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission, 2001,* vol. II (Part Two); annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4
Information Memorandum	See paragraph 40 of this Decision
PPI	See paragraph 41 of this Decision
Schreuer Commentary	Christoph Schreuer, *The ICSID Convention: A Commentary* (2001)
Second Jurisdiction Decision	*Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (Ancillary Claim), August 2, 2004
Stamp Tax Claim	See paragraph 78 of this Decision
TGS	Transportadora de Gas del Sur: see paragraphs 38-42 of this Decision
Treaty	The BIT (*q.v.*)
Tribunal	The tribunal which rendered the Award (*q.v.*) to which the Application for Annulment (*q.v.*) in the present annulment proceedings relates
the umbrella clause	The provision in the BIT (*q.v.*) that each Party shall observe any obligation it may have entered into with regard to investments (Article II(2)(c) of the BIT)
US PPI	See paragraph 41 of this Decision
Vienna Convention	Vienna Convention on the Law of Treaties, Vienna, May 23, 1969; 1155 U.N.T.S. 331
YPF	Yacimientos Petrolíferos Fiscales: see paragraph 157 of this Decision

A. Introduction

1. On 21 February 2008, the Argentine Republic ("Argentina") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") an application in writing (the "Application for Annulment") requesting the annulment of the Award of May 22, 2007 (the "Award"),[1] rendered by the tribunal (the "Tribunal") in the arbitration proceeding between Enron Corporation and Ponderosa Assets, L.P. (the "Claimants") and Argentina.

2. The Application for Annulment was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"), having regard to Article 49(2) of the ICSID Convention and considering that on 25 October 2007, the Tribunal rendered its decision on a request by the Claimants under that provision for rectification and/or a supplementary decision of the Award.

3. The Application for Annulment sought annulment of the Award on three of the five grounds in Article 52(1) of the ICSID Convention, specifically claiming that:

   (a) the Tribunal manifestly exceeded its powers;

   (b) there was a serious departure from a fundamental rule of procedure; and

   (c) the Award failed to state the reasons on which it was based.

4. The Application for Annulment also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), for a stay of enforcement of the Award until the Application for Annulment is decided.

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[1] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, May 22, 2007 ("Award").

5. On 26 February 2008, the Centre acknowledged receipt of the Request for Annulment and sent a copy to the Claimants.

6. On 7 March 2008, the Acting Secretary-General of ICSID registered the Application, and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted a Notice of Registration to the parties. The parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

7. On 9 May 2008, the Centre informed the parties of the ensuing recommendation to the Chairman of the Administrative Council of the appointment of Dr. Gavan Griffith Q.C., from Australia, Judge Patrick Lipton Robinson from Jamaica and Judge Per Tresselt from Norway, to the *ad hoc* Committee, each of whom was designated to the ICSID Panel of Arbitrators by their respective countries.

8. By letter of 22 May 2008, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee ("the Committee") had been constituted, composed of Dr. Griffith Q.C., Judge Robinson and Judge Tresselt. On the same date the parties were informed that Dr. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Committee.

9. On 29 May 2008, the Centre informed the parties of the designation of Dr. Griffith Q.C. as President of the Committee.

10. On 18 June 2008, the Claimants filed a request to lift the provisional stay of enforcement of the Award, or alternatively, to condition a continuation of the stay on Argentina's posting adequate security (the "Claimants' Request").

11. By letter of 20 June 2008, the Committee invited Argentina to submit its written observations on the Claimants' Request no later than 7 July 2008. By the same letter, the Committee confirmed that the oral arguments on this matter would take place during the first session and informed the parties that the Committee would make a decision on the continuation of the stay of enforcement of the Award in accordance with ICSID Arbitration Rule 54.

12. By a letter dated 30 June 2008, the Committee asked the parties whether they would agree to retain the services of an assistant, Dr. Christopher Staker, in addition to the Secretary of the Committee. Argentina and the Claimants agreed to Dr. Staker's appointment by letters dated 2 and 8 July 2008, respectively.

13. In compliance with the Committee's instructions, on 7 July 2008, Argentina filed its observations on the continuation of the stay of enforcement of the Award.

14. On 14 July 2008, the first session of the Committee was held at the premises of the World Bank in Paris. Prior to the start of the session, the Secretariat distributed to the parties copies of the declarations, signed by each Member of the Committee, pursuant to ICSID Arbitration Rule 52(2).

15. On 7 October 2008, the Committee issued its "Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award".

16. On 11 November 2008, Argentina filed a Memorial on Annulment.

17. By letter of December 17, 2008, the Claimants requested the Committee to end the stay of enforcement of the Award, or in the alternative, to condition such a stay on Argentina's provision of adequate financial security in the form of a bank guarantee or its monetary equivalent.

18. By a letter of December 30, 2008, with attachments, Argentina requested leave of the Committee to develop its position on evidence and arguments which were not originally before the Committee, and requested that a hearing be held to discuss new reasons that should dispel doubts that Argentina will comply with its obligations under the ICSID Convention.

19. On 19 February 2009, the Claimants filed a Counter-Memorial on Annulment.

20. On 9 March 2009, the Committee held a hearing in Paris on the stay of enforcement of the Award.

21. On 11 March 2009, Argentina requested an extension to file its Reply on Annulment due to the religious holidays. The Committee granted the requested extension and decided that the Reply on Annulment would be due on April 17, 2009.

22. On March 27, 2009, in accordance with ICSID Administrative and Financial Regulation 25, the Committee and the parties were informed that due to a redistribution of the Centre's workload Mr. Ucheora Onwuamaegbu, Senior Counsel, ICSID, would be appointed as Secretary of the Committee.

23. On March 30, 2009, the Claimants confirmed a change of name of the first Claimant from Enron Corporation to Enron Creditors Recovery Corporation. On April 7, 2009 Argentina requested the Secretariat that the case name be changed to reflect the Claimant's name change. On April 13, 2009 the Claimants confirmed that they did not oppose the requested name change.

24. On April 17, 2009, Argentina filed a Reply on Annulment.

25. On May 8, 2009, the Centre proceeded to change the name of the case to *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3)-Annulment Proceeding.

26. On May 20, 2009, the Committee issued its "Decision on the Claimant's Second Request to Lift the Provisional Stay of Enforcement of the Award".

27. On June 16, 2009, the Claimants filed a Rejoinder on Annulment.

28. On June 19, 2009, in accordance with ICSID Administrative and Financial Regulation 25, the Committee and the parties were informed that due to a redistribution of the Centre's workload Mr. Gonzalo Flores, Senior Counsel, ICSID, would be appointed as Secretary of the Committee.

29. In response to the Chairman's request that each party file a skeleton list of its arguments and issues, Argentina filed a document dated July 20, 2009, and the Claimants filed a document dated July 24, 2009.

30. On July 29-31, 2009, the hearing on the Application for Annulment (the "hearing") was held at the seat of the Centre in Washington D.C. Present at the hearing were:

— the members of the Committee: Dr Gavan Griffith Q.C., President; Judge Patrick Lipton Robinson and Judge Per Tresselt;

— the representatives of the Claimants: Mr R. Doak Bishop, Mr Craig S. Miles, Ms Kerrie Nanni and Mr David Weiss of King & Spalding; and Dr Guido Santiago Tawil, Dr Hector María Huici and Dr Federico Campolieti of M. & M. Bomchil, Abogados;

— the representatives of the Argentine Republic: Sub-Procurador del Tesoro de la Nación Dr Adolfo Gustavo Scrinzi, Dr Gabriel Bottini, Dr Ignacio Pérez Cortés, Dr Verónica Lavista, Dr Tomás Braceras, Dr Rodrigo Ruiz Esquide, Dr María Alejandra Etchegorry and Dr Ignacio Torterola of the Procuración del Tesoro de la Nación;

— the Secretary to the Committee: Mr Gonzalo Flores;

— counsel to the Committee: Ms Anneliese Fleckenstein;

— the legal assistant of the Committee: Dr Christopher Staker.

31. By a communication dated August 4, 2009, in accordance with a direction given by the Committee at the hearing, Argentina provided the Committee with references to the record of the proceedings before the Tribunal dealing with the issue of public order.

32. On August 6, 2009, in accordance with a direction given by the Committee at the hearing, Argentina provided a CD-ROM entitled "Video on the Argentine Crisis", which was distributed to the Committee.

33. By letter of August 21, 2009, in accordance with the request made by the President of the Committee at the hearing, Argentina submitted a statement of costs incurred by Argentina in connection with the annulment proceedings, amounting to USD 1,001,603.58, as detailed in an attachment to that letter.

By letter of August 24, 2009, in accordance with the same request made by the President, the Claimants reiterated their request that the Committee require Argentina to pay all costs and fees associated with this proceeding, including the Claimants' reasonably incurred legal expenses, which were detailed in an attachment to that letter, totalling USD 1,219,073.44.

34. In accordance with leave granted by the Committee to the parties at the hearing, both parties filed written post-hearing briefs dated October 1, 2009, after the *ad hoc* annulment committee in the *Azurix* case had rendered its decision on annulment on September 1, 2009.[2]

35. The Committee declared the proceeding closed on June 21, 2010.

36. During the course of the proceedings, the Members of the Committee deliberated by various means of communication and have taken into account all pleadings, documents and testimony before them.

B. The dispute

37. The background facts relating to the dispute between the Claimants and Argentina that were the subject of the Award, as found by the Tribunal, are in summary as follows.

38. From 1989, the Government of Argentina undertook a program of privatization of State-owned companies, including in the gas transportation and distribution sectors. With a view to restructuring the Argentine economy, currency convertibility was introduced in 1991 and the Argentine peso was fixed at par with the United States dollar.

39. New rules governing gas transportation and distribution were introduced in 1992 by the Gas Law and the implementing regulations embodied in the Gas Decree. Two major transportation companies were created, one of which was Transportadora de Gas del Sur ("TGS").

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[2] *Azurix Corp. v. Argentine Republic*, ICSID Case No ARB/01/12 (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, September 1, 2009 ("*Azurix* Annulment Decision").

40. In order to facilitate the process of privatisation, a Standard Gas Transportation License or "Model Licence" was approved by Decree 2255/92 including the applicable Basic Rules; all such rules were embodied in the License actually signed by TGS and the Government of Argentina and approved by Decree 2458/92. An "Information Memorandum" concerning the privatization of Gas del Estado, the former State-owned transportation and distribution company, together with a "Pliego" explaining the bidding rules and the legal and contractual arrangements, were provided to prospective investors so as to organize the bidding process.

41. The Claimants' position was that in making the decision to invest in TGS upon its privatisation, they relied specifically on the conditions offered by these legislative and regulatory enactments, including the conditions that tariffs would be calculated in US dollars, that tariffs would be subject to semi-annual adjustment according to changes in the US Producer Price Index ("PPI" or "US PPI"), that there would be no price freeze applicable to the tariff system or that if one was imposed the licensee had a right to compensation, that the license would not be amended by the Government in full or part except with the prior consent of the licensee, that the licence would be for 35 years with the possibility of a 10-year extension, and that the license would not be withdrawn except in case of specific breaches.

42. The Claimants' investment in TGS following its privatisation evolved over time. Originally, in 1992, EPCA, an indirectly wholly-owned subsidiary of Enron, was a member of a consortium of four companies that was awarded 70% of the shares in TGS. In order to comply with the requirement that an Argentine company should hold the shares in TGS, the consortium incorporated an Argentine company ("CIESA") to hold this 70% shareholding in TGS. Each of the four members of the consortium acquired a 25% interest in CIESA, and consequently, through CIESA, an indirect 17.5% interest in TGS. Through a number of subsequent transactions involving the Claimants and related companies, there were changes in the percentage of TGS that represented the Claimants' investment and in the structure of that investment, and there was some disagreement between the parties in this respect.

43. Throughout the 1990s the regulatory system for the gas transportation sector operated without difficulties, with periodic modification of tariffs to reflect changes in the cost of natural gas and the adjustment of tariffs, both up and down, following the variations in the US PPI. A quinquiennial tariff revision was approved by ENARGAS, the government regulatory agency for the gas sector, for the period 1997-2002.

44. In late 1999, however, an economic, social and political crisis in Argentina evidenced its early symptoms. Following meetings between Government officials and industry representatives in late 1999 and early 2000, an agreement was signed in January 2000, postponing the PPI adjustment due on January 1, 2000, for six months, and providing that the deferred increase would be recovered with interest in the period 1 July 2000- 30 April 2001.

45. However, in July 2000, a second agreement suspended PPI adjustments for a further two years, from 1 July 2000 to 30 June 2002. This agreement provided that the differences would be placed in an interesting-bearing stabilization fund and that tariff increases would resume at the end of the suspension period, including recovery of the deficits originating in these arrangements.

46. Argentina's position was that these agreements were the outcome of genuine consent by the parties, while the Claimants asserted that licensees were pressured by the Government into giving their consent.

47. In August 2000, the Argentine Ombudsman ("*Defensor del Pueblo de la Nación*") obtained a judicial injunction suspending the second of these agreements. On the basis of this injunction, ENARGAS directed the licensees to suspend all PPI adjustments and rejected all requests for adjustment made thereafter. As a result, no PPI adjustments were made after 1999.

48. The economic crisis in Argentina continued to expand thereafter. On January 6, 2002, Argentina enacted Law No. 25.561, or the "Emergency Law", which has featured in many claims brought by foreign investors against Argentina.

49. The Emergency Law eliminated the right to calculate tariffs in US dollars, converting tariffs to pesos at the fixed rate of exchange of one dollar to one peso. In addition, the Emergency Law authorised the Government to devalue the peso, which a few days later was fixed at a new rate of exchange of 1.40 pesos per dollar for certain transactions (mainly banking transactions) and the free market rate for all other transactions. A month later, the free market rate applied to all transactions and PPI adjustments were definitely abolished.

50. The Emergency Law also directed the Government of Argentina to begin a renegotiation process of public utility contracts affected by these measures. Gradually the Government conditioned the right of participation in this process on the abandonment of all claims (by the Licensees or their shareholders), either totally or partially according to the nature of the claim, before local courts or arbitral tribunals. Various bodies in charge of renegotiation were set up over time and the deadlines established were regularly extended.

51. While the renegotiation process succeeded in respect of a number of public utility contracts and sectors, it made little progress in the gas transportation and distribution industry, and there was no negotiated settlement with TGS.

52. The Claimants' position was that these measures led to TGS being unable to secure international financing and led to a loss of revenue and decreased the value of the "regulated" business of TGS. The business of TGS consisted of both the "regulated" sector of gas transportation and the "non-regulated" sector of production of liquified natural gas (LNG). Argentina's position was that TGS must be considered as a business as a whole, that the revenues of the non-regulated sector in fact significantly increased in US dollars in the period 1993-2004, and that TGS benefited from the devaluation, since its costs were pesified while international prices increased at a time when TGS was the principal exporter of LNG in Argentina.

53. The Claimants maintained that the various measures complained of resulted in the violation of specific commitments made to the investors referred to in paragraph 41 above, which commitments had been determinative of the decision to invest in TGS. The Claimants maintained that the measures

complained of amounted to breaches of the guarantees provided under the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment[3] (the "BIT"), namely the guarantees that:

(a) each Party shall observe any obligation it may have entered into with regard to investments (Article II(2)(c) of the BIT);

(b) investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (Article IV(1) of the BIT);

(c) investments shall at all times be accorded fair and equitable treatment (Article II(2)(a) of the BIT);

(d) investments shall enjoy full protection and security (Article II(2)(a) of the BIT) (Article II(2)(b) of the BIT);

(e) neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.

54. The position of Argentina was principally based on the argument that the legal and regulatory framework governing the privatisation provided only for the right of the licensee to a fair and reasonable tariff and that the right to the calculation of the tariffs in US dollars was a feature that could last only as long as the Convertibility Law was in force, but not if this law was abandoned at some point in time.

55. Argentina also argued that if investors relied on the information conveyed by private consulting firms, such as that contained in the Information Memorandum, this could not be attributed to the Government which expressly disclaimed any responsibility for such information.

56. Argentina further argued that the Government had the duty to take into account the interests of the consumers in regulating a national public service

[3] Signed November 14, 1991; entered into force October 20, 1994.

such as the transportation of gas, a function which is within the ambit of discretionary Government powers.

57. Argentina additionally maintained that the Government's responsibility is excluded both under the Argentine legislation and jurisprudence on emergency, and under the rules of customary international law and BIT provisions governing the state of necessity.

58. The Tribunal ultimately found that Argentina had breached its obligations to accord the Claimants the fair and equitable treatment guaranteed in Article II(2)(a) of the BIT and to observe the obligations entered into with regard to the investment guaranteed in Article II(2)(c) of the BIT. The Tribunal awarded the Claimants compensation in the sum of USD 106.2 million.

59. Argentina now asks the Committee to annul this Award.

C. The grounds for annulment

(a) Introduction

60. Article 52(1) of the ICSID Convention provides as follows:

> *(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:*
> *(a) that the Tribunal was not properly constituted;*
> *(b) that the Tribunal has manifestly exceeded its powers;*
> *(c) that there was corruption on the part of a member of the Tribunal;*
> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
> *(e) that the award has failed to state the reasons on which it is based.*

61. Argentina identifies a number of matters which it claims are grounds for annulment, relating to the Tribunal's jurisdictional findings, to its findings relating to the applicable law, to its consideration of evidence, as well as to the Tribunal's calculation of the damages. Argentina relies on three of the five grounds of annulment provided for in the ICSID Convention, namely those

under sub-paragraphs (b), (d) and (e) of Article 52(1). Before addressing Argentina's grounds specific to the present case, the Committee first considers generally the role of an *ad hoc* committee in annulment proceedings and the scope of the grounds of annulment in the sub-paragraphs of Article 52(1) that are relied on by Argentina.

62. Applications for annulment have become an increasingly common feature in ICSID arbitration proceedings, and there is now a considerable body of case law on ICSID annulment proceedings. Two of the most recent annulment decisions are those given in the *MCI* case[4] and the *Azurix* case.[5] At the time of the oral hearing on Argentina's application for annulment in the present case, the decision on annulment in the *Azurix* case, in which Argentina was also the applicant for annulment, had not yet been given but was anticipated imminently. In the circumstances, both parties were given leave to file subsequent post-hearing written submissions on the *Azurix* Annulment Decision once it was given, and both parties filed such written submissions dated 1 October 2009.

(b) The role of an *ad hoc* annulment committee

63. An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention.[6] In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1).[7]

64. As was for instance stated in the *MTD* Annulment Decision, annulment has a limited function since a committee:

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4 *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No ARB/03/6 (Annulment Proceeding), Decision on Annulment, October 19, 2009 ("*MCI* Annulment Decision").
5 *Azurix* Annulment Decision.
6 ICSID Convention, Article 53(1).
7 *MCI* Annulment Decision ¶ 24; *Azurix* Annulment Decision ¶ 41.

> *… cannot substitute its determination on the merits for that of the Tribunal. Nor can it direct a Tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a* res judicata *but on a question of merits it cannot create a new one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in* Klöckner *and* AMCO.[8]

65. The Committee is also in agreement with the *MCI* Annulment Decision that:

> *... the role of an ad hoc committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. ... The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals. They are assisted in their task by the development of a common legal opinion and the progressive emergence of "*une jurisprudence constante*" ...*[9]

66. Notwithstanding this, in relation to matters which fall within the competence of an *ad hoc* committee to decide, it is in the Committee's view to be expected that the *ad hoc* committee will have regard to relevant previous ICSID awards and decisions, including other annulment decisions, as well as to other relevant persuasive authorities. Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term there should develop a *jurisprudence constante* in relation to annulment proceedings.[10]

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8 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007 ("*MTD* Annulment Decision") ¶ 54; quoted in *Azurix* Annulment Decision ¶ 42.

9 *MCI* Annulment Decision ¶ 24.

10 See for example *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, January 29, 2004 ("*SGS v. Philippines* Jurisdiction Decision") ¶ 97; *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, April 26, 2005 ("*AES* Jurisdiction Decision"), ¶ 33; *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, December 8, 2008 ("*Wintershall* Award"), ¶ 178; *MCI* Annulment Decision ¶ 24 (noting that the responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals rather than annulment committees).

(c) Manifest excess of powers (Article 52(1)(b))

67. This ground of annulment will exist where the Tribunal lacked jurisdiction, for instance because the dispute is not covered by the arbitration agreement. This ground of annulment may also exist where the tribunal disregards the applicable law or bases the award on a law other than the applicable law under Article 42 of the ICSID Convention.[11]

68. However, there is a distinction between *non-application* of the applicable law (which is a ground for annulment), and an *incorrect application* of the applicable law (which is not),[12] although this is a distinction that may not always be easy to draw.

69. Additionally, it is an express requirement of Article 52(1)(b) of the ICSID Convention that:

> *the error must be "manifest", not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rule is not enough.*[13]

The Committee agrees with the *Azurix* Annulment Decision that even in cases where it is claimed that the tribunal lacked jurisdiction, the *ad hoc* committee will annul the decision only where the tribunal has *manifestly* exceeded its power: in cases where there is any uncertainty or doubt as to whether or not a tribunal has jurisdiction, that question falls to be settled by the tribunal itself in exercise of its *compétence-compétence* under Article 41(1) of the ICSID Convention, and Article 52(1)(b) does not provide a mechanism for *de novo* consideration of, or an appeal against, a decision of a tribunal under Article 41(1) after the tribunal has given its award.[14]

(d) Serious departure from fundamental rule of procedure (Article 52(1)(d))

70. As was stated in the *Vivendi* Annulment Decision:

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11 *Azurix* Annulment Decision ¶¶ 45-46, 136, and the earlier case law there cited.

12 *MCI* Annulment Decision ¶ 42 and *Azurix* Annulment Decision ¶¶ 47-48, 137, and the earlier case law there cited.

13 *MTD* Annulment Decision ¶ 47 quoted in *Azurix* Annulment Decision ¶ 48; also *MCI* Annulment Decision ¶¶ 49, 51, 55; *Azurix* Annulment Decision ¶¶ 64-69.

14 *Azurix* Annulment Decision ¶¶ 63-68.

> *… [u]nder Article 52(1)(d), the emphasis is clearly on the term "rule of procedure," that is, on the manner in which the Tribunal proceeded, not on the content of its decision.*[15]

71. For this ground of annulment to be established, the rule of procedure in question must be "fundamental".[16] Furthermore, the departure from that rule of procedure must be "serious" in the sense that it "*must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed*",[17] or in the sense that it was "*such as to deprive a party of the benefit or protection which the rule was intended to provide*".[18]

(e) Failure to state reasons (Article 52(1)(e))

72. Failure to deal with *questions* submitted to the tribunal has been considered in the case law of annulment committees to be a failure to state reasons for purposes of this provision. On the other hand, while a tribunal has a duty to deal with each of the *questions* ("*pretensiones"*) submitted to it, it is not required to comment on all arguments of the parties in relation to each of those questions.[19]

73. Furthermore, even in cases where a tribunal has failed to deal with a question submitted to it, the appropriate remedy may not be an application for annulment, but rather, an application to the tribunal for a supplementary decision, pursuant to Article 49(2) of the ICSID Convention.[20]

74. It is generally accepted that this ground of annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons for its

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15 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002 ("*Vivendi* Annulment Decision") ¶ 83, quoted in *Azurix* Annulment Decision ¶ 49.

16 *Azurix* Annulment Decision ¶ 50; *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, December 22, 1989 ("*MINE* Annulment Decision") ¶¶ 5.05 and 5.06; *MTD* Annulment Decision ¶ 49.

17 *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, February 5, 2002 ("*Wena Hotels* Annulment Decision") ¶ 48; quoted in *Azurix* Annulment Decision ¶ 51.

18 *MINE* Annulment Decision ¶ 5.05; quoted in *Azurix* Annulment Decision ¶ 52.

19 *MCI* Annulment Decision ¶¶ 66-67.

20 *MCI* Annulment Decision ¶¶ 68-69.

decision on a particular question, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons. In the *MINE* Annulment Decision it was said that:

> *[T]he 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)…*
>
> *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. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.*[21]

75. Furthermore, the tribunal's reasons "*may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision*".[22]

76. The Committee agrees with the *ad hoc* committee in the *Vivendi* Annulment Decision, which stated that:

> *[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. … 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.*
>
> *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*

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21 *MINE* Annulment Decision ¶¶ 5.08-5.09, quoted in *Azurix* Annulment Decision ¶ 53.

22 *Wena Hotels* Annulment Decision ¶ 81, quoted in *Azurix* Annulment Decision ¶ 54; also *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007 ("*CMS* Annulment Decision") ¶ 127, quoted in *Azurix* Annulment Decision ¶56.

> *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 expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.*[23]

77. The Committee further agrees with the *ad hoc* committee in the *Wena Hotels* Annulment Decision, which considered that:

> *It is in the nature of this ground of annulment that in case the award suffers from a lack of reasons which can be challenged within the meaning and scope of Article 52(1)(e), the remedy need not be the annulment of the award. The purpose of this particular ground for annulment is not to have the award reversed on its merits. It is to allow the parties to understand the Tribunal's decision. If the award does not meet the minimal requirement as to the reasons given by the Tribunal, it does not necessarily need to be resubmitted to a new Tribunal. If the ad hoc committee so concludes, on the basis of the knowledge it has received upon the dispute, the reasons supporting the Tribunal's conclusions can be explained by the ad hoc Committee itself.*[24]

D. Indirect claims

(a) Background

78. Proceedings were originally commenced in this case by a request for arbitration received by the Centre from the Claimants on February 26, 2001. That request for arbitration concerned a claim different to the one addressed in the Award, namely that the imposition of stamp taxes by certain Argentine provinces on operations of TGS violated the BIT.[25] This original claim is referred to below as the "Stamp Tax claim".

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23 *Vivendi* Annulment Decision ¶¶ 64-65, quoted in *Azurix* Annulment Decision ¶ 55.

24 *Wena Hotels* Annulment Decision ¶ 83, quoted in *Azurix* Annulment Decision ¶ 54.

25 *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction, January 14, 2004 ("First Jurisdiction Decision") ¶¶ 1, 25; *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No ARB/01/3, Decision on Jurisdiction (Ancillary Claim), August 2, 2004 ("Second Jurisdiction Decision") ¶ 8; Award ¶ 4.

79. On January 15, 2003, Argentina raised objections to the jurisdiction of the Centre and the competence of the Tribunal in respect of the Stamp Tax claim.[26] Argentina contended *inter alia* that the claim was inadmissible on the ground that the Claimants did not have the rights upon which they based their claim, as the measures complained of directly affected only TGS, a corporation incorporated in Argentina, and that the Claimants were only indirectly affected as minority shareholders in TGS.[27]

80. On March 25, 2003, the Claimants then filed before the Centre a new request for arbitration against Argentina.[28] On April 25, 2003, the Tribunal decided to accept this new request for arbitration as a claim ancillary to the Stamp Tax claim and to have both cases proceed on separate tracks until the Tribunal has decided on jurisdiction in respect of both claims.[29] Although the new claim was originally referred to as the "ancillary claim", it was this claim which was ultimately the subject of the Award.

81. Argentina also filed jurisdictional objections in relation to the ancillary claim. Argentina argued *inter alia* that the Claimants lacked *ius standi* because the dispute concerned contractual rights that appertained to TGS and not the Claimants, that an indirect claim such as that asserted by the Claimants was in violation of Article 25(2)(b) of the ICSID Convention and that the dispute did not arise directly out of an investment as required by Article 25(1) of the ICSID Convention.[30]

82. On January 14, 2004, the Tribunal rendered a decision confirming its jurisdiction in respect of the Stamp Tax claim (the "First Jurisdiction Decision").[31] Subsequently, on August 2, 2004, the Tribunal gave a decision affirming its jurisdiction in respect of the ancillary claim (the "Second Jurisdiction Decision").[32]

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26 First Jurisdiction Decision ¶ 13.
27 First Jurisdiction Decision ¶ 34.
28 First Jurisdiction Decision ¶ 16; Second Jurisdiction Decision ¶ 1; Award ¶¶ 5-6.
29 First Jurisdiction Decision ¶ 17; Second Jurisdiction Decision ¶ 4; Award ¶ 5-6.
30 Second Jurisdiction Decision ¶ 14.
31 First Jurisdiction Decision.
32 Second Jurisdiction Decision.

83. On December 8, 2005, the Tribunal issued a procedural order embodying the parties' agreement on the discontinuance of the Stamp Tax claim.[33] As noted above, the Tribunal subsequently produced the Award dealing with the ancillary claim which Argentina now seeks to have annulled.

84. Argentina seeks annulment of the Award:

(a) under Article 52(1)(e) of the ICSID Convention, on the ground that the Tribunal failed to state reasons for its conclusion that the Claimants could bring a claim in respect of alleged violations of rights which belonged not to them, but to TGS;[34]

(b) under Article 52(1)(b) of the ICSID Convention, on the ground that the Tribunal exceeded manifestly its powers in exercising jurisdiction over the Claimants' claims, all of which are grounded on alleged interference with rights under the License, which did not confer any rights on the Claimants and to which TGS, rather than the Claimants, was a party.[35]

(b) Arguments of the parties

85. Argentina argues, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

(a) While an investment in shares is protected under the BIT and shareholders have an independent claim from that of the company if events affect their rights *as shareholders*, and while the Claimants are thus protected investors under the BIT and their investment in TGS is thus a protected investment, the Claimants cannot as shareholders

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33 Award ¶ 32.

34 The Committee notes that this ground of annulment does not appear to be contained in Argentina's Application for Annulment. However, as the Claimants have not objected on that basis and have made submissions in response to this ground of annulment, the Committee has considered and decided it.

35 Application for Annulment ¶¶ 24-29.

pursue an individual action against third parties as a result of a claimed violation of rights that did not belong to them but to TGS.

(b) In the First Jurisdiction Decision, the Tribunal failed to analyze this issue.

(c) The Second Jurisdiction Decision also failed to resolve the issue, arguing that such issue had already been discussed in the First Jurisdiction Decision.[36]

(d) In the Award, the Tribunal stated that this issue had already been solved in its decisions on jurisdiction,[37] when in fact this was not the case.[38] When determining Argentina's responsibility, the Tribunal only referred to the rights of TGS under the Licence.[39]

(e) The Tribunal also did not deal with Argentina's argument based on Article 25(2)(b) of the ICSID Convention, and the Tribunal did not eliminate or resolve the issue of multiple claims.

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

(f) A tribunal's partial or total lack of jurisdiction is an "excess of powers" under Article 52(1)(b),[40] and an excess of powers is always "manifest" if it relates to matters of jurisdiction.[41]

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36 Referring to Second Jurisdiction Decision ¶ 15.

37 Referring to Award ¶¶ 152, 211 and 241.

38 Referring to Second Decision on Jurisdiction ¶¶ 27-32; First Decision on Jurisdiction ¶¶ 44-46.

39 Referring to Award ¶¶ 88, 103, 106, 166, 265-266, 275-276, 375, 378, 389, 402, 403, 438-439.

40 Relying on *Klöckner Industrie-Anlagen GmbH et al v. United Republic of Cameroon & Société Camerounaise des Engrais*, Decision on Annulment, May 3, 1985 ("*Klöckner* Annulment Decision"), ¶ 4; *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007 ("*Soufraki* Annulment Decision"), ¶ 37; *Industria Nacional de Alimentos, S.A. & Indalsa Perú, S.A. v. Republic of Peru,* ICSID Case No. ARB/03/4, Decision on Annulment, September 5, 2007 ("*Lucchetti* Annulment Decision"), ¶¶ 99-100; Christoph Schreuer, "Three Generations of ICSID Annulment Proceedings", in *Annulment of ICSID Awards* (Emmanuel Gaillard & Yas Banifatemi eds., 2004) at 17, 25.

41 Relying on Björn Pirrwitz, "Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other

(g) The Tribunal did not have jurisdiction over this case because the Claimants were requesting damages for alleged violations of rights that did not belong to them but to TGS. The legal and contractual rights of TGS, including the rights of TGS under the Licence were not indirectly controlled by the Claimants, and therefore neither TGS, nor its assets, nor its legal and contractual rights, are investments of the Claimants under Article I(1)(a) of the Treaty. The Claimants' investment in Argentina only consisted of their indirect non-controlling shareholding in TGS. The Claimants were not entitled to bring ICSID proceedings in respect of alleged violations of the rights of TGS, but only in respect of alleged violations of the BIT in respect of their own investment, *i.e.* their indirect non-controlling shareholding in TGS.

(h) Neither general international law nor the BIT defines shareholder rights, and domestic law (the *lex societatis*) must be resorted to in order to establish which rights a shareholder has.[42] All legal systems draw a distinction between the corporation and its shareholders, and "corporate identity" is only disregarded when it has been used for fraudulent purposes.[43]

(i) It is wrong to reject the application of the *Barcelona Traction* case to investment treaty arbitrations, since if an investment treaty is silent on

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States", 23 *Texas International Law Journal* 73, 99- 100; *Vivendi* Annulment Decision ¶ 72; *Lucchetti* Annulment Decision ¶ 99.

42 Relying on *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 3 (the "*Barcelona Traction* case"), 37.

43 Referring to *Prudential Assurance Co v. Newman Industries* [1982] Ch 204, 224; *American Law Institute,* 2 Principles of Corporate Governance § 7.01 (1994); *Bramelid and Malmström v. Sweden*, Requests No 8588/79 and 8589/79, 5 Eur. Ct. H.R. Rep. 249 (1983); *Agrotexim and others v. Greece*, 1995 Eur. Ct. H.R. 42, ¶¶ 64-66; *Samardžić and Ad Plastika v. Serbia*, 2007 Eur. Ct. H.R. 830, ¶¶ 30-32; *Teliga and others v. Ukraine*, 2006 Eur. Ct. H.R. 1465, ¶ 87; *Bulinwar Ood and Hrusanov v. Bulgaria*, 2007 Eur. Ct. H.R. 355, ¶ 27; *Terem Ltd, Chechetkin and Olius v. Ukraine*, European Court of Human Rights, Judgment of 18 October 2005, ¶¶ 28-30; *'Iza' Ltd and Makrakhidze v. Georgia*, 2005 Eur. Ct. H.R. 641, ¶¶ 28-30; *Amat-G Ltd and Mebaghishvili v. Georgia*, 2005 Eur. Ct. H.R. 639, ¶¶ 32-34; *Tadeusz Olczak v. Poland*, European Court of Human Rights, Decision on Admissibility of 7 November 2002, ¶ 59.

the issue of indirect claims,[44] the matter should be resolved by reference to general principles of international law.

(j) If shareholders were allowed to sue and to obtain compensation for the infringement of rights of the corporation, problems would arise, including the risk of double recovery, if the corporation filed its own claims before the national courts of the host State or if the corporation came to an agreement with the host State, or if the corporation had creditors or had to pay local taxes for the amounts obtained as a result of the litigation. The Tribunal did not resolve this issue on the basis of legal provisions,[45] as it was obliged to, but relied upon equity considerations, which amounts to a manifest excess of its powers.[46]

(k) The Tribunal's conclusion that a shareholder may claim directly for measures that affected the rights of the company leaves Article 25(2)(b) of the ICSID Convention with no *effet utile*, contrary to what had been negotiated by the States in drafting the Convention.[47]

(l) Even if the BIT allowed the filing of indirect claims, such claims would not be admissible in ICSID proceedings as the "outer limits" of ICSID jurisdiction are set forth in Article 25 of the ICSID Convention and "are not subject to the parties' disposition".

(m) The Claimants are in fact indirect shareholders of TGS, increasing the risk of double recovery, since different shareholders in different positions of the shareholding chain might make simultaneous claims. The Tribunal's solution to this problem, to require a claiming shareholder to have been "invited by the Government ... to participate in the investment",[48] is not supported by domestic, international, or any

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44 Argentina argues that the BIT and ICSID Convention can be contrasted with certain other treaties which do expressly provide such claims by shareholders in respect of rights of the company, referring to North American Free Trade Agreement, 17 November 1992, Art. 1117; US–Chile Free Trade Agreement, 6 June 2003, Art. 10.25(2).

45 Referring to Award ¶ 212.

46 Referring *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment, November 1, 2006 ("*Mitchell* Annulment Decision"), ¶ 46.

47 Referring to Christoph Schreuer, *The ICSID Convention: A Commentary* (2001) ("Schreuer Commentary") at 290-291.

48 Referring to First Jurisdiction Decision ¶ 54.

other law, and is uncertain. The Tribunal invented a rule that is not part of the applicable law and that does not resolve the problem of multiple claims.[49] The *Azurix* case is distinguishable since the Claimants in the present case did not and do not have a controlling shareholding in the local company.

(n) If the Tribunal considered that the Claimants could claim for the damage to their indirect shareholding in TGS, it could not simultaneously distinguish between TGS's regulated and unregulated activities. The Tribunal failed to provide any grounds for its decision to consider only regulated activities.

(o) Argentina has successfully renegotiated public utility contracts in a number of sectors, and TGS is renegotiating the terms of its License with the Argentine Government, but decisions such as the Award have increased transaction costs and are impeding the renegotiation process.

(p) Any future increase of TGS's tariffs would necessarily entail a double recovery.

86. The Claimants argue, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

(a) In the First Jurisdiction Decision, the Tribunal specifically adopted the reasoning of other tribunals when evaluating whether a shareholder could assert claims independently of the local company, rather than regurgitating the same words that numerous other tribunals had already used.[50] The Tribunal never treated those decisions as binding,

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[49] Referring to *Hrvatska Elektroprivreda, d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24, Individual Opinion of Jan Paulsson attached to the Decision on the Treaty Interpretation Issue, June 8, 2009; *Wintershall* Award ¶ 185.

[50] Referring to First Jurisdiction Decision ¶ 37, citing *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, July 17, 2003 ("*CMS* Jurisdiction Decision"), ¶¶ 42-45, 54-46, 87-88; *Lanco International, Inc. v. Argentine Republic*,

but adopted their reasoning, which the Tribunal was entitled to do. The Tribunal also examined the language of the BIT,[51] and considered and rejected Argentina's argument that a shareholder may only assert claims to the extent that its rights *qua* shareholder were affected,[52] Argentina's arguments based on the *Barcelona Traction* case[53] and Argentina's arguments concerning minority shareholders.[54]

(b) There was no need for the Second Decision on Jurisdiction to repeat the reasoning included in the First Decision on Jurisdiction.

(c) The Tribunal was not required to determine the extent to which the Claimants could file a claim under the License instead of the BIT, but in any event, the Tribunal did examine the difference between a BIT claim and a contract claim.[55]

(d) Since the Claimants did not assert claims for breach of contract, it was not necessary for the Tribunal to make such a determination. The Tribunal's finding that Argentina breached the BIT was not based upon breaches of the License, although this was certainly a factor in the Tribunal's analysis of Argentina's overall conduct relative to the BIT standards.

(e) The Tribunal was not required to address Argentina's arguments concerning the hypothetical risk of double recovery, but in any event, did address this issue.[56]

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

(f) The dispute before the Tribunal was not for breach of contractual rights belonging to TGS but for damages arising from Argentina's violations of

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ICSID Case No. ARB/97/6, Preliminary Decision on Jurisdiction, December 8, 1998 ("*Lanco* Jurisdiction Decision"), ¶¶ 9-11.

51 Referring to First Jurisdiction Decision ¶ 39.

52 Referring to First Jurisdiction Decision ¶ 37-40, 49.

53 Referring to First Jurisdiction Decision ¶¶ 46-47.

54 Referring to First Jurisdiction Decision ¶¶ 44, 49.

55 Referring to Second Jurisdiction Decision ¶¶ 49-50.

56 Referring to Award ¶ 212.

the BIT and the resulting harm to the Claimants' investment in TGS. It is immaterial that TGS might have had its own claims against Argentina.

(g) Because Article 25 does not define "investment," that task was "left largely to the terms of bilateral investment treaties or other instruments on which jurisdiction is based." The Tribunal evaluated Claimants' investment and determined that it satisfied the definition of "investment" under the BIT, which the Tribunal found includes "the channelling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina".[57]

(h) The Tribunal's decision is consistent with more than 22 other ICSID cases, where the tribunals have unanimously found jurisdiction to exist in the same or similar circumstances.[58] Argentina cites no relevant

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[57] Referring to Second Decision on Jurisdiction ¶ 30.

[58] Referring to *CMS* Jurisdiction Decision ¶¶ 43-65; *CMS* Annulment Decision ¶¶ 68-76; *AES* Jurisdiction Decision ¶¶ 85-89; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Objections to Jurisdiction, April 30, 2004 ("*LG&E* Jurisdiction Decision"), ¶¶ 50, 63; *Lanco* Jurisdiction Decision ¶¶ 9-10; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, December 8, 2003 ("*Azurix* Jurisdiction Decision"), ¶¶ 65-66; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, August 26, 2006 ("*Total* Jurisdiction Decision"), ¶¶ 67-76; Second Jurisdiction Decision; First Jurisdiction Decision; *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9. Decision on Jurisdiction, 22 February 2006 ("*Continental Casualty* Jurisdiction Decision"), ¶¶ 51-54, 76-89; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10. Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005 ¶¶ 32-35, 50-52; *Camuzzi International S.A. v. Argentine Republic*, ICSID Case No. ARB/03/2. Decision on Objections to Jurisdiction, May 11, 2005 ("*Camuzzi* Jurisdiction Decision"), ¶¶ 12, 78-82, 140-145; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3. Decision on Jurisdiction, 14 November 2005 ("*Vivendi II* Jurisdiction Decision"), ¶¶ 46-50; *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16. Decision on Objections to Jurisdiction, May 11, 2005 ("*Sempra* Jurisdiction Decision"), ¶¶ 90-102; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8. Decision on Jurisdiction, August 3, 2004 ("*Siemens* Jurisdiction Decision") ¶¶ 125, 135-44; *Maffezini v. Kingdom of Spain,* ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000 ¶¶ 65-70; *American Manufacturing and Trading, Inc. v. Republic of Zaire,* ICSID Case No. ARB/93/1, Award, February 21, 1997 ("*AMT* Award"), ¶¶ 5.14-5.16; *CME Czech Republic B.V. (The Netherlands) v. Czech Republic*, UNCITRAL arbitration proceedings, Partial Award, September 13, 2001 ("*CME* Partial Award"), ¶¶ 375 et seq.; *Goetz v. Republic of Burundi,* ICSID Case No. ARB/95/3. Award, February 10, 1999 ("*Goetz* Award"), ¶¶ 35-36; *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic,* ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶¶ 209-22; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990¶¶ 3, 86; *Gami Investments, Inc v.*

authority to show that the Tribunal could not accept jurisdiction in this case.

(i) The *Barcelona Traction* case does not require that domestic law regarding corporations be transplanted to cases involving indirect claims under a BIT. The *Barcelona Traction* case, in which no investment treaty was involved, itself recognized the developments occurring in international law on investment protection, especially investment protection treaties, which may accord direct protection to shareholders.[59]

(j) The BIT, as *lex specialis*, specifically allows shareholders to assert an action for damage caused by violations of the BIT by explicitly defining "investments" to include those "owned directly or *indirectly*" and listing "a company" and "shares in a company" as well as "rights conferred by law or contract".[60]

(k) Governments often require foreign investors to make their investment in a project through a locally-incorporated company, at times with other shareholders such as local nationals, and foreign investors would have no real protection under BITs and international law if they could not bring a BIT action for damages to their investment.[61]

Government of the United Mexican States, NAFTA Chapter 11/UNCITRAL Arbitration Rules, Final Award, November 15, 2004, ¶¶ 26-33; *Alex Genin et al. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, June 25, 2001 ("*Genin* Award"), ¶¶ 319-29; *Waste Management, Inc. v. United Mexican States,* **ICSID** Case N° ARB(AF)/00/3, Award, April 30, 2004, ¶¶ 79-85; *El Paso Energy International Company v. Argentine Republic,* ICSID Case No. ARB/03/15, Decision on Jurisdiction, April 27, 2006 ("*El Paso* Jurisdiction Decision"), ¶¶ 97-100.

59 Referring to *Barcelona Traction* case ¶ 90.

60 Referring to BIT, Article 1.

61 Referring to Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* (1992) at 45-46 § 4.01; Pamela B. Gann, "The U.S. Bilateral Investment Treaty Program", (1985) 21 *Stanford J. Int'l L.* 373; Scott Gudgeon, "United States Bilateral Investments Treatises: Comments on Their Origin, Purposes, and General Treatment Standards"*,* (1986) 4 *Int'l Tax & Bus. Law* 105, 114–15; Francisco Orrego Vicuña, "Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement", (2000) 15 *ICSID Rev.—Foreign Inv. L.J.* 340, 359; Rudolph Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2008), at 56-57; Campbell McLachlan, "Investment Treaties and General International Law", 57 *I.C.L.Q.* 361, 361-62.

(l) It is not the case that, since neither investment treaties nor international law regulate the rights of shareholders, rights related to shares in a corporation must be determined by reference to domestic law.[62]

(m) The *Barcelona Traction* case has been heavily criticised.[63]

(n) The case law of the European Court of Human Rights relied upon by Argentina is irrelevant to this case because the BIT provides protection for both direct and indirect rights, because the European Court decisions are limited to the *lex specialis* regime of the European Court, and because the European Court has a pronounced policy of deferring to municipal law. By contrast, no such rule of deference to municipal law or harmonization is contained in either the BIT or the ICSID Convention.

(o) Argentina's acts and omissions may amount to both violations of the BIT and breaches of the License, but Claimants are not barred from bringing their own BIT claims simply because Argentina's acts and omissions also breached the License.[64] The claims made against Argentina were not contractual claims relating to the License; they were claims for Argentina's specific violations of the BIT, and are therefore not correctly described as "indirect claims".[65]

(p) The Tribunal did not base its decision to allow the Claimants' claims to proceed on the fact that Argentina invited the Claimants to invest but on the text of the BIT.

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62 Referring to *CMS* Jurisdiction Decision ¶ 48; *Azurix* Jurisdiction Decision ¶ 73.

63 Referring to Richard B. Lillich, "Two Perspectives on the Barcelona Traction Case: The Rigidity of Barcelona", (1971) 65 *A.J.I.L.* 522, 523-26; Rosalyn Higgins, "Aspects of the Case Concerning the Barcelona Traction, Light and Power Company, Ltd.", (1970) 11 *Va. J.I.L.* 327, 331, 333.

64 Referring to *CMS* Jurisdiction Decision ¶¶ 65-68; *LG&E* Jurisdiction Decision ¶¶ 48-63; *Lanco* Jurisdiction Decision ¶¶ 10-11; *Total* Jurisdiction Decision ¶¶ 68-69, 80; *Azurix* Jurisdiction Decision ¶ 76; *Continental Casualty* Jurisdiction Decision ¶¶ 85-86; *Camuzzi* Jurisdiction Decision ¶ 83; *Vivendi II* Jurisdiction Decision ¶¶ 112-113; *Sempra* Jurisdiction Decision ¶ 95; *Siemens* Jurisdiction Decision ¶¶ 180-83.

65 Referring to *Total* Jurisdiction Decision ¶ 81.

(q) Article 25(2)(b) of the ICSID Convention is not applicable in the current case because TGS was not a party to the arbitration, and the Tribunal therefore rightly concluded that Article 25(2)(b) was irrelevant.[66]

(c) Failure of the award to state the reasons on which it is based as a ground of annulment under Article 52(1)(e) of the ICSID Convention: the Committee's views

87. As the Tribunal stated, its two decisions on objections to jurisdiction are part of the Award,[67] and the Committee considers that all three must be considered as a whole.

88. At paragraph 152 of the Award, the Tribunal referred to:

> *... a jurisdictional argument which the Respondent has reiterated in the pleadings on the merits to the effect that the investors are not the licensees and, therefore, cannot invoke the terms of a contract to which they are not parties. The Tribunal has dealt with this question in its Decision on Jurisdiction.*

This reference to the "Decision on Jurisdiction" must be a reference to the Second Jurisdiction Decision, which concerned jurisdiction over the "ancillary claim", which was the subject of the Award.

89. In paragraph 14 of the Second Jurisdiction Decision, the Tribunal noted that Argentina had raised five jurisdictional objections. It is the first three of these that are relevant to Argentina's present ground of annulment dealing with "indirect claims". (The fourth jurisdictional objection, relating to the forum selection clause in the Licence is the subject of consideration in paragraphs 128-150 below, while the fifth jurisdictional objection, that the dispute had already been submitted to the local courts of Argentina, is not relevant to the present annulment proceedings.)

90. The first jurisdictional objection of Argentina was that the Claimants lacked *ius standi* because the dispute concerned contractual rights that appertained to

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66 Referring to Second Decision on Jurisdiction ¶¶ 42-46; *CMS* Jurisdiction Decision ¶ 51; *CMS* Annulment Decision ¶ 74.

67 Award ¶ 3.

TGS and not the Claimants, and that therefore only TGS was entitled to bring such claims.[68] The second jurisdictional objection was that an indirect claim such as that asserted by the Claimants was in violation of Article 25(2)(b) of the Convention, and the third was that the dispute did not arise directly out of an investment as required by Article 25(1) of the Convention.[69]

91. At paragraph 15 of the Second Jurisdiction Decision, the Tribunal said that:

> *Since these arguments have already been discussed in the Stamp Tax Decision* [that is, the First Jurisdiction Decision]*, and the situation in respect of this dispute is not different, the Tribunal will address them briefly and devote more attention to certain aspects that the Argentine Republic has emphasized in respect of this particular dispute.*

92. The Tribunal described the parties' positions on the first three jurisdictional objections in paragraphs 16-22 of the Second Jurisdiction Decision, and the Tribunal gave its decision and reasons in paragraphs 25-52.

93. At paragraph 25, the Tribunal said that although decisions of other ICSID tribunals are not binding precedents, "*the conclusions of the Tribunal follow the same line of reasoning, not because there might be a compulsory precedent but because the circumstances of the various cases are comparable, and in some respects identical*".

94. Contrary to what Argentina has argued in the present annulment proceedings, the Committee considers that there is no reason why a tribunal cannot state sufficient reasons for its decision by referring to, and expressing agreement with, the reasoning in a previous ICSID case, or indeed, the reasoning in any other arbitration or judicial decision, or for that matter the reasoning in a commentary or publication or in any other source. Where a tribunal does so, the Committee sees no reason why the tribunal must itself repeat at length the reasoning contained in that other source. There is nothing to prevent a tribunal from agreeing with, and incorporating by reference as its own, reasoning found in any other source, provided that it is ultimately sufficiently clear what are the tribunal's reasons. The fact that a prior decision or other

[68] Second Jurisdiction Decision ¶¶ 14, 16 and 17.
[69] Second Jurisdiction Decision ¶ 14.

source is not binding on the tribunal in no way prevents the reasoning in it from being adopted by the tribunal as its own, if the tribunal upon its own consideration finds that reasoning to be correct.

95. There are no rigid or formulaic requirements as to the form or method by which a tribunal must state its reasons. The question will always be whether, in a given case, the tribunal's reasons are sufficiently capable of being discerned such as to satisfy the standard of Article 52(1)(e) of the ICSID Convention, as elaborated in paragraphs 72-77 above. In some cases, where a tribunal says no more than that it reaches a particular conclusion for the reasons given in a previous similar but not identical case, the basis of the tribunal's decision may in all the circumstances be sufficiently apparent. In other cases it may not. Provided that the tribunal's own reasons are sufficiently apparent, it is not necessary for a tribunal in adopting the reasoning of the earlier decision to distinguish specifically between those passages in the earlier decision that it adopts as its own reasoning, and those passages in the earlier decision that it considers inapplicable to its own decision.

96. At paragraph 26 of the Second Jurisdiction Decision, the Tribunal said that it could have relied on its jurisdictional findings in the First Jurisdiction Decision, that it nonetheless examined anew the jurisdictional arguments of the parties, but that "*The parties have not really made any new argument in this respect and, therefore, the Tribunal sees no basis for changing any of the conclusions already reached in the Stamp Tax Claim*". The Committee's views in the previous paragraph apply *mutandis mutatis* to the circumstance where a tribunal adopts its own reasoning in a previous decision in the case dealing with another matter that is similar but not identical.

97. At paragraph 27 of the Second Jurisdiction Decision, the Tribunal then said that:

> *It follows that the Tribunal is persuaded that again in this case the Claimants have* ius standi *to claim in their own right as they are protected investors under the Treaty. The Claimants' right to bring an action on their own has been firmly established in the Treaty and there are no reasons to*

> *hold otherwise in connection with this dispute. Neither is this situation contrary to international law or to ICSID practice and decisions.*

At the end of the first sentence of this paragraph there is a footnote reference to paragraphs 62-63 of the *Azurix* Jurisdiction Decision.

98. In the subsequent paragraphs of the Second Jurisdiction Decision, the Tribunal sets out additional reasoning, considering and rejecting certain specific arguments of Argentina.

99. The Committee considers it clear from paragraphs 26 and 27 of the Second Jurisdiction Decision that the Tribunal rejected Argentina's argument concerning indirect claims for the same reason that similar arguments were rejected in the First Jurisdiction Decision and in certain prior ICSID decisions. In paragraphs 26 and 27 of the Second Jurisdiction Decision the Tribunal did not specify what were the relevant prior ICSID decisions (other than the *Azurix* Jurisdiction Decision) but it is similarly apparent that the Tribunal was referring to prior ICSID decisions to which the First Jurisdiction Decision referred and with which it agreed.

100. In the First Jurisdiction Decision, the argument of Argentina is described by the Tribunal at paragraphs 34-37. At paragraphs 38-39 it said that "*for the sake of brevity*" it would not repeat "*The reasoning supporting the ... holdings*" in other ICSID cases on a range of identified questions relevant to Argentina's argument. Some of the other decisions in question are cited in footnotes 7 and 8 of the decision.[70] From paragraph 24 of the decision and accompanying footnote reference 3, it is furthermore apparent that the prior decisions relied upon included, in addition to the *Lanco* Jurisdiction Decision and *CMS* Jurisdiction Decision,[71] the *Vivendi* Award and *Vivendi* Annulment Decision. At paragraph 40 the Tribunal noted that while those prior decisions were not

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[70] These decisions being *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, June 27, 1990; *AMT* Award; *Goetz* Award; *Lanco* Jurisdiction Decision; *Genin* Award; *Compañía de Aguas del Aconquija S.A. v. Argentine Republic,* ICSID Case No. ARB/97/3, Award, November 21, 2000; *Vivendi* Annulment Decision. Also *CME* Partial Award; *CMS* Jurisdiction Decision.

[71] Which were cited in paragraph 38 of the First Jurisdiction Decision: see previous footnote.

binding, the Tribunal "*believes that in essence the conclusions and reasons of those decisions are correct*".

101. The Tribunal then stated at paragraph 39, as a general proposition, that:

> *It is sufficient for the purpose of the present case to emphasize that there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.*

A statement of this proposition supported by reasons is contained in the *CMS* Jurisdiction Decision at paragraphs 43-48. The Committee is satisfied that those paragraphs in the *CMS* Jurisdiction Decision provide sufficient reasons for that general conclusion.

102. The Tribunal then proceeded to consider whether the particular BIT with which this case was concerned did in fact have this effect of permitting BIT claims by minority shareholders.[72]

103. The Tribunal began by noting that "*As the ICSID Convention did not attempt to define 'investment', this task was left largely to the parties to bilateral investment treaties or other expressions of consent*", and the Tribunal turned to the definition of "investment" in Article I(1) of the BIT as the relevant definition for the purposes of this case.[73] The Committee cannot fault the Tribunal's approach in this respect.[74]

104. Looking at the definition in Article 1(1) of the BIT, the Tribunal found that it was very broad, that "*this definition does not exclude claims by minority or non-controlling shareholders*", and that there was not "*anything unreasonable in this definition that would make it incompatible with the object and purpose*

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[72] See First Jurisdiction Decision ¶ 41 ("*The Tribunal will accordingly discuss with particular attention the situation of these claims under the Bilateral Investment Treaty in view of the existence of facts that are specific to this particular case*").

[73] First Jurisdiction Decision ¶ 42.

[74] See, for instance, Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, International Bank for Reconstruction and Development, March 18, 1965: "*No attempt was made to define the term 'investment' given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25(4))*".

of the ICSID Convention".[75] The Tribunal then proceeded to reject a number of specific arguments of Argentina that were said to militate against this conclusion.[76] The Tribunal ultimately concluded that "*the claim in the present case is admissible under the Bilateral Investment Treaty or, stated in another way, that the Claimants have* jus standi *under this Treaty in their capacity as protected investors*".[77]

105. In brief, the reasoning of the Tribunal in the First Jurisdiction Decision could be summarised as being that under customary international law and the ICSID Convention it is possible for a BIT to confer on shareholders the right to bring a claim of the kind brought by the Claimants in the present case, that the plain wording of Article 1 of the BIT would allow such a claim in the present case, and that the Tribunal did not accept any of Argentina's arguments for giving the BIT a more restrictive interpretation.

106. Similar reasoning is, in effect, stated again in the Second Jurisdiction Decision. In this latter decision, the Tribunal found that the broad definition of "investment" in Article I(1) of the BIT would allow the type of claim brought in the present case,[78] and that such an interpretation was consistent with the treaty interpretation rules in the Vienna Convention on the Law of Treaties,[79] and the Tribunal then went on to deal with and reject certain arguments of Argentina for giving the BIT a more restrictive interpretation.[80]

107. The Committee considers that when the Second Jurisdiction Decision is read in the light of the First Jurisdiction Decision, and in particular in the light of the other ICSID decisions with the reasoning of which the Tribunal expresses agreement, its reasoning is enough that it "*enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion*".[81] The specific argument raised by Argentina was materially similar to an argument that had been raised and rejected in previous ICSID cases, with the

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75 See First Jurisdiction Decision ¶¶ 42-44.
76 See First Jurisdiction Decision ¶¶ 45-56.
77 See First Jurisdiction Decision ¶ 57.
78 See Second Jurisdiction Decision ¶¶ 29-31.
79 Vienna Convention on the Law of Treaties, Vienna, May 23, 1969; 1155 U.N.T.S. 331 ("Vienna Convention"). See Second Jurisdiction Decision ¶ 32.
80 See Second Jurisdiction Decision ¶¶ 33 *et seq*.
81 See paragraph 74 above.

reasoning of which the Tribunal expressly agreed. Those previous cases included the *CMS* Jurisdiction Decision and *Azurix* Jurisdiction Decision, both of which involved the very same BIT (albeit in the latter case, the claimant was a majority shareholder). Argentina has not established that the reasoning in this body of prior ICSID case law was insufficient or contradictory. The Committee is simply not persuaded that the Tribunal committed an annullable error by failing to provide greater reasoning than it did.

108. Argentina claims that the Tribunal did not address the issue of "which rights a shareholder may claim for", and therefore did not address Argentina's argument that while a shareholder may be able to claim for alleged violations of his or her rights *qua* shareholder, a shareholder cannot claim for alleged violations of rights belonging, not to the shareholder, but to the company.

109. The Committee considers it clear from paragraph 34 of the First Jurisdiction Decision, and from paragraph 17 of the Second Jurisdiction Decision, that the Tribunal clearly understood that this was the argument of Argentina. It is also clear from paragraph 35 of the First Jurisdiction Decision, and from paragraph 18 of the Second Jurisdiction Decision, that the Tribunal understood that the Claimants' answer to this argument was that they were "not claiming for or on behalf of TGS, but in their own right as United States investors with investments qualifying under the Treaty". The Committee considers it abundantly clear from the Tribunal's findings in the First Jurisdiction Decision at paragraphs 42, 44 and 49-65, and in the Second Jurisdiction Decision at paragraphs 28, 30-31 and 34, that the Tribunal accepted the argument of the Claimants in this respect, and that the Tribunal consciously rejected the argument of Argentina that the Claimants could only claim in respect of their rights *qua* minority shareholders in TGS.

110. In its submissions before this Committee, Argentina has argued that the Tribunal failed to deal with various specific issues and arguments raised in Argentina's pleadings before the Tribunal. However, the Tribunal was not required to comment on all arguments of the parties in relation to this issue.[82] The Committee recalls the standard of review on annulment in relation to an

[82] See paragraph 72 above.

alleged failure by the Tribunal to state reasons for its decision.[83] The Committee finds that it cannot be said that the Tribunal's reasoning was frivolous, and it is not for the Committee to determine whether the Tribunal's reasoning was convincing or correct. It is not the role of an annulment committee to examine meticulously the reasoning of the tribunal on a given issue to check that every point raised by a party has been given a clear answer.

111. This claim of Argentina must accordingly be rejected.

(d) Manifest excess of powers as a ground of annulment under Article 52(1)(b) of the ICSID Convention: the Committee's views

112. For the reasons given in paragraphs 103-104 above, the Committee considers it clear that the Tribunal found that the Claimants' "investment" for purposes of Article I(1) of the BIT was not confined to its rights *qua* minority shareholder in TGS. The Committee finds it necessarily implicit that the Tribunal considered that TGS was merely a vehicle through which the Claimants' investment in the privatisation of the gas industry was channelled, and that the Claimants had *ius standi* to bring a BIT claim in respect of any measure of Argentina affecting that investment. This is for instance clearly implicit in paragraph 56 of the First Jurisdiction Decision,[84] and in the Second Jurisdiction Decision at paragraphs 28[85] and 44.[86] The Committee considers

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83 See paragraphs 72-77 above.

84 "*The conclusion that follows is that in the present case the participation of the Claimants was specifically sought and that they are thus included within the consent to arbitration given by the Argentine Republic. The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization, they are beyond any doubt the owners of the investment made and their rights are protected under the Treaty as clearly established treaty-rights and not merely contractual rights related to some intermediary. The fact that the investment was made through CIESA and related companies does not in any way alter this conclusion*."

85 "*Foreign investors, such as the Claimants, were specifically invited to participate in the privatization process, various companies were set up in Argentina to this effect and investments were channeled into TGS through this network of corporate arrangements. It is simply not tenable to try now to dissociate TGS from those other companies and the investors and argue that the Claimants do not have* ius standi*. This is one of the essential features of the Treaty and the protection it extends to foreign investors*."

86 "*There are specific foreign investors, who were invited by the Argentine Government to participate in the privatization process and required to organize locally incorporated companies to channel their investments. At all times this was a foreign investment operation*."

that it was necessarily implicit that the Tribunal accepted the Claimants' argument, referred to in paragraph 109 above, that were "not claiming for or on behalf of TGS, but in their own right as United States investors with investments qualifying under the Treaty".

113. Argentina's claim that the Tribunal manifestly exceeded its powers in allowing the Claimants to bring an "indirect" claim as shareholders is similar to the argument that it raised in the annulment proceedings in the *Azurix* case, which was dealt with in paragraphs 57-130 of the *Azurix* Annulment Decision under the heading "derivative claims".

114. For the same reasons that were given in the *Azurix* Annulment Decision, which the Committee considers to be correct, the Committee is of the view that:

(a) No issue arose in the present case as to the *ius standi* of the Claimants to bring a claim on TGS's behalf or in respect of TGS's rights. The issue was whether the Claimants had *ius standi* to bring a claim alleging a violation of the BIT in respect of their own investment and, if so, whether, in the circumstances of the case the provisions of the BIT had been violated in respect of the Claimants' investment.[87]

(b) It is not the Committee's function to reach its own conclusion on the correct interpretation of the BIT and ICSID Convention in respect of these questions, but to determine whether the Tribunal manifestly exceeded its powers in reaching the conclusion that it did.[88]

(c) In addressing this question, the Committee must itself consider the terms of the BIT and the ICSID Convention, which fall to be interpreted in accordance with customary international law rules of treaty interpretation as codified in the 1969 Vienna Convention on the Law of Treaties.[89]

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87 Compare *Azurix* Annulment Decision ¶¶ 76-80.
88 *Azurix* Annulment Decision ¶ 82.
89 *Azurix* Annulment Decision ¶¶ 82-84.

(d) The *Barcelona Traction* case concerned customary international law rules of diplomatic protection rather than investment treaty arbitration, and except where norms of *ius cogens* are involved, a treaty is capable of modifying the rules of customary international law that would otherwise be applicable as between the States parties to the treaty. Hence the starting point in determining the effect of the treaty is the terms of the treaty itself, rather than the principles of customary international law that may or may not be displaced by the treaty provisions.[90]

115. Article I(1)(a) of the BIT relevantly provides that:

> *1. For the purposes of this Treaty,*
>
> *a) "investment" means every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes without limitation:*
>
> *(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;*
>
> *(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;*
>
> *(iii) a claim to money or a claim to performance having economic value and directly related to an investment;*
>
> *(iv) intellectual property which includes, inter alia, rights relating to: literary and artistic works, including sound recordings, inventions in all fields of human endeavor, industrial designs, semiconductor mask works, trade secrets, know-how, and confidential business information, and trademarks, service marks, and trade names; and*

[90] *Azurix* Annulment Decision ¶¶ 86-90.

> *(v) any right conferred by law or contract, and any licenses and permits pursuant to law ...*

116. In *Azurix*, the claimant had established a company under Argentine law (ABA) for the specific purpose of entering into a concession agreement with an Argentine province in the context of the privatisation of the water and wastewater services industry. The tribunal in that case had found that Azurix had *ius standi* to bring a claim in respect of alleged violations of the BIT with respect to rights under that concession. The tribunal rejected Argentina's argument that as rights under the concession belonged to ABA and not to Azurix, only ABA and not Azurix could bring such a claim. In the *Azurix* Annulment Decision, the *ad hoc* committee found that the tribunal in that case did not manifestly exceed its powers in so deciding.[91]

117. The *ad hoc* committee in *Azurix* found that under the broad definition of "investment" in the BIT, ABA itself was an "investment" of Azurix, since ABA is a company (Article I(1)(a)(iii)) owned and controlled directly or indirectly by Azurix (Article I(1)(a), chapeau); that Azurix's "*interests in the assets*" of ABA were also an "investment" (Article I(1)(a)), and that the legal and contractual rights of ABA, including the rights of ABA under the concession, being indirectly controlled by Azurix through its majority shareholding in ABA (Article I(1)(a), chapeau), would similarly be "investments" of Azurix for the purposes of the BIT (Article I(1)(a)(v)).[92]

118. The *ad hoc* committee in that case further concluded that:

> *In this case there was clearly a dispute between Azurix and Argentina, and that dispute concerned an alleged breach of rights conferred by the BIT with respect to what the Tribunal found was, for the purposes of the BIT, an investment of Azurix. In its ordinary meaning, here there was an investment dispute between Azurix and Argentina.*[93]

119. The *ad hoc* committee in that case considered this interpretation to be consistent with international law principles of treaty interpretation as embodied

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91 *Azurix* Annulment Decision ¶¶ 91-130.
92 *Azurix* Annulment Decision especially ¶ 94.
93 *Azurix* Annulment Decision especially ¶ 97.

in the Vienna Convention on the Law of Treaties, as well with Article 25 of the ICSID Convention.[94] The Committee considers the legal reasoning in the *Azurix* Annulment Decision on the issue of "derivative claims" to be correct, and adopts that reasoning. The Committee does not consider it necessary to deal specifically with each of Argentina's legal arguments that were already dealt with in the *Azurix* Annulment Decision.

120. The circumstances of the present case are materially similar to those in the *Azurix* case with only one difference. Azurix indirectly owned 90% of ABA. In contrast, in the present case it appears not to have been disputed that the Claimants only ever had a minority interest in TGS,[95] even if the precise extent of the Claimants' interests in TGS changed over time, and was the subject of some disagreement.[96]

121. The Tribunal took the view that the Claimants "owned" an "investment" for purposes of Article I of the BIT, even if that investment may have been owned "indirectly", having been channelled through a corporate structure that included TGS.[97] The Committee considers it plain that the Claimants invested in Argentina, and that in ordinary parlance it must be said that any conduct of Argentina affecting TGS's rights under the Licence affected the Claimants' investment. Thus, notwithstanding that the Claimants were only minority shareholders in TGS, the Committee does not accept that the Tribunal's conclusions with respect to the *ius standi* issue are manifestly inconsistent with an interpretation of the BIT and the ICSID Convention in accordance with the principle in Article 31(1) of the Vienna Convention.

122. As to Article 32 of the Vienna Convention, the Committee does not consider the relevant provisions of the BIT or Articles of the ICSID Convention to be ambiguous or obscure. However, Argentina in effect argues that the interpretation referred to above leads to a result which is manifestly absurd or unreasonable.

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94 *Azurix* Annulment Decision especially ¶¶ 83-129.
95 See First Jurisdiction Decision ¶ 21.
96 See First Jurisdiction Decision ¶¶ 47-61.
97 *See* First Jurisdiction Decision ¶¶ 56; Second Jurisdiction Decision ¶¶ 38-39.

123. Argentina argues that there is a risk of double recovery if both a company and a shareholder can bring a claim in respect of a violation of the rights of the company. This argument was dealt with in paragraphs 113 to 128 of the *Azurix* Annulment Decision. Argentina now argues additionally that the risk of double recovery is increased if a minority shareholder could bring a BIT claim, particularly an indirect minority shareholder that is several steps removed in the shareholding chain, since many different shareholders in different positions of the chain might make simultaneous claims. The Committee considers that the reasoning in the *Azurix* Annulment Decision is as applicable to claims by indirect minority shareholders as it is to claims by majority shareholders. The Committee concludes that, even if resorted to, the principles in Article 32 of the Vienna Convention would not require a different interpretation of the BIT and ICSID Convention to that resulting from the application of Article 31.

124. The Committee rejects Argentina's argument that the Tribunal did not resolve this issue of double recovery on the basis of legal provisions,[98] but relied upon equity considerations. At paragraph 212 of the Award, the Tribunal indicated that if a situation of double recovery were potentially to arise, "able government negotiators or regulators would make sure that no such double recovery or effects occur". In so stating, the Tribunal did not decide the dispute based on equitable considerations rather than on the basis of the applicable law. The Tribunal clearly decided the case on the basis of the relevant provision of the BIT. In effect, the Tribunal decided that a particular interpretation of the BIT was not absurd or unreasonable on the basis that it gave rise to potential problems of double recovery, first, because such problems had not in fact arisen in practice, and secondly, because even if they were to arise, there existed pragmatic ways of dealing with them.

125. The Committee further rejects Argentina's argument that the Tribunal "invented a rule that is not part of the applicable law" when it referred to the fact that the Claimants had been "invited by the Government ... to participate

[98] Referring to Award ¶ 212.

in the investment".[99] The Tribunal found, as a matter of law, that on the correct interpretation of the BIT, the Claimants had standing to bring a BIT claim in respect of conduct affecting its investment in Argentina, notwithstanding that the Claimants had only a minority shareholding in TGS. The Tribunal acknowledged that while a minority shareholder might bring such a claim, there must nonetheless be "a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company".[100] The Tribunal considered that that cut-off point had not been reached in this case, in circumstance where "*The Claimants cannot be considered to be only remotely connected to the legal arrangements governing the privatization*".[101] The circumstances referred to in paragraphs 54-55 of the First Jurisdiction Decision are the *facts* on which this conclusion of the Tribunal was based.

126. Argentina has also argued that if the Tribunal considered that the Claimants could claim for the damage to their indirect shareholding in TGS, it failed to provide any grounds for its decision to consider only regulated activities. The Committee considers that the question of any distinction between regulated and unregulated activities could not be relevant to the Claimants' *ius standi* to bring a claim in respect of alleged violations of the BIT in respect of their investment. The question of any such distinction could be relevant only to the measure of damages awarded. The issue of *quantum* of damages is addressed in paragraphs 413-415 below.

(e) Conclusion

127. For the above reasons, the Committee concludes that the Tribunal did not manifestly exceed its powers in determining that the Claimants had *ius standi* to bring the claim. The Committee rejects this ground of annulment.

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99 Referring to First Jurisdiction Decision ¶ 54.
100 First Jurisdiction Decision ¶ 52.
101 First Jurisdiction Decision ¶ 56.

E. Forum clause

(a) Background

128. In the proceedings before the Tribunal, Argentina argued that the Tribunal lacked jurisdiction due to the existence of a forum selection clause in the Licence, which provided for disputes to be submitted to the exclusive jurisdiction of the Argentine courts. The Tribunal rejected this argument.

129. Argentina now seeks annulment of the Award:

(a) under Article 52(1)(b) of the ICSID Convention, on the ground that the Tribunal exceeded manifestly its powers in deciding that it had jurisdiction notwithstanding the express clauses on the election of the forum;[102] and

(b) under Article 52(1)(e) of the ICSID Convention, on the ground that the Tribunal "seriously contradicted itself" by allowing the Claimants to make claims based on the License while at the same time stating that the forum selection clause in the License did not prevent it from exercising jurisdiction over those claims.[103]

(b) Arguments of the parties

130. Argentina argues, *inter alia*, that:

(a) The Tribunal lacked jurisdiction due to the existence of a forum selection clause in the Licence, which provided that "For all purposes connected with this License as it relates to the Grantor, the Licensee submits itself to the courts with jurisdiction over administrative law matters of the City of Buenos Aires" and that "Federal courts shall have jurisdiction over disputes with other parties concerning the License".

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[102] Application for Annulment ¶¶ 21-23.

[103] The Committee notes that this ground of annulment is not contained in Argentina's Application for Annulment, and appears to have been stated for the first time in paragraph 109 of Argentina's Memorial on Annulment. However, as the Claimants have not objected on that basis and have made submissions in response to this argument, the Committee has considered and decided it.

(b) The Bidding Terms and the Gas Law also provided for the jurisdiction of local authorities.

(c) All of the Claimants' claims for breaches of the Treaty were related to the License between the Federal State and TGS, regardless of the fact that the Claimants disguised them as claims under the BIT.[104] The Tribunal itself recognised in the Award that the claims were based on the License and the regulatory framework.[105]

(d) Treaty tribunals should decline their jurisdiction when the investor brings a cause of action based on a contract before a treaty tribunal and the contract contains a forum selection clause in favour of a different court or tribunal.[106] Dispute settlement provisions in bilateral investment treaties do not override forum selection clauses in contracts.[107]

(e) The Tribunal awarded the Claimants compensation calculated on the basis of the income TGS would supposedly have obtained under the License rather than on the basis of any causality theory linking the alleged damages to the purported breaches of the BIT. It therefore cannot be held that the claim is independent from the Licence. It was contradictory of the Tribunal to award compensation based on the Licence but to find that the forum selection clause in the Licence did not prevent it from exercising jurisdiction.

(f) The Claimants could not seek to benefit from the License without being subject to the limitations thereof, including the forum selection clause.[108] Either the Claimants were entitled to make claims based on

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104 Referring to Second Jurisdiction Decision ¶ 51.

105 Referring to Award ¶ 166.

106 Relying on Zachary Douglas, "The Hybrid Foundations of Investment Treaty Arbitration", (2004) 74 *British Yearbook of International Law* 151, 245-246 (2004) ("Douglas"); *Vivendi* Annulment Decision ¶ 98.

107 Relying on *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction of 6 August 2003 ("*SGS v. Pakistan* Jurisdiction Decision"), ¶ 161; *SGS v. Philippines* Jurisdiction Decision ¶¶ 143, 155; Douglas, 287; *TSA Spectrum de Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/05/5, Award of 13 November 2008 ("*TSA* Award"), Concurring Opinion of arbitrator Georges Abi-Saab ¶ 5.

108 Relying on Douglas, 243; *SGS v Philippines* Jurisdiction Decision ¶ 155.

the Licence and were bound by the forum selection clause, or were not entitled to make claims based on the Licence in which case they lacked *ius standi*.

(g) The fact that this matter was decided by the Tribunal does not prevent the matter from being considered by the Committee in order to determine whether the Tribunal has manifestly exceeded its powers in the terms of Article 52(1)(b) of the ICSID Convention.

131. The Claimants argue, *inter alia*, that:

(a) Argentina raised a similar jurisdictional objection in relation to the Stamp Tax Claim which was rightly rejected by the Tribunal in the First Jurisdiction Decision.[109]

(b) The Tribunal similarly, in its Second Jurisdiction Decision, correctly rejected Argentina's argument based on the forum selection clause in the Licence on the basis that "the essence of the claims ... relates to alleged violations of the Treaty rights".[110]

(c) The Claimants were not parties to the Licence and therefore could not be bound by the forum selection clause in it.

(d) In any event, the issue is not whether the claim touches on a contract with a forum selection clause, but rather, the fundamental basis of the claim. If the "fundamental basis of a claim" is a treaty, a forum selection clause in a contract cannot bar the application of a treaty standard.[111] Other annulment committees have reached the same conclusion,[112] as have other Tribunals including in cases involving Argentina.[113]

(e) Argentina does not point to a single decision that holds otherwise. Neither the *SGS v. Pakistan* Jurisdiction Decision nor *SGS v.*

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109 Referring to First Jurisdiction Decision ¶¶ 92-93.
110 Referring to Second Jurisdiction Decision ¶¶ 49-51.
111 Relying on *Vivendi* Annulment Decision ¶ 101.
112 Referring to *Wena Hotels* Annulment Decision ¶ 31; *Vivendi* Annulment Decision ¶ 113.
113 Referring to *Lanco* Jurisdiction Decision ¶¶ 26-27; *Vivendi II* Jurisdiction Decision; *CMS* Jurisdiction Decision ¶ 76; *AES* Jurisdiction Decision ¶¶ 92-96; *Azurix* Jurisdiction Decision ¶ 79.

Philippines Jurisdiction Decision stands for the proposition that exclusive forum clauses exclude ICSID jurisdiction over BIT claims.

(f) There is no contradiction in the Tribunal's reasoning: the Claimants made claims for damage to their investments caused by Argentina's violation of the BIT, and thus the Claimants were not bound by the forum selection clause in the Licence.

(g) Argentina misinterprets the Tribunal's words and ignores the very concept of "investment." It was Claimants who were targeted by Argentina in the 1990s with a view to attracting foreign investors, and who invested in Argentina's privatization process.

(h) Although the Claimants' claim does involve Argentina's dismantling of the guarantees granted under the License and the Regulatory Framework, that does not mean that the Claimants made a contractual claim for breach of the License. The same facts may be analyzed very differently under international law than under municipal law. The fact that an act or omission by a State constitutes a breach of contract does not necessarily imply that there is a breach of a BIT or of international law.

(c) The Committee's views

132. Argentina raised a similar argument based on the forum selection clause in relation to the Stamp Tax Claim. In respect to this argument, the Tribunal said in the First Jurisdiction Decision that:

> *The Tribunal is mindful of the various ICSID decisions that have recently discussed this very issue, particularly those in* Lanco, Compañía de Aguas del Aconquija *(Award and Annulment),* Wena, CMS *and* Salini*. In all these cases the tribunals have upheld jurisdiction under the Convention to address violations of contracts which, at the same time, constitute a breach of the pertinent bilateral investment treaty. The Tribunal will not repeat those considerations.*[114]

[114] First Jurisdiction Decision ¶ 91 (footnotes omitted).

133. Argentina's argument was considered and rejected by the Tribunal in the Second Jurisdiction Decision, in which the Tribunal said that:

> *49. The distinction between these different types of claims has relied in part on the test of the triple identity. To the extent that a dispute might involve the same parties, object and cause of action it might be considered as a dispute where it is virtually impossible to separate the contract issues from the treaty issues and drawing from that distinction any jurisdictional conclusions.*
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> *50. However, as the Annulment Committee held in* Vivendi*, "A treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standard". The tribunal also held in* CMS*, referring to this line of decisions, that "as contractual claims are different from treaty claims, even if there had been or there currently was a recourse to the local courts for breach of contract, this would not have prevented submission of the treaty claims to arbitration".*
>
> *51. In this case, although there are no doubt questions concerning the Contract between the parties, the essence of the claims, like in the Stamp Tax Claim, relates to alleged violations of the Treaty rights. Having the Tribunal* [sic] *concluded that there are no reasons to change the conclusions on jurisdiction reached in the Stamp Tax Claim Decision, the distinction between contract-based claims and treaty-based claims looses* [sic] *to a great extent its significance in the present phase of the case.*[115]

134. The Committee considers it to be self-evident, in the words of the *Vivendi* Annulment Decision quoted by the Tribunal, that "*A treaty cause of action is not the same as a contractual cause of action*". Conduct of a host State may simultaneously amount to a breach of a contract and a breach of a treaty, or may amount to a breach of the former but not of the latter, or to a breach of the latter but not the former.

135. The terms of a contract and the terms of a treaty are unlikely to be identical, and in any event, even if they were, the contract would be governed by the municipal law of one State or another while the treaty would be governed by public international law. The contract would fall to be interpreted in

[115] Second Jurisdiction Decision ¶¶ 49-51 (footnotes omitted), referring to *Ronald S. Lauder v. Czech Republic*, UNCITRAL Final Award, September 3, 2001, ¶¶ 161, 163; *Vivendi* Annulment Decision ¶ 113; *CMS* Jurisdiction Decision ¶ 80; *Azurix* Jurisdiction Decision ¶ 89.

accordance with municipal law rules of contract interpretation while the treaty would fall to be interpreted in accordance with international law rules of treaty interpretation. The principles for determining whether or not particular conduct on the part of a party to the contract gives rise to liability for breach of contract are the applicable municipal law rules, while the principles for determining whether particular conduct gives rise to responsibility for breach of the treaty are those found in public international law.

136. Thus, a determination of the question whether or not there has been a breach of contract will not answer the question whether or not there has been a breach of the treaty, and vice versa. The fact that one forum has exclusive jurisdiction to determine one of these questions is not logically inconsistent with another forum having jurisdiction to determine the other of these questions. In the present case, the BIT provided expressly for ICSID arbitration of alleged violations of the BIT. This is not logically inconsistent with any contractual clause giving exclusive jurisdiction to the national courts over claims for breaches of contract.

137. Argentina nevertheless seeks to argue that where an ICSID claim is brought in respect of an alleged breach of a treaty which is based on rights under a contract, the claimant cannot seek to benefit from the contract without being subject to the limitations thereof, including any forum selection clause in the contract.

138. In support of this position, Argentina relies on a number of authorities.

139. The first is the *Vivendi* Annulment Decision, which was quoted by the Tribunal. In *Vivendi*, in the paragraph relied upon by Argentina, the *ad hoc* committee said that "*In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract*".[116] However, the *ad hoc* committee then went on to cite an example of a case brought before a

[116] *Vivendi* Annulment Decision ¶ 98.

mixed commission in which the claim was indeed for breach *of contract*.[117] The *ad hoc* committee then went on to say:

> *101. On the other hand, where "the fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.*
>
> *102. In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties.*
>
> *103. Moreover the Committee does not understand how, if there had been a breach of the BIT in the present case (a question of international law), the existence of Article 16(4) of the Concession Contract could have prevented its characterisation as such. A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty*.[118]

140. The Committee finds that this decision directly contradicts Argentina's position.

141. The next authority relied on by Argentina is the *SGS v. Pakistan* Jurisdiction Decision. In the paragraph of that decision relied upon by Argentina, the tribunal said that:

> *We believe that Article 11.1 of the PSI Agreement is a valid forum selection clause* so far as concerns the Claimant's

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[117] *Vivendi* Annulment Decision ¶¶ 98-100, referring to *Woodruff* case, American-Venezuelan Mixed Commission, 1903, *Reports of International Arbitral Awards,* vol. IX, p. 213.

[118] *Vivendi* Annulment Decision ¶¶ 101-103 (footnote omitted).

> contract claims which do not also amount to BIT claims*, and it is a clause that this Tribunal should respect.*[119]

The tribunal then concluded that:

> *... the Tribunal has no jurisdiction with respect to claims submitted by SGS and based on alleged breaches of the PSI Agreement which do not also constitute or amount to breaches of the substantive standards of the BIT.*[120]

142. The Committee considers that the suggestion in these quotes is that a breach of contract may also amount to a breach of the BIT, and that where this is the case, a forum clause in the contract will not preclude an ICSID tribunal from determining a claim for breach of the BIT. The Committee considers that this decision therefore also directly contradicts Argentina's position.

143. A further authority relied on by Argentina is the *SGS v. Philippines* Jurisdiction Decision. However, the Committee notes that in that case the tribunal said that:

> *Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT, the Tribunal has jurisdiction to determine the claim.*[121]

The tribunal went on to say that in that particular case, the dispute was on its face about the amount of money owed under a contract,[122] and that that case could be distinguished from *SGS v. Pakistan* which was said to arguably raise a breach of the BIT independent of a breach of contract, and the *Vivendi* case where "the claim presented by the Claimant went beyond the scope of the concession agreement and involved allegations which, if proved, were capable of amounting to breaches of a BIT".[123] The Committee does not consider that this decision clearly supports Argentina's position.

144. Argentina next relies on the concurring opinion of arbitrator Georges Abi-Saab to the *TSA* Award. The Tribunal notes that this concurring opinion states that:

> *... where what is contended in the treaty claim is mainly that the contract has been violated and that this violation*

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119 *SGS v. Pakistan* Jurisdiction Decision ¶ 161 (emphasis in original).
120 *SGS v. Pakistan* Jurisdiction Decision ¶ 162.
121 *SGS v. Philippines* Jurisdiction Decision ¶ 157.
122 *SGS v. Philippines* Jurisdiction Decision ¶ 159.
123 *SGS v. Philippines* Jurisdiction Decision ¶¶ 158-159.

> *constitutes in turn and by another name (figuring in the treaty) a treaty violation, such a nominal trick does not suffice to transform the contract claim into a treaty claim or to create a parallel treaty claim. To use the terminology of Vivendi II, "where 'the fundamental basis of the claim'" is the contract, however, many more layers of claims one tops it with, it remains a contract claim, which has to be settled according to the terms of the contract and in the forum chosen in that contract*.[124]

145. This quote would indeed appear to support the position of Argentina. However, the Committee notes that this concurring opinion went on to state that on the evidence in that case, certain statements of officials of Argentina provided:

> ... prima facie *evidence that the termination of the concession contract and consequent action by the Argentinian government may have been motivated, not only by TSA's alleged grave breaches of the concession contract, but also by other considerations which seem to fall within the purview of the BIT guarantees*.[125]

The concurring opinion then concluded that:

> *These considerations, independent of the alleged violations of the contract, are, in my view, sufficient* prima facie *to constitute the subject-matter of a treaty claim, and consequently to bring the jurisdictional clause of the BIT into play.*[126]

146. Thus, even this concurring opinion would seem to acknowledge that a forum selection clause in a contract will not deprive an ICSID tribunal of jurisdiction to determine a claim for an alleged violation of a treaty based on a breach of that contract, if the conduct giving rise to the breach is "*independent of the alleged violations of the contract, ... sufficient* prima facie *to constitute the subject-matter of a treaty claim*". Furthermore, in the *TSA* Award itself, the Tribunal found that the exclusive jurisdiction clause in that case was "*not such as to exclude recourse to a remedy under the BIT in cases where a dispute arises about acts which might constitute breaches of both the Concession*

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124 *TSA* Award, Concurring Opinion of arbitrator Georges Abi-Saab ¶ 5.
125 *TSA* Award, Concurring Opinion of arbitrator Georges Abi-Saab ¶ 9.
126 *TSA* Award, Concurring Opinion of arbitrator Georges Abi-Saab ¶ 9.

Contract and the BIT".[127] The Committee finds that overall, the *TSA* case does not provide clear support for Argentina's position.

147. As explained above, even in cases where it is claimed that the tribunal lacked jurisdiction, the *ad hoc* committee will annul the decision only where the tribunal has *manifestly* exceeded its power.[128] The Committee finds that it has not been established that the Tribunal manifestly exceeded its powers in finding, for the reasons that it did, that it had jurisdiction over the alleged breaches of the BIT, notwithstanding the forum selection clause.

148. The Committee also finds for the reasons above that it has not been established that there is anything contradictory in the Tribunal's reasoning in this respect.

149. In considering this ground of annulment, the Committee has been required to apply the standard of review under Article 52(1)(b) and (e) of the ICSID Convention. The Committee would merely add that quite apart from this standard, it can see no obvious error at all in the Tribunal's approach as to the applicable principles.

150. The Committee concludes that this ground of annulment must therefore be rejected.

F. Procedural issues

(a) Introduction

151. Argentina argues that three separate procedural matters in the course of the proceedings before the Tribunal amounted to a serious departure from a fundamental rule of procedure, justifying annulment under Article 52(1)(d) of the ICSID Convention.

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[127] *TSA* Award, ¶ 62.
[128] See paragraph 69 above.

152. The first concerns the Tribunal's decision to admit, over the objections of Argentina, a witness statement of Mr Patricio Carlos Perkins that had been submitted by the Claimants.[129]

153. The second concerns the Tribunal's decision to admit, over the objections of Argentina, the expert report of Mr. Alberto Bianchi submitted by the Claimants.[130]

154. The third concerns the Tribunal's decision, on 22 March 2007, to close the proceedings, notwithstanding that, according to Argentina, certain issues remained unresolved.[131]

(b) Admission of the evidence of Mr. Perkins

(i) Background

155. In a letter to the President of the Tribunal dated 1 April 2005, Argentina requested that written witness testimony of Mr Perkins, which had been submitted with the Claimants' ancillary claim, be dismissed from the arbitration.

156. According to this letter, Mr Perkins had in 1992 been appointed by the Argentine Privatisation Committee as executive director of the Gas del Estado SE privatisation project. The letter suggested that it was not legitimate or ethical for Mr Perkins now to give testimony in favour of the recipient of a license in the privatisation process as to what was the intention of the Privatisation Committee that appointed him to that office. The letter added that Mr Perkins was an engineer, and noted the duty of confidentiality under section 2.3.1.4 of the Code of Professional Ethics in Surveying, Architecture, and Engineering (*Código de Ética Profesional de la Agrimensura, la Arquitectura y la Ingeniería*).

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129 Application for Annulment ¶ 66.
130 Application for Annulment ¶¶ 67-68.
131 Application for Annulment ¶ 69.

157. The letter further stated that a government-owned company then subject to a privatisation process, Yacimientos Petrolíferos Fiscales ("YPF"), had entered into an agreement with the consulting company Patricio C. Perkins & Asociados S.A. for the latter to provide "*professional consulting services for the management of the Argentine gas and business privatization project*". Section 11 of this agreement was said to contain a confidentiality clause, entitled "*Intellectual Property—Confidentiality*", which provided that "*any and all acts, information, investigations, conclusions, recommendations and reports performed, conducted, prepared or obtained under this agreement are exclusively owned by YPF*", and which further provided that the consulting company agreed "*to maintain the professional secrecy in connection with any data, information, investigations, conclusion, recommendation or report obtained by the company's personnel in the course of execution of*" the agreement. The letter stated that Mr Perkins' testimony in these proceedings violated this clause.

158. The letter additionally stated that a further circumstance was that the funds used to pay Mr Perkins for these services had been obtained under a World Bank programme to promote privatisations, and that Mr Perkins was now testifying against the country to which he rendered those services before a World Bank agency. The letter claimed that behaviour such as that of Mr Perkins had adversely affected the reputation of privatised companies in Argentina, and sought the exclusion of Mr Perkins' testimony from the case "*[n]otwithstanding the civil or criminal actions that the Argentine Republic may bring against Mr. Perkins*".

159. By a letter dated 11 April 2005, from the Secretary of the Tribunal, counsel for the Claimants were invited to present any observations on Argentina's letter.

160. By a letter dated 11 April 2005, the Claimants presented observations opposing Argentina's request. That letter stated that the Tribunal did not have jurisdiction to ascertain whether Mr Perkins' appearance in these proceedings violated ethical principles or alleged contractual obligations alien to the matters under discussion, and that Argentina could submit claims to other

appropriate venues. The letter further stated that an identical challenge had been made by Argentina in the *CMS* and *LG&E* cases, and that in the *CMS* case Argentina's challenge had been rejected and Mr Perkins was permitted to provide testimony. The letter went on to state that the information disclosed by Mr Perkins in his witness statement was in the public domain and that Argentina had failed to indicate what confidential information had been revealed by him; that the Code of Conduct for Engineers was inapplicable as Mr Perkins had not been hired to provide engineering services and that in any event it was not the Tribunal's duty to enforce that Code of Conduct; that only YPF (now a private company) could seek enforcement of the confidentiality clause in its contract with Mr Perkins; that that confidentiality clause had not in any event been breached as it related to intellectual property rights; and that Mr Perkins had not provided a witness statement "against Argentina" or "in favour of" the Claimants but had given impartial and objective testimony. The letter claimed that Argentina was illegitimately seeking to intimidate Mr Perkins so as to affect the impartiality and objectiveness of his testimony.

161. By a letter dated 22 April 2005, the Secretary of the Tribunal informed the parties that the Tribunal considered that there was no reason to exclude Mr Perkins' testimony from the proceeding. It stated that "*The question concerning confidentiality raised by the Respondent is a matter that can only be dealt with in the context of the contract between Mr. Perkins and the Republic of Argentina or its agencies*". It further stated that "*The above considerations are without prejudice to the question of the value of evidence which the Tribunal will weigh in due course*". The letter concluded with an invitation to the parties not to discuss decisions made by tribunals in different cases which were governed by considerations of confidentiality, and stated that this case would be decided by the Tribunal on its own merits and circumstances.

162. The Claimants subsequently addressed a letter to the Secretary of the Tribunal dated October 24, 2005, to which was attached a letter received by Mr Perkins from the Argentine Attorney-General's Office. The letter from the Claimants stated that in the letter to Mr Perkins, "*the Government of Argentina*

attempts to bully and intimidate the witness by threatening him with civil and criminal prosecution if he testifies at the hearing in this case". The Claimants' letter stated that the Government of Argentina had previously published the names of witnesses within Argentina. The letter contended that Argentina, having failed in its attempt to exclude the testimony of Mr Perkins, was seeking to coerce Mr Perkins so as to improperly influence his impartiality and objectiveness in favour of Argentina. The letter requested an order of provisional measures pursuant to ICSID Arbitration Rule 39, requiring Argentina to withdraw its letter to Mr Perkins and to declare that it would not bring civil or criminal proceedings against him for providing testimony in this matter, and requiring Argentina not to take any actions that would further exacerbate the dispute.

163. By a letter dated 31 October 2005 from the Secretary of the Tribunal, Argentina was invited to present any observations on the Claimants' letter.

164. By a letter dated 3 November 2005, Argentina requested that the Claimants' request be dismissed. This letter stated *inter alia* that the Tribunal was not competent to issue orders but only to make recommendations, that the Claimants had failed to meet the second and third requirements of ICSID Arbitration Rule 39, and that Argentina was not aggravating the dispute by ensuring that the agreement entered into with Mr Perkins was honoured.

165. By a letter dated 10 November 2005, the Secretary of the Tribunal informed the parties that:

> *The Tribunal, after considering the Claimant's letter of October 24, 2005, and the Respondent's letter of November 3, 2005, does not consider it appropriate to issue an Order on Provisional Measures in this matter.*
>
> *The Tribunal wishes to remind the parties that this is an issue that has already been decided upon by the Tribunal (Tribunal's letter to the parties of April 22, 2005). In that occasion, the Tribunal informed the parties that the question concerning Mr. Perkins' eventual obligations with the Republic of Argentina is a matter that can only be dealt with in the context of the contract between Mr. Perkins and the Argentine Republic or its agencies and not before this Tribunal.*

> *The Tribunal decides accordingly to admit Mr. Perkins' testimony. This is without prejudice to the question of the evidentiary value of such testimony which the Tribunal will weigh in due course.*
>
> *The Tribunal also expects the Argentine Republic to facilitate the participation of Mr. Perkins in this proceeding in accordance with the Article 22 of the Convention.*

166. At paragraph 141 of the Award, the Tribunal considered the written statement of Mr Perkins on a particular point. In paragraph 142 of the Award, the Tribunal then stated:

> *The Tribunal would have wished that Mr. Perkins had been examined and cross-examined on this and other aspects of his testimony, and also to put questions to him, but his participation in the hearing on the merits was regrettably prevented by an injunction issued by an Argentine judge on November 24, 2005 at the request of the Government. The Tribunal makes no inference of this situation, but decided in Procedural Order No. 5, dated December 2, 2005, that the witness' written statement was admissible and that, moreover, Mr. Perkins enjoyed and continues to enjoy the immunities provided under Articles 21 and 22 of the ICSID Convention.*

(ii) Arguments of the parties

167. Argentina argues, *inter alia*, that:

(a) The Tribunal took into account the evidence of Mr Perkins as a "key official in the privatization process"[132] which in view of the existence of a confidentiality clause and the injunction of the Argentine court, was provided illegitimately. The use of evidence that has been illegitimately obtained has been harshly criticised.[133]

(b) The Tribunal's decision to reject the Claimants' request acknowledged that the injunction obtained from an Argentine court had been

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[132] Referring to Award ¶ 141.

[133] Referring to Hugh Thirlway, "Dilemma or chimera? Admissibility of Illegally Obtained Evidence in International Adjudication", (1984) 78 *A.J.I.L.* 622, 623; Michael Reisman & Eric E. Freedman, "The Plaintiff's dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication", (1982) 76 *A.J.I.L.* 737, 738.

legitimate as it stated that "*Mr. Perkins' eventual obligations with the Republic of Argentina is a matter that can only be dealt with in the context of the contract between Mr. Perkins and the Argentine Republic or its agencies and not before this Tribunal*".

(c) The Tribunal thereby seriously damaged Argentina's right to defence, which is "an essential part of the right to a fair trial."[134]

(d) The Tribunal thereby also violated the principle of equality of the parties, which constitutes one of the main characteristics of the process in which a decision needs to be reached.[135]

(e) The admission of this evidence "implied preventing Argentina from exercising its right to fair treatment".

168. The Claimants argue, *inter alia*, that:

(a) Mr Perkins testified on exactly the same subject matter in the *CMS* case, and the *CMS* Tribunal rejected that objection.

(b) Since the injunction was issued by the Argentine court, in over three years no decision has been rendered by that court on the merits of the alleged breach of the confidentiality clause, confirming that Argentina's challenge was a pure litigation tactic to intimidate the witness and to actually prevent him from testifying at the hearing.

(c) The Tribunal exercised its authority under ICSID Arbitration Rule 34(1) to decide the admissibility of Mr Perkins's written testimony and its probative value, and the Committee should not second-guess the Tribunal's decision on this issue.

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[134] Referring *inter alia* to *Bricmont v. Belgium*, 1989 Eur. Ct. H.R. 12, ¶ 81; *CDC Group plc v. Republic of Seychelles,* ICSID Case No. ARB/02/14, Decision on Annulment, June 29, 2005 ("*CDC* Annulment Decision"), ¶ 49; *Wena Hotels* Annulment Decision ¶ 57; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*, *I.C.J. Reports 1973*, p. 16 ¶ 92; *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, December 17, 1992 ("*Amco II* Annulment Decision"), ¶ 9.08.

[135] Referring to Bin Cheng, General Principles of Law (1987), at 290; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *I.C.J. Reports 1986,* p. 14, ¶¶ 31, 59; *MINE* Annulment Decision ¶ 5.06; *MTD* Annulment Decision ¶ 49; *Wena Hotels* Annulment Decision ¶ 57.

(d) The Tribunal had no jurisdiction to determine whether or not Mr Perkins had breached any confidentiality obligation under an agreement with YPF.

(e) In making its objection in this case and promoting local proceedings against Mr Perkins, Argentina violated Articles 21 and 22 of the ICSID Convention, which grant immunity from legal process to witnesses.

(f) Argentina had a full opportunity to rebut Mr Perkins's testimony in its Counter-Memorial and Rejoinder, and it was Argentina's own actions that barred Mr Perkins from attending the hearing and being cross-examined.

(g) There is a clear difference between "evidence which is illegitimately obtained" and the evidence submitted in this case, which was freely given by Mr Perkins.

(h) Mr Perkins disclosed no confidential information, and his witness statement only ratified what had been proved by multiple sources of evidence in the record.

(i) Even if Mr Perkins' witness statement was excluded the Tribunal would have reached the same conclusion. [136]

(iii) The Committee's views

169. The Committee notes that Mr Perkins did not appear as a witness or give evidence at the hearing on the merits in this case. The Committee finds that the only issue before it concerns the admission into evidence by the Tribunal of the witness statement of Mr Perkins.

170. ICSID Arbitration Rule 34(1) provides that "*The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value*". Neither the ICSID Convention nor the ICSID Arbitration Rules contains specific rules

[136] Referring to Schreuer Commentary at 971.

on the admissibility of evidence. Accordingly, the issue of the admissibility of Mr Perkins' witness statement in these proceedings was one for the Tribunal to decide. It is not a matter for the Committee to decide in annulment proceedings. The only basis for the Committee to intervene would be if Argentina establishes that the Tribunal, in admitting Mr Perkins' witness statement, in the relevant circumstances seriously departed from a fundamental rule of procedure.

171. The Committee notes that there is no suggestion that Mr Perkins' witness statement was not provided voluntarily and no suggestion that he did not voluntarily agree that the statement would be used in these proceedings.

172. The Committee notes also that at the time that Mr Perkins gave his witness statement and at the time that the Claimants submitted it to the Tribunal, the injunction of the Argentine court had not been given. The submission of the witness statement therefore cannot have been in violation of that injunction. There has been no suggestion that the injunction purported to bind the Tribunal, to prevent the Tribunal from considering the witness statement in its deliberation of the case.

173. The Committee notes further that the agreement containing the confidentiality clause was between "YPF SOCIEDAD ANÓNIMA ... acting on behalf of the Under-Department of Fuels" and "Patricio C. Perkins y Asociados S.A.". It would appear from the submissions of the Claimants, that were not contradicted by Argentina, that YPF is now a private company. There does not appear to have been any detailed discussion before the Tribunal as to whether the rights under that agreement now legally belong to YPF as a private company, or to the Under-Department of Fuels on whose behalf YPF was acting in entering into the agreement. The Claimants in their letter dated 11 April 2005, argued that only YPF could seek enforcement of the confidentiality clause in its contract with Mr Perkins. However, the Tribunal did not decide this issue. The Tribunal's decision as expressed in the letter of 22 April 2005 was that "*The question concerning confidentiality raised by the Respondent is a matter that can only be dealt with in the context of the contract between Mr. Perkins and the Republic of Argentina or its agencies*".

174. The Tribunal did not in any way indicate what attitude it would take in the event that a court having jurisdiction over the matter did determine that Mr Perkins' testimony was in violation of his confidentiality obligations. There has been no suggestion that this issue has ever been determined by a court. Although an Argentine court subsequently issued an injunction preventing the Claimants from testifying, this injunction was of an interlocutory nature (a "precautionary measure"), and did not determine the merits of the claim of breach of confidentiality. According to the Claimants, the merits of this claim have yet to be determined.

175. The situation with which the Tribunal was faced was thus this. Argentina claimed that Mr Perkins' witness statement was made in violation of his confidentiality obligations under the agreement with YPF, and possibly other confidentiality obligations such as under the Code of Professional Ethics. The Claimants denied that this was the case. The Tribunal considered that it could not determine whether or not there was a breach of such confidentiality obligations. The Tribunal did not state what it would have done if a competent court were to have decided that there *was* a breach of confidentiality obligations. As there was no such decision by a competent court, it is purely speculative to consider what the Tribunal might have done.

176. In circumstances where there was no such decision of a competent court, the Tribunal decided to admit the witness statement. After it had so decided, the Argentine court issued the injunction to Mr Perkins. Mr Perkins himself complied with that injunction and did not testify at the hearing, and as noted above, that injunction did not purport to bind the Tribunal. The Tribunal evidently considered that this interlocutory measure of an Argentine court addressed to Mr Perkins did not provide any reason why the Tribunal should not consider the witness statement of Mr Perkins that had by that time already been submitted to it.

177. Argentina cites numerous authorities for the general proposition that the principle of equality of the parties, the right to defence, and right to fair treatment are fundamental rules of procedure. However, Argentina cites no authority for the proposition that it would amount to a serious violation of a

fundamental rule of procedure for a tribunal to admit the witness statement of a witness in the circumstances described in the preceding two paragraphs.

178. Tribunals might reach different conclusions on whether or not evidence should be admitted in such circumstances. Regardless of which view a tribunal may take, its decision will not amount to an annullable error unless one of the grounds of annulment in Article 52(1) of the ICSID Convention is established. Regardless of which view a tribunal may take on the issue in the circumstances of the present case, the Committee is not satisfied that the decision could without more constitute a serious departure from a fundamental rule of procedure.

179. The Committee is not required to reach any view on issues of admissibility of evidence in ICSID proceedings in circumstances other than the specific circumstances of this case, and does not do so.

(c) Admission of the expert report of Mr Bianchi

(i) Background

180. The minutes of the first session of the Tribunal, held at the seat of the Centre in Washington D.C. on December 5, 2001, recorded in its paragraph 16 an agreed timetable for the filing of the parties' pleadings and stated at paragraph 19.1:

> *It was agreed that after the submissions stipulated in paragraph 16 above, no other documents shall be submitted by the parties unless an extraordinary situation arises and it is agreed by both parties or the Tribunal. The Tribunal may request additional documents if necessary for the conduct of the litigation.*

181. In accordance with the applicable procedural schedule, Argentina filed its Rejoinder on the merits on July 7, 2005.

182. Over three months later, by a letter dated October 20, 2005, the Claimants stated that:

> *With its Rejoinder on the Merits, Argentina introduced for the first time several new expert reports that deal with*

> *issues already addressed in Claimants' Memorial, and which therefore should have been filed by Argentina together with the Counter-Memorial*.

The letter stated that by waiting to file these documents with its Rejoinder, Argentina had violated ICSID Arbitration Rule 24[137] and had tried unfairly to restrict the Claimants' fundamental right to due process by denying them the ability to rebut these reports. The letter went on to say that accordingly, "*in the exercise of its fundamental rights*" the Claimants were enclosing with the letter two new expert reports to rebut the reports filed with Argentina's Rejoinder. One of the two new reports submitted with that letter was by Mr Bianchi.

183. By letters to the Secretary of the Tribunal dated 24 and 26 October 2005 respectively, Argentina objected to the submission by the Claimants of these new reports and accompanying documentation. In the latter letter, Argentina stated that the submission of the new reports by the Claimant was untimely as it was only one month prior to the hearing on the merits, that the Claimants had had the possibility of defending themselves in their Memorial and Reply and would have the opportunity to do so again at the hearing, that Argentina had not introduced any new issue in its Rejoinder, that the filing of these reports would mean that the Claimants would have three opportunities to present evidence while Argentina would have only two, that it had taken the Claimants over three and a half months to produce these two reports when Argentina's Rejoinder had been prepared in 60 days, and that exhibits to the new reports included documents that the Claimants could have filed earlier.

184. By a letter to the parties dated November 10, 2005, the Secretary of the Tribunal stated:

> *The Tribunal ... decides that it will consider the new Claimants' expert reports but only to the extent that they refer or directly relate to the new expert reports submitted by the Respondent with its Rejoinder. ...*
>
> *The additional documentation that the Claimants have submitted will be considered on the same conditions and requirements referred to above. The Respondent may raise*

[137] ICSID Arbitration Rule 24 provides: "Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument".

specific objections to this documentation during the hearing. The Tribunal will take a decision on the relevance of this documentation at the hearing.

(ii) Arguments of the parties

185. Argentina argues, *inter alia*, that:

(a) The Claimants waited three and a half months to produce the new reports, until only one month before the hearing on the merits, when Argentina had produced its Rejoinder in 60 days.

(b) Neither the Claimants nor the Tribunal established the existence of any "extraordinary situation" as required by paragraph 19.1 of the minutes of the First Session of the Tribunal.

(c) Mr Bianchi's report was a deciding factor for the Tribunal as far as the exercise of police power in emergency situations is concerned.[138]

(d) The Tribunal violated Argentina's right of defence and the equality of treatment between the parties, by providing the Claimants with three opportunities to produce evidence when Argentina only had two.

(e) Inequitable treatment on the part of the Tribunal constitutes a serious violation of a core rule of procedure in the terms of Article 52(1)(d) of the ICSID Convention.

186. The Claimants argue, *inter alia*, that:

(a) Professor Bianchi's expert report was submitted in response to the report of Argentina's expert, Professor Comadira, which raised new issues for the first time in Argentina's Rejoinder. Professor Comadira's expert report should have been submitted with Argentina's Counter-Memorial, allowing Claimants an opportunity to properly rebut it in their Reply, and there is no reason why Argentina could not have submitted it at that time.

[138] Referring to Award ¶ 219.

(b) If the Tribunal had not allowed Claimants to submit Professor Bianchi's expert report, Claimants' right of due process would have been seriously affected by Argentina's strategy of withholding evidence until the last possible moment. Allowing submission of Professor Bianchi's expert report was absolutely necessary in order to treat the parties equally and fairly.

(c) Argentina cross-examined Professor Bianchi for an hour during the hearing on the merits.

(d) Under the ICSID Convention tribunals have a discretion whether or not to allow expert reports upon request of either party, and the Tribunal's decision to accept Professor Bianchi's expert report was within the exercise of that discretion.

(e) Even without Professor Bianchi's expert report, the Tribunal would have reached the same conclusion based on Argentine case law. Argentina cannot show any material effect on the outcome of the case.

(f) Argentina gives no indication of what fundamental rule of procedure was breached or how such a departure from the rule was serious or would have "caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed".

(iii) The Committee's views

187. ICSID Arbitration Rule 34(1) has been quoted above. ICSID Arbitration Rule 26(2) provides that "*The Tribunal may extend any time limit that it has fixed*". ICSID Arbitration Rule 26(3) provides that "*Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides*".

188. The Committee has no doubt that under these provisions, a tribunal has the power to accept the filing by a party of an expert report after the deadline fixed

for such filing, if the tribunal considers that there are good reasons for so doing.

189. In this case, as indicated in the letter dated 10 November 2005, the Tribunal decided to accept the filing of the new expert reports and supporting documents of the Claimants, and it is clear that the Tribunal did so having considered the views of the Claimants expressed in their letter dated 20 October 2005, and the views of Argentina expressed in the letters dated 24 and 26 October 2005. The reason for the late submission of the new expert reports was that they were intended to respond to expert reports of Argentina that had only been submitted at the stage of Argentina's Rejoinder. Consistently with this, the letter dated 10 November 2005 states that the Tribunal would consider the new expert reports submitted by the Claimants "*only to the extent that they refer or directly relate to the new expert reports submitted by the Respondent with its Rejoinder*".

190. Argentina maintains that the Claimants did not produce the new expert reports until three and a half months after Argentina's Rejoinder, by which time there was only one month before the hearing on the merits. Argentina also complains that the result of the Tribunal's decision was that the Claimants had three opportunities to produce evidence when Argentina only had two.

191. However, the Committee notes that Argentina raised these points in its letter of October 26, 2005, and they were taken into account by the Tribunal. In deciding any procedural request by one party that is opposed by the other, the Tribunal will have to balance all of the relevant competing considerations raised by each party and reach a decision. As was observed in the *Azurix* Annulment Decision:

> *A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an* exercise *of that rule of procedure, and not a* departure from *that rule of procedure. It is only where the exercise of that discretion, in all of the circumstances of the case, amounts to a serious departure from another rule of procedure of a fundamental nature that there will be*

grounds for annulment under Article 52(1)(e) of the ICSID Convention.[139]

192. There is no reason for thinking that the Tribunal did not, in reaching its decision. give full consideration to all of the views that had been expressed by both parties. The Committee does not consider it inconsistent with any fundamental rule of procedure for a tribunal to give one party an opportunity to present specific additional evidence on a particular point where the tribunal finds that there are circumstances that justify this. If Argentina considered that as a result of the Tribunal's decision it needed more time to prepare for the oral hearing or an opportunity to submit further evidence to respond to new matters in Mr Bianchi's report, it could have made an appropriate application to the Tribunal. The decision on any such application would have been of course a matter within the Tribunal's discretion. It is not for an annulment committee to second guess how a tribunal exercises its discretion, unless a particular exercise of discretion amounts to a serious departure from a fundamental rule of procedure.

193. The Committee considers that no tenable basis has been advanced by Argentina for suggesting that the way that the Tribunal exercised its discretion in the circumstances was inconsistent with any principle of equality of the parties or right of defence or fair treatment.

194. The Committee notes that Argentina has also argued that the Tribunal's decision was contrary to paragraph 19.1 of the minutes of the First Session of the Tribunal, which recorded the parties' agreement at the First Session that no further evidence would be submitted after conclusion of the written pleadings except in "*extraordinary circumstances*". Argentina argues that in its letter of October 20, 2005, the Claimants did not assert the existence of any such extraordinary circumstances, and that the Tribunal did not in its decision make any finding of extraordinary circumstances.

195. Although Argentina includes this argument under the heading of breach of the principle of equality of the parties and denial of the right of defence, the Committee has additionally considered the argument as an alleged breach of

[139] *Azurix* Annulment Decision ¶ 210.

the principle in ICSID Arbitration Rule 20(2).[140] The Committee does not doubt that the principle of party autonomy is a fundamental rule of procedure, and paragraph 19.1 of the minutes of the First Session records an *agreement* of the parties on a procedural matter.

196. The Committee considers however that there is no reason for concluding that the Tribunal did not consider the circumstances to be "*extraordinary*" within the meaning of paragraph 19.1 of the minutes of the First Session. It is true that the failure of the Claimants or the Tribunal to mention paragraph 19.1 may suggest that the Tribunal did not in fact expressly address its mind to its terms. However, even if this were so, the Committee is satisfied that the circumstances that were considered by the Tribunal to justify allowing submission of the new expert reports were such as to fall within the definition of "extraordinary" as that phrase was used in paragraph 19.1. The Committee considers that in context, the word "extraordinary" in that paragraph means "outside the usual course of events" such as to justify a departure from what would otherwise be the applicable time limit. A claim by one party that new issues have been raised in evidence in the other party's rejoinder requiring further evidence in rebuttal is not the usual course of events. The Committee therefore does not consider that the Tribunal's decision was inconsistent with paragraph 19.1, whether or not the Tribunal expressly considered it.

197. In any event, even if the Tribunal's decision were inconsistent with paragraph 19.1, for the reasons given above, the Committee does not consider that there was any inconsistency with the principle of equality of the parties or right of defence. Even if there may in that event have been a departure from a fundamental rule of procedure (the principle of party autonomy), in the Committee's view, in all of the circumstances, it was not a *serious* departure justifying annulment of the Award. A "serious" departure "*must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide*".[141] The Committee is not satisfied that any departure

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[140] ICSID Arbitration Rule 20(2): "In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations."

[141] See paragraph 71 above.

from the principle of party autonomy was serious, or that Argentina has been deprived of the benefit that that principle was intended to provide.

198. It follows that this ground of annulment must be rejected.

(d) Closure of the proceedings

(i) Background

199. In a letter to the Secretary of the Tribunal dated 26 November 2006, the Claimants made reference to a meeting between representatives of the parties on 17 May 2006, and noted a disagreement between the parties as to the discussion that occurred at that meeting.

200. In a letter dated 18 January 2007, Argentina referred to the disagreement between the parties as to what had occurred at an informal meeting, stating that Argentina had "*advised the tribunal to use all the technology available to detect who is lying and who is not*", noted that the President of the Tribunal "*states that it is not necessary to analyse the meaning of a meeting that was held between the parties, in view of previous considerations*", said that because of a "*new situation*" Argentina "*want[ed] to air*" what transpired at the meeting, and maintained that Argentina had a "*right to receive a reasonable reply on this issue*".

201. By a letter to the parties dated March 22, 2007, the Secretary of the Tribunal stated:

> *On behalf of the Arbitral Tribunal, I write to inform you that the proceeding is declared closed as of today's date in accordance with Rule 38(1) of the ICSID Arbitration Rules.*

202. By a letter to the Secretary of the Tribunal dated April 26, 2007, Argentina expressed its "*profound concern as regards to the circumstances in which the proceedings were closed*". It noted that the proceedings were closed only 14 days after Argentina had challenged the President of the Tribunal in the

Sempra and *Camuzzi* cases,[142] and only 6 days after Argentina had in those other cases presented its reasons for the challenge. The letter noted that the effect of the closure of the proceedings in the present case was that Argentina could no longer propose the disqualification of an arbitrator under ICSID Arbitration Rule 9. The letter stated that Argentina objected to the closing of the proceedings in these circumstances. The letter further stated that in addition, the Tribunal had "*not taken any decision with regard to the serious accusation made by the Argentine Republic in its note dated January 18, despite the fact that said note expressly requested a decision in this regard*".

203. By a letter dated March 22, 2007, the Secretary of the Tribunal stated:

> *The President of the Tribunal, after having consulted with the Tribunal's members, has asked me to inform you of the following: The Tribunal, after having carefully examined the Respondent's letter of April 26, 2007 and the Claimant's letter of May 4, 2007, wishes to inform the parties, as a matter of courtesy, that the closing of the proceedings in this case was decided only in consideration to the advanced stage of deliberations and the fact that final translations and editing of the award were well under way.*

(ii) Arguments of the parties

204. Argentina argues, *inter alia*, that:

(a) There was still a request filed by Argentina on January 18, 2007 pending resolution as regards serious actions committed by ENRON representatives, which were extremely relevant for the present arbitration.

(b) In spite of the seriousness and importance of the requests and claims made by Argentina, the Tribunal failed to make a decision in this regard and closed the proceeding, thus affecting Argentina's right to defence. Considering and assessing evidence is a crucial aspect of the fair and

[142] Professor Francisco Orrego-Vicuña, who was President of the Tribunal in the present case, was also the president of the tribunal in *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16) and is the president of the tribunal in *Camuzzi International S.A. v. Argentine Republic* (ICSID Case No. ARB/03/2).

impartial assessment of the procedure. Failing to settle such a serious claim filed by Argentina warrants the annulment of the Award.

(c) Closure of the proceedings only 14 days after Argentina Republic had proposed the disqualification of the President of the *Enron* tribunal in the *Sempra* and *Camuzzi* cases, and only 6 days after Argentina had explained in writing the grounds for such disqualification proposal, and even though a decision on Argentina's request was pending, made it impossible for the Tribunal to analyze the Claimants' attitude at the meeting held at the Argentine Treasury Attorney General's Office, in which the Claimants' attorneys stated that, if they received USD 40 million they would abandon this arbitration proceeding, when they demanded the payment of USD 453 or 639 million, depending on the calculation method.

(d) Failing to settle such serious requests filed by Argentina before closing the proceedings was a serious departure from a fundamental rule of procedure in terms of Article 52(1)(d) of the ICSID Convention.[143]

205. The Claimants argue, *inter alia*, that:

(a) The Tribunal's decision to close the proceedings was adopted 6 years after the case was filed and 15 months after the hearing on the merits and the post-hearing briefs were submitted.

(b) Argentina had ample time to file a challenge to one of the arbitrators but never did so. This case had no relationship with the *Sempra* or *Camuzzi* cases, and if Argentina considered it appropriate to challenge the President of the Tribunal in this case, it could have done so earlier, or even after closure of the proceedings based on Rule 38(2) of the ICSID Arbitration Rules. Argentina's voluntary decision not to challenge an arbitrator cannot be used later as a valid ground for annulment.[144]

[143] Referring to Schreuer Commentary at 645.
[144] Referring to *Azurix* Annulment Decision ¶ 230.

(c) There were no "pending requests" at the time that the Tribunal decided to close the proceedings. Argentina's letter to the Tribunal dated January 8, 2007, merely requested the Tribunal to decide the truth of what was said in a settlement meeting that occurred long after the merits hearing had concluded, and it is hard to argue that there was any other pending request in the letter.

(d) Since the parties did not settle the dispute, what occurred at settlement discussions long after the hearing on the merits was concluded was irrelevant to the proceeding.

(e) It is not a serious departure from a fundamental rule of procedure for a tribunal to decline to consider an issue that it considers to be irrelevant, merely because one of the parties considers it to be important.[145]

(iii) The Committee's views

206. The Committee finds that Argentina has not articulated clearly why the closure of the proceedings on March 22, 2007, amounted to a serious departure from a fundamental rule of procedure.

207. Argentina's submissions appear to suggest that the closure of the proceedings deprived Argentina of any further opportunity to challenge any of the members of the Tribunal. However, Argentina does not clearly state that it would have challenged any of the members of the Tribunal but for the closure of the proceedings, or on what basis it would have brought such a challenge. Nor does Argentina address the question of why, if it had wanted to challenge any of the members of the Tribunal, it could not have done so earlier, before the proceedings were closed.

208. There is at best a very vague implication in Argentina's submissions that but for the closure of the proceedings on March 22, 2007, Argentina might have sought to challenge the President of the Tribunal on the same grounds as it had sought to challenge him in the *Sempra* or *Camuzzi* cases two weeks

[145] Referring to *Azurix* Annulment Decision ¶ 244.

earlier. However, such a vague implication cannot be sufficient justification for annulment of an award. In the absence of any clear statement by Argentina that it would have challenged a member of the Tribunal, and that the closure of the proceedings prevented it from so doing, there is simply no basis for the Committee to consider whether closure of the proceedings prevented such a challenge.

209. Even if there were such a clear statement by Argentina, it would be necessary for the Committee to consider whether Argentina could have brought such a challenge earlier, before the proceedings were closed. Argentina makes no submissions on this issue. There would also be a question of whether or not, as the Claimants argue, Argentina could have sought to reopen proceedings under Rule 38(2) of the ICSID Arbitration Rules. In the absence of details from Argentina as to the precise basis and circumstances of any challenge that it would have wished to make, it is not possible for the Committee to consider these questions.

210. On the basis of the material and arguments before it, the Committee therefore concludes that there can be no suggestion that the closure of proceedings on 22 March 2007, amounted to a serious departure from any fundamental rule of procedure on the basis that it prevented Argentina from challenging a member of the Tribunal.

211. As regards the allegations that had been made by Argentina concerning the meeting of representatives of the parties, the Committee notes that in order to be a "serious" departure from a fundamental rule of procedure, the departure from such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.[146] Argentina does not in its submissions explain how the Tribunal's decision to close the proceedings without expressly taking action in response to Argentina's letter of 18 January 2007, may have affected the outcome of the Award. Furthermore, for a ground of annulment under Article 52(1)(e), it is necessary for Argentina to establish the fundamental rule of procedure from which it is claimed that the Tribunal departed. There is no fundamental rule of

[146] See paragraph 71 above.

procedure requiring a tribunal to undertake enquiries into the circumstances of a meeting between representatives of the parties whenever one party requests this. For a tribunal to decline to do so cannot in the Committee's view in any sense be considered inconsistent with any principles of equality or right of defence.

212. The Committee considers this ground of annulment to be manifestly unfounded.

G. Applicable law

(a) Introduction

213. In its Application for Annulment, Argentina contends that to the extent that the Tribunal was correct to resort to sources of law outside the BIT, Article 42(1) of the ICSID Convention required the Tribunal to apply the law of Argentina, which it failed to do, thereby manifestly exceeding its powers, a ground of annulment under Article 52(1)(b) of the ICSID Convention.[147] Argentina also contends that the Award does not state the reasons on which it is based and does not provide reasons for its interpretation of the Licence and failed to analyse Argentina's arguments, a ground of annulment under Article 52(1)(b) of the ICSID Convention.[148]

(b) Arguments of the parties

214. Argentina argues, *inter alia*, that:

Interpretation of the Licence

Generally

(a) The Tribunal said that it had analysed the extent to which Argentina's obligations were fulfilled in terms of Argentine law since "the License is

[147] Application for Annulment ¶¶ 32-38.
[148] Application for Annulment ¶¶ 70 *et seq*.

expressly subject to Argentine law in some key aspects", but groundlessly and in manifest excess of power concluded that those obligations were not fulfilled.[149]

PPI adjustments

(b) The Tribunal expressed no grounds for its conclusions that Argentina guaranteed that the tariffs would be "*adjusted semi-annually in accordance with the US PPI*",[150] and that "*such understanding was also the Government's view at the time and for almost a whole decade".*[151] nor analyzed the arguments put forward by Argentina.

(c) The Tribunal stated that Decree 669/2000 confirmed the existence of the "right" to PPI-based adjustment since it referred to the adjustment as a "legitimately acquired right", but the Claimants could not in 1992 have had an expectation based on a decree issued in 2000.

(d) The Tribunal derived rights from the Information Memorandum[152] notwithstanding it was not prepared by the Argentine State[153] and contained an express disclaimer that the Government of Argentina made no representation as to the accuracy, reliability or the completeness of the information it contained.[154]

(e) The Tribunal made no analysis whatsoever of Argentina's arguments regarding the PPI matter,[155] and said that it "is persuaded" by the Claimants' approach without explaining why.[156]

(f) The Tribunal took in isolation one Article of the Licence (which referred to the PPI) and did not pay any attention to other provisions that provided context for it.

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149 Referring to Award ¶ 231.
150 Referring to Award ¶¶ 101-102, 264.
151 Referring to Award ¶ 102.
152 Referring to Award ¶ 103.
153 Referring to Award ¶ 103.
154 Referring to Award ¶ 103.
155 Referring to Award ¶¶ 97-98.
156 Referring to Award ¶ 102.

(g) The Tribunal took into account the Bianchi Report, which was presented in violation of the rules of procedure.[157]

(h) The Tribunal had no power to grant damages for the suspension of the PPI in 2000 and 2001 due to the Suspension Agreements, before the Emergency Law was enacted,[158] as they were voluntary agreements; this finding contradicted a separate finding of the Tribunal that the question of the Trust Fund and its operation, to which TGS had agreed, "*cannot be a matter of complaint before it*".[159]

(i) The Tribunal incorrectly found that the licensees only agreed to the suspension of the PPI-adjustment due to the fact that the amounts that would not be collected as a result of the suspension would be recovered later.[160]

Tariff calculation in US dollars

(j) The Tribunal did not give reasons for rejecting Argentina's argument that Article 18(2) of the Licence, which prohibited the Grantor to change the licence except with express agreement of the Licensee, was a prohibition applying specifically to the Executive branch as the grantor of the Licence, and which did not apply to Legislative branch which adopted the Emergency Law, or the Judicial branch, which issued the injunction of 17 August 2000.[161]

(k) The Tribunal failed to consider certain arguments of Argentina, gave no reasons for rejecting certain arguments of Argentina, "counter-argued" against alleged arguments of Argentina which Argentina in fact never raised, discarded terms that were expressly agreed upon in the Licence, and gave no reasons for certain factual conclusions, thereby

157 This argument is considered by the Committee in paragraphs 180-198 above.
158 Referring to Award ¶¶ 445-448.
159 Referring to Award ¶ 190.
160 Referring to Award ¶ 447.
161 Referring to Award ¶ 154.

acting in an arbitrary fashion, failing to settle issues raised by the parties, and giving merely frivolous reasons.[162]

(l) The Tribunal stated that "*the Gas Decree and the Basic Rules of the License unequivocally refer to the calculation of tariffs in US dollars*", when the Gas Law makes no mention of tariffs calculations in US dollars.

(m) The English version of the Award does not mention the Gas Law, such that the Spanish and English versions contradict each other.

(n) The Tribunal did not provide reasons for rejecting the expert opinion of Professor Comadira, and the Tribunal did not even mention his report in Chapter IV of the Award.

The issue of TGS's and CIESA's financing policy

(o) The Tribunal did not decide on this allegation of Argentina and discarded Argentina's arguments without analysing them, and violated the principle of equality between the parties because it did consider the Claimants' arguments.[163]

(p) The Tribunal's finding that no claim was made by ENARGAS that the policy followed by TGS might be contrary to the regulatory framework or the License[164] was false and contradictory.

Rejection of the theory of "*imprevisión*"

(q) By applying the concept of *force majeure* in compliance with Article 23 of the ILC Articles in its analysis of the theory of "*imprevisión*" under Argentine law, the Tribunal failed to apply the applicable law, which was Argentine law.

(r) The Tribunal did not analyse Professor Comadira's report on unforeseeability in Argentine law.

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[162] Referring to *Soufraki* Annulment Decision ¶ 126.
[163] Referring to Award ¶ 373.
[164] Referring to Award ¶ 165.

(s) The Tribunal did not apply the relevant domestic law, did not deal with the point in the Comadira Report as to the distinction between ordinary and extraordinary risk, and did not analyse the relevant point in the Roubini Report or the case law of the Argentine Supreme Court.

Liability under Argentine law

(t) The Tribunal failed to apply the applicable law in relation to Argentina's liability under domestic law.[165]

(u) Professor Comadira's evidence as to the legality of the challenged measures under internal law were discarded for no reasons and remained unanalysed.

(v) The acceptance and use of Alberto Bianchi's report to support this core part of the Award constituted a serious violation of a rule of procedure.[166]

(w) The Tribunal's analysis of the consistency between the challenged regulations and the internal law is faulty and leads to the non-application of the applicable law.[167]

215. The Claimants argue, *inter alia*, that:

Interpretation of the Licence

Generally

(a) Argentina's claim is a disguised appeal on the merits of the case, and Argentina impermissibly seeks to reargue the merits of the issues.

PPI adjustments

(b) Argentina's claim seems to be an alleged inadequacy of reasons rather than their absence, which is not a basis for annulment, the requirement

[165] Referring to Award ¶¶ 218 *et seq*.
[166] Referring to the arguments dealt with in paragraphs 187-198 above.
[167] Referring to Award ¶¶ 218-232.

to provide reasons not being a duty to provide reasons that convince the losing party.[168]

(c) In relying on a binding contractual provision (the Licence) in order to ascertain whether there was a right to the PPI tariff adjustment, the Tribunal satisfied the requirement of Article 52(1)(e) of the ICSID Convention, and its decision is consistent with other arbitration awards.[169]

(d) The Tribunal further supported its decision by pointing to the provisions of the Gas Regulatory Framework, on which the License's provisions were based, and provided additional reasons based on the Government's previous practice, the terms of Decree 669/00, and the representations made in the Information Memorandum.[170]

(e) The Tribunal did not state that Claimants based their investment decision on the terms of Decree 669/00, but simply pointed out that the Government's own statements in the decree confirmed the Tribunal's reading of the Gas Regulatory Framework.[171]

(f) The Tribunal cited the Information Memorandum as an element that also confirmed, rather than established, the Tribunal's conclusion,[172] and whether it was legally binding is irrelevant. The Tribunal acknowledged that the Information Memorandum was prepared by private consultants and it contained a disclaimer regarding the Government's liability, but stated that if an error had been made in the statements in the Information Memorandum it would not have passed

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168 Referring to *Wena Hotels* Annulment Decision ¶ 79; *CDC* Annulment Decision ¶ 75.

169 Referring to *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, May 12, 2005 ("*CMS* Award"), ¶ 144; *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007 ("*LG&E* Award"), ¶ 119.2; *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Award, September 28, 2007 ("*Sempra* Award"), ¶ 110; *BG Group plc v. Republic of Argentina*, UNCITRAL arbitration, Final Award, December 24, 2007 ("*BG Group* Award"), ¶¶ 162(c) and 173(c).

170 Referring to Award ¶¶ 62, 102.

171 Referring to Award ¶ 102.

172 Referring to Award ¶ 101.

unnoticed by the Government, which had a duty to issue a clarification.[173]

(g) The Tribunal correctly found that the Claimants were entitled to compensation based on the terms of the 2000 and 2001 suspension agreements as the Tribunal found that they were executed "in January and June 2000 on the basis that the amounts not collected as a result of the suspension would be recouped later and with interests".[174]

Tariff calculation in US dollars

(h) The Tribunal devoted almost 50 paragraphs to analyzing the US dollar tariff issue,[175] and its reasoning provides a coherent basis for its decision on this issue.

(i) The Regulatory Framework granted a right to calculate the tariff in US dollars, and the same reasoning was followed by tribunals in other cases.[176]

(j) The Tribunal analyzed and rejected Argentina's position regarding Section 18 of the License,[177] as did the Tribunal in the *Sempra* Award.[178]

(k) Any discrepancy between the English and Spanish versions of the Award should have been made by Argentina the subject of the procedure under Article 49(2) of the ICSID Convention.

(l) The Tribunal has full discretion to assess the probative value of any evidence produced by the parties,[179] and the fact that the Award contains reasons different from those argued by Argentina's expert demonstrates the Tribunal's implicit rejection of the latter's position.

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173 Referring to Award ¶ 103.
174 Referring to Award ¶ 447.
175 Referring to Award ¶¶ 106-155.
176 Referring to *CMS* Award ¶ 133; *LG&E* Award ¶ 119.1; *Sempra* Award ¶ 141; *BG Group* Award ¶¶ 166, 171, 173(a).
177 Referring to Award ¶¶ 128, 143-144, 154, 224.
178 Referring to *Sempra* Award ¶ 173.
179 Referring to ICSID Arbitration Rule 34(1).

(m) The Tribunal's statement that in the context of a long period of economic turmoil, investors would not have been attracted to participate in the privatization process unless specific guarantees were provided in respect of the stability of their agreement,[180] is fully supported by the evidence in the record, and other tribunals on the same fact also reached the conclusion that US dollar tariffs were one of the main features of the Regulatory Framework.[181]

(n) The Tribunal duly dealt with Argentina's argument related to an alleged incompleteness of the Gas Regulatory framework.[182]

(o) The Tribunal provided reasons for its interpretation of the Privatisation Committee minutes[183] that was identical to the conclusion reached in the *Sempra* Award,[184] and even if its interpretation were inaccurate, that would not provide grounds for annulment.

(p) The Tribunal did analyse Argentina's argument regarding "country risk",[185] and its findings are consistent with at least two other awards.[186]

The issue of TGS's and CIESA's financing policy

(q) The Tribunal dealt with the financing policy issue in two different sections of the Award and expressly rejected Argentina's argument,[187] and in doing so, gave its reasons.

Rejection of the theory of "*imprevisión*"

(r) The Tribunal applied the BIT (which is also part of Argentina's domestic law) as *lex specialis*, complemented by customary international law where necessary, and these sources prevail over the law of the host

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180 Referring to Award ¶¶ 213-214.
181 Referring to *Sempra* Award ¶ 141.
182 Referring to Award ¶¶ 128-29, 136-137, 150.
183 Referring to Award ¶¶ 139-140.
184 Referring to *Sempra* Award ¶¶ 153-154.
185 Referring to Award ¶¶ 148-150.
186 Referring to *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, October 3, 2006 ("*LG&E* Decision on Liability"), ¶ 133; *Sempra* Award ¶¶ 164-65.
187 Referring to *CMS* Award ¶¶ 133-134, 137; *Sempra* Award ¶ 142.

State which plays a limited role in adjudicating the merits of a treaty dispute.[188] Article 23 of the ILC Articles was a valid source of law.[189]

(s) After identifying the requirements for application of the theory, the Tribunal simply found that those conditions were not met in the present case.[190]

Liability under Argentine law

(t) The Award includes an in-depth analysis of Claimants' rights under Argentine law and the subsequent impact of Argentina's measures on those rights,[191] followed by a determination of the applicable standards for emergency situations established by the Argentine Supreme Court,[192] followed by a finding that those requirements had not been met.[193]

(u) The Tribunal did not apply the Civil Code, but supported its findings with the Gas Law, the Regulatory Framework and the License, which are part of Argentine administrative and regulatory law.[194]

(v) Even if the Tribunal erred by applying the wrong law, which it did not, this would not constitute a manifest excess of power, since the outcome of the case would not have been different.

(w) Some Argentine case law which the Tribunal is said by Argentina not to have considered was not submitted as evidence to the Tribunal during the merits phase and therefore have no place in annulment

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188 Referring to *Vivendi* Annulment Decision ¶ 102; International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission, 2001,* vol. II (Part Two); annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4 ("ILC Articles"), Article 3.

189 Referring to ICSID Convention, Article 42(1).

190 Referring to Award ¶¶ 216-217, 311-312.

191 Referring to Award ¶¶ 95-155, 206, 209.

192 Referring to Award ¶ 218.

193 Referring to Award ¶¶ 218-226.

194 Referring to Award ¶ 143.

proceedings,[195] and these cases were distinguishable and did not alter the basic principles in the case law cited by the Tribunal.

(x) It is sufficient that the Tribunal examined the parties' submissions on Argentine law and stated reasons since a more detailed review of the Tribunal's application of Argentine law is beyond the scope of this annulment proceeding.[196]

(c) The Committee's views

General matters

216. The Tribunal found that at the time that the Claimants' investment was made, the relevant provisions of the regulatory regime in Argentina included guarantees of semi-annual US PPI adjustments[197] and of calculation of tariffs in US dollars.[198] The Tribunal also found that there was no justification under Argentine law for the subsequent measures taken by Argentina that had the effect of dismantling these guarantees.[199] Argentina contends in effect that in reaching this conclusion, the Tribunal in fact failed to apply Argentine law and failed to give reasons for its decision.

217. The scope of the various grounds of annulment under Article 52 of the ICSID Convention has been dealt with above.[200]

218. The ground of annulment under Article 52(1)(b), that the tribunal manifestly exceeded its powers, extends to the situation where a tribunal disregards the applicable law, or bases the award on a law other than the applicable law under Article 42 of the ICSID Convention.[201] As the *ad hoc* committee said in the *Azurix* Annulment Decision:

> *Grounds for annulment under Article 52(1)(b) will exist where the tribunal fails to apply any law at all in determining*

195 Referring to *MTD* Annulment Decision ¶ 31.
196 Referring to *Amco II* Annulment Decision ¶ 7.21.
197 Award ¶ 95-105.
198 Award ¶ 106-150.
199 Award ¶ 210, 230, 231, 233.
200 See paragraphs 60-77 above.
201 See, for instance, *Azurix* Annulment Decision ¶ 136.

> *the dispute, for instance, where the tribunal decides the dispute* ex aequo et bono *despite not being authorised to do so under Article 42(3). Such grounds for annulment will similarly exist where the tribunal purports to apply a law other than the law applicable under Article 42, or where while purporting to apply the law applicable under Article 42, the tribunal manifestly applies a different body of law.*[202]

219. The Committee further agrees with earlier case law to the effect that "*while non-application by the tribunal of the law applicable under Article 42 may be a ground for annulment, the* incorrect application *by the tribunal of the applicable law is not*".[203] Only failure to apply the applicable law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of power on the part of the Tribunal and a ground for nullity under Article 51(1)(b) of the Convention.[204]

220. The Committee additionally agrees that its task of distinguishing between, on the one hand, "*failure to apply the applicable law as a ground for annulment*", and, on the other hand, "*misinterpretation of the applicable law as a ground for appeal*", is one that must be approached with caution.[205] The Committee cannot accept any suggestion that where a tribunal errs in articulating or applying the applicable law, it thereby ultimately fails to apply the applicable law and thus manifestly exceeds its powers. Such an argument, if accepted, and even if confined to cases where an error of law by the tribunal is manifest, would obliterate the distinction which an annulment committee is required carefully to maintain between non-application of the applicable law and alleged error in applying the applicable law. An error of law, like an error of fact, is not of itself a ground of annulment.[206] This being the case, in circumstances where it has not been established that the tribunal failed to apply the applicable law, there will normally be no occasion for an *ad hoc* committee to enquire whether or not the tribunal may have erred in its

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202 *Azurix* Annulment Decision ¶ 136 (footnotes omitted).

203 *Azurix* Annulment Decision ¶ 137.

204 *Amco Asia Corporation and others* v. *Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, May 16, 1986 ("*Amco I* Annulment Decision"), ¶ 23, cited with approval in *Soufraki* Annulment Decision ¶ 85, quoted in *Azurix* Annulment Decision ¶ 137.

205 *Amco I* Annulment Decision ¶ 23, cited with approval in *Soufraki* Annulment Decision ¶ 85, quoted in *Azurix* Annulment Decision ¶ 137.

206 *MINE* Annulment Decision ¶¶ 5.08-5.09, quoted in *Azurix* Annulment Decision ¶ 53 and *MCI* Annulment Decision ¶ 84; *CMS* Annulment Decision ¶ 121.

articulation or application of the applicable law, or whether the tribunal may have made an error of fact.

221. The scope of the ground of annulment under Article 52(1)(e) of the ICSID Convention (failure to state reasons) has been considered above.[207] The Committee reiterates that a tribunal is not required to comment on all arguments of the parties in relation to each of the questions that it decides; that this ground of annulment only applies in a clear case when there has been a failure by the tribunal to state any reasons for its decision on a particular question, and not in a case where there has merely been a failure by the tribunal to state correct or convincing reasons; and that "*the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*".

222. Article 48(3) of the ICSID Convention states that "The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based". Article 52(1)(e) provides for a ground of annulment in cases where the award "has failed to state the reasons on which it is based". As has been noted, pursuant to these provisions, a tribunal has a duty to deal with each of the *questions* ("*pretensiones"*) submitted to it, but is not required to comment on all arguments of the parties in relation to each of those questions. Similarly, the Committee considers that the tribunal is required only to give reasons for its decision in respect of each of the *questions*. This requires the tribunal to state its pertinent findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or did not expressly state a view on every single legal and factual issue raised by

[207] See paragraphs 72-77 above.

the parties in the course of the proceedings. The tribunal is required to state reasons for its *decision*, but not necessarily reasons for its *reasons*.

223. Article 42(1) of the ICSID Convention provides that:

> *The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.*

224. The claim brought by the Claimants in this case was for alleged violations of the BIT. In the Award, the Tribunal found that there were breaches of the BIT for which Argentina was responsible, and determined an amount of compensation that Argentina was to pay the Claimants in respect of those breaches of the BIT. The Committee considers that in relation to such a claim, the applicable law is that identified in the *Azurix* Annulment Decision as follows:

> *Each of [the] claims in this case was for an alleged breach of the BIT. The BIT is an international treaty between Argentina and the United States. By definition, a treaty is governed by international law, and not by municipal law. It is a fundamental principle that "*[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty*". In any claim for breach of an investment treaty, the question whether or not there has been a breach of the treaty must therefore be determined, not through the application of the municipal law of any State, but through the application of the terms of the treaty to the facts of the case, in accordance with general principles of international law, including principles of the international law of treaties. Bearing in mind that an investment treaty, whether bilateral or multilateral, is itself a source of international law as between the States parties to that treaty, the applicable law in any claim for a breach of that treaty can thus be said to be the treaty itself specifically, and international law generally.*
>
> *Furthermore, in arbitration proceedings under the ICSID Convention, the tribunal also must comply with the terms of the ICSID Convention, which is also an international treaty to be interpreted and applied in accordance with general principles of international law, including principles of the international law of treaties. … [I]n a claim for breach of an investment treaty, the application by the tribunal of the*

> *terms of the investment treaty and of international law as the applicable law is foreseen by the words "*and such rules of international law as may be applicable*" in Article 42(1) of the ICSID Convention*.[208]

225. The Committee reaches the same conclusion as in the *Azurix* case that in the present case, the law applicable under Article 42 of the ICSID Convention to the Claimants' claims of breaches of the BIT was "*the ICSID Convention, … the BIT and … applicable international law*".[209]

226. As the *ad hoc* committee then went on to say in the *Azurix* Annulment Decision:

> *In some cases, it may be an express term of the investment treaty that the host State is required to comply with specified provisions of its own municipal law. In such cases, a breach by the host State of municipal law may thus amount to a breach of the treaty. Although municipal law does not as such form part of the law applicable to a claim for breach of a treaty, in such cases it may be necessary to determine whether there has been a breach of municipal law as a step in determining whether there has been a breach of the treaty. …*
>
> *However, even in this situation, municipal law would not thereby become part of the applicable law under Article 42 of the ICSID Convention for purposes of determining whether there was a breach of Article II.2(c) of the BIT. Rather, any breach of municipal law that might be established would be a fact or element to which the terms of the BIT and international law would be applied in order to determine whether there was a breach of Article II.2(c).*[210]

227. In the present case, the Tribunal considered the law applicable to the dispute in paragraphs 203 to 209 of the Award. The Tribunal said, *inter alia*, that:

> *The Respondent is right in arguing that domestic law is not confined to the determination of factual questions. It has indeed a broader role, as it is evident in this very case from the pleadings and arguments of the parties that have relied heavily on the Gas Law and generally the regulatory framework of the gas industry, just as they have relied on many other rules of the Argentine legal system, including the Constitution, the Civil Code, specialized legislation and*

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208 *Azurix* Annulment Decision ¶¶ 146-147 (footnotes omitted).

209 *Azurix Corp. v. Argentine Republic,* ICSID Case No. ARB/01/12, Award 14 July 2006 ¶ 67 (*Azurix* Award); approved in *Azurix* Annulment Decision ¶ 148.

210 *Azurix* Annulment Decision ¶¶ 149, 151.

> *the decisions of courts. The License itself is governed by the legal order of the Argentine Republic and it must be interpreted in its light. …*
>
> *While on occasions writers and decisions have tended to consider the application of domestic law or international law as a kind of dichotomy, this is far from being the case. In fact, both have a complementary role to perform and this has begun to be recognized. …*
>
> *The Tribunal must also note that in examining the Argentine law as pertinent to various issues disputed by the parties, it finds that there is generally no inconsistency with international law as far as the basic principles governing the matter are concerned. The Tribunal will accordingly apply both Argentine law and international law to the extent pertinent and relevant to the decision of the various claims submitted.*[211]

228. The Committee considers that it is unclear from these paragraphs precisely what role the Tribunal considered that it was required to accord to international law and to domestic law respectively in resolving the dispute before it. It therefore becomes necessary to consider the Tribunal's reasoning in the parts of the Award where the Tribunal ultimately gives its decision on the claimed violations of the BIT.

229. The Tribunal found that the conduct for which Argentina was responsible constituted violations of two provisions of the BIT, the "fair and equitable treatment" clause, and the "umbrella" clause.

230. In relation to the fair and equitable treatment clause, the key paragraphs of the Award stating the reasons for finding a breach of this provision were paragraphs 264 to 267, in which the Tribunal said:

> *264. The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Argentina in the early 1990s constructed a regulatory framework for the gas sector containing specific guarantees to attract foreign capital to an economy historically unstable and volatile. As part of this regulatory framework, Argentina guaranteed that tariffs would be calculated in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the*

[211] Award ¶¶ 206-207, 209.

> *US PPI and sufficient to cover costs and a reasonable rate of return. It further guaranteed that tariffs would not be subject to freezing or price controls without compensation. Foreign investors were specifically targeted to invest in the privatization of public utilities in the gas sector. Substantial foreign investment was undertaken on the strength of such guarantees, including the investment made by Enron in TGS.*
>
> *265. The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.*
>
> *266. A decade later, however, the guarantees of the tariff regime that had seduced so many foreign investors, were dismantled. Where there was certainty and stability for investors, doubt and ambiguity are the order of the day. The long-term business outlook enabled by the tariff regime, has been transformed into a day-to-day discussion about what comes next. Tariffs have been frozen for almost five years. The recomposition of the tariff regime is subject to a protracted renegotiation process imposed on the public utilities that has failed to provide a final and definitive framework for the operation of business in the energy sector.*
>
> *267. The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years.*
>
> *268. Even assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established in Article II(2)(a) of the Treaty has not been observed and that to the extent that it results in a detriment to the Claimants' rights it will give rise to compensation.*

231. These paragraphs contain no reference to any liability on the part of Argentina under *Argentine* law. There is no suggestion that the finding of liability for

breach of the fair and equitable treatment clause of the BIT was premised on any finding that Argentina was in breach of, or liable to the Claimants or TGS or any other person, under Argentine domestic law. Rather, the Committee considers it clear from these paragraphs that the basis of the Tribunal's decision was essentially that:

(a) as a matter of *fact*, Argentina constructed a regulatory framework for the gas sector containing specific guarantees to attract foreign capital to an economy historically unstable and volatile (paragraph 264);

(b) as a matter of *fact*, Enron undertook investment in Argentina (by investing in TGS) on the strength of those guarantees, and had reasonable grounds to rely on those guarantees (paragraphs 264-265);

(c) as a matter of *fact*, a decade later those guarantees were dismantled (paragraphs 266) and the "stable legal framework" that induced the investment was no longer in place (paragraph 267);

(d) as a matter of *law*, this amounted to a violation by Argentina to a breach of the fair and equitable treatment clause (paragraphs 267-268).

232. From a reading of these paragraphs, it is in the Committee's view apparent that on the reasoning adopted by the Tribunal, Argentine domestic law was not relevant to the Tribunal's decision in respect of the claimed violation of the fair and equitable treatment clause, except in relation to the finding referred to at (a) in the previous paragraph. That is to say, in determining whether the Claimants were attracted to invest in Argentina by particular guarantees provided for in the regulatory framework for the gas sector, it was necessary to determine whether the alleged guarantees (including the semi-annual US PPI adjustments and the calculation of tariffs in US dollars) were indeed part of the regulatory framework at the time that the investment was made. If the regulatory regime did include these particular guarantees, it would in the Committee's view follow from the Tribunal's reasoning that any subsequent measures taken by Argentina to dismantle those guarantees in circumstances where the Claimants had reasonably relied on them when making their investment (other than measures taken in accordance with the mechanisms

provided for in the regulatory framework and Licence itself[212]) would amount to a breach of the fair and equitable treatment clause, even if those measures were entirely lawful under Argentine domestic law, and even if those measures gave rise to no liability on the part of Argentina under Argentine domestic law. In those circumstances, the measures, although lawful under Argentine law, would in international law be contrary to the protections afforded by the BIT.

233. In relation to the umbrella clause, the key paragraphs of the Award stating the reasons for finding a breach of this provision were paragraphs 274 to 276, in which the Tribunal said:

> *274. Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature. Tribunals interpreting this expression have found it to cover both contractual obligations such as payment as well as obligations assumed through law or regulation. 'Obligations' covered by the 'umbrella clause' are nevertheless limited by their object: 'with regard to investments'.*
>
> *275. Through the Gas Law and its implementing legislation, the Respondent assumed 'obligations with regard to investments': tariffs calculated in US dollars converted to pesos for billing purposes, linked to the US PPI and sufficient to provide a reasonable rate of return were intended to establish a tariff regime that assured the influx of capital into the newly privatized companies such as TGS and ensured the value of such investment. The dismantling of these guarantees would suffice to establish a violation of the obligations entered into by the Respondent with regard to the Claimants' investment.*
>
> *276. In addition, the prohibition of price controls without indemnification and the prohibition of License amendments without consent, although contained in the License were also approved by decree and formed part of the implementing legislation that established the tariff regime. The obliteration of these commitments likewise entails a violation of obligations entered into by the Respondent with regard to the Claimants' investment.*
>
> *277. The Tribunal concludes accordingly that the breach of the obligations noted undertaken both under contract and law and regulation in respect of the investment have*

[212] See for instance Award ¶¶ 104, 143-144, 228-230.

resulted in the breach of the protection provided under the umbrella clause of Article II(2)(c). [Footnotes omitted.]

234. Again, these paragraphs contain no suggestion that the finding of liability for breach of the umbrella clause was premised on any finding of liability under Argentine law. Again, the Committee considers it clear enough that the basis of the Tribunal's decision that:

(a) as a matter of *fact*, through the Gas Law and its implementing legislation, Argentina assumed obligations with regard to the Claimants' investment (paragraph 275);

(b) as a matter of *fact*, Argentina subsequently dismantled those guarantees, and this suffices to establish a violation of the umbrella clause (paragraphs 275-276); and

(d) as a matter of *law*, this amounted to a violation by Argentina to a breach of the umbrella clause (paragraphs 276-277).

235. From a reading of these paragraphs, it is once more in the Committee's view apparent that on the Tribunal's reasoning, Argentine domestic law was relevant to the Tribunal's decision only in relation to the finding referred to at (a) in the previous paragraph. That is to say, in determining whether Argentina assumed particular obligations with regard to the Claimants' investment through the Gas Law and its implementing legislation, it was necessary to determine whether the alleged obligations (including the semi-annual US PPI adjustments and the calculation of tariffs in US dollars) were indeed once part of the Gas Law and its implementing legislation. If so, it would in the Committee's view follow from the Tribunal's reasoning that any subsequent measures taken by Argentina to dismantle those obligations (other than measures taken in accordance with the mechanisms provided for in the regulatory framework and Licence itself[213]) would amount to a breach of the umbrella clause, even if those measures were entirely lawful under Argentine domestic law, and even if those measures gave rise to no liability on the part of Argentina under Argentine domestic law. Again, in those circumstances,

[213] See for instance Award ¶¶ 104, 143-144, 228-230.

the measures, although lawful under Argentine law, would in international law be contrary to the protections afforded by the BIT.

236. The Committee further notes that, as discussed above, in determining the issue referred to in paragraphs 231(a) and 234(a) above, it was on the Tribunal's reasoning not necessary for the Tribunal to find that the Gas Law and its implementing legislation conferred rights or guarantees specifically *on the Claimants*, but only to find that guarantees had been given and obligations undertaken with respect *to the Claimants' investment*.[214]

237. It is beyond the mandate of the Committee to determine whether or not the Tribunal's reasoning was correct. The role of the Committee is confined to the grounds of annulment in Article 52 of the ICSID Convention, and as noted above, even if the Tribunal erred in law, this would not be a ground of annulment. The Committee does however note that it is well established that conduct for which a State is responsible may constitute a breach of international law, including a breach of an investment protection treaty, even where the conduct gives rise to no liability on the part of the State under domestic law.[215]

238. While the Committee considers the reading of the above paragraphs of the Award to be sufficiently clear, it notes that the Tribunal made certain statements that could be read as inconsistent with it. At paragraph 210 of the Award, the Tribunal said that "*It is now necessary to examine the Argentine law governing contracts in order to determine whether liability exists under the domestic legal order*". At paragraph 230 it said that the unilateral nature of the measures taken by Argentina "*resulted in the inconsistency of the measures taken with the domestic legal order*". At paragraph 231 it further said that:

> *The inescapable conclusion for the Tribunal to reach is that in considering the claims purely from the point of view of the Argentine legislation as one of the laws applicable to the dispute, the obligations which the Argentine Republic had and the commitments it undertook under the License were not observed. This is particularly significant in view that the License is expressly subject to Argentine law in some key*

[214] See paragraphs 112-117 above.
[215] See for instance *Azurix* Annulment Decision ¶¶ 143-147.

> *respects, without prejudice to the effect that these legal arrangements have under the Treaty and international law. Liability is thus the consequence of such breach and there is no legal excuse under the Argentine legislation which could justify the non-compliance, as the very conditions set out by this legislation and the decisions of courts have not been met.*[216]

239. At paragraph 233, the Tribunal added that it "*must now examine the question of whether the breach of the License and its regulatory regime, in addition to its assessment under Argentine legislation, amounts to a breach of the Treaty guarantees*".[217]

240. At first blush, these passages could be read as suggesting that the Tribunal, in contradiction to the discussion above, considered that Argentina would only be liable for a breach of the BIT if Argentina was liable under Argentine law in respect of the measures taken. However, the Committee considers it to be sufficiently clear on a closer reading of the Award that this is not the case.

241. The section of the Award dealing with liability under Argentine law (paragraphs 211-212) begins by referring to Argentina's argument that the guarantees were as a matter of Argentine law owed to TGS and not the Claimants, and that there was a risk of double recovery if both the company and the shareholders could claim in respect of the measures adopted by Argentina.[218] The Tribunal's response was to say that "*this question has already been decided in the decision on jurisdiction and it shall not be discussed again here*".[219] Argentina's challenge to the Tribunal's decision on jurisdiction, including the Tribunal's response to Argentina's argument with respect to double recovery, has been considered by the Committee above.[220] For the reasons there given, the Committee considers it clear that the Tribunal found that the right of the Claimants to bring an ICSID claim was not limited to violations of their rights *qua* shareholders under Argentine law, but extended to any breach of the protections accorded by the BIT to the Claimants' "investment" as defined in the BIT. This reference to the decision on

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216 Emphasis added.
217 Emphasis added.
218 Award ¶¶ 211-212.
219 Award ¶ 211.
220 See paragraphs 112-127 above.

jurisdiction in paragraph 211 of the Award, in the section of the Award dealing with liability under Argentine law, would thus appear to confirm again that Argentina's liability for a breach of the BIT did not in the Tribunal's view require a prior finding of liability under Argentine law.

242. The remainder of the section of the Award dealing with liability under Argentine law is concerned with the principles of "*imprevisión*" and "state of emergency" under Argentine law. The Tribunal found that neither of these principles applied in the present case, without however stating clearly what difference it would have made to the BIT claim if Argentina had been entitled to invoke either of them. The fact that the Tribunal considered Argentina's arguments concerning these principles suggests that the Tribunal considered that if they had been applicable, they might have precluded liability for breach of the BIT.

243. In its Memorial on Annulment, Argentina states that in the proceedings before the Tribunal, it argued as follows:

> *What Argentina ... stated is that the Licence agreed to by TGS could not be unilaterally modified by the Executive branch, but that nonetheless it was expressly subject to regulation by Congress. This original agreement—this is, the possibility that the contract and the legal framework could be modified by a subsequent law—should have been part of the legitimate expectations of Enron and Ponderosa when investing in TGS. Therefore, in principle, the Licence being modified by a law from Congress could never have frustrated those legitimate expectations or constituted a violation of fair and equitable treatment.*

244. It may be that the Tribunal accepted that this argument might be valid in relation to the principles of "*imprevisión*" and "state of emergency" under Argentine law: that is to say, that at the time the investment was made, the guarantees were given and obligations were undertaken subject to principles of "*imprevisión*" and "state of emergency", which were legal principles existing in Argentine law at the time that the investment was made. However, it is clear that the Tribunal rejected the argument that the guarantees were given and obligations were undertaken subject to a possibility of unilateral amendment at any time by Congress or the judiciary. The Tribunal said that:

> *153. ... The Respondent has argued that as the prohibition of Clause 18.2 refers to the License not being modified by the Licensor, and the Licensor is the Executive Branch of Government, any measures or effects arising from congressional action, such as the Emergency Law, or from judicial decisions, such as the US PPI injunction, are not adopted by the Licensor and hence not envisaged in the prohibition of unilateral modification.*
>
> *154. Ingenuous as this argument might be it is no more than a play of words because the Executive Branch binds the State in guaranteeing certain rights to foreign investors. Furthermore, quite evidently any State action, governmental, legislative or judicial, must respect the rights acquired under a contract. If contract rights were at the mercy of other branches of the State the rule of law, under both domestic and international law, would be seriously in jeopardy, a view which is not quite likely to be accepted in an arbitration which, at least in part, is governed by international law.*

245. The Committee considers it to be clear that the Tribunal did not state here that the Argentine State would be liable *under Argentine law* for any unilateral modification of the Licence through legislation adopted by Congress or through judicial decisions. Rather, the Tribunal was here stating that Argentina could not escape liability *under international law* for a breach of the BIT by contending, in reliance on Clause 18.2 of the Licence, that Argentina had for purposes of its BIT obligations only guaranteed and undertaken the obligation that there would be no unilateral modification to the Licence conditions by the Executive branch of government (as opposed to the Legislative or Judicial branches). The Committee considers it necessarily implicit in what the Tribunal stated that even if as a matter of Argentine law the Licence only bound the Executive branch of government, for purposes of Argentina's BIT obligations, guarantees given and obligations undertaken by the Executive branch of government applied to future measures taken by any branch of government. The Committee considers the reasons for rejecting Argentina's arguments to be sufficiently clear.

246. In conclusion, for these reasons, the Committee is of the view that the law applicable to the Claimant's claims was the ICSID Convention, the BIT and applicable international law, and that on the Tribunal's reasoning, Argentine

law was relevant in determining whether Argentina had for purposes of the BIT in fact given the claimed guarantees and undertaken the claimed obligations in respect of the Claimants' investment (as defined in the BIT). The Tribunal also found it relevant to consider whether as a matter of Argentine law the principles of "*imprevisión*" and "state of emergency" were applicable in the circumstances of this case. The Committee finds that in adopting the approach that it did, the Tribunal did not fail to apply the applicable law.

Interpretation of the Licence

PPI adjustments

247. At paragraph 43 of the Award, the Tribunal found that:

> *In order to facilitate the process of privatization, a Standard Gas Transportation License or "Model Licence" was approved by Decree 2255/92 including the applicable Basic Rules; all such rules were embodied in the License actually signed by TGS and the Government of Argentina and approved by Decree 2458/92. The duration of the License is of 35 years, leading up to 2027. An "Information Memorandum" concerning the privatization of Gas del Estado, the former State-owned transportation and distribution company, together with a "Pliego" explaining the bidding rules and the legal and contractual arrangements, were provided to prospective investors so as to organize the bidding process.*

248. The Tribunal found, at paragraph 101 of the Award, that:

> *The Tribunal must first note that it is correct that Article 41 of the Gas Law, while providing for adjustment of tariffs in accordance with a formula based on international market indicators, also related this formula to the change in value of goods and services. The formula, however, was not defined under the Law. This task was left to the Basic Rules of the License, which provided in this connection that tariffs were to be adjusted semi-annually in accordance with the US PPI. This was also the information conveyed to investors by the Information Memorandum.*[221]

[221] Award ¶ 101.

249. The Claimants' argument was that this semi-annual US PPI adjustment was a *right* and that it "*was an essential feature of the tariff system devised for the privatization, as it would prevent erosion of the US dollar value of the tariffs*".[222] Argentina's arguments, as referred to in paragraphs 97-98 of the Award, were that Article 41 of the Gas Law expressly related the adjustment to *the change in value of goods and services of the industry* and was only to reflect the evolution of changes in costs and not to ensure a given value of tariffs in US dollars. Argentina argued that the US PPI made sense at the beginning when the US indexes were lower than those of Argentina, but that the US PPI lost any meaning when the economy in Argentina went into recession and deflation. Paragraph 99 of the Award refers to an additional argument by Argentina that the suspension of the adjustment was first agreed with the licensees before being ordered by the judicial injunction of August 2000.

250. The Tribunal ultimately reached the conclusion that "*the licensees had a right to the US PPI adjustment under both the regulatory framework and the License, confirmed by the context and the practice of the privatization*".[223]

251. The Tribunal's reasoning that lead to this conclusion is contained in paragraphs 101 to 104 of the Award.

252. Paragraph 101 of the Award has been quoted above. In that paragraph, the Tribunal found that Article 41 of the Gas Law provided that tariffs would be in accordance with a formula based on certain factors (international market indicators and change in value of goods and services) but that Article 41 itself did not define what that formula would be. The Tribunal further found in this paragraph that the formula was defined in the Basic Rules of the Licence, which provided for the semi-annual US PPI adjustments.

253. This paragraph of the Award needs to be read together with paragraph 43 of the Award, also quoted above, in which the Tribunal finds that the Basic Rules

[222] Award ¶ 96.
[223] Award ¶ 103.

"*were embodied in the License actually signed by TGS and the Government of Argentina and approved by Decree 2458/92*".

254. The reasoning of the Tribunal might have been easier to follow if the relevant provisions of the Gas Law, the Basic Rules, the Licence, and the relevant Decrees had been set out in the Award. Nevertheless, the Committee considers that it is necessarily implicit in the language of the Award that the Tribunal reasoned as follows. The Basic Rules provided for semi-annual US PPI adjustments. The Basic Rules were embodied in the Licence signed by TGS and the provision in the Basic Rules providing for the PPI adjustments thus became a term of the Licence. This provision of the Basic Rules was consistent with Article 41 of the Gas Law and served the purpose of defining the formula referred to in only general terms in Article 41.

255. In paragraph 102 of the Award, the Tribunal then went on to say that:

> *The Tribunal is persuaded that such understanding was also the Government's view at the time and for almost a whole decade. This explains that Decree 669/00, dealing specifically with this mechanism, referred to the adjustment under it as a "legitimately acquired right", thus involving an unequivocal recognition of the existence of such a right.*

256. The first sentence of this paragraph must be read together with paragraph 62 of the Award, in which the Tribunal states that "*Throughout the 1990s the regulatory system devised for the gas transportation sector operated without difficulties, including most significantly the periodic modification of tariffs to reflect changes in the cost of natural gas and the adjustment of tariffs, both up and down, following the variations in the US PPI*". The Committee considers that it is sufficiently clear that the Tribunal was here stating, in effect, that the practice of the parties in the first period of operation of the Licence for almost a decade was consistent with the conclusion that the Tribunal had reached in paragraph 101 of the Award, and that from this the Tribunal was also satisfied that the Government of Argentina shared the understanding that the semi-annual US PPI adjustments were in fact a term of the Licence. While it is true, as Argentina argues, that there may have been a different explanation for the US PPI adjustments in the initial period, the Committee finds that there is nothing inherently absurd or illogical in the Tribunal taking into account, in

determining whether a particular interpretation of the Licence was correct, that the practice of the parties in the period immediately following the conclusion of the Licence was consistent with that interpretation.

257. Similarly, although Decree 669/00 was adopted many years after the Licence was concluded, the Committee finds nothing inherently absurd or illogical in the Tribunal taking into account, in determining whether a particular right was provided for in the Licence, that a decree adopted years after the event referred to the semi-annual US PPI adjustments as a *"legitimately acquired right".*

258. The last sentence of paragraph 101 indicates that this interpretation was also confirmed by the Information Memorandum. In paragraph 103, the Tribunal addressed Argentina's argument that the Information Memorandum was prepared by private consultants and that it contained a disclaimer that the Government of Argentina was not responsible for its contents. Contrary to what Argentina argues, the Committee can find no suggestion in the Award that the Tribunal considered that the Information Memorandum was itself in any way a source of the right to the PPI adjustments. The Committee considers it clear that the Tribunal was here merely stating that the *fact* that the Information Memorandum was also consistent with the conclusion reached by the Tribunal in paragraph 101 of the Award, and the *fact* that the Government of Argentina never took steps to correct what was stated in for Information Memorandum, were matters that further supported the conclusion reached in paragraph 101.

259. The final sentence of paragraph 103 of the Award, which deals with the Information Memorandum, states that "*It is thus the conclusion of the Tribunal that the licensees had a right to the US PPI adjustment under both the regulatory framework and the License, confirmed by the context and the practice of the privatization*". The Committee considers it to be clear from context that this sentence is in fact intended to be a general conclusion to what was stated in paragraphs 101, 102 and the earlier sentences of paragraph 103, and that the conclusion expressed in that sentence is not based solely on the considerations elaborated in paragraph 103.

260. In paragraph 104 of the Award, the Tribunal then proceeded to note that this interpretation of the licence was not inconsistent with the ability of the Government to "change its mind later" in the light of changing economic conditions, since adjustment mechanisms existed under the regulatory framework, and added that any different route taken by the Government could not be to the detriment of investors' rights such that "*any ensuing damage must be compensated if legally justified*".

261. Argentina makes a number of specific complaints in respect of the Tribunal's reasoning in this part of the Award, such as that:

(a) The Tribunal referred to,[224] but gave no reasons for rejecting, Argentina's argument that the purpose of adjusting rates on the basis of a price index was not to guarantee profits in a foreign currency but to reflect the evolution of costs of public utility providers in the periods between periodical tariff recalculations.

(b) The Tribunal referred to,[225] but gave no reasons for rejecting, Argentina's argument that there was a specific reason to adopt the chosen adjustment methods and that it became unreasonable to rely on those methods in the late 1990s when that reason no longer existed.

(c) The Tribunal, when dealing with the PPI-based adjustment issue, made no mention of relevant evidence of the expert Professor Nouriel Roubini and the witness Charles Massano, as if that evidence had not been presented.

(d) The Tribunal took in isolation one Article of the Licence (which referred to the PPI) and did not pay any attention to other provisions that provided context for it, such as the provisions to the effect that the adjustment methodology should reflect the changes in the value of goods and services, that the rate should guarantee the lowest cost for consumers that is compatible with the security of the facilities, and that the licence should be interpreted in accordance with Argentine law.

[224] Referring to Award ¶¶ 69, 70 and 97.
[225] Referring to Award ¶¶ 238 *et seq*, 492-496.

> Moreover, the Tribunal did not take into consideration relevant provisions of Argentina's Constitution, even though the Tribunal expressly acknowledged that the Licence was subject to the Argentine law.

262. In this respect, the Committee refers to its discussion at paragraph 107 above. The Committee considers that the reasoning of the Award on this particular question "*enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law*". To the extent that the Tribunal's reasoning is inconsistent with arguments of Argentina, it must be taken to have rejected those arguments. The Committee finds nothing to indicate that the Tribunal did not consider all of the evidence and arguments before it. The Tribunal was not required to give its evaluation of each individual item of evidence or each individual legal authority or legal provision relied upon by Argentina.

263. Argentina also argues that the Tribunal had no power to grant damages for the suspension of the PPI in 2000 and 2001 due to the Suspension Agreements, before the Emergency Law was enacted,[226] as they were voluntary agreements. Argentina maintains that this finding of the Tribunal contradicted a separate finding of the Tribunal that the question of the Trust Fund and its operation, to which TGS had agreed, "cannot be a matter of complaint before it".[227]

264. The Committee considers that the Tribunal gave reasons for this aspect of its decision. It found that TGS agreed to the suspension of the PPI adjustments in January and June 2000 on the basis that amounts not collected as a result of the suspension would be recouped later and with interest,[228] and that with the abolition of the PPI adjustments by Law 25,561 such recouping was no longer available.[229] The Committee finds no inconsistency with the Tribunal's finding that the Claimants could not complain about the Trust Fund

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226 Referring to Award ¶¶ 445-448.
227 Referring to Award ¶ 190.
228 Award ¶¶ 64-65, 447.
229 Award ¶¶ 447.

established in 2004, "to the extent that TGS has consented to this Trust Fund and its operation".

265. While the Tribunal's reasoning on the issue of US PPI adjustments is brief, the Committee is unable to conclude, bearing in mind the scope of the standard of review under Article 52(1)(e) of the ICSID Convention referred to above, that the reasoning in the Award is insufficient to enable one "*to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law*". Nor, in the light of the discussion in paragraphs 223-246 above, does the Committee consider that the Tribunal failed to apply the applicable law in determining this question.

Tariff calculation in US dollars

266. The Tribunal dealt with this issue in paragraphs 106 to 150 of the Award. At paragraphs 106 to 126 the Tribunal sets out at some length the arguments of the parties, and then at paragraphs 127 to 150 set out its own reasoning.

267. In stating its reasons, the Tribunal begins in paragraph 127 by stating that "*The Tribunal finds the Claimants' arguments about the existence of a right to the calculation of tariffs in US dollars persuasive*". This statement must be read in the light of paragraphs 106 to 109 of the Award, setting out the relevant arguments of the Claimants. It is apparent from these paragraphs that the Claimants relied for their position particularly on the wording of Article 41 of the Gas Decree and Article 9.2 of the Basic Rules of the Licence, and argued that their understanding was confirmed by minutes of a meeting of the Privatisation Committee held on 2 October 1992, and the wording of Annex F to the Pliego.

268. At paragraph 128 of the Award, the Tribunal notes that the Gas Decree and Basic Rules of the Licence unequivocally referred to the calculation of tariffs in US dollars and noted that "*such feature was also explained in the same terms by the Information Memorandum*". It considered "*that there cannot be any doubt about the fact that this is the central feature governing the tariff regime*",

and went on to say in the following paragraph that this was not surprising "*[g]iven the emphasis that this regulatory framework placed on the stability of the tariff structure*".

269. The Committee considers that these paragraphs in turn have to be read in the light of other paragraphs of the Award as a whole dealing with the context and circumstances of Argentina's programme of privatisation (referred to in paragraphs 41-43 of the Award), including for instance paragraph 136 in which the Tribunal said that "*Precisely because these measures were preceded by a long period of economic turmoil, investors would not be attracted to participate in the privatization process unless specific assurances were provided in respect of the stability of their arrangements*".

270. The Committee considers that paragraphs 127 to 129 of the Award contain the Tribunal's conclusion and essential reasoning on the issue of calculation of tariffs in US dollars. Although the reasoning in these paragraphs is brief, and the Tribunal does not even set out the text of the relevant provisions, the Committee considers it to be at the very least necessarily implicit in these paragraphs that the Tribunal found that there was a right to calculation of tariffs in US dollars under the provisions of the Gas Decree and Basic Rules of the Licence, given that these provisions referred "unequivocally" to the calculation of tariffs in US dollars and given the circumstances in which those provisions were adopted.

271. The Committee finds that the remainder of this section of the Award (paragraphs 130 to 150) is then devoted to addressing specific arguments of Argentina.

272. At paragraph 130 to 133 of the Award, the Tribunal refers to arguments of Argentina to the effect that the relevant clauses providing for tariff calculation in US dollars were linked to the Convertibility Law. These paragraphs must be read together with paragraphs 110 to 114, setting out relevant arguments of Argentina, in which the Tribunal noted *inter alia* Argentina's argument that "*the mechanism envisaged only the possibility of a modification of the relationship between the peso and the dollar under the Convertibility Law, but not the*

situation if the Convertibility Law was altogether abandoned" (Award, para 112). At paragraphs 134 to 137, the Tribunal then proceeds to reject this argument, essentially on the grounds that "*[g]uarantees and stability are meant precisely to operate when problems arise, not when business continues as usual*", that "*[t]he tariff regime approved was devised as a permanent feature of the privatization, not a transitory one*" and that "*[t]he regulatory and contractual arrangements were thus not incomplete*". In short, it is necessarily implicit that the Tribunal considered that the relevant provisions were intended also to cover the eventuality that the Convertibility Law was abandoned, because (in addition to the reasons given in paragraphs 127 to 129 of the Award) they would not serve their purpose if they did not have this effect.

273. At paragraphs 138 to 144 of the Award, the Tribunal considered certain issues relating to the minutes of the Privatisation Committee that were in evidence before it. The Tribunal states that the discussion of these minutes "*was on occasion confusing*", and the first sentence of paragraph 139 of the Award appears to indicate that the Tribunal considered these minutes to be open to more than one interpretation. The Tribunal in these paragraphs appears to reach the conclusion that the minutes are consistent with the conclusion reached in paragraphs 127 to 129 of the Award, and appears to have considered this a relevant matter, which it was entitled to do.

274. At paragraphs 143 to 144 the Tribunal explains why it did not consider its conclusion to "ignore economic reality" or the possible need for adjustments to be made as a result of changing economic circumstances. The Tribunal was of the view that the contract itself contained mechanisms for such adjustment and that what was not permitted in this case was the unilateral action by the Government outside of those mechanisms.

275. In paragraphs 145 to 147 of the Award the Tribunal then addresses the arguments, referred to in paragraphs 115 to 118, concerning the "historical experience" with ENTEL, the national communications company that had earlier been privatised. The Tribunal considered amongst other things that the privatisation of ENTEL, which has occurred prior to the adoption of the

Convertibility Law was "*an entirely different situation to the present one*", given that, following the adoption of the Convertibility Law, "*the terms of the original privatisation of ENTEL were no longer viable*".

276. In paragraphs 148 to 150 of the Award the Tribunal then addresses the arguments, referred to in paragraphs 119-212, that tariffs were higher because they included a premium for the risk that convertibility might be abandoned at some point in the future. The Tribunal found that the country risk premium related only to the risk of default by Argentina on its foreign debt, and not to the risk of future devaluation of the Argentine currency.

277. Argentina has raised a variety of specific arguments in its challenge to this part of the Award. Some of these arguments are to the effect that the Tribunal left unanswered particular arguments of Argentina or ignored particular items of evidence. However, for the reasons given above, the Tribunal was not required to address every argument or every item of evidence. Other arguments of Argentina were to the effect that the Tribunal made findings of fact not supported by the evidence, or in contradiction to the evidence. However, for the reasons given above, neither error of fact nor error of law is in itself a ground of annulment, and it is accordingly not within the mandate of the Committee to determine whether or not the Tribunal's findings were consistent with the evidence.

278. Argentina has also raised arguments to the effect that the Tribunal was partial and dogmatic in accepting arguments of the Claimant that had no basis, or in inventing counter-arguments to Argentina's position that had not been advanced by the Claimants. The Committee notes that lack of impartiality may be a ground of annulment under Article 52(1)(d) of the ICSID Convention, and leaves open the possibility that such lack of impartiality might be evidenced, for instance, by the fact that an Award consistently and perversely makes findings favourable to one party without any basis in the evidence. However, Argentina has not expressly sought to rely on Article 52(1)(d) as a ground for annulment of the portions of the Award dealing with either the US PPI adjustments or the tariff payments in US dollars. Nor has it presented a developed argument in this respect. Nor in the Committee's view has it

demonstrated that any findings or reasoning of the Tribunal were in the circumstances such as to establish the existence of partiality justifying annulment under Article 52(1)(d).

279. The Committee is unable to conclude, bearing in mind the scope of the standard of review under Article 52(1)(e) of the ICSID Convention referred to above, that the reasoning in the Award is insufficient to enable one "*to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion, even if it made an error of fact or of law*". Nor, in the light of the discussion in paragraphs 223-246 above, does the Committee consider that the Tribunal failed to apply the applicable law in determining this question.

The issue of TGS's and CIESA's financing policy

280. At paragraphs 157-167 of the Award, the Tribunal dealt with what it termed "The question of leverage policy". In this section of the Award, the Tribunal dealt with Argentina's argument that the leverage policy followed by TGS had a negative impact on its equity value, and that this was something for which Argentina should not be held responsible.[230] After setting out the parties' arguments at some length (paragraphs 157-163 of the Award) the Tribunal rejected Argentina's argument on the basis that there had been no suggestion by Argentina that the leverage policy followed by TGS was contrary to the regulatory framework, and that the leverage policy followed by TGS was thus "essentially a company decision".[231] In effect, the Tribunal considered the issue of TGS's leverage policy to be irrelevant to the determination of the claim before it. The Committee finds nothing illogical or absurd in this conclusion, and finds that the Tribunal's rejection of Argentina's argument on this basis was not subject to any annullable error.

281. At paragraph 166 of the Award, the Tribunal dealt with a specific argument of Argentina, to the effect that devaluation fell within the sovereign prerogative of the State. The Tribunal rejected this argument on the basis that the Claimants'

[230] See especially Award ¶ 158.
[231] Award ¶ 165.

claim was not in respect of devaluation but in respect of the breach of various aspects of the tariff system and the rights that the investors had in that respect.

282. Despite rejecting the argument on this basis, the Tribunal also considered the merits of Argentina's argument to the extent of deciding that there was nothing unreasonable about TGS's leverage policy. At paragraph 165 of the Award, the Tribunal gave reasons as to why it was not unreasonable for TGS to take debt in dollars in international financial markets. At paragraph 373, the Tribunal said that TGS's leverage was reasonable by industry standards and close to that advised by the regulator and that none of the debt holders expressed any concern regarding the level of leverage before the measures taken by Argentina were adopted. At paragraphs 374-375, the Tribunal noted that TGS's stock was consistently positive before the measures were adopted, and that it was only after the pesification of tariffs that the company defaulted on its debt.

283. The Committee considers that the Tribunal gave sufficient reasons for rejecting Argentina's arguments based on the leverage policy. The Committee finds nothing absurd or illogical or contradictory in the Tribunal's reasoning.

Rejection of the theory of "*imprevisión*"

284. The Tribunal found that "*there is no legal excuse under the Argentine legislation which could justify the non-compliance, as the very conditions set out by this legislation and the decisions of courts have not been met*".[232] In the course of its reasoning, the Tribunal considered and rejected the applicability of two legal excuses under Argentine law that might potentially have justified non-compliance, namely the principle of "*imprevisión*" and the "state of emergency".

285. The principle of "*imprevisión*" is dealt with in paragraphs 214-217 of the Award. The Tribunal referred in these paragraphs to the expert opinion of

[232] See especially Award ¶ 231.

Professor Comadira that was relied on by Argentina, and it is to be presumed that the Tribunal gave full consideration to the arguments in that expert opinion. The Committee considers it evident from paragraphs 215-216 of the Award that the Tribunal considered that the theory of "*imprevisión*" applied only in the case of events that were unforeseeable, and that in the circumstances of the present case the events were to be regarded as having been foreseeable. This was because "*the major features of the whole regulatory regime put in place under the privatisation were based on taking cover against all kinds of risks inspired by the economic history of the country and the instability of the 1980s*", that "*the parties were quite aware of the dangers ahead*" and that "*it would make no sense if when the dangers materialized, as they did, the protection envisaged would not operate*".[233]

286. The Committee considers that although the principle of "*imprevisión*" is dealt with relatively briefly, it is easy to understand the Tribunal's reasoning, and there is no basis for concluding that the Tribunal failed to state reasons for its decision. For the reasons given above, it is beyond the scope of the mandate of the Committee to consider whether the Tribunal correctly articulated and applied the theory of "*imprevisión*" under Argentine law, since error of law is not a ground of annulment. The Committee considers that in determining this issue, the Tribunal determined (correctly or incorrectly) the application of the principle of "*imprevisión*" under Argentine law and did not fail to apply the applicable law.

287. In paragraph 217 of the Award, the Tribunal noted that under Article 23 of the ILC Articles, the concept of *force majeure* does not include circumstances in which performance of an obligation has become more difficult due to a political or economic crisis. The Committee does not accept the argument that the Tribunal thereby applied Article 23 of the ILC Articles rather than the principle of "*imprevisión*" under Argentine law. The Committee considers that the applicability of the principle of "*imprevisión*" was rejected by the Tribunal in paragraph 216 of the Award, not in paragraph 217 of the Award. The Committee considers that in paragraph 217, the Tribunal merely drew an

[233] See especially Award ¶ 216.

additional comparison with Article 23 of the ILC Articles, and suggested that this would be an additional consideration "*at least as the theory of* 'imprevisión' *is expressed in the concept of force majeure*". In any event, even if the Tribunal was of the view that the content of the principle of "*imprevisión*" was identical to Article 23 of the ILC Articles, and even if this were not correct, this would be an error of law not amounting to a ground of annulment.

288. The second legal excuse under Argentine law considered by the Tribunal was "state of emergency" which it addressed in paragraphs 218-225 of the Award (and again in paragraphs 291-293). The Tribunal indicated that in reaching its conclusion in respect of this issue, it considered the expert opinions of both Dr Bianchi and Professor Comadira,[234] and it is again to be presumed that the Tribunal gave full consideration to the arguments in both opinions.

289. It is clear from paragraphs 219-230 of the Award that the Tribunal considered that as a matter of Argentine law, the use of extraordinary powers in emergency situations was subject to three limitations articulated by the Argentine Supreme Court in the *San Luis* case.[235] The Tribunal found that the first of these requirements, temporality, was not met because the Emergency Law had been extended a number of times and had "*in reality been turned into a permanent feature of the Argentine economy*"[236] notwithstanding that "*in actual fact the crisis is largely over*".[237] The Tribunal found that the second of these requirements, "no essential mutation of rights", at the very least appeared not to be met on the basis that the elimination of dollar clauses and other emergency provisions were adopted on a definitive rather than a transitory basis.[238] The Tribunal found that the third of these requirements, reasonableness, was not met because both parties had recognised "*an inescapable need to attend to tariff adjustments*" such that "*the prolongation of emergency measures without re-establishing or rebalancing the benefits of*

234 See especially Award ¶ 219.
235 Argentine Supreme Court, *Provincia de San Luis c. P. E. N. –Ley 25,561, Dto. 1570/01 y 214/02 s/ amparo*, judgment of March 5, 2003, cited in Award ¶ 218.
236 Award ¶ 221.
237 Award ¶ 222.
238 Award ¶ 223.

the Licence cannot be regarded as satisfying the legal requirements of reasonableness".[239]

290. The Tribunal furthermore found, as a matter of Argentine law, that the emergency measures could not be imposed unilaterally by the Argentine State, but had either to be agreed between the parties or requested from a judge. The Tribunal found that this requirement was not satisfied, and noted that adjustment mechanisms did exist under the Licence.[240]

291. Again, the Committee considers it easy to understand the Tribunal's reasoning, and finds that there is no basis for concluding that the Tribunal failed to state reasons for its decision. The Committee considers that in determining this issue, the Tribunal applied (correctly or incorrectly) Argentine domestic law with respect to emergency measures and therefore did not fail to apply the applicable law.

Liability under Argentine law

292. For the reasons given above, the Committee finds that the Tribunal did apply the applicable law, and that the Tribunal gave sufficient reasons for its decision on that issue. It is beyond the scope of the mandate of the Committee to consider whether the Tribunal articulated and applied Argentine law correctly.

(d) Conclusion

293. For these reasons, this ground of annulment must be rejected.

[239] Award ¶ 225.
[240] Award ¶¶ 226-230.

H. The Tribunal's finding of a breach of the fair and equitable treatment clause

(a) Background

294. Article II(2)(a) of the BIT states in part (the "fair and equitable treatment clause") that:

> *Investment shall at all times be accorded fair and equitable treatment ...*

295. Argentina maintains that in finding that Argentina violated fair and equitable treatment clause, the Tribunal manifestly exceeded its powers, justifying annulment under Article 52(1)(b) of the ICSID Convention.[241]

(b) Arguments of the parties

296. Argentina argues, *inter alia*, that:

(a) The Tribunal took the wording of the preamble to the BIT, and turned it into a legal obligation to maintain a stable framework for investment for the parties as a fundamental element of fair and equitable treatment.[242]

(b) This interpretation amounts to a manifest excess of powers, since the preamble to the BIT does not establish such a legal obligation.[243] Maintaining a stable legal system is substantially different from any obligation deriving from the BIT or the applicable international law, and by interpreting the standard of fair and equitable treatment in this way the Tribunal sought to create obligations for Argentina that did not derive from the BIT or the applicable international law, and did not resort to the applicable law for interpreting the fair and equitable treatment standard.[244]

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241 This ground does not appear to have been stated in the Application for Annulment.
242 Referring to Award ¶¶ 256, 259-260, 267-268.
243 Referring to *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9. Award, September 5, 2008 ("*Continental Casualty* Award"), ¶¶ 258, 261.
244 Referring to *MTD* Annulment Decision ¶ 67.

(c) The Tribunal based its decision on a dictum in the *Tecmed* Award[245] which was criticised in the *MTD* Annulment Decision.[246]

(d) The Tribunal's conclusion is absurd. A State has the right to enact, modify or cancel a law and an investor knows that laws will evolve over time.[247]

(e) In the proceedings before the Tribunal, Argentina objected to the Claimants' arguments as to the scope of the fair and equitable treatment standard, and consistently took the position that fair and equitable treatment means the minimum international standard.

297. The Claimants argue, *inter alia*, that:

(a) The Tribunal never determined that the preamble to the BIT establishes a legal obligation, but rightly concluded that stability of the legal framework is an element of the fair and equitable treatment standard. The Tribunal interpreted Article II(2)(a) of the BIT "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose*" as required by the Vienna Convention.[248] During this exercise, the Tribunal "gave weight" to the preamble of the BIT,[249] but did not conclude that the preamble itself established a legal obligation.

(b) The Tribunal relied on the BIT's language for the standard, looked to relevant case law for persuasive authority, and then evaluated Argentina's actions. [250] It did not base its decision only on the *Tecmed* Award, which was cited in support of the standard provided by the BIT, not in substitution of it. The Tribunal discussed other tribunals' interpretation of the fair and equitable treatment standard.[251]

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245 Referring to Award ¶¶ 262, 267.
246 Referring to *MTD* Annulment Decision ¶ 67.
247 Referring to *Parkerings-Compagniet AS v. Republic of Lithuania,* ICSID Case No. ARB/05/8, Award of 11 September 2007, ¶¶ 332, 233, 238.
248 Referring to Award ¶ 259.
249 Referring to Award ¶ 259.
250 Referring to Award ¶¶ 264-265.
251 Referring to Award ¶¶ 260, 262.

(c) Throughout the merits phase, Argentina did not contest the Claimants' arguments that the fair and equitable treatment standard encompassed these requirements, and annulment is not the proper place for parties to reargue the merits of the case, under the guise of arguing that the Tribunal manifestly exceeded its powers.

(d) Numerous tribunals and legal scholars have confirmed that the protection of legitimate expectations is a key facet of the fair and equitable treatment standard[252] and Argentina cannot legitimately claim that the Tribunal somehow manifestly exceeded its power by drawing the same conclusion drawn by other tribunals.

(e) The Tribunal examined Argentina's actions and determined that they violated the obligation to protect an investor's legitimate expectations that Argentina undertook when it signed the BIT and enacted the relevant legal framework applicable to Claimants' investment.

(f) Argentina's arguments are merely disguised assaults on the Tribunal's conclusions.

(g) The *Continental Casualty* Award specifically acknowledged that there were significant factual and contextual differences in its case that caused it to differ from other awards. The *CMS* case could be viewed as a companion case to Claimants' case.[253]

(h) The *Parkerings-Compagniet* Award contradicts Argentina's position by recognizing that an investor's legitimate expectations must be protected. Unlike in that case, the present case has nothing to do with a lack of due diligence or the unreasonableness of the investor's expectations.

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[252] Referring *inter alia* to *CME* Partial Award ¶ 611; *Eureko B.V. v. Republic of Poland*, *ad hoc* arbitration, Partial Award, August 19, 2005 ("*Eureko* Partial Award"), ¶¶ 232, 234; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic,* ICSID Case No. ARB/97/3. Award, August 20, 2007, ¶ 7.4.42; *Saluka Investments BV (The Netherlands) v. Czech Republic,* UNCITRAL arbitration, Partial Award, March 17, 2006, ¶ 302.

[253] Referring to *Continental Casualty* Award ¶¶ 259-260; *CMS* Award ¶ 275.

(i) The *MTD* Annulment Decision did not consider that the tribunal exceeded its powers by holding that the legitimate expectations of the investor were part of the fair and equitable treatment standard.[254]

(c) The Committee's views

298. The Tribunal's reasons for its finding that Argentina was in breach of the fair and equitable treatment clause are contained in paragraphs 251-268 of the Award.

299. At paragraphs 251-255 of the Award, the Tribunal summarised the arguments of the parties.

300. At paragraph 256, the Tribunal expressed agreement with Argentina that the fair and equitable treatment standard "*is a standard none too clear and precise*". The Tribunal then went on to note that the international law standard on the minimum treatment due to foreign citizens, traders and investors is similarly "not *too clear and precise*", and that the standards have "*gradually evolved over the centuries*".

301. At paragraph 257, the Tribunal said that the development had been "*fragmentary and gradual*", based as it was on "*a case by case determination by courts and tribunals*".

302. At paragraph 258, the Tribunal expressed the view that the international minimum standard was insufficiently elaborate and clear for the fair and equitable treatment to be equated with it, that the fair and equitable treatment standard may be more precise than the customary international law minimum standard, and that the fair and equitable standard, in the context of the BIT, could require a treatment additional to, or beyond that of, customary law.

303. At paragraph 259, the Tribunal said that it was bound to interpret the fair and equitable treatment clause "*in good faith in accordance with the ordinary*

[254] Referring to *MTD* Annulment Decision ¶ 68.

meaning to be given to the terms of the treaty in their context and in the light of the object and purpose" as required by Article 31 of the Vienna Convention.

304. The Committee considers that to this point in its reasoning, the Tribunal in effect said no more than that the standard of "fair and equitable treatment" in the BIT is not necessarily the same as the customary international law minimum standard, and that the content of the "fair and equitable treatment" clause in Article II(2)(a) of the BIT was a question of interpretation of the BIT in accordance with normal principles of treaty interpretation. The Committee considers this obvious.

305. In paragraph 259, the Tribunal went on to say that it "*gives weight to the text of the Treaty's Preamble, which links the standard to the goal of legal stability*". The Tribunal then quoted a provision of the preamble of the BIT which states that *"fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources*".

306. The Tribunal did not state in this paragraph that the preamble to the BIT imposed a legal obligation or that the Tribunal was "applying" a provision of the preamble. Rather, in the Committee's view it is quite clear from context that the Tribunal was merely taking into account, and "giving weight" to, a provision of the preamble in interpreting the fair and equitable treatment clause in Article II(2)(a) of the BIT. The Committee considers that there was nothing illogical or contrary to principle in the Tribunal doing this. Article 31(2) of the Vienna Convention expressly states that "*The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes*".

307. At paragraph 260, the Tribunal then concluded that "*a key element of fair and equitable treatment is the requirement of a* 'stable framework for the investment'". The Committee considers it clear from a reading of this paragraph as a whole, in the context of the preceding paragraphs, that the Tribunal considered this to be a key element of Article II(2)(a) of the BIT, and

that the Tribunal based this conclusion on the case law cited in that paragraph.[255]

308. At paragraph 261, the Tribunal said that "*the stabilization requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State"*, and quoted a passage from the *CMS* Award to the effect that the legal framework can always evolve and be adapted to changing circumstances, but that it cannot "*be dispensed with altogether when specific commitments to the contrary have been made*".[256]

309. At paragraph 262, the Tribunal said that "*The protection of the '*expectations that were taken into account by the foreign investor to make the investment*' has likewise been identified as a facet of the standard*". In a footnote reference, the Tribunal indicated that it was quoting from paragraph 154 of the *Tecmed* Award. The Tribunal said that "The *Tecmed* approach has been consistently adopted by subsequent decisions", and cited a number of decisions.[257] After referring to a difference in terminology used in the *Tecmed* Award and a NAFTA decision,[258] the Tribunal then concluded, with reference to certain other awards,[259] that "*What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest*".[260]

310. At paragraph 263, the Tribunal said that, as acknowledged in certain earlier cited decisions, "*the principle of good faith is not an essential element of the*

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255 Award, footnotes 59-60, referring to *Occidental Exploration and Production Company (OEPC) v. Republic of Ecuador*, London Court of International Arbitration Administered Case No. UN 3467, Final Award of July 1, 2004 ("*OEPC* Award"), ¶¶ 190-191; *CMS* Award ¶¶ 274-276; *LG&E* Decision on Liability ¶¶ 124-125.

256 Citing *CMS* Award ¶ 277.

257 Referring to *MTD* Award ¶ 114; *OEPC* Award ¶ 185; *Eureko* Partial Award ¶ 235; *LG&E* Award ¶ 127.

258 Referring to *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2. Award, May 29, 2003 ("*Tecmed* Award"), ¶ 154; *International Thunderbird Gaming Corporation v. United Mexican States,* NAFTA Chapter 11/UNCITRAL Arbitration Rules, Arbitral Award, January 26, 2006 ("*Thunderbird* Award") ¶ 147.

259 Referring to *Southern Pacific Properties (Middle East) Limited (SPP)* v. *Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992, ¶ 82; *LG&E* Award ¶¶ 127, 130; *CME* Partial Award ¶ 611; *Tecmed* Award ¶ 154; *Thunderbird* Award ¶ 147.

260 Footnotes omitted.

standard of fair and equitable treatment and therefore violation of the standard would not require the existence of bad faith".

311. The Committee considers it clear from the terms of paragraphs 260 to 263 of the Award that the Tribunal was in these paragraphs stating what it considered to be the correct interpretation of the fair and equitable treatment clause contained in Article II(2)(a) of the BIT, and that the Tribunal undertook this interpretation in accordance with the principles of treaty interpretation embodied in the Vienna Convention, under which it gave weight to the preamble of the BIT as well as to previous case law dealing with the same or similar provisions.

312. The Committee further considers it clear that the Tribunal then proceeded to apply the fair and equitable treatment clause in Article II(2)(a), as so interpreted, to the facts of this case as found by the Tribunal. At paragraph 264, the Tribunal found that "*The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented".* At paragraph 265, the Tribunal found that "*it was in reliance upon the conditions established by [Argentina] in the regulatory framework for the gas sector that Enron embarked on its investment in TGS*" and that in the circumstances of the case "*Enron had reasonable grounds to rely on such conditions*". At paragraph 266 the Tribunal found that "*A decade later ... the guarantees of the tariff regime that had seduced so many foreign investors, were dismantled*" and that "*The long-term business outlook enabled by the tariff regime, has been transformed into a day-to-day discussion about what comes next*".

313. At paragraphs 267 and 268, the Tribunal then concluded that:

> *The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years.*

> *Even assuming that the Respondent was guided by the best of intentions, which the Tribunal has no reason to doubt, there is here an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established in Article II(2)(a) of the Treaty has not been observed and that to the extent that it results in a detriment to the Claimants' rights it will give rise to compensation.*

314. The Committee is satisfied that the Tribunal, in finding that there was a breach of the fair and equitable treatment clause in Article II(2)(a) of the BIT, purported to interpret that provision in accordance with general international law treaty interpretation principles and to apply it to the facts of the case as found. In so doing, the Tribunal applied the applicable law, whether or not it did so correctly.

315. The Committee finds that no other valid basis has been advanced by Argentina for the contention that the Tribunal manifestly exceeded its powers. Argentina in effect argues no more than that the Tribunal's interpretation of the BIT was wrong, which as observed above is not a ground of annulment.

316. For these reasons, this ground of annulment must also be rejected.

I. The Tribunal's finding of a breach of the umbrella clause

(a) Background

317. Article II(2)(c) of the BIT (the "umbrella clause") states that:

> *Each Party shall observe any obligation it may have entered into with regard to investments.*

318. Argentina maintains that in finding that Argentina violated umbrella clause, the Tribunal:

(a) failed to state reasons for its conclusion, justifying annulment under Article 52(1)(e) of the ICSID Convention; and[261]

[261] Application for Annulment ¶¶ 55-60, 71-74.

(b) manifestly exceeded its powers, justifying annulment under Article 52(1)(b) of the ICSID Convention.

(b) Arguments of the parties

319. Argentina argues, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

(a) The Tribunal's reasoning does not allow the reader to proceed from the existence of the umbrella clause in the BIT to the ruling against Argentina for alleged breaches of the provisions of the Licence to which the Claimants were not parties, and with regard to which they had no rights.[262]

(b) The Tribunal confined itself to making an inadequate description of other Tribunals' interpretations of the phrase "*any obligations*" contained in the umbrella clause and gave no grounds regarding the phrase "*entered into*" or the purported violation of the clause by Argentina.

(c) The present case is materially similar to that in the *CMS* Annulment Decision in which the *ad hoc* committee found that the tribunal had failed to analyse relevant issues[263] and that "*it is quite unclear how the Tribunal arrived at its conclusion*".[264]

(d) The Tribunal did not address the arguments of Argentina, in particular Argentina's argument as to the inexistence of an investment agreement or obligations with the Claimants.

[262] Referring to *CMS* Annulment Decision ¶¶ 89-97.
[263] Referring to *CMS* Annulment Decision ¶ 95(d)-(f).
[264] Referring to *CMS* Annulment Decision ¶¶ 96-97.

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

(e) The Tribunal's analysis[265] was based on only four decisions of arbitral tribunals,[266] but in the cases relied on, except for the *LG&E* case, there were instruments expressly linking the investor to the host State. In the present case, Argentina never assumed any obligation *vis à vis* the Claimants other than the BIT.

(f) The expression "obligations" in the umbrella clause means specific obligations concerning the investment, and does not include general requirements imposed by the law of the host State.[267] Contrary to what the Tribunal found,[268] the Gas Law did not comprise any "specific obligations" with respect to the Claimants.

(g) The application of the umbrella clause is limited to commitments in investment contracts.[269]

(h) The License cannot be assimilated to an investment contract.[270] There is no investment agreement in this case, since the Claimants did not enter into any agreement with the Argentine Government. Furthermore, the License lacked any element to internationalise it,[271] was regulated by Argentine law, was subject to local courts, and was granted to an Argentine company (TGS). Under Argentine Law and the License,

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265 Referring to Award ¶¶ 269-277.

266 Referring to Award ¶ 274, citing *Fedax N.V. v. Venezuela*, ICSID Case No. ARB/96/3, Award, March 9, 1998; *SGS v Philippines* Jurisdiction Decision; *SGS v. Pakistan* Jurisdiction Decision; *LG&E* Decision on Liability.

267 Referring to *CMS* Annulment Decision ¶¶ 93-95; *SGS v. Philippines* Jurisdiction Decision ¶ 121; F. A. Mann, "British Treaties for the Promotion and Protection of Investments", (1981) 52 *British Yearbook of International Law* 241, 246 (1981); Thomas W. Wälde, George Ndi, "Stabilizing International Investment Commitments: International Law versus Contract Interpretations", (1996) 31 *Texas International Law Journal* 215, 234.

268 Referring to Award ¶¶ 275-276.

269 Referring to *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, October 12, 2005, ¶ 53; *El Paso* Jurisdiction Decision ¶¶ 81-82, 84, 85; *Lanco* Jurisdiction Decision ¶ 16.

270 Referring to *SGS v. Pakistan* Jurisdiction Decision.

271 Referring to A.F.M. Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", (2001) 12 *European Journal of International Law* 309, 316; Thomas W. Wälde, George Ndi, "Stabilizing International Investment Commitments: International Law versus Contract Interpretations", (1996) 31 *Texas International Law Journal* 215, 234.

Argentina was subject to obligations only towards TGS and not the Claimants, who had no right to enforce it.[272]

(i) Article VII of the BIT deals with "investment agreements". Argentina and the United States intended to attribute a special meaning to the term "investment agreement", and the special meaning should be observed.[273] Under the BIT, in order for an investment agreement to exist, there must be an agreement between a party and a national or company of the other party. The definition of "investment treaty" of the 1994 US Model BIT was intended to broaden the notion of "investment agreement" and is inapplicable to the interpretation of the BIT.[274]

(j) It is inadmissible for the Claimants on the one hand to assert that they are not a party to the Licence and therefore are not bound by its forum clause, and on the other hand to claim that the Licence is an investment agreement entitling them to invoke the umbrella clause. The Tribunal followed the same contradictory reasoning.[275]

(k) The position in the *Azurix* case[276] and *CMS* Annulment Decision[277] was correct.

320. The Claimants argue, *inter alia*, that:

In relation to the ground of annulment in Article 52(1)(e) of the ICSID Convention

(a) The Tribunal set forth reasons for its decision. It rejected the notion that the "obligation" in question had to be "entered into" with the investor directly. The Tribunal expressly observed that "*Through the Gas Law*

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272 Referring to *CMS* Annulment Decision ¶ 90.

273 Referring to Vienna Convention, Article 31; V.D. Degan, L'Interprétation des accords en droit international (1963) at 117-119; *Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier Between Turkey and Iraq)*, 1925, P.C.I.J., Ser. B, No. 12, p. 19; *Case concerning the Factory at Chórzow (Germany v. Poland)*, 1927, P.C.I.J. Ser. A, No. 9, p. 24; *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion*, *I.C.J. Reports 1948*, p. 62; *Rights of Nationals of United States of America in Morocco (France v. United States of America), I.C.J. Reports 1952*, p. 198.

274 Referring to Vienna Convention, Articles 31(3) and (4) and 41.

275 Referring to Award ¶ 277.

276 Referring to *Azurix* Award ¶ 384.

277 Referring to *CMS* Annulment Decision ¶ 95.

and its implementing legislation, the Respondent assumed "obligations with regard to investments".[278] The Tribunal found that Argentina had failed to observe those obligations, thus triggering its liability under the Umbrella Clause.[279]

(b) The Tribunal expressly found that the Award covered both contractual obligations such as payment as well as obligations assumed through law or regulation, and cited authorities.[280]

(c) It is not the case that the Tribunal failed to explain what "entered into" means.[281]

(d) The Award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion. The Tribunal clearly by implication rejected Argentina's arguments.

(e) It would be a rare event that the host State would enter into an obligation directly with the foreign investor, precisely because foreign investors are often required by local law to channel their investment through and into local companies (as they were in this case).[282]

In relation to the ground of annulment in Article 52(1)(b) of the ICSID Convention

(f) The Tribunal expressly invoked the precise wording of the umbrella clause, finding that the Gas Law and its implementing legislation constituted "obligations with regard to investments"[283] and that the License provisions were "obligations entered into by the Respondent with regard to Claimants' investments." [284]

(g) Under the broad definition of "investment" in the BIT, the Claimants' indirect interests in TGS, and the rights conferred on TGS by the Gas

[278] Referring to Award ¶¶ 275-276.
[279] Referring to Award ¶¶ 273-277.
[280] Referring to Award ¶ 274.
[281] Referring to Award ¶¶ 275-276.
[282] Referring to First Jurisdiction Decision ¶ 55.
[283] Referring to Award ¶ 275.
[284] Referring to Award ¶ 276.

Law and the License, were "investments" of the Claimants, and Argentina's failure to observe the obligations it entered into "with regard to" those "investments" violated the plain text of the umbrella clause, as the Tribunal properly and expressly found.

(h) The umbrella clause provides that each Party shall observe any obligation it may have entered into "with regard to invest*ments*" and not "with regard to a particular invest*or*". The fact that the obligation "entered into" in this case was the License with TGS does not mean that the Claimants were enforcing contractual rights to which they were not a party. Any breach of those License rights constituted an independent violation of the BIT under the umbrella clause in respect of an "investment" of the Claimants.

(i) The umbrella clause uses the term "investments," not "investment agreements", and it is not confined to "contracts" or "investment agreements", but extends to "any obligation" entered into "with regard to" any category of "investment" within the definition of the BIT.[285] Argentina effectively argues that the umbrella clause should be read as stating, which it does not, that "each party shall observe any obligation it may have entered into *in an investment agreement with an investor of the other party*".

(j) Even if the umbrella clause did only cover investment agreements, the License would qualify as an "investment agreement" under the BIT because it was a written agreement between the national authorities of Argentina and an "investment" of the Claimants (namely, TGS) granting rights with respect to assets controlled by the national authorities on

[285] Referring to F.A. Mann, "British Treaties for the Promotion and Protection of Investments", (1982) 52 *British Yearbook of International Law* 241; Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995) at 81-82; Kenneth J. Vandevelde, "U.S. Bilateral Investment Treaties: The Second Wave", (1993) 14 Michigan Journal of International Law 621; Kenneth J. Vandevelde, *United States Investment Treaties: Policy and Practice* (1992) at 78 § 5.03; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (1998) at 56; *SGS v. Philippines* Jurisdiction Decision ¶ 126; *Eureko* Partial Award ¶ 246.

which the Claimants relied in establishing, acquiring and continuing their investments in Argentina.[286]

(k) Even if the Committee were to conclude that the Tribunal erred in its interpretation of the scope of the umbrella clause, that would not rise to the level of a manifest excess of power, as erroneous application of the law is not grounds for annulment. Argentina's argument amounts to little more than a disagreement as to the proper scope and interpretation of the umbrella clause. While some tribunals and commentators have taken the interpretation that Argentina favours, other awards have held (as the Tribunal did in this case) that foreign shareholders may invoke the umbrella clause when the host State fails to observe obligations entered into with their locally-incorporated subsidiaries.[287]

(c) Failure of the award to state the reasons on which it is based as a ground of annulment under Article 52(1)(e) of the ICSID Convention: the Committee's views

321. The Tribunal's reasons for its finding that Argentina was in breach of the umbrella clause are contained in paragraphs 269-277 of the Award.

322. At paragraphs 269-272 of the Award, the Tribunal summarised the arguments of the parties.

323. At paragraph 273, the Tribunal set out the terms of the umbrella clause and noted that it is to be interpreted "*in good faith in accordance with the ordinary meaning to be given to the terms of the treaty*" in accordance with Article 31(1) the Vienna Convention.

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[286] Referring to the definition of "investment agreement" in the 1994 US Model Prototype BIT and the Free Trade Agreements entered into by the United States of America and Chile, Morocco and Singapore.

[287] Referring to *CMS* Award ¶¶ 296-303; *LG&E* Decision on Liability ¶ 175; *Sempra* Award ¶¶ 309-14; Thomas W. Wälde, "The "Umbrella" (or Sanctity of Contract/Pacta Sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases", (2003) 1(5) *Oil, Gas & Energy Law Intelligence* 1, 35.

324. At paragraph 274, the Tribunal said that "*Under its ordinary meaning the phrase 'any obligation' refers to obligations regardless of their nature*", and that at least two other tribunals had found this expression to include obligations assumed through law or regulation. The Tribunal said that nonetheless, in accordance with the express wording of the umbrella clause, to be covered by the clause, an obligation had to be one that was "*with regard to investments*".

325. At paragraph 275 of the Award, the Tribunal then said that "*Through the Gas Law and its implementing legislation, the Respondent assumed 'obligations with regard to investments'*", and referred to the provisions in the legislation for tariffs to be calculated in US dollars converted to pesos for billing purposes, linked to the US PPI.

326. The Committee considers that this section of the Award must be read in the light of the Award as a whole, including in the light of the Tribunal's two decisions on jurisdiction which, as noted above, form part of the Award.

327. For the reasons given in paragraphs 87-111 above, the Committee is satisfied that the Tribunal gave sufficient reasons for its conclusion that the Claimants could bring BIT proceedings, notwithstanding Argentina's argument that the claim concerned rights which belonged to TGS and not to the Claimants.

328. The Tribunal expressly found that the Claimants had invested in TGS.[288] Paragraph 241 of the Award refers back to paragraphs 29-30 of the Second Jurisdiction Decision in which the Tribunal noted that the definition of "investment" in the BIT included "*the channeling of investments through locally incorporated companies, particularly when this is mandated by the very legal arrangements governing the privatization process in Argentina*". At paragraphs 264-267 of the Award (in the section dealing with the fair and equitable treatment clause, which precedes the treatment of the umbrella clause) the Tribunal then went on to say:

> *The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and*

[288] Award ¶¶ 42 (final sentence), 47-61 (especially the heading to that section), 191, 193, 242.

implemented. Argentina in the early 1990s constructed a regulatory framework for the gas sector containing specific guarantees to attract foreign capital to an economy historically unstable and volatile. As part of this regulatory framework, Argentina guaranteed that tariffs would be calculated in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the US PPI and sufficient to cover costs and a reasonable rate of return. It further guaranteed that tariffs would not be subject to freezing or price controls without compensation. Foreign investors were specifically targeted to invest in the privatization of public utilities in the gas sector. Substantial foreign investment was undertaken on the strength of such guarantees, including the investment made by Enron in TGS.

The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina's privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.

A decade later, however, the guarantees of the tariff regime that had seduced so many foreign investors, were dismantled. Where there was certainty and stability for investors, doubt and ambiguity are the order of the day. The long-term business outlook enabled by the tariff regime, has been transformed into a day-to-day discussion about what comes next. Tariffs have been frozen for almost five years. The recomposition of the tariff regime is subject to a protracted renegotiation process imposed on the public utilities that has failed to provide a final and definitive framework for the operation of business in the energy sector.

The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years.

329. Returning to paragraph 275 of the Award, dealing with the umbrella clause, the Tribunal said that:

> *The dismantling of these guarantees [under the Gas Law and its implementing legislation] would suffice to establish a*

> *violation of the obligations entered into by the Respondent with regard to the Claimants' investment.*

330. At paragraph 276 of the Award, the Tribunal then said:

> *In addition, the prohibition of price controls without indemnification and the prohibition of License amendments without consent, although contained in the License were also approved by decree and formed part of the implementing legislation that established the tariff regime. The obliteration of these commitments likewise entails a violation of obligations entered into by the Respondent with regard to the Claimants' investment.*

The Committee considers it sufficiently clear from the wording of this paragraph that the Tribunal did not consider a violation of the Licence itself to be a breach of the umbrella clause. Rather, the Tribunal found that the terms of the Licence formed part of the implementing legislation, such that a violation of the provisions of the Licence referred to in this paragraph also amounted to a violation of the guarantees contained in the legislative framework.

331. The Committee considers that the reasoning of the Award as a whole is clear. The Tribunal considered that the Claimants had invested in the privatised gas sector in Argentina, and had, as required by Argentine law, channelled that investment through a locally incorporated company. That investment was found to have been made by the Claimants on the strength of guarantees contained in a regulatory regime that had been implemented by Argentina for the purpose of attracting such foreign investment. Pursuant to the plain meaning of the wording of the BIT, and consistently with at least two prior arbitration decisions, the Tribunal considered that those guarantees in the legislative framework were therefore "*obligations*" entered into by Argentina "*with regard to*" the investment that the Claimants had made. The guarantees concerned included the right to tariff calculations in US dollars, converted into pesos for billing purposes, adjusted semi-annually in accordance with the US PPI and sufficient to cover costs and a reasonable rate of return. The dismantling of these guarantees, as it was described in paragraphs 189, 266 and 275 of the Award, were considered by the Tribunal as a violation of the

obligations entered into by Argentina with regard to the Claimants' investment, and hence a violation of the umbrella clause with respect to that investment.

332. The Committee recalls the standard of review on annulment under Article 52(1)(e) of the ICSID Convention. It is not for the Committee to determine whether the reasoning of the Tribunal was correct or convincing. It is only for the Committee to determine whether "*the award enables one to follow how the tribunal proceeded from Point A. to point B. and eventually to its conclusion*". The Committee is of the view that it clearly does. The Committee finds nothing contradictory or frivolous in the Tribunal's reasoning.

333. Argentina relies on the *CMS* Annulment Decision, in which the *ad hoc* committee did annul, under Article 52(1)(e), the finding in the *CMS* Award that there had been a violation of the umbrella clause.[289] However, a finding that the tribunal in the *CMS* case failed to give adequate reasons for its decision in no way necessarily leads to a conclusion that the Tribunal in the present case failed to give adequate reasons. The reasoning of the two tribunals in the two cases was different.

334. In the *CMS* case, the tribunal found that not all violations of a contractual obligation will result in a breach of the BIT, and that "*Purely commercial aspects of a contract might not be protected by the treaty in some situations, but the protection is likely to be available when there is significant interference by governments or public agencies with the rights of the investor*".[290] The tribunal in that case then went on to say no more than that "*None of the measures complained of in this case can be described as a commercial question as they are all related to government decisions that have resulted in the interferences and breaches noted*",[291] and that the umbrella clause had therefore not been observed "*to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty*".[292]

289 *CMS* Annulment Decision ¶¶ 89-100.
290 *CMS* Award ¶ 299.
291 *CMS* Award ¶ 301.
292 *CMS* Award ¶ 303.

335. In the annulment proceedings in the *CMS* case, the claimant apparently made it clear to the *ad hoc* committee that the claimant did not assert a right under either Argentine law or international law to enforce compliance with the terms of the licence held by the locally incorporated company of which it was a shareholder.[293] Rather, in the words of the *ad hoc* committee:

> *... CMS relied on a literal interpretation of Article II(2)(c). It contended that Argentina entered into legal obligations under the License, which were obligations "with regard to investments" under that Article. Although CMS was not entitled as a minority shareholder to invoke those obligations of Argentina under Argentine law (not being the obligee), the effect of Article II(2)(c) was to give it standing to invoke them under the BIT.*[294]

336. The *ad hoc* committee in the *CMS* case considered that it was not clear from paragraph 303 of the *CMS* Award quoted above whether the Tribunal accepted this interpretation,[295] that "*In the end it is quite unclear how the Tribunal arrived at its conclusion*"[296] and that "*In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point*".[297]

337. While the *ad hoc* committee in the *CMS* case may for these reasons have considered the reasoning in the *CMS* Award to be inadequate, for the reasons given above, the Committee considers that the reasoning of the Tribunal in the present case is quite clear.

338. The Committee notes that in the *CMS* Annulment Decision, the *ad hoc* committee said that "*there are major difficulties with this broad interpretation*" taken by the claimants,[298] and then proceeded to list these issues,[299] and to say that if the tribunal in that case had adopted such an interpretation "*one would have expected a discussion of*" these issues.[300]

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293 *CMS* Annulment Decision ¶¶ 90-91.
294 *CMS* Annulment Decision ¶ 92.
295 *CMS* Annulment Decision ¶¶ 93-94.
296 *CMS* Annulment Decision ¶ 96.
297 *CMS* Annulment Decision ¶ 97.
298 *CMS* Annulment Decision ¶ 95.
299 *CMS* Annulment Decision ¶ 95.
300 *CMS* Annulment Decision ¶ 96.

339. The Committee considers that all that the *CMS ad hoc* committee could properly have meant by this is that in the absence of any clearly expressed reasoning in the *CMS* Award, the absence of any discussion of these problematic issues made it impossible to conclude that the tribunal in that case had by implication adopted this particular interpretation of the umbrella clause.

340. The *ad hoc* committee in the *CMS* Annulment Decision said that "*seems clear that Article II(2)(c) is concerned with consensual obligations arising independently of the BIT itself*",[301] that "*Consensual obligations are not entered into erga omnes but with regard to particular persons*",[302] and that "*The effect of the umbrella clause is not to transform the obligation which is relied on into something else*".[303] However, it is not for an annulment committee to express its own views on the meaning of particular provisions of the treaty. Thus, in the Committee's view, the CMS *ad hoc* committee should not be regarded as having thereby purported, akin to an appeal court, to pronounce on what the correct position is. Rather, this paragraph of the *CMS* Annulment Decision should, in the Committee's view, be regarded merely as identifying *lacunae* that were found to have existed in the award in that particular case, in view of the absence of any express rationale or any discussion of certain issues from which a rationale might have been implied.

341. Provided that it is clear how a tribunal arrived at the conclusion that it did, it is unnecessary for the tribunal to address every argument of the parties, let alone every possible argument that might be raised in relation to a particular point. Thus, when the *ad hoc* committee in the *CMS* Annulment Decision stated that "*There is no discussion in the award of the travaux of the BIT on this point*",[304] this similarly in the Committee's view should not be understood as suggesting that an Award will contain an annullable error under Article 52(1)(e) if it does not discuss the *travaux* of the BIT on a particular point. In every case, the question will be whether the standard of review on annulment

[301] *CMS* Annulment Decision ¶ 95(a).
[302] *CMS* Annulment Decision ¶ 95(b).
[303] *CMS* Annulment Decision ¶ 95(c).
[304] *CMS* Annulment Decision ¶ 95(f).

under Article 52(1)(e) of the ICSID Convention has been met in the particular circumstances of the particular award that is sought to be annulled.

342. In the present case, the Committee is quite satisfied for the reasons given above that there is a very clearly stated rationale for the Tribunal's conclusion that there was a breach of the umbrella clause. It is not for the Committee to determine whether or not that rationale was correct.

343. For these reasons, this ground of annulment must be rejected.

(d) Manifest excess of powers as a ground of annulment under Article 52(1)(b) of the ICSID Convention: the Committee's views

344. The Committee is satisfied that the Tribunal, in finding that there was a breach of the umbrella clause, purported to interpret and apply the relevant provisions of the BIT in accordance with customary international law principles. In so doing, it applied the applicable law, whether or not it did so correctly.

345. The Committee finds that no other valid basis has been advanced by Argentina for the contention that the Tribunal manifestly exceeded its powers. Argentina in effect argues no more than that the Tribunal's interpretation of the BIT was wrong. However, that is not a ground of annulment.

346. For these reasons, this ground of annulment must also be rejected.

J. Emergency situation

(a) Introduction

347. In the proceedings before the Tribunal, Argentina argued that the gravity of the economic crisis faced by Argentina at the material time was such that Argentina was exempted from liability for taking the measures complained of by the Claimant by virtue of the theory of *imprevisión* under Argentine law; the principle of necessity under customary international law; Article IV(3) of the BIT; and Article XI of the BIT.

348. The arguments concerning the theory of *imprevisión* under Argentine law are considered in paragraphs 284-291 above.

349. As to the principle of necessity under customary international law, the Tribunal found this customary international principle to be as stated in Article 25 of the ILC Articles, which provides that:

> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril;*
>
> *and*
>
> *(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> *(a) The International obligation in question excludes the possibility of invoking necessity; or*
>
> *(b) The State has contributed to the situation of necessity*[305]

The Tribunal found that the requirements of this provision were not satisfied, in particular because the measures adopted by Argentina were not the only way available to Argentina to achieve the result,[306] and because Argentina had itself contributed to the state of necessity.[307]

350. The Tribunal further rejected Argentina's argument based on Article IV(3) of the BIT, which provides that:

> *Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national*

[305] Award ¶ 303.
[306] Award ¶¶ 304-309.
[307] Award ¶¶ 311-312.

> *emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses.*

The Tribunal found that the effect of this provision is to provide a minimum treatment to foreign investments suffering losses in the host country, and that this provision does not allow derogation from rights under the BIT or exclude wrongfulness, liability and eventual compensation for a breach of the BIT.[308]

351. The Tribunal additionally rejected Argentina's argument based on Article XI of the BIT, which provides that:

> *This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.*

Rejecting Argentina's arguments, the Tribunal found that Article XI of the BIT is not self-judging and that the Tribunal's examination was not limited to the question whether the measures were adopted by Argentina in good faith, but also extended to the substantive question whether the requirements of this provision had been met such as to preclude wrongfulness.[309] The Tribunal found that this provision was not applicable for the same reasons that it found that Argentina could not rely on the principle of necessity under customary international law.

352. Argentina seeks annulment of the Award on the basis that, in relation to these aspects of the Award, the Tribunal manifestly exceeded its powers in failing to apply the applicable law to the merits of the dispute (Article 52(1)(b) of the ICSID Convention), and failed to state sufficient reasons for its decision (Article 52(1)(e) of the ICSID Convention).

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[308] Award ¶¶ 320-321.
[309] Award ¶¶ 335-340.

(b) Arguments of the parties

353. Argentina argues, *inter alia*, that:

In relation to Article XI of the BIT

(a) Article XI of the Treaty differs significantly from the "state of necessity" under customary international law, which is substantially contained in Article 25 of the ILC Articles, in that (1) Article XI may only be invoked within the framework of the BIT while the state of necessity can be invoked in any context against any international obligation; (2) Article XI is a provision that delimits the scope of application of the Treaty such that if it applies the substantive obligations under the BIT do not apply, while the state of necessity is only relevant once it has been decided that there has otherwise been a breach of substantive obligations under the BIT; (3) Article XI does not include the stringent requirements of the state of necessity such as the requirement that the measure at issue be "the only way for the State to safeguard its interests" and the requirement that the State must not itself have contributed to the state of emergency; (4) Article 25 of the ILC Articles, in contrast to Article XI of the BIT, has been drafted in a negative way especially to emphasize its exceptional nature; and (5) when Article XI of the BIT is applicable no compensation is payable, while Article 25 of the ILC Articles is expressed by virtue of Article 27 of the ILC Articles to be without prejudice to the question of compensation.

(b) The Tribunal therefore made manifest errors of law in equating Article XI of the BIT with Article 25 of the ILC Articles,[310] and in applying the rule of Article 27 of the Articles on State Responsibility to Article XI of the Treaty.[311]

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[310] Referring to *CMS* Annulment Decision ¶¶ 130-131.

[311] Referring to *CMS* Annulment Decision ¶¶ 146, 383-394; Jürgen Kurtz, *Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis* 24-25 (Jean Monnet Center for International and Regional Economic Law & Justice, NYU School of Law, Jean Monnet Working Paper 06/08, 2008).

(c) Although an error of law is not a ground for annulment under Article 52 of the ICSID Convention,[312] in certain circumstances, an error of law may be serious enough to be deemed a manifest excess of powers for failure to apply the proper law.[313] The manifest errors of law present in the Award in this case are so serious that they amount to a manifest excess of powers for failure to apply the proper law.[314]

(d) The Tribunal also failed to apply Article XI of the BIT as it did not respect the self-judging nature of that provision.[315]

(e) Furthermore, even if Article XI is not self-judging, the Tribunal failed to apply Article XI of the BIT as it did not perform a substantial review but simply replaced Article XI of the Treaty with the state of necessity under customary international law, which differs substantially from Article XI, contrary to the principle of *effet utile* or *ut res magis valeat quam pereat*.

(f) For purposes of Article XI of the BIT, Argentina alleged that the measures challenged had been taken not only to protect the essential security interests of the State, but also to maintain public order, but the Tribunal said nothing about the maintenance of public order.[316] The public order component does not find direct reflection in customary law, and the absence of an analysis in the Award with respect to public order shows that the Tribunal in fact did not apply Article XI of the BIT.

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312 Referring to *CMS* Annulment Decision ¶¶ 136, 150, 158.

313 Referring to *Amco II* Annulment Decision ¶¶ 7.12, 7.19; *Klöckner* Annulment Decision ¶¶ 59, 169; *Mitchell* Annulment Decision ¶ 45; *CMS* Annulment Decision ¶¶ 135; *MTD* Annulment Decision ¶¶ 46-47; *Soufraki* Annulment Decision ¶ 86.

314 Referring to Campbell McLachlan, *"Investment Treaties and General International Law",* (2008) 57 International and Comparative Law Quarterly 361, 363; Théodore Christakis, "Quel remède a l'éclatement de la jurisprudence CIRDI sur les investissements en Argentine? La décision du Comité ad hoc dans l'affaire CMS c. Argentine", (2007) 111 *R.G.D.I.P.* 879, 895.

315 Referring *inter alia* to Kenneth J. Vandevelde, "Of Politics and Markets: The Shifting Ideology of the BITs", (1993) 11 International Tax & Business Lawyer 159, 171 (1993); Senate Exec. Rept. No. 100-32 (1988), at 8; 1992 US Model BIT, commentary to Art. X; Letter from James H. Thessin, Principal Deputy Legal Adviser and Designated Agency Ethics Official, United States Department of State, to Abraham D. Sofaer, Senior Fellow of Hoover Institution, Standford University, at 3.

316 Referring to Award ¶ 333.

This is particularly disturbing as in practice the Tribunal recognised that the Argentine crisis involved issues related to public order.[317]

(g) The Tribunal failed to state reasons pursuant to Article 52(1)(e) of the ICSID Convention in that it did not explain (1) why the lack of specific guidance in the Treaty with respect to essential security interests made it necessary to rely on the requirements of the state of necessity under customary international law; and (2) why Article XI did not establish conditions different from the requirements under customary law set forth in Article 25 of the ILC Articles.

In relation to Article IV(3) of the BIT

(h) Article IV(3) of the BIT establishes a special solution for exceptional situations in which general obligations arising from normal circumstances do not apply. Otherwise, Article II(1) would have sufficed, since it obliges each party to afford treatment no less favourable than that accorded to its own nationals or nationals of a third State. Under Article IV(3), in the event of "state of national emergency" or "other similar events", if foreign investors suffer losses, the only obligation of the State is not to discriminate if it decides to take measures in relation to such losses.

(i) The Tribunal in this case did not evaluate whether there had existed a state of national emergency or other similar events that triggered the application of Article IV(3), but summarily rejected the relevance of that article.[318]

In relation to state of necessity under customary international law

(j) The reasons provided by the Tribunal in relation to the requirements of the state of necessity under customary international law were contradictory and insufficient, which warrants annulment of the Award pursuant to Article 52(1)(e) of the ICSID Convention.

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317 Referring to Award ¶¶ 306, 308.
318 Referring to Award ¶¶ 320-321; *LG&E* Decision on Liability ¶ 244.

(k) The Tribunal's finding that it had not been established that the economic crisis had compromised the very existence of the State[319] is inconsistent with other findings in the Award.[320] Furthermore, the essential interests of the State are not limited to its existence, and the State must be given a margin of appreciation in the protection of its essential interests.[321]

(l) The Tribunal's finding that it had not been established that events were out of control or had become unmanageable[322] is inconsistent with other findings in the Award,[323] and in any event the necessity defence "does not require that "total collapse" of the country or a "catastrophic situation".[324]

(m) The Tribunal, having found that it is a requirement of the state of necessity that the challenged measures be the *only way* for the State to safeguard its essential interests, did not identify which were the supposed alternatives. Furthermore, there will always be alternative ways for dealing with an economic crisis, but this does not preclude the application of the state of necessity to an economic crisis.[325]

(n) The Tribunal did not identify how Argentina contributed to the state of necessity or how that contribution was substantial.[326]

354. The Claimants argue, *inter alia*, that:

In relation to Article XI of the BIT

(a) Argentina's challenge is a flagrant appeal of the merits of the Award.

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319 Referring to Award ¶ 306.
320 Referring to Award ¶¶ 306-308.
321 Referring to *Continental Casualty* Award ¶ 181; *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, June 6, 2008 ("*Metalpar* Award"), ¶ 198.
322 Referring to Award ¶ 307.
323 Referring to Award ¶¶ 306-308.
324 Referring to *Continental Casualty* Award ¶ 180.
325 Referring to *LG&E* Decision on Liability ¶ 257; *Continental Casualty* Award ¶ 197.
326 Referring to *LG&E* Decision on Liability ¶¶ 256-257; *Continental Casualty* Award ¶¶ 234-236; *Metalpar* Award ¶ 200.

(b) Argentina's challenge is also based on new arguments and material that post-date the Award. Argentina cannot re-plead its case and introduce new arguments now.

(c) The Tribunal correctly interpreted and applied Article XI and the defense of necessity in accordance with the international rules of treaty interpretation, as codified in Articles 31 and 32 of the Vienna Convention.

(d) Argentina is advancing a new interpretation of Article XI in these annulment proceedings, which it is not entitled to do. Before the Tribunal, Argentina advanced two primary necessity arguments (1) that Article XI is self-judging, and (2) that the defense of necessity precluded its liability and compensation duty. The *CMS* Annulment decision subsequently advanced an alternative interpretation of Article XI that Argentina now advances in these annulment proceedings.

(e) Argentina's new interpretation of Article XI is unsupported by a proper treaty analysis but merely relies on three authorities that all post-date the underlying proceeding. The Committee would be second-guessing what would have been the Tribunal's decision had the new material been available to it before rendering the Award, but the Committee's role is solely to evaluate whether the Tribunal exceeded its authority or failed to state reasons.

(f) A manifest error of law is not a ground for annulment.

(g) Even if manifest errors of law could constitute a ground for annulment, the Tribunal interpreted the law correctly.

(h) The Tribunal expressly considered and rejected Argentina's argument that Article XI is different and separate from customary law as it is *lex specialis*.[327] The Tribunal did not hold that they are one and the same, but rather, that the conditions under which these two defences may be invoked are the same.

[327] Referring to Award ¶ 334.

(i) Without a provision like Article XI, a Tribunal could exclude the necessity plea entirely. The specific purpose of Article XI is to clarify that the necessity defense in customary international law may still be invoked under the BIT.

(j) The Tribunal correctly analyzed the "Maintenance of Public Order" Aspect of Article XI.[328]

(k) Argentina's new interpretation of Article XI is wrong.

(l) The *Continental Casualty* Tribunal's analysis is even more flawed than Argentina's.[329]

(m) The Tribunal did not fail to state reasons regarding its Article XI analysis.

(n) The Tribunal correctly interpreted and applied Article IV(3).

(o) The Tribunal did not fail to state reasons regarding the plea of necessity under customary international law.

(c) The Committee's views

Situation of necessity under customary international law

355. The section of the Award dealing with this issue sets out the arguments of Argentina (Award, paragraphs 294-298) and of the Claimants (Award, paragraphs 299-302), followed by the Tribunal's consideration and conclusion (Award, paragraphs 303-313).

356. The Tribunal's reasoning begins with its finding, at paragraph 303 of the Award, that Article 25 of the ILC Articles, although not a treaty provision or part of customary international law, reflects the state of customary international law on the matter. From paragraphs 294 and 299 of the Award,

[328] Referring to Award ¶ 306.
[329] Referring to *Continental Casualty* Award ¶¶ 167-168, 175, 192.

it appears that this was common ground between the parties in the proceedings before the Tribunal, and this has not been disputed in these annulment proceedings. In the circumstances, the Committee finds that the Tribunal did not err in proceeding on this basis. Whether or not the Committee were to agree that Article 25 of the ILC Articles reflects customary international law, it could not amount to an annullable error for the Tribunal to give an applicable legal rule an interpretation on which both parties were agreed.

357. At paragraph 305 of the Award, the Tribunal noted that under the terms of Article 25(1)(a) of the ILC Articles, Argentina could only plead the defence of necessity in relation to its conduct if that conduct was "the only way for the State to safeguard an essential interest against a grave and imminent peril". The Tribunal therefore considered that in addressing Argentina's plea of necessity under customary international law, it had to "establish whether the Argentine crisis qualified as affecting an essential interest of the State". The Committee considers that this follows logically from the conclusion referred to in the previous paragraph.

358. At paragraph 306 of the Award, the Tribunal said that it did not find convincing the argument that the economic crisis "compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State". By this wording, the Tribunal rejected the argument of Argentina, referred to in paragraph 289 of the Award, that the crisis "threatened in its view the very existence of the State and its independence". The Tribunal's reason for rejecting this argument appeared to be that regardless of how serious the crisis may have been, "[q]uestions of public order and social unrest could be handled", "questions of political stabilization were handled", and "there is no convincing evidence that the events were out of control or had become unmanageable" (Award, paragraphs 306-307). In other words, the Tribunal was not satisfied that the existence of the State was threatened because the evidence was that the Government of Argentina continued to exist and to function and to deal with the crisis.

359. Contrary to what Argentina suggests, the Committee considers that paragraphs 306-307 of the Award cannot be understood as going further, amounting to a finding that the "essential interests" of the State are limited to its existence. The Committee considers that when paragraphs 306 to 308 of the Award are read as a whole, it is implicit that the Tribunal, while rejecting the argument that the existence of Argentina was threatened, nonetheless accepted that an "essential interest" of Argentina may have been affected. The Committee considers that this follows from the Tribunal's findings that "there was a severe crisis and ... in such context it was unlikely that business could have continued as usual", that "the government had the duty to prevent the worsening of the situation and could not simply leave events to follow their own course", and that "[i]t is quite evident that measures had to be adopted to offset the unfolding crisis" (Award, paragraphs 306-308).

360. Although the Tribunal made no express finding that an "essential interest" of Argentina was affected, the Committee considers it necessarily implicit from these statements in the Award that at the very least the Tribunal left open that the "essential interests" requirement of Article 25(1)(a) might be satisfied, as well as the requirement that the measures in question were taken to safeguard that essential interest from a "grave and imminent peril". The Tribunal may have left this open rather than deciding the matter on the basis that the Tribunal considered that, in any event, other requirements of Article 25 considered below were not met.

361. The first of these other requirements was the requirement in ILC Article 25(1)(a) that the measures of Argentina in question must have been "*the only way*" to safeguard the essential interest. The Tribunal found that this requirement was not satisfied at paragraphs 308 to 309 of the Award.

362. The Tribunal's reason for so finding was that "*there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case*". The Tribunal indicated at paragraph 309 that it was not the Tribunal's role to say what alternative Argentina *should* have adopted, and that the Tribunal confined itself to finding that there were alternatives that Argentina *could* have adopted.

363. Although the Tribunal did not in this paragraph identify what any of these alternatives might have been, this paragraph must be read in the context of the Award as whole, and in particular in the light of paragraph 300 of the Award, which states that:

> *The Claimants also argue that options other than pesification were available and thus this measure was not the only way to address the crisis; among the options discussed there was the structural reforms indicated, the agreed restructuring of its debt, dollarization and devaluation without pesification. Such alternative plans have worked in other countries, such as Uruguay, the expert explains.*

364. The reference to the "expert" in the final sentence of this quote must from context be a reference to the expert report of Professor Sebastián Edwards dated April 27, 2005 (the "Edwards Report"),[330] which is referred to in a footnote in paragraph 300 of the Award, as well as in the first sentence of the following paragraph 301. The measures other than pesification that could in the opinion of Professor Edwards have been adopted by Argentina are set out in paragraphs 12 to 21, 83-125 and 134-137 of the Edwards Report.

365. The Committee notes that the Edwards Report deals separately with alternatives that would have been available to Argentina in the 1990s and 2000 (paragraphs 13, 84-85 and 134 of the Edwards Report), in 2001 (paragraphs 14-16, 86-96 and 135-136 of the Edwards Report), and at the time of adoption of the Emergency Law in January 2002 (paragraphs 17-21, 97-125 and 137 of the Edwards Report).

366. For instance, in relation to the time at which the Emergency Law was adopted in January 2002, the only alternative to the adoption of the Emergency Law that is identified in the Edwards Report is devaluation of the peso without pesification of contracts denominated in US dollars, accompanied by other measures (a non-comprehensive list of which is given in paragraphs 20 and 108 of the Edwards Report) for assisting debtors who had borrowed in dollars and for whom devaluation would result in financial distress.

[330] Exhibit CEX-40 to the Claimants' Counter-Memorial on Annulment.

367. The Committee considers it sufficiently implicit that the Tribunal's reasoning was that the Claimants (via the Edwards Report) had identified alternative ways in which Argentina could have sought to address the economic crisis, that the Tribunal was not satisfied that none of these alternatives would have been available to Argentina, and that the Tribunal was therefore not satisfied that the "*only way*" requirement in Article 25(1)(a) of the ILC Articles was satisfied.

368. The Committee finds that this reasoning of the Tribunal does not address a number of issues that are essential to the question of whether the "*only way*" requirement was met.

369. The first question concerns the legal definition of the expression "*only way*" in Article 25(1)(a) of the ILC Articles. The Committee notes that the expression is capable of more than one possible interpretation. One potential interpretation is that it has its literal meaning, such that in the present case, the principle of necessity could be relied on by Argentina if there were genuinely no other measures that Argentina could possibly have adopted in order to address the economic crisis. As Argentina points out, there will almost inevitably be more than one way for a Government to respond to any economic crisis, and if this interpretation were correct, the principle of necessity under customary international law could rarely if ever be invoked in relation to measures taken by a Government to deal with an economic crisis. However, that would not mean that it would not be open to a Tribunal to find that this is the correct interpretation, although there are other interpretations that would be equally open to a Tribunal.

370. For instance, another possible interpretation would be that there must be no alternative measures that the State might have taken for safeguarding the essential interest in question that did not involve a similar or graver breach of international law. Under this interpretation, if there are three possible alternative measures that a State might adopt, all of which would involve violations of the State's obligations under international law, the State will not be prevented from invoking the principle of necessity if it adopts the measure involving the least grave violation of international law. Under this

interpretation, the principle of necessity will only be precluded if there is an alternative that would not involve a breach of international law or which would involve a less grave breach of international law.

371. A second question not addressed by the Tribunal is whether the relative effectiveness of alternative measures is to be taken into account. In adopting measures to safeguard an essential interest, a State may in practice not be in a position to know with certainty whether a given measure will prove to be effective, and reasonable minds may judge that some measures are likely to be more effective than others. For instance, suppose that there are two possible measures that a State might take in order to seek to safeguard an essential interest. One is 90 per cent probable to be 90 per cent effective to safeguard that essential interest, while the other is 50 per cent probable to be 60 per cent effective. Suppose that the former measure would (subject to the potential application of the principle of necessity) be inconsistent with obligations of the State under international law, while the latter measure would not. Would the State be precluded from invoking the principle of necessity if it adopted the former measure, on the basis that there was an alternative available? Or could the State claim that the measure taken was the "only way" that stood a very high chance of being very effective?

372. A third question that is not specifically addressed by the Tribunal is who makes the decision whether there is a relevant alternative, and in accordance with what test? Does the Tribunal determine this at the date of its award, when the Tribunal may have the benefit of knowledge and hindsight that was not available to the State at the time that it adopted the measure in question? Or does the Tribunal determine whether, on the basis of information reasonably available at the time that the measure was adopted, a reasonable and appropriately qualified decision maker would have concluded that there was a relevant alternative open to the State? Or does customary international law recognise that reasonable minds might differ in relation to such a question, and give a "margin of appreciation" to the State in question? In that event, the relevant question for the Tribunal might be whether it was

reasonably open to the State, in the circumstances as they pertained at the relevant time, to form the opinion that no relevant alternative was open.

373. It is not for the Committee in these annulment proceedings to provide answers to these questions. It was however necessary for the Tribunal, either expressly or *sub silentio*, to decide or assume the answers in order to apply the "only way" provision of Article 25(1)(a) to the facts of this case.

374. On no view could Professor Edwards be said to have expressed an expert opinion on these questions. Professor Edwards is an economist and not a lawyer, and his report does not purport to address the principle of necessity under customary international law or the interpretation of Article 25 of the ILC Articles. When Professor Edwards states that Argentina had other options for dealing with the economic crisis, he so states as an economist, and does not suggest that these other options would have amounted to relevant alternatives for purposes of the "only way" requirement of Article 25 of the ILC Articles.

375. The Committee notes that from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the questions set out above, which would provide an explanation for why the Tribunal did not expressly address them. A Tribunal is not required to address expressly every argument put by a party, and a Tribunal is therefore certainly not required to address arguments that have not been put by parties.

376. Having said that, the Tribunal is required to apply the applicable law, and is required to state sufficient reasons for its decision. In this case, a reading of the cursory reasoning of paragraphs 300 and 308-309 of the Award clearly suggests that the Tribunal accepted the expert evidence of Professor Edwards over the conflicting expert evidence of Professor Nouriel Roubini, to the effect that Argentina had other options available to it for dealing with the economic crisis. From this, without any further analysis, the Tribunal immediately concluded, that the measures adopted by Argentina were not the "only way".

377. The Tribunal was required to determine whether, on the proper construction of Article 25(1)(a) of the ILC Articles, the "only way" requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis. The Committee concludes that in determining that the measures adopted were not the "only way", the Tribunal did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances the Committee finds that this amounts to a failure to apply the applicable law, as ground of annulment under Article 52(1)(b) of the ICSID Convention.

378. Further, even if the Tribunal did in fact satisfy itself that the "only way" requirement in Article 25(1)(a) was not met on the evidence before it, it is not apparent from the reasoning in the Award how or why the Tribunal came to that legal conclusion. Even if, contrary to all appearance, the Tribunal did apply the "only way" requirement in Article 25(1)(a), the Committee considers that the Tribunal failed to state reasons for its decision. This constitutes a ground for annulment under Article 52(1)(e) of the ICSID Convention.

379. The next issue that was considered by the Tribunal, dealt with in paragraph 310 of the Award, was whether the measures adopted by Argentina "*seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole*", within the meaning of Article 25(1)(b) of the ILC Articles. The Tribunal found in that paragraph that "*the interest of the international community does not appear to be in any way impaired*", and said that the Tribunal would discuss subsequently whether there was an impairment of an essential interest of the State towards which the obligation exists. This subsequent discussion to which the Tribunal refers is paragraphs 341 to 342 of the Award. In paragraph 342, the Tribunal concluded that:

> *... in the context of investment treaties there is still the need to take into consideration the interests of the private entities who are the ultimate beneficiaries of those obligations, as explained by the English court case in* OEPC *noted. The essential interest of the Claimants would certainly be*

> *seriously impaired by the operation of ... state of necessity in this case.*

380. The reference in this paragraph to the *OEPC* case appears to be a reference back to paragraph 338 of the Award, which states:

> *As an English court has recently held in respect of a claim of non-justiciability relating to a State challenge to the* OEPC *award, the fact that a treaty is concluded between States cannot derogate from rights that belong to private parties, in the instance concerning dispute settlement, and as a consequence the doctrine of non-justiciability could not apply.*

381. A footnote to that paragraph indicates that the reference to the *OEPC* case is to *Republic of Ecuador v. Occidental Exploration and Production Company (OEPC)*, Queen's Bench Application of April 29, 2005, at paragraph 85. This paragraph of that decision states:

> *I appreciate also that Article VII provides the means whereby the state Parties to the BIT can resolve a dispute as to the interpretation or application of the BIT through an arbitral tribunal "in accordance with the applicable rules of international law". But there is no dispute as between the USA and Ecuador, so far as I know. And that provision of the BIT cannot detract from the rights given to Occidental to have an investment dispute resolved in accordance with the procedures laid down in Article VI. That is what it has done and that is what Ecuador wishes to challenge. [Footnote omitted.]*

382. That paragraph of that decision was not concerned with the principle of necessity under customary international law, or with Article 25 of the ILC Articles, or indeed with the question of what are the "essential interests" of the two contracting States to a BIT. The relevance to the quoted passage from the *OEPC* case to the application of Article 25(1)(b) of the ILC Articles is entirely obscure.

383. Paragraph 310 of the Award might be understood as stating implicitly that in the context of a BIT, an essential interest of one contracting State will be seriously impaired if the other contracting State fails to respect the rights under the BIT of a national of the former. However, this is far from clearly implicit. Paragraph 342 of the Award states that "*The essential interest of the Claimants would certainly be seriously impaired by the operation of ... state of*

necessity in this case". This suggests that the Tribunal considered that the principle of necessity would not, or might not, apply in the context of a BIT if *the application of the principle of necessity* would seriously impair an essential interest of a national of the other contracting State to the BIT. This contrasts with the language of Article 25(1)(b) of the ILC Articles, which speaks of a situation where *the act of the State* invoking the principle of necessity would seriously impair a relevant essential interest.

384. The Tribunal nowhere states expressly that it finds the requirement in Article 25(1)(b) of the ILC not to be satisfied in this case. The Committee considers it unclear whether the Tribunal ultimately did make such a finding or not. To the extent that the Tribunal did make such a finding, the Committee considers that it is entirely unclear on what basis that finding of law was made, and the Committee concludes that the Tribunal therefore failed to state reasons for that decision, within the meaning of Article 52(1)(e) of the ICSID Convention.

385. The next issue that was considered by the Tribunal, dealt with in paragraphs 311-313 of the Award, was whether Argentina "*contributed to the situation of necessity*" within the meaning of Article 25(2)(b) of the ILC Articles.

386. As in the case of the "only way" requirement, the Committee considers it self-evident that this requirement is potentially capable of more than one interpretation, and that the Tribunal was necessarily required, either expressly or *sub silentio*, to decide or assume the correct interpretation in order to apply the provision to the facts of the case.

387. On the most literal interpretation of this requirement, if there is any causal link at all between the conduct of the State and the situation of necessity, the principle of necessity will not apply, no matter how small a contribution the State's conduct made to the situation of necessity, regardless of whether or not the State was in any way blameworthy for that conduct, and regardless of whether or not the State could have in any way foreseen that its conduct would contribute to a situation of necessity.

388. It would appear that the Tribunal did not adopt such a literal interpretation. At paragraph 311 of the Award it said that "*This [requirement in Article 25(2)(b)*

of the ILC Articles] is of course the expression of a general principle of law devised to prevent a party taking legal advantage of its own fault". The Tribunal therefore appeared to consider that conduct of a State contributing to a situation of necessity for purposes of Article 25(2)(b) of the ILC Articles must be conduct constituting some sort of "fault" on the part of the State.

389. However, that begs the question as to what will amount to "fault" in this context. Must the conduct of the State in question be deliberate (in the sense of being deliberately intended to bring about the situation of necessity), or does it suffice that the conduct was reckless or negligent, or is some even lesser degree of fault sufficient?

390. The Tribunal did not address this question. The Tribunal found at paragraphs 311-312 of the Award that:

> *Although each party claims that the factors precipitating the crisis were either endogenous or exogenous, the truth seems to be somewhere in between with both kind of factors having intervened, as in the end it has been so recognized by both the Government of Argentina and international organizations and foreign governments.*
>
> *... This means that to an extent there has been a substantial contribution of the State to the situation of necessity and that it cannot be claimed that the burden falls entirely on exogenous factors. This has not been the making of a particular administration as it is a problem that had been compounding its effects for a decade, but still the State must answer as a whole.*

391. From these paragraphs it is apparent to the Committee that the Tribunal's finding that Argentina made a substantial contribution to the situation of necessity was based on the finding that the crisis was caused by both "endogenous" factors and "exogenous" factors. From these paragraphs read in conjunction with the first sentence of paragraph 300 of the Award, it is apparent that the Tribunal's finding that the crisis was caused at least in part by endogenous factors was based on paragraphs 33-82 of the Edwards Report. That report expresses the view that Argentina made various mistakes in its management of its economy in the years preceding and during the economic crisis, and states for instance at paragraph 74 that:

> *While external factors undoubtedly did play a role in the slowdown of the economy after 1998, that role was minor when compared to Argentina's own misguided policies - both during the 1990s and during 2000-2001. Those misguided internal policies greatly amplified the effects of external shocks on the Argentine economy.*

However, Professor Edwards was speaking as an expert economist. He was not addressing the principle of necessity under customary international law, or Article 25(2)(b) of the ILC Articles.

392. As in the case of the "only way" requirement, the Committee notes that from the material before it, the parties in their arguments before the Tribunal do not appear to have expressly identified and argued the issue of the legal definition of the expression "*contributed to the situation of necessity*" in Article 25(2)(b) of the ILC Articles. However, the Committee again considers that the Tribunal is nonetheless required to apply the applicable law. The Committee considers that a reading of the cursory reasoning of the Tribunal in paragraphs 300 and 311-312 of the Award clearly suggests that the Tribunal accepted the expert evidence of Professor Edwards to the effect that Argentina's own "misguided" policies contributed to the magnitude of the economic crisis, and that from this the Tribunal directly concluded that the measures adopted by Argentina "*contributed to the situation of necessity*".

393. The Committee finds that in reaching that conclusion, the Tribunal did not in fact apply Article 25(2)(b) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. While an economist might regard a State's economic policies as misguided, and might conclude that such policies led to or amplified the effects of an economic crisis, that would not of itself necessarily mean that as a matter of law, the State had "*contributed to the situation of necessity*" such as to preclude reliance on the principle of necessity under customary international law. The Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the Edwards Report. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings

as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "*contributed to the situation of necessity*" within the meaning of Article 25(2)(b). For the Tribunal to leap from the first step to the third without undertaking the second amounts in the Committee's view to a failure to apply the applicable law. This constitutes a ground of annulment under Article 52(1)(b) of the ICSID Convention.

394. The final issue considered by the Tribunal was whether the BIT itself "*excludes the possibility of invoking necessity*", thereby precluding reliance on that principle in terms of Article 25(2)(a) of the ILC Articles. At paragraph 310 of the Award, the Tribunal said that it would discuss this issue subsequently. The Committee finds that the Tribunal did not subsequently make any determination of this question.

395. For these reasons, the Committee finds that the decisions of the Tribunal that requirements of Article 25 of the ILC Articles were not met were tainted by annullable error. The Committee accordingly finds that the Tribunal's decision that Argentina is precluded from relying on the principle of necessity under customary international law must be annulled.

Article IV(3) of the BIT

396. The section of the Award dealing with this issue sets out the arguments of Argentina (Award, paragraphs 314-316) and of the Claimants (Award, paragraphs 317-319), followed by the Tribunal's consideration and conclusion (Award, paragraphs 320-321).

397. The Tribunal ultimately found that this provision of the BIT, contrary to the submissions of Argentina, does not have the effect of allowing the host State to derogate from rights under the BIT in times of emergency.

398. It may well be that different interpretations of this provision are possible. However, for the reasons given in paragraphs 60-77 above, it is not for the

Committee to determine whether or not the interpretation given to this provision by the Tribunal was correct or not. Whether it did so correctly or not, the Tribunal applied this provision as part of the applicable law. The Committee considers that from paragraphs 320-321 of the Award, read together with the preceding paragraphs setting out the arguments of the parties, the Tribunal's reasons for adopting the interpretation that it did are sufficiently clear. The Committee finds no annullable error.

399. The Committee accordingly finds no annullable error in this section of the Award.

Article XI of the BIT

400. The section of the Award dealing with this issue sets out the arguments of Argentina (Award, paragraphs 324-326) and of the Claimants (Award, paragraphs 327-330), followed by the Tribunal's consideration and conclusion (Award, paragraphs 331-342).

401. In its reasoning in respect of this issue, the Tribunal found (at paragraphs 331-332 and 335-342) that Article XI of the BIT is not "self-judging". This finding is the Tribunal's ruling on the arguments of Argentina referred to in paragraphs 324 and 326 of the Award. The Claimants' response to that argument is referred to in paragraphs 327-328 and 330 of the Award.

402. The Committee considers that when these paragraphs are read as a whole, the reasons for the Tribunal in reaching the conclusion that it did are quite clear. It is not for the Committee to determine whether that interpretation was correct or not. The Committee accordingly finds no annullable error in these paragraphs of the Award.

403. At paragraphs 333-344 of the Award, the Tribunal then concluded that it is "*necessary to rely on the requirements of state of necessity under customary international law, as outlined above in connection with their expression in Article 25 of the Articles on State Responsibility, so as to evaluate whether*

such requirements have been met in this case". This was said in paragraph 333 of the Award with particular reference to the expression "security interests" in Article XI. The apparent meaning of these paragraphs is that the Tribunal found that the effect of Article XI of the BIT is the same or similar to the effect of Article 25 of the ILC Articles, or at least, that the expression "*measures necessary for ... the Protection of its own essential security interests*" in Article XI of the BIT has the same or similar meaning as the expression "*[an act that is] the only way for the State to safeguard an essential interest against a grave and imminent peril*" in Article 25 of the ILC Articles. The Committee finds that the reasons for the Tribunal in reaching the conclusion are sufficiently clear, that it is not for the Committee to determine whether or not that interpretation was correct, and the Committee accordingly finds no annullable error in these paragraphs of the Award.

404. In view of this finding, the Tribunal then proceeded at paragraphs 339-341 of the Award to note that as it had already found that Argentina could not rely on the principle of necessity under customary international law because the requirements of Article 25 of the ILC Articles were not satisfied, for similar reasons Argentina could not rely on Article XI of the BIT in this case.

405. The Committee has concluded above that the Tribunal's finding that the requirements of Article 25 of the ILC Articles are not satisfied in this case must be annulled. Because that finding formed the basis of the Tribunal's finding that Article XI of the BIT was inapplicable in this case, the Committee concludes that the latter finding of the Tribunal must also be annulled.

The Committee notes that in the *CMS* Annulment Decision, the *ad hoc* committee expressed the view that the requirements under Article XI of the BIT are not the same as those under customary international law as codified by Article 25 of the ILC Articles, and that the tribunal in the *CMS* Award had erred on this point.[331] The *ad hoc* committee in that case also considered that because the two texts have a different operation and content, it was necessary for the tribunal to take a position on their relationship and to decide whether they were both applicable in that case, and that the tribunal had

[331] *CMS* Annulment Decision ¶ 130.

made a manifest error of law in failing to do so.[332] However, the Committee considers that the substantive operation and content of Article XI and the customary international law principles of necessity, and the interrelationship of the two, are issues that fall for decision by the tribunal. The role of an annulment committee is not to reach its own conclusions on these issues, but to determine whether the tribunal manifestly exceeded its powers in reaching the conclusion that it did, or whether the tribunal failed to state reasons for reaching the conclusion that it did. The Committee has concluded that both the Tribunal's decision that Argentina is precluded from relying on Article XI, and the Tribunal's decision that Argentina is precluded from relying on the principle of necessity under customary international law, are tainted by annullable error. It follows that both of those findings of the Tribunal and its associated reasoning must be annulled. In the circumstances, there is no occasion for the Committee to go further and to express any view on the correctness or otherwise of the Tribunal's findings with respect to the substantive operation and content of, and interrelationship between, Article XI and the customary international law principles of necessity, and the Committee does not do so.

K. Conclusions

406. The Committee has found above that the Tribunal's decision that Argentina is precluded from relying on Article XI of the BIT and on the principle of necessity under customary international law must be annulled.

407. The findings of the Tribunal that Argentina was precluded from relying on Article XI of the BIT and on the principle of necessity under customary international law were essential to the Tribunal's disposition of the case. The Committee finds it necessarily implicit in the reasoning in the Award that if the Tribunal had found that Argentina was entitled to rely on Article XI of the BIT or on the principle of necessity, it might have found that Argentina was not liable for any breach of the BIT. It therefore follows that the Tribunal's ultimate

[332] *CMS* Annulment Decision ¶¶ 131-132, and see also ¶¶ 145-146.

finding that Argentina breached its obligations *vis-à-vis* the Claimants under the fair and equitable treatment clause and umbrella clause of the BIT must also be annulled.

408. Having annulled these findings of the Tribunal, the Committee cannot go further and make its own findings as to whether or not Argentina is entitled to rely on the principle of necessity under customary international law or on Article XI of the BIT, or as to whether or not Argentina is responsible for breaches of its obligations *vis-à-vis* the Claimants under the fair and equitable treatment clause and umbrella clause of the BIT. These questions could only be determined by a tribunal, in the event that either party were to request resubmission pursuant to Article 52(6) of the ICSID Convention.

409. Argentina has also sought annulment of the Tribunal's findings and decision with respect to the quantum of compensation awarded.[333] However, a preliminary question arises as to whether, even if Argentina's arguments in this respect were rejected, the Tribunal's decision on compensation could in any event stand in view of the annulment of its decision on liability.

410. It is clearly possible for an award to be annulled only in part.[334] As one *ad hoc* committee has stated:

> *... a party to annulment proceedings which successfully pleads and sustains a ground for annulment set out in Article 52(1) of the ICSID Convention cannot limit the extent to which an* ad hoc *committee may decide to annul the impugned award as a consequence. Certain grounds of annulment will affect the award as a whole—for example, where it is demonstrated that the tribunal which rendered the award was not properly constituted (Article 52(1)(a)). Others may only affect part of the award. An* ad hoc *committee is expressly authorised by the Convention to annul an award "in whole or in part" (Article 52(3)).*
>
> *Thus where a ground for annulment is established, it is for the* ad hoc *committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterisation of its request, whether in the original application or otherwise, as requiring either*

[333] Application for Annulment ¶¶ 61-64, 77-90.
[334] ICSID Convention, Article 52(3) (final sentence); ICSID Arbitration Rule 55(3).

> *complete or partial annulment of the award. This is reflected in the difference in language between Articles 52(1) and 52(3), and it is further supported by the* travaux *of the ICSID Convention.*[335]

411. As another *ad hoc* committee has also stated:

> *Generally speaking, partial annulment would seem appropriate if the part of the Award affected by the excess of power is identifiable and detachable from the rest, and if so, the remaining part of the Award has an independent basis.*[336]

412. For this reason, the Committee considers that it would be inappropriate to annul an entire award where the decision on annulment affects only a discrete part of parts of an award.

413. Liability and quantum of compensation are two discrete issues, but a decision on the latter must necessarily follow the decision on the former. It is unproblematic in theory to annul the portion of an award dealing with quantum of compensation but to leave intact the portion dealing with liability. In that event, in any resubmission proceedings, the issue before the resubmission tribunal would be confined to determining the quantum of damages in the light of the findings on liability made by the original tribunal.

414. The position is otherwise where the finding on liability is annulled. There can be no obligation to pay compensation in the absence of any liability. Following annulment of the Tribunal's finding on liability, its finding on damages can simply no longer stand, but must fall with the finding on liability. In the event that resubmission proceedings were requested, and in the event that a resubmission tribunal were to make a new finding of liability, it would be for that tribunal to also make a new finding of damages. The Committee therefore finds that the Tribunal's original decision with respect to damages must also be annulled in consequence of the annulment of the Tribunal's finding on liability. In the circumstances, there is no need for the Committee to consider Argentina's contentions that the Tribunal's findings with respect to damages themselves contained annullable errors.

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335 *Vivendi* Annulment Decision ¶¶ 68-69.
336 *Klöckner* Annulment Decision ¶ 80.

415. The Committee finds however that the parts of the Award other than those referred to above are detachable from the annulled portions and have an independent existence. These other parts are not annulled.

416. A further issue concerns the Tribunal's decision with respect to the costs of the proceedings before the Tribunal. The Tribunal decided that each party is to bear the legal costs by it in connection with those proceedings and that the arbitration costs were to be borne in equal shares by the parties. The Tribunal indicated that it reached this decision as to costs "Considering ... the various issues in this case",[337] which would have included the consideration that the Claimants had succeeded in their claim. The question is whether the partial annulment of the Award removes the basis for that decision as to costs. For instance, as the *ad hoc* committee said in the *MINE* Annulment Decision, in which the award was partially annulled:

> *The award of costs can nevertheless not remain in existence since its basis, viz., that Guinea was the losing party, has disappeared as a result of the annulment of the portion of the Award relating to damages. The award of costs cannot survive the annulment of that portion of the Award with which it is inextricably linked. The Committee therefore finds that the award of costs must be annulled in consequence of the annulment of the damages portion of the Award.*[338]

417. However, the present case is distinguishable in that in the *MINE* case, the tribunal had awarded to the successful claimant costs towards its fees and expenses in the ICSID arbitration.[339] In the present case, the Tribunal ordered both parties to bear their own costs and to share equally the arbitration costs notwithstanding that the Claimants had succeeded in their claim. The Committee finds no reason for thinking that the Tribunal would not have made exactly the same order, even if Argentina had been successful in defending the claim. The Committee therefore sees no reason for annulling the Tribunal's decision as to the costs of the proceedings before the Tribunal.

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337 Award ¶ 453.
338 *MINE* Annulment Decision ¶ 6.112.
339 *MINE* Annulment Decision ¶ 2.01.

L. Costs and stay of proceedings

418. Under Article 61(2) of the ICSID Convention and ICSID Arbitration Rule 47(1)(j), read in conjunction with Article 52(4) of the ICSID Convention and ICSID Arbitration Rule 53, the Committee has a discretion to determine how and by whom shall be paid the expenses incurred by the parties in connection with the proceedings, the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre.

419. The Committee notes that in the *MTD* Annulment Decision, it was said that:

> *In all but one of the concluded annulment proceedings, Committees have made no order for the parties' own costs and have held that ICSID's costs should be borne equally by the parties. They did so not only where the application for annulment succeeded in whole or part but also where it failed.*[340]

420. Other annulment decisions have also adopted the same approach to costs,[341] which has been referred to a "*developing practice*",[342] subject to some flexibility, for instance in a case where the annulment application was "*fundamentally lacking in merit*" and that the respondent's case was "*to any reasonable and impartial observer, most unlikely to succeed*".[343]

421. On the other hand, in the *Azurix* Annulment Decision, the *ad hoc* committee took a different approach. It noted that under Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, the default rule is that an applicant for annulment is solely responsible for making the advance payments to ICSID on account of ICSID's costs. It contrasted this provision with Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations, which applies to the original proceedings before a tribunal, under which the default rule is that each party shall pay one half of each advance payment to ICSID on

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340 *MTD* Annulment Decision ¶ 110.

341 *Soufraki* Annulment Decision ¶ 138; *CMS* Annulment Decision ¶¶ 161-162; *Lucchetti* Annulment Decision ¶ 131.

342 *Soufraki* Annulment Decision ¶ 138.

343 *MTD* Annulment Decision ¶ 111. See also *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment, January 08, 2007, ¶ 88; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, April 16, 2009, ¶ 82.

account of the costs of the arbitration. The *ad hoc* committee in *Azurix* concluded that:

> *As to this difference in approach the Committee takes the view that a default position is thereby established that in the absence of other order a party who has applied for annulment and has paid in advance all of the costs of the Centre in relation to that application as is required by the Regulations should bear those costs.*[344]

422. The *ad hoc* committee then went on to conclude that:

> *The Committee considers that under the Regulations, and as a matter of discretion, the normal course should be for a wholly unsuccessful applicant for annulment carry the burden of the whole of the costs of the Centre advanced by it associated with the proceedings, including the fees and expenses of the members of the* ad hoc *committee. Of course, the Committee does not exclude the possibility that circumstances might justify a departure from this normal rule, but the Committee finds no such exceptional circumstances in the present case. In particular, the fact that there are novel and complex issues to be determined in the annulment proceedings, as here, does not of itself amount to such exceptional circumstances. Also, as here, it is of the essence of annulment matters that they are original and difficult*.[345]

423. A similar approach was subsequently taken in the *MCI* Annulment Decision, in which the *ad hoc* committee concluded that a consequence of Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations "*should normally be that the applicant, when annulment is refused, remains responsible for these costs*".[346]

424. However, unlike the *Azurix* and *MCI* cases, this is not a case in which the annulment application has been entirely unsuccessful. In the present case, the application for annulment of Argentina has succeeded in part, but not in whole. The Committee considers that it would be appropriate in the circumstances and in the light of previous annulment decisions for ICSID's costs in these annulment proceedings to be borne equally by the parties.

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344 *Azurix* Annulment Decision ¶ 373.
345 *Azurix* Annulment Decision ¶ 378.
346 *MCI* Annulment Decision ¶ 88.

425. As to each party's own litigation costs, the Committee notes that after the oral hearing on the merits, each of the parties submitted details of the precise costs of their own representation in these annulment proceedings. The Committee notes that the costs of each party were of a comparable magnitude. In view of this, and in view of the fact that the application for annulment of Argentina has succeeded in part but not in whole, the Committee considers that it would also be appropriate in the circumstances and in the light of previous annulment decisions for each party to bear its own litigation costs and expenses incurred with respect to this annulment proceeding, including its costs of legal representation.

426. During these annulment proceedings, the enforcement of the Award was stayed pending the Committee's decision on the Application for Annulment, pursuant to Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(1) and (2). ICSID Arbitration Rule 54(3) provides that:

> *If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).*

427. The present stay of enforcement of the Award thus terminates with the rendering of the present decision of the Committee. Given that the Tribunal's decision on liability as well as its decision on damages have both been annulled, the remaining portions of the Award that have not been annulled are presently incapable of enforcement, and will remain so unless and until that position is altered by a subsequent decision of a tribunal on resubmission. In the circumstances, the Committee considers that there is no need for it to make any order pursuant to the second sentence of ICSID Arbitration Rule 54(3).

Decision

For the reasons given above, the Committee:

(1) pursuant to Article 52(1)(b) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning that the Argentine Republic is precluded from relying on Article XI of the BIT;

(2) pursuant to Article 52(1)(b) of the ICSID Convention, annuls the finding of the Tribunal and associated reasoning that the Argentine Republic is precluded from relying on the principle of necessity under customary international law;

(3) consequently to (1) and (2), annuls the decision of the Tribunal in paragraph 1 of the Disposition of the Award that "The Respondent breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the Treaty and to observe the obligations entered into with regard to the Investment guaranteed in Article II(2)(c) of the Treaty";

(4) consequently to (1), (2) and (3), annuls the decision of the Tribunal in paragraph 2 of the Disposition of the Award that "The Respondent shall pay the Claimants compensation in the amount of US$106.2 million", and the decision of the Tribunal in paragraph 3 of the Disposition of the Award relating to the payment of interest on such compensation;

(5) otherwise rejects the application for annulment of the Argentine Republic;

(6) decides that each Party shall bear one half of the costs incurred by the Centre in connection with this annulment proceeding, including the fees and expenses of the members of the Committee;

(7) decides that each Party shall bear its own litigation costs and expenses incurred with respect to this annulment proceeding, including its costs of legal representation.

Dr. Gavan Griffith Q.C.
President of the *ad hoc* Committee

5. 07. 2010

Judge Patrick L. Robinson
Member of the *ad hoc* Committee

06/30/10

Judge Per Tresselt
Member of the *ad hoc* Committee

25. VI. 2010