INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

**EDF INTERNATIONAL S.A.**

**SAUR INTERNATIONAL S.A.**

**and**

**LEON PARTICIPACIONES ARGENTINAS S.A.**

**v.**

**ARGENTINE REPUBLIC**

(ICSID Case No. ARB/03/23)

Annulment Proceeding

# DECISION

Members of the *ad hoc* Committee

Sir Christopher Greenwood, CMG, QC, *President*
Professor Teresa Cheng, SC
Professor Yasuhei Taniguchi

Secretary to the *ad hoc* Committee

Ms Anneliese Fleckenstein

Date of dispatch to parties: 5 February 2016

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TABLE OF CONTENTS

## Acronyms and Abbreviations

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|---|---|
| AC | Claimants' Annex; document submitted by the Claimants |
| Award | Award of 11 June 2012 in *EDF International SA and Others v. Argentine Republic* (ICSID ARB/03/23) |
| BIT | Bilateral investment treaty |
| Counter-Memorial | Claimants' Counter-Memorial on Annulment |
| Disqualification Decision | Decision of 25 June 2008 on the challenge to Professor Kaufmann-Kohler in *EDF International SA and Others v. Argentine Republic* (ICSID ARB/03/23) |
| ICSID, or the Centre | International Centre for the Settlement of Investment Disputes |
| ICSID Arbitration Rules | International Centre for the Settlement of Investment Disputes Rules of Procedure for Arbitration Proceedings (2006 version) |
| ICSID Convention | Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 |
| Jurisdiction Decision | Decision of 5 August 2008 on Jurisdiction in *EDF International SA and Others v. Argentine Republic* (ICSID ARB/03/23) |
| Memorial | Argentine Republic's Memorial on Annulment |
| RA | Respondent's Annex; document submitted by the Argentine Republic |
| Rejoinder | Argentine Republic's Rejoinder on Annulment |
| Reply | Claimants' Reply on Annulment |

# I. Introduction

## *A. Procedural History of the Annulment Proceedings*

1. On 9 October 2012, the Centre received from the Argentine Republic ("Argentina") an Application (the "Application") for the Annulment of the Award rendered on 11 June 2012, by the Tribunal in the arbitration proceeding between EDF International S.A. ("EDFI"), Saur International S.A. ("Saur") and León Participaciones Argentinas S.A. ("León") (collectively "the Claimants") and Argentina. The Application contained a request for the stay of enforcement of the Award under Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(1). On the same day, the Centre acknowledged receipt of the Application and transmitted a copy to the Claimants.

2. On 11 October 2012, pursuant to ICSID Arbitration Rule 50(2), ICSID's Secretary-General registered the Application and transmitted a copy of the Notice of Registration to the parties. The parties were also informed that, pursuant to ICSID Arbitration Rule 52(2), the enforcement of the Award was provisionally stayed.

3. On 2 January 2013, the *ad hoc* Committee was deemed constituted by Sir Christopher Greenwood (British), President of the Committee; Professor Teresa Cheng (Chinese) and Professor Yasuhei Taniguchi (Japanese).

4. On 22 February 2013, the First Session was held with the Members of the Committee present at the seat of the Centre in Washington, D.C. and the parties participating via telephone conference. During that session, a procedural calendar for the conduct of the proceedings was agreed upon by the parties.

5. On 25 February 2013, the Committee issued Procedural Order No. 1 concerning the schedule of the proceedings. On 5 March 2013, the Committee issued Procedural Order No. 2 concerning the schedule of the proceedings for the continuation of the provisional stay of enforcement of the Award which had been granted by the Secretary-General in accordance with Article 54(2) of the Arbitration Rules.

6. On 18 March 2013, Argentina filed a formal request for the stay of the enforcement of the Award. On 3 April 2013, the Claimants filed observations on Argentina's request. On 17 April 2013, Argentina filed a response and on 29 April 2013, the Claimants filed a reply.

7. On 28 May 2013, Argentina filed its Memorial on Annulment.

8. On 18 July 2013, the Committee issued a decision continuing the stay of enforcement of the Award until 30 September 2013, upon which date the stay would be lifted unless Argentina provided by 16 September 2013 an

> unequivocal undertaking that, in the event the Award is not annulled (or is annulled only in part), it will make payment of the principal and interest awarded (or, in the event of partial annulment, awarded in those parts of the Award which are not annulled) within ninety days of the final decision of the Committee and without any requirement that the Claimants bring proceedings in the courts of Argentina or that those courts or other Argentine national authorities issue an order requiring payment, the stay of enforcement will be lifted with effect from midnight on 30 September 2013 unless the Committee otherwise decides.

9. In a letter dated 13 September 2013, Argentina declined to give the undertaking requested in the Committee's decision of 18 July 2013. Consequently, on 26 September 2013, the Committee issued a further decision lifting the stay of enforcement of the Award which took effect from midnight (Washington D.C. time) on 30 September 2013.

10. On 16 September 2013, EDF filed its Counter-Memorial on Annulment. Argentina filed its Reply on Annulment on 6 December 2013 and on 25 February 2014, EDF filed its Rejoinder on Annulment.

11. From 2 June to 3 June 2014 the Committee held a hearing on annulment at the seat of the Centre in Washington D.C.. Present at the hearing were:-

- *the* ad hoc *Committee*: Sir Christopher Greenwood, President of the Committee; Professor Teresa Cheng and Professor Yasuhei Taniguchi, Members of the Committee; and Mrs. Anneliese Fleckenstein, Secretary of the Committee;

- *for the Argentine Republic*: Dr. Javier Pargament, *Subprocurador del Tesoro de la Nación*; Dr. Gabriel Bottini; Mrs. María Alejandra Etchegorry and Soledad Romero Caporale, and Mr. Nicolás Duhalde from the *Procuración del Tesoro de la Nación;* and

- *for the Claimants*: Mr. Paolo Di Rosa, Ms. Mallory B. Silberman, Mr. Pedro G. Soto, Mr. Kelby Ballena (Legal Assistant) and Ms. Aimee Reilert (Legal Assistant) from Arnold & Porter LLP; and Mr. Jean-Paul Palma and Mrs. Isabelle Praud from EDF.

12. In a letter dated 29 July 2015, Argentina requested information from Professor Cheng in connection with a disclosure made in the *Total* case[1]. Argentina supplemented its letter with a further letter dated 3 August 2015, in which Argentina requested further information from Professor Cheng. By letter dated 6 August 2015, Professor Cheng provided answers to both of Argentina's letters.

13. On 6 August 2015, Argentina filed a proposal for the disqualification of Professor Cheng in the present proceedings, in accordance with Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (the "Disqualification Proposal"). On the same day, the Centre informed the parties that the proceeding had been suspended until the Disqualification Proposal was decided, pursuant to ICSID Arbitration Rule 9(6).

14. Argentina filed its arguments on the Proposal on 19 August 2015; the Claimants replied to the Proposal on 25 August 2015. Professor Cheng furnished explanations on 7 September 2015, as envisaged by ICSID Arbitration Rule 9(3). Argentina submitted additional comments on 14 September 2015. The Claimants did not submit any additional comments.

15. On 17 September 2015 Argentina wrote to the Secretary of the Committee requesting information from the members of the Committee regarding any past or present links with any of the parties or their counsel currently engaged in litigation with Argentina. Sir Christopher Greenwood and Prof. Yasuhei Taniguchi provided responses to this request by letters of 22 September and 6 October 2015, and 16 October 2015, respectively.

[1] *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1).

16. On 20 November 2015, the Majority issued its Decision on the Proposal to Disqualify Professor Teresa Cheng rejecting Argentina's Disqualification Proposal.

17. On 22 December 2015, the proceeding was declared closed, pursuant to ICSID Arbitration Rule 38(1).

### *B. Brief History of the Dispute*

18. The dispute, which is described in detail in paragraphs 50-176 of the Award, has its origins in the restructuring during the late 1990's of the framework for the distribution of electricity in the Argentine Province of Mendoza ("Mendoza"). On 28 May 1997, Mendoza enacted Provincial Law No. 6,497 (the "Provincial Electricity Law") and No. 6,498 (the "Transformation Law") which adopted a new regulatory framework for the provision of electricity supplies in the Province. In accordance with that framework, the state-owned electricity distributor was to be privatised. A new company, Empresa Distribuidora de Energía de Mendoza S.A. ("EDEMSA") was created. Mendoza sought the sale of 51% of the Class "A" shares in EDEMSA and to that end retained Chase Manhattan Bank and Salomon Smith Barney as advisers. In accordance with their remit, Chase Manhattan and Salomon Smith Barney sought to attract foreign investors. They prepared an information memorandum (the "Info Memo") and held a number of "road shows", including an exclusive meeting with Electricité de France ("EDF"), the parent company of EDFI. They emphasised the guarantees to investors under the regulatory framework and the concession which it was envisaged would be granted to EDEMSA. That framework provided for tariffs to be fixed in such a way as to ensure an investor was able to recoup expenditure and obtain a reasonable rate of return on the investment. Tariffs were to be fixed for a five year period but with provision for both an ordinary tariff review and an extraordinary tariff review. At the time, the Convertibility Law of Argentina provided that the Argentine peso was convertible at the rate of one peso to one US dollar. It was envisaged that the concession would contain provisions guaranteeing that the costs and reasonable rate of return would be determined in US dollars for purposes of assessing the tariff rate and that customers would then be invoiced in pesos at the rate of one peso to one dollar. According to the Tribunal, these safeguards were "key features of the sales pitch" by Chase Manhattan Bank and Salomon Smith

Barney.[2] Investors wishing to bid for the shares in EDEMSA were required to accept and initial a copy of the proposed concession.

19. A consortium company, SODEMSA, incorporated in Argentina, was formed by EDFI, SAURI and Crédit Lyonnais together with Argentine co-investors. EDFI acquired a 45% interest in SODEMSA and SAURI a 15% interest. The remaining 40% interest was acquired by MENDINVERT, an Argentine company, in which Crédit Lyonnais held 70% of the shares, the remainder being held by Argentine investors. Crédit Lyonnais subsequently transferred its interest in MENDINVERT to León, a Luxembourg corporation which was wholly owned by Crédit Lyonnais until 2004 when it became a wholly owned subsidiary of EDFI.[3] SODEMSA successfully bid for 51% of the Class A shares in EDEMSA and in July 1998 EDEMSA and the Government of Mendoza concluded an agreement ("the Concession Agreement") on the terms envisaged. SODEMSA assumed control of EDEMSA and commenced operations on 1 August 1998.

20. In late 2001 and early 2002 Argentina experienced an acute economic emergency which saw the appointment and resignation of four presidents in a period of three weeks.[4] The scale of the situation facing Argentina was described by the tribunal in the *Continental Casualty* case which spoke of –

> a crisis that brought about the sudden and chaotic abandonment of the cardinal tenet of the country's economic life, such as the fixed convertibility rate which had been steadfastly recommended and supported for more than a decade by the IMF and the international community; the near collapse of the domestic economy; the soaring inflation; the leap in unemployment; the social hardships bringing down more than half the population below the poverty line; the immediate threats to the health of young children, the sick and the most vulnerable members of the population; the widespread unrest and disorders; the real risk of insurrection and extreme political disturbances; the abrupt resignations of successive presidents and the collapse of the government, together with a partial breakdown of the political institutions and an extended vacuum of power…[5]

[2] Award, para. 1008.
[3] Jurisdiction Decision, para. 133.
[4] Award, paras. 141-156.
[5] *Continental Casualty Co. v. Argentine Republic* (ICSID Case No. ARB/03/9), Award of 5 September 2008, para. 180 ("*Continental Casualty*").

21. A National Emergency Law was adopted in January 2002 which abrogated the fixed parity between the peso and the US dollar and allowed the peso to float on the exchange markets. It rapidly dropped to an exchange rate of approximately three pesos to one dollar. The National Emergency Law, which was adopted in slightly modified form by the Province of Mendoza, also abrogated tariff terms in public utility concessions involving foreign currencies, including the relevant clauses in the Concession Agreement. The effect was that EDEMSA was obliged to accept payment calculated on the basis of parity between the peso and the US dollar even though the peso was then worth only approximately one third of a dollar; an effect known as "pesification". In addition, the emergency measures adopted by Argentina and Mendoza precluded utility companies from suspending or changing the performance of their obligations. The emergency measures made provision for renegotiation of contracts. EDEMSA entered into negotiations with the authorities in Mendoza [6] but no revision of the tariff was agreed until 7 April 2005, one week after the Claimants had sold their interests in SODEMSA to an Argentine company, IADESA, owned by Argentine investors.

22. On 16 June 2003, EDFI and SAURI filed a request for arbitration. That request was subsequently amended to add León as a claimant. The Claimants maintained that the effect of (a) a series of measures taken by Mendoza prior to the emergency and (b) the measures taken as a result of the emergency which commenced in late 2001 was to destroy the economic equilibrium of the Concession Agreement. They contended that the equilibrium was not restored until after they had, in an attempt to mitigate their losses, sold their interests to IADESA. Under the terms of that sale, the Claimants retained their rights in respect of the ICSID claim they had instituted.

23. The Claimants maintained that the pre-emergency interference with their investment and the emergency measures constituted violations of the Argentina-France Agreement for the Promotion and Reciprocal Protection of Investments (the "Argentina-France BIT"), and, to the extent relevant (a matter considered below), the Mutual Investment Promotion and Protection Treaty between Argentina and the Belgium-Luxembourg Economic Union (the "Argentina-Luxembourg BIT"). The Claimants contended that the measures taken both before and during the emergency were arbitrary and discriminatory, that they constituted

[6] Award, paras. 157-169.

unfair and inequitable treatment, violated the requirement of full protection and security and amounted to indirect expropriation. In addition, the Claimants maintained that the failure to respect the commitments entered into in the Concession Agreement and by means of the regulatory framework of laws adopted by Argentina and Mendoza contravened the Most Favoured Nation ("MFN") clause in Article 4 of the Argentina-France BIT, because other BITs concluded by Argentina, notably those with Luxembourg and Germany, contained umbrella clauses making failure to comply with specific commitments entered into in connection with an investment a breach of treaty.

24. Argentina challenged the jurisdiction of the Tribunal on several grounds. For present purposes, the objections which are of particular relevance are that:-

(i) the Claimants no longer owned any relevant investment after the sale of shares to IADESA; and

(ii) the Claimants lacked standing to present claims for injuries allegedly suffered by EDEMSA.

Argentina also denied that the claims were well-founded on the merits, asserting in particular that the emergency measures were necessary and legitimate responses to an acute economic emergency.

### *C. Summary of the Jurisdiction Decision and Award*

#### 1. The Jurisdiction Decision

25. On 5 August 2008, the Tribunal issued a decision on jurisdiction (the "Jurisdiction Decision") dismissing Argentina's objections to jurisdiction. Although it will be necessary, in the course of this decision, to refer to other points in the Jurisdiction Decision, for present purposes it is sufficient to note two aspects of the Tribunal's findings on jurisdiction.

26. First, the Tribunal considered that the jurisprudence of the International Court of Justice and arbitral tribunals made clear that "as a general matter, the date when proceedings are instituted serves as the relevant time to establish jurisdiction".[7] Accordingly, jurisdiction had

[7] Jurisdiction Decision, para. 93.

to be assessed as at the date in 2003 when proceedings were commenced, irrespective of the subsequent transfers of interest. It therefore proceeded on the basis that SAURI and León should remain parties,[8] while leaving open the question whether they continued to possess substantive rights.[9] The Tribunal approached León's claims on the basis that they were founded upon the Argentina-Luxembourg BIT.[10]

27. Secondly, the Tribunal rejected Argentina's objection that the Claimants lacked standing. That objection was based upon a series of arguments concerning the nature of the Claimants' interests and, in particular, the fact that the Concession Agreement was between Mendoza and EDEMSA, whereas the Claimants held shares in SODEMSA, which in turn held shares in EDEMSA. The Tribunal held that neither Article 25 of the ICSID Convention, nor the relevant provisions of the Argentina-France and Argentina-Luxembourg BITs required that an investment be held directly, so that the fact that the Claimants' interests in EDEMSA were indirect was not an obstacle to jurisdiction.[11]

28. Argentina had also argued that, in accordance with the judgments of the International Court of Justice in the *Barcelona Traction,*[12] *ELSI* [13] and *Diallo* [14] cases, international law did not recognize any right for the shareholders in a company to maintain a claim in respect of a wrong allegedly done to the company. The Tribunal held that these judgments concerned the right of diplomatic protection by a State and were inapplicable to claims brought by investors in their own name under the terms of a bilateral investment treaty.[15] In the present case, the Tribunal held, the terms of both the Argentina-France BIT and the Argentina-Luxembourg BIT were broad enough to cover indirect investments. It also stated that:

> 174. Finally, this Tribunal cannot ignore the common-sense meaning given to "investment". Holding shares in a company normally means ownership of an investment in the underlying economic activity conducted by that entity, directly or indirectly. Every day people speak of oil, mining or timber

[8] Jurisdiction Decision, para. 92.
[9] Jurisdiction Decision, para. 95.
[10] See, e.g., Jurisdiction Decision, paras. 7-8, 51, 68, 97 and 177-198.
[11] Jurisdiction Decision, paras. 137-8 and 157-163.
[12] *Barcelona Traction, Light and Power Company (Belgium v. Spain),* I.C.J. Reports 1970, p. 3 ("*Barcelona Traction*").
[13] *Elettronica Sicula S.p.A* (United States of America v. Italy), I.C.J. Reports 1989, p. 15 ("*ELSI*").
[14] *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of Congo) (Preliminary Objections), I.C.J. Reports 2007, p. 582 ("*Diallo*").
[15] Jurisdiction Decision, para. 171.

> investments, even though ownership resides in shares rather than rigs, gold deposits or forests. Stock in a bank might be said to implicate an investment in the financial services industry, when in fact the ownership relates to corporate securities of a distinct legal person, which in turn owns a loan portfolio and the bricks and mortar of a vault or building. To use language in any other way would create an artificial formalism unworthy of a living legal system.
>
> 175. In short, for treaty-based investment arbitration, the concept of investment must be understood to include the underlying business represented by the shares of the investment vehicle. Otherwise, an expropriation which left an empty corporate shell would never be compensable.

### 2. The Award

29. On 11 June 2012, the Tribunal issued its Award. It concluded that Argentina had breached its obligations to respect its specific commitments undertaken in connection with EDF's investment and to afford the Claimants fair and equitable treatment.[16] It rejected the Claimants' other claims. The Tribunal awarded damages to the Claimants in the amount of US$ 136,138,430 as of December 2001, with interest compounded annually at the rate for ten year U.S. Treasury Bonds until payment of the Award.[17] The Award runs to over three hundred pages; it is unnecessary to summarise all of its reasoning here and the Committee therefore reviews only those parts that are directly relevant to the issues raised in the Application for annulment.

#### *a. Applicable law*

30. León invoked the Argentina-Luxembourg BIT in the Amended Request for Arbitration, and the Tribunal in its Jurisdiction Decision proceeded on the basis that León's claims were governed by that Treaty.[18] In the Award, however, the Tribunal noted that

> Claimant León is said to be an assignee of the investment made in Argentina by its French parent company, Crédit Lyonnais, and hence has standing to file arbitrations under the Argentina-France BIT. See Amended Request footnote 1. Nevertheless, to the extent its Luxembourgian corporate nationality is found to preclude standing, León invokes provisions of the Agreement between the Government of Argentina and the Belgian/Luxembourg Economic Union for the Promotion and Reciprocal Protection of Investments, signed on 28 June

[16] Award, *Dispositif*, para. I.
[17] Award, *Dispositif*, paras. II and III
[18] See para. 26, above. The claims of EDFI and SAURI were governed only by the Argentina-France BIT. The Argentina-Luxembourg BIT was relevant to those claims only insofar as it was invoked in connection with EDFI and SAURI's argument based on the MFN clause.

1990 and which entered into force on 20 May 1993 ("Argentina-Luxembourg BIT").[19]

The Tribunal subsequently concluded that the case should be decided exclusively on the basis of the Argentina-France BIT and that it was unnecessary to refer to the Argentina-Luxembourg BIT, save in respect of the argument based on the MFN clause in the Argentina- France BIT.[20]

31. Regarding the role of Argentine law in determining Argentina's international liability, the Tribunal concluded that the terms of the Argentine-France BIT provided the foundation and framework for its decision.[21] The fact that the Argentine Government was vested with broad authority by Argentine law to deal with the national economic crisis did not change the Tribunal's conclusion. Finally, the Tribunal was not convinced by the evidence that Argentina was not able to comply with its international obligations due to its need to guarantee human rights.[22]

***b. The "umbrella clause" and Argentina's compliance with specific commitments***

32. The Claimants argued that the MFN clause in Article 4 of the Argentina-France BIT enabled them to rely upon "umbrella clauses" in other Argentine BITs and thus to claim in respect of alleged breaches by Argentina of commitments specifically undertaken with regard to the investment, in particular the clauses in the Concession Agreement guaranteeing the rate of return and the calculation of tariffs by reference to the US dollar. Argentina denied that the MFN clause could be used in that way and maintained that, even if the MFN clause was broad enough to permit reliance on the umbrella clauses in other BITs, those clauses did not assist the Claimants as they were not party to the Concession Agreement and that Agreement gave exclusive jurisdiction to the Argentine courts.

33. The Tribunal held that the MFN clause did permit recourse to umbrella clauses in other BITs.[23] While noting the existence of considerable controversy over the use of MFN clauses

[19] Award, para. 9.
[20] Award, paras. 884-887.
[21] Award, paras. 898-908.
[22] Award, paras. 909-914.
[23] Award, paras. 925-937.

to obtain recourse to arbitration on terms more favourable than those in the treaty applicable to an investor, it held that no similar controversy existed with regard to the use of MFN clauses to obtain recourse to the substantive protection afforded by other treaties. The Tribunal considered that the terms of Article 4 of the Argentina-France BIT clearly permitted recourse to the umbrella clauses invoked by the Claimants.

34. The Tribunal also rejected Argentina's arguments regarding the meaning and scope of the umbrella clauses on which the Claimants relied (principally those in the Argentina-Germany and Argentina-Luxembourg BITs). The Tribunal held that

> This does not mean that all contractual breaches necessarily rise to the level of treaty violation. However, the serious repudiation of concession obligations implicated by failure to respect the currency clause … must clearly be seen as a violation of "commitments … undertaken with respect to investors" (Article 10(2) Argentina-Luxembourg BIT) and "a commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party". (Article 7(2) Argentina-Germany BIT).[24]

35. The Tribunal considered that the pesification of tariffs combined with the fact that EDEMSA was forbidden to vary or suspend its own performance under the Concession Agreement, and the absence of any increase in tariffs until 2005 undermined the entire basis on which the Province of Mendoza had solicited investment.[25] The Tribunal stated that it was unconvinced by Argentina's argument that maintaining the Currency Clause and other provisions of the Concession Agreement would have extinguished the principle of fair and reasonable tariff rates and that the measures taken were in practice of benefit to EDEMSA.[26] It held that there was no evidence that the Emergency Measures benefited EDEMSA's economic position; on the contrary, the Tribunal found that these measures affected EDEMSA's profitability, altering the economic equilibrium of the Concession Agreement.[27] Additionally, this financial equilibrium was never restored, even after financial indicators showed a stable trend towards recovery.[28] The Tribunal therefore concluded that Argentina had "breached its

[24] Award, para. 940.
[25] Award, paras. 943-993 and 1008.
[26] Award, para. 976.
[27] Award, paras. 979-981.
[28] Award, para. 986.

obligations … to respect specific commitments undertaken in connection with Claimants' investment".[29]

### *c. Fair and equitable treatment*

36. With regard to the claim that Argentina's actions contravened Article 3 of the Argentina-France BIT (fair and equitable treatment), the Award concluded that Argentina's violation of certain obligations under the umbrella clause, operated "*in tandem*" with the breach of its duty to afford EDF's investments Fair and Equitable Treatment.[30] The Tribunal found that it did not need to decide whether Article 3 established an independent standard of fairness or coincided with the customary international minimum standard. According to the Tribunal, Article 3 required Argentina to respect international law in principle and in practice, and its failure to abide by express commitments without re-establishing the economic equilibrium within a reasonable time, constituted inequitable treatment.[31] The Tribunal considered that the application of this provision depended on the factual context of the Host State's actions and, in this regard, it was mindful that the economic crisis was relevant to the interpretation of the fair and equitable treatment standard. The investor's expectations were to be balanced against the Host State's need to take action in a crisis. However, fairness and equity also required that the Host State respect the fundamental representations of a concession once the crisis was over.[32] The Tribunal concluded that there had been a breach of Article 3 of the Argentina-France BIT.[33]

### *d. Claims in respect of actions taken before the emergency*

37. Subsequently, the Tribunal dealt with EDF's claims that, prior to the enactment of the Emergency Measures, Argentina had breached its obligations by unilaterally modifying the regulatory framework and the Concession Agreement, in a way that had negative effects on EDEMSA, and changing the financial equilibrium of the contract to EDEMSA's detriment.[34] The Tribunal found that Argentina was liable only in respect of the claims related to the

[29] Award, *Dispositif*, para. I.
[30] Award para. 994.
[31] Award paras. 999, 1009-1011.
[32] Award paras. 1004-1005.
[33] Award, *Dispositif*, para. I
[34] Award para. 1023.

modification of the Tariff Regime, namely:[35] (i) modification of the fee structure for large users; (ii) reduction of contracting periods with users; and (iii) incorporation of an option for users to choose between categories at their discretion (Optional T-2 tariff category).[36] It dismissed the other claims regarding actions taken before the emergency.

### *e. Other claims*

38. The Tribunal dismissed the Claimants' other claims, holding that the measures taken by Argentina were not arbitrary or discriminatory [37] and that they did not violate the requirement to provide full protection and security.[38] The Tribunal also held that Argentina's actions did not amount to indirect expropriation.[39]

### *f. Argentina's defences*

39. During the proceedings on the merits, Argentina asserted several affirmative defences.[40] The Award rejected the argument that these defences precluded a finding against Argentina, holding that they were not a bar to the Claimants' recovering compensation.

40. With regard to Argentina's defence of necessity, the Tribunal held that, since the Award was based exclusively upon the Argentina-France BIT, the necessity defence in Article 3(2) of the Argentina-Luxembourg BIT was inapplicable.[41] The Tribunal also concluded that Argentina had failed to establish that the requirements for a defence of necessity under customary international law had been met. The Tribunal maintained that "necessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[42] In that connection, the Tribunal considered that Argentina had failed to demonstrate that the measures taken were the only way for it to safeguard its essential interests, that it had not contributed to the state of necessity by its own actions, or that it had returned to the status quo when possible or paid compensation.[43]

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[35] Award para. 1026.
[36] Award paras. 1027-1100.
[37] Award, paras. 1101-1107.
[38] Award, paras. 1108-1112.
[39] Award, paras. 1113-1118.
[40] Award paras. 1119.
[41] Award, para. 888 and paras. 1149-1152.
[42] Award, para. 1171.
[43] *Ibid*.

41. The Tribunal further dismissed Argentina's inadmissibility defence that any claim based on a denial of justice in connection with the Pre-Emergency Measures should be dismissed *in limine*, because they were not pleaded by EDF in its Memorial on the Merits.[44] The Tribunal found that EDF had not made a separate claim of denial of justice, but instead framed its arguments in the context of fair and equitable treatment and full protection and security. Additionally, Argentina's defence regarding EDF's double recovery of damages caused by the Pre-Emergency Measures was dismissed; the Tribunal concluded that EDF had not received any redress for such damages.[45]

### *g. Quantum of Damages*

42. The Tribunal assessed damages on a discounted cash flow ("DCF") basis, having noted that the Parties agreed that the alternative methods of valuation considered were not appropriate.[46] It awarded damages of US$ 2,502,797.00 in respect of the losses sustained prior to the emergency and of US$ 133,635,633 in respect of the losses caused by the emergency measures. The latter figure was calculated as at 31 December 2001 by taking the value of the Claimants' stake in EDEMSA (44.88% of the total)[47] had the emergency measures not been taken (the "but for" scenario) and then deducting the amount which might reasonably have been received in the 2005 sale to IADESA, valued as of 31 December 2001.

## II. Grounds for Annulment

43. Article 52(1) of the ICSID Convention provides that –

> 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;

[44] Award paras. 1091-1096.
[45] Award, paras. 1098-1100.
[46] Award, paras. 1186-1188.
[47] It will be recalled that SODEMSA held 51% of the Class A shares in EDEMSA but that 40% of the shares in SODEMSA were held by MENDINVERT, a company in which only 70% of the shares were held by one of the Claimants, the remainder being held by Argentine investors. Thus, only 88% of SODEMSA was ultimately owned by the Claimants. 88% of 51% yields a figure of 44.88%.

(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.

44. In its Application, Argentina seeks annulment on all of the above grounds except for that set out in Article 52(1)(c), i.e. corruption on the part of a member of the Tribunal. Argentina's objections to the Award concern six different issues, in respect of most of which it seeks annulment on more than one of the grounds set out in Article 52(1). The Tribunal has therefore structured its Decision by reference to these six issues, rather than by the Article 52 grounds on which annulment is sought. Argentina's arguments in respect of each issue, and the Claimants' response thereto, are considered in detail in the subsequent sections of this Decision. It is, however, useful to set out a brief overview of the six issues and the grounds invoked in respect of each of them at this stage.

### *A. Challenges to Two Members of the Tribunal*

45. Argentina maintains that neither Professor Gabrielle Kaufmann-Kohler nor Professor Jesús Remón possessed the requisite qualifications of independence and impartiality demanded by Article 14(1) of the ICSID Convention, with the result that the Award should be annulled because the Tribunal was not properly constituted (Article 52(1)(a)) and there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)).

46. In the case of Professor Kaufmann-Kohler, Argentina refers to the fact that in 2006 she became a director of the Swiss Bank UBS. When Argentina discovered this fact in November 2007, Argentina proposed, under Article 57 of the Convention, that she should be disqualified because UBS had various interests in, and links to, EDF.[48] In accordance with Article 58 of the Convention, the challenge to Professor Kaufmann-Kohler was heard by the two remaining members of the Tribunal, Professor Park and Professor Remón, who issued a decision on 25 June 2008 ("the Disqualification Decision") dismissing the challenge.[49] Argentina maintains that when a challenge to an arbitrator is dismissed, it is open to the party

[48] RA 512.
[49] RA 521.

which brought that challenge to seek annulment of the award and that an *ad hoc* Committee may annul the award under either or both of the grounds in Article 52(1)(a) and (d) if it considers that the challenged arbitrator lacked the qualifications required by Article 14(1).

47. In the case of Professor Remón, the application for annulment arises in a different context both procedurally and substantively. In April 2012 Professor Remón informed the parties that the law firm of which he was a partner acted for the Spanish company Repsol and that if the firm was asked by Repsol to represent it in any proceedings which it might bring against Argentina in connection with the measures taken by Argentina in relation to Repsol's interests in the Argentine company Yaciementos Petrofileros Fiscales ("YPF"), then he would abstain from any involvement in those proceedings until the Award in the present case had been issued.[50] Argentina called for his resignation on the ground that this disclosure showed the existence of a professional relationship between the law firm and a company already in dispute with Repsol and that this relationship, together with the fact that Professor Remón had made clear that he was prepared to act for Repsol against Argentina in the future, showed that he lacked the requisite qualities of independence and impartiality.[51] Professor Remón declined to resign. Since the proceedings had already been closed at the date of the disclosure, Argentina was unable to propose disqualification under Article 57. The matter is thus raised for the first time in the annulment proceedings.

48. This aspect of Argentina's case is addressed in Part IV of this Decision.

### *B. Applicable Law*

49. Argentina criticises the Tribunal's decision on the applicable law on three grounds. First, it maintains that the Tribunal should not have decided the entire case solely on the basis of the Argentina-France BIT given that León, which remained a Claimant, was a Luxembourg corporation. Secondly, it maintains that the Tribunal wrongly underplayed the importance of Argentine law as part of the applicable law. Lastly, it contends that the decision of the Tribunal in the Award that there was no general requirement that a claimant prove the existence of discrimination in order to establish a breach of the Argentine-France BIT was at odds with what the Tribunal had said in its Jurisdiction Decision.

[50] RA 531.
[51] RA 532.

50. For Argentina each of these aspects of the Tribunal's findings constitutes an annullable error. It maintains that they involved a manifest excess of power (within Article 52(1)(b)). In addition, Argentina argues that the Tribunal failed adequately to state the reasons for its conclusions on these points, thus making the Award subject to annulment under Article 52(1)(e). Finally, Argentina contends that the manner in which the Tribunal dealt with these issues entailed a serious departure from a fundamental rule of procedure calling for annulment under Article 52(1)(d).

51. The Committee addresses this aspect of Argentina's challenge to the Award in Part V of this Decision.

### *C. Derivative Rights and the Umbrella Clause*

52. Argentina also seeks the annulment of the Award on the ground that the Tribunal mishandled the issue of the Claimants' assertion of derivative rights and their reliance on the umbrella clauses in treaties other than the Argentina-France BIT.

53. Argentina maintains that the Tribunal erred in holding that, contrary to the principle of international law enunciated in the *Barcelona Traction*, *ELSI* and *Diallo* judgments,[52] the Claimants could maintain a claim for wrongs which, if they existed at all, had been suffered by EDEMSA and not by the Claimants. It further contends that the Tribunal was wrong in holding that the MFN Clause in the Argentina-France BIT permitted the Claimants to rely upon the umbrella clauses in the Argentina-Luxembourg and Argentina-Germany BITs and that, even if the umbrella clauses were applicable, they did not assist the Claimants as they did not alter the nature of the Concession Agreement as a contract which, so far as the Claimants were concerned, was *res inter alios acta*. Again, Argentina contends that these errors entailed a manifest excess of power, a failure to state reasons and a serious departure from a fundamental rule of procedure.

54. This aspect of Argentina's challenge to the Award is addressed in Part VI of this Decision.

[52] See para. 28 and footnotes 12-14, above.

### *D. Necessity*

55. Argentina contends that the Tribunal committed further annullable errors in the way in which it treated the issue of necessity. Its decision not to apply Article 3(2) of the Argentina-Luxembourg BIT, its decision that Article 5(3) of the Argentina-France BIT did not justify the measures taken and its decision that the requirements for a defence of necessity under customary international law were inapplicable are, according to Argentina, grounds for annulment for manifest excess of power and failure to state reasons.

56. This aspect of the challenge to the Award is addressed in Part VII of the present Decision.

### *E. Failure to Decide on Fundamental Evidence*

57. Argentina maintains that the Tribunal failed to address fundamental evidence which could have had a decisive influence on the case and thereby committed a manifest excess of power, failed to state the reasons for its decision and seriously departed from a fundamental rule of procedure. This part of Argentina's challenge to the Award concerns primarily evidence from official bodies in the French State critical of EDFI's investment strategy in Argentina and the evidence of Engineer Neme regarding the privatisation of electricity distribution in Mendoza, all of which Argentina claims is ignored in the Award.

58. The Committee will address this part of Argentina's challenge to the Award in Part VIII of the present Decision.

### *F. Failures in the Assessment of Damages*

59. Finally, Argentina asserts that the Tribunal's assessment of damages is fundamentally flawed in several ways, including the examination of the question of causation, the evidence referred to in relation to quantum and the assessment of EDEMSA's viability in 2001. Argentina maintains that these errors amount to a manifest excess of power, failure to state reasons and a serious departure from a fundamental rule of procedure.

60. This part of the challenge to the Award will be considered in Part IX of the Decision.

## III. The Nature of Annulment and the Powers of an *ad hoc* Committee

61. Before discussing the different grounds on which annulment is sought in the current case, it is necessary briefly to consider the nature of annulment proceedings and the powers of an *ad hoc* committee.

62. First, it is clear from the text of Article 52(1) that it is only an award which a party may seek to annul, not a decision which a tribunal may have taken as part of the steps leading to an award.[53] Thus, it is not open to a party to seek annulment of a decision not to disqualify an arbitrator or a decision that the tribunal possesses jurisdiction in a case. A party which is dissatisfied with a decision must wait until the tribunal gives its final award. Only then may it commence annulment proceedings. Of course, it is open to the party to argue that the award should be annulled because it is tainted by an error in the earlier decision; for example, a party is free to argue that the award entailed a manifest excess of powers because the tribunal had earlier taken a decision on jurisdiction which was fatally flawed. Indeed, one leading commentator considers that "decisions on jurisdiction are eventually incorporated into awards either explicitly or by implication" and that "at that stage they become subject to annulment *as parts of* awards".[54] But it is the award itself, and only the award, which the *ad hoc* committee can annul.

63. Argentina's Application requests only the annulment of the Award. However, in the Prayer for Relief set out at the end of its Memorial,[55] and in the Prayer at the end of the Reply,[56] Argentina requests the Committee to annul both the Award and the earlier Decision on Jurisdiction. For the reasons just given, the Committee has no power to annul the Decision as such. However, in paragraph 2 of the Reply Argentina makes clear that "the annulment of the Decision on Jurisdiction [is] not requested separately from, but jointly with, that of the Award". The Committee considers that the Prayers in the Memorial and the Reply must be read in the light of the Application and the explanation in paragraph 2 of the Reply. It will therefore proceed to consider Argentina's criticisms of the Decision on Jurisdiction as

[53] Schreuer, Malintoppi, Reinisch and Sinclair, *The ICSID Convention: A Commentary* (Cambridge, 2nd edition, 2009), Article 52, para. 61 (p. 921) ("Schreuer, *Commentary*").
[54] *Ibid*., Article 52, para. 62 (p. 921), emphasis added.
[55] Memorial, para. 198.
[56] Reply, para. 157.

advanced in support of arguments that the Award should be annulled and not as a request – which would necessarily fall outside Article 52 of the Convention – for the annulment of the Decision as such.

64. Secondly, it is a well established principle that, as the *ad hoc* committee in *MTD Equity and MTD Chile* v. *Republic of Chile* put it –

> Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal.[57]

65. The *ad hoc* committee in *Soufraki* v. *United Arab Emirates* was similarly insistent on this point, commenting that –

> … annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, … 'an ad hoc committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings.' [58]

The *Soufraki* Committee went on to analyse this role of an *ad hoc* committee as the safeguard of the integrity of the proceedings in greater detail.

> In the view of the *ad hoc* Committee, the object and purpose of an ICSID annulment proceeding may be described as the control of the fundamental integrity of the ICSID arbitral process in all its facets. An *ad hoc* committee is empowered to verify (i) the integrity of the tribunal – its proper constitution (Article 52(1)(a)) and the absence of corruption on the part of any member thereof (Article 52(1)(c)); (ii) the integrity of the procedure – which means firstly that the tribunal must respect the boundaries fixed by the ICSID Convention and the Parties' consent, and not manifestly exceed the powers granted to it as far as its jurisdiction, the applicable law and the questions raised are concerned (Article 52(1)(b)), and secondly, that it should not commit a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) the integrity of the award – meaning that the reasoning presented in the award should be coherent and not contradictory, so as to be understandable by the Parties and must reasonably support the solution adopted by the tribunal (Article 52(1)(e)). Integrity of the dispute settlement mechanism, integrity of

[57] *MTD Equity and MTD Chile* v. *Republic of Chile* (ICSID Case No. ARB/01/07), Decision on Annulment of 21 March 2007, 13 ICSID Reports 500, para. 31 ("*MTD*").
[58] *Hussein Nuaman Soufraki* v. *United Arab Emirates* (ICSID Case No. ARB/02/07), Decision on Annulment of 5 June 2007, para. 20 ("*Soufraki*").

> the process of dispute settlement and integrity of solution of the dispute are the basic interrelated goals projected in the ICSID annulment mechanism.[59]

66. Thirdly, as the *Soufraki* Committee also explained –

> Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.[60]

The reference to principles of treaty interpretation is to the principles laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties, 1969. Although the Vienna Convention is not, as such applicable to the ICSID Convention, which predates it, the provisions of the Vienna Convention on treaty interpretation are generally regarded as declaratory of customary international law

67. Lastly, it is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds. Its function is not to consider whether or not it agrees with the reasoning or the conclusions of the tribunal but only to determine whether or not one or more of the five grounds has been made out.

68. None of these points is contested in the present proceedings, although the Parties differ in the way that they seek to apply them to the specific issues in the case. They were also in broad agreement regarding the approach which a committee must take to questions of fact.

69. The Claimants maintain that the burden of proof is always upon the party seeking annulment.[61] At the hearings the Claimants developed this argument in the following terms:

> The second principle is that the burden of proof is on Argentina to substantiate its claims. Argentina is the proponent of annulment in this proceeding and, as such, bears the burden of proof. This means that if the Committee members are undecided or on the fence on particular arguments or issues, then it must decide – the Committee must decide against annulment.[62]

[59] *Soufraki*, note 58, above, para. 23.
[60] *Ibid*, para. 21.
[61] Counter-Memorial, para. 30.
[62] Transcript, p. 114; see also p. 189.

Argentina does not dispute that, where it asserts the existence of a particular fact, it bears the burden of proving that fact, although it sometimes asserts that the Committee should infer or assume the existence of certain facts (see, e.g., para. 171, below). The Committee considers that the principle that a party bears the burden of proof in respect of any fact whose existence it asserts is well established both in ICSID jurisprudence [63] and elsewhere.[64] Nevertheless, in annulment proceedings the importance of the principle that a party bears the burden of proof in respect of a fact which it asserts has to be seen in the light of the principle that, as the *Helnan* Committee observes "it is no part of the function of an annulment committee to reconsider findings of fact made by an ICSID arbitral tribunal".[65] Moreover, in the present case, many of the facts (particularly with regard to the allegations concerning the independence and impartiality of arbitrators) are not in dispute.[66]

70. However, the Claimants' argument, as quoted above, goes beyond the burden of proof with regard to matters of fact and urges that "if the Committee members are undecided or on the fence *on particular arguments or issues*" (emphasis added), then the Committee must decide against annulment. That comes close to an argument that there is a presumption in favour of upholding the Award. In that context the Committee recalls the observation of the *Soufraki* Committee that "such presumption … finds no basis in the text of Article 52 and has not been used by annulment committees".[67] The Committee agrees with that analysis. The concept of burden of proof is confined to matters of fact; it does not extend to a general principle that when in doubt about "particular arguments or issues" a committee must find in favour of upholding the award.

71. There is, however, one issue regarding the powers of an *ad hoc* committee on which the Parties are in marked disagreement. That concerns whether a committee which finds that one

[63] See, e.g., in relation to the burden of proof in relation to an application to disqualify an arbitrator, *Nations Energy Corp. v. Panama* (ICSID Case No. ARB/06/19), Decision on Challenge to an Arbitrator of 7 September 2011, para. 56.
[64] See, e.g., the Judgment of the International Court of Justice in *Pulp Mills on the River Uruguay*, (*Argentina v. Uruguay*), ICJ Reports 2010-I, p. 71, para 162.
[65] *Helnan International Hotels A/S* v. *Egypt* (ICSID Case No. ARB/05/19), Decision on Annulment of 4 June 2010, ("*Helnan*"), para. 20. See also *Fraport AG* v. *Philippines* (ICSID Case No. ARB/03/25), Decision on Annulment of 23 December 2010 ("*Fraport*"), para. 84. Both are cited at Counter-Memorial, para. 3.
[66] Argentina expressly accepted as much; Transcript, p. 255.
[67] *Soufraki*, note 58, above, para. 22.

or more of the grounds set out in Article 52 has been established in respect of an award is obliged to annul the award or has a discretion whether or not to do so. The Claimants assert that a committee always has a discretion not to annul and that it may exercise that discretion on grounds of fairness, taking account, for example, of the length of the proceedings.[68] By contrast, Argentina maintains that, if a committee considers that one of the grounds for annulment has been made out, then the committee is obliged to annul the award.[69]

72. The Committee notes that the final sentence of Article 52(3) is in the following terms:

> The Committee shall have *the authority to annul* the award or any part thereof on any of the grounds set forth in paragraph (1).
>
> Esta Comisión *tendra facultad para resolver sobre la anulación* total o parcial del laudo por alguna de las causas enumeradas en el apartado (1).
>
> Le Comité *est habilité à annuler* la sentence en tout ou en partie pour l'un des motifs énumérés à l'alinéa (1) du présent article.

(The emphasis has been added by the Committee.)

73. The Committee considers that the italicised words clearly indicate that committees were intended to have a degree of discretion. To say that a committee "shall have the authority to annul the award" is very different from saying that a committee "shall annul the award". Moreover, the Committee notes that other *ad hoc* committees have proceeded on the basis that annulment was not mandatory and that they enjoyed a discretion whether or not to annul the award under consideration.[70] The Committee concludes that, even if an Article 52(1) ground is made out, it nevertheless retains a discretion as to whether or not to annul the award. That discretion is by no means unlimited and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether or not they had – or could have had – a material effect upon the

[68] Counter-Memorial, para. 57; Transcript, pp. 110, 132 and 189.
[69] Transcript, pp. 271-274.
[70] See, in particular, *Amco v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 3 December 1992, 9 ICSID Reports 15, para. 1.20 ("*AMCO II*"); *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, 4 ICSID Reports 86, paras. 4.09-4.10 ("*MINE*"); *Compañía de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, 6 ICSID Reports 358, para. 66 ("*Vivendi I*"). See also Schreuer, *Commentary*, note 53, above, Article 52, paras. 466-485.

outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.

## IV. Challenges to Two Members of the Tribunal

### *A. Introduction*

74. As outlined above (paras. 46 to 47), Argentina maintains that the Award should be annulled because of the existence of conflicts of interest in the case of both Professor Kaufmann-Kohler and Professor Remón. In each case Argentina contends that the conflict of interest was such that the Tribunal cannot be regarded as having been properly constituted (thus affording a ground for annulment under Article 52(1)(a) of the ICSID Convention). It also argues that, since the right of each party to have the case determined by a tribunal whose members meet the requirements of independence and impartiality constitutes a fundamental rule of procedure, the fact that two members of the Tribunal did not meet those requirements means that there has been a serious departure from that fundamental rule (thus affording a ground for annulment under Article 52(1)(d) of the ICSID Convention).[71]

75. Since the facts on which Argentina relies are, for the most part, not in dispute between the Parties, the Committee will briefly set out those facts before reviewing the arguments of the Parties.

### *B. The facts*

#### 1. Professor Kaufmann-Kohler

76. Professor Kaufmann-Kohler became a director of UBS in April 2006, two and a half years after her appointment as an arbitrator and nearly two years after the Tribunal was constituted.[72] It is not in dispute that Professor Kaufmann-Kohler did not inform the Parties of her appointment as a director of UBS. She did, however, give UBS a list of the arbitrations in which she was then involved and asked UBS to investigate whether there was a conflict of interests. According to a letter which she wrote to the other members of the

[71] Memorial, para. 33.
[72] Award, paras. 11-16.

Tribunal (Professor Park and Professor Remón) after she was challenged by Argentina,[73] UBS replied that the only conflict was with her involvement as a member of the jury for the America's Cup, a conflict which arose from the fact that UBS sponsored one of the competitors. Professor Kaufmann-Kohler withdrew from the America's Cup jury in light of this response.

77. Argentina maintains that it became aware of Professor Kaufmann-Kohler's appointment at UBS in November 2007. It then filed a proposal, in accordance with Article 57 of the ICSID Convention,[74] that Professor Kaufmann-Kohler be disqualified from the Tribunal.[75] In the light of that proposal, Professor Kaufmann-Kohler wrote to UBS inquiring whether the links between EDFI and UBS detailed in Argentina's challenge did in fact exist.[76] By a letter dated 20 December 2007, Dr Karin Eugster, Legal Adviser to UBS, and Dr Bernhard Schmid, General Counsel of the Corporate Center of UBS, replied giving details of certain links between UBS and EDFI.[77] That letter was sent to the Tribunal on 21 December 2007 under cover of a letter from Professor Kaufmann-Kohler.

78. Argentina challenged Professor Kaufmann-Kohler on the basis of five connections between UBS and EDFI:-

(a) that UBS had listed EDF, the parent company of EDFI, as one of the companies in which it recommended investment;[78]

(b) that UBS and EDF had common interests in AEM Milan, an Italian company which was controlled by EDF through a subsidiary;[79]

(c) that UBS and EDF both held shares in Motor Columbus, a Swiss company, [80] although the 20 December 2007 letter from UBS made clear that UBS had disposed of its shareholding in Motor Columbus before Professor Kaufmann-Kohler became a UBS director;

[73] Letter of 21 December 2007.
[74] See para. 112 below.
[75] RA 512.
[76] Letter of 17 December 2007, RA 513.
[77] RA 514.
[78] RA 512, para. 36.
[79] RA 512, para. 37.
[80] RA 512, para. 38.

(d) that in October 2005 EDF and the French State had entered into an agreement with a group of financial institutions which included UBS in connection with a share offer in the French financial market;[81] and

(e) that the UBS Foundation listed EDF securities as part of its portfolio.[82]

79. In addition, on 14 May 2008, Argentina drew the attention of the remaining members of the Tribunal to a press release concerning Professor Kaufmann-Kohler's role in the removal of certain directors of UBS following problems at the bank. According to Argentina, this incident demonstrated the degree of Professor Kaufmann-Kohler's influence on the Board of Directors.[83]

80. Finally, Argentina maintained that Professor Kaufmann-Kohler's failure to notify the Parties of her appointment as a director was itself a factor which could raise questions concerning her impartiality or independence.[84]

81. In accordance with Article 58 of the ICSID Convention,[85] Argentina's challenge to Professor Kaufmann-Kohler was heard by the remaining members of the Tribunal, Professor Park and Professor Remón. They issued their Disqualification Decision on 25 June 2008. That decision dismissed Argentina's proposal for disqualification on the grounds that:

> The facts asserted by Respondent give no reason to suppose that Professor Kaufmann-Kohler would be biased in favour of Claimants. Her position as a non-executive director at UBS gives her no financial interest in any of the Claimant companies. Nor would she benefit in any way from an award in favour of Claimants.[86]

The remaining members of the Tribunal considered whether Professor Kaufmann-Kohler might favour the Claimants on the ground that a victory for them might result in some

[81] RA 512, para. 39.
[82] RA 512, para. 40.
[83] Disqualification Decision, para. 46.
[84] RA 512, paras. 56-64.
[85] See para. 112, below.
[86] Disqualification Decision, para. 71.

benefit to UBS "an entity with which Professor Kaufmann-Kohler feels a sense of emotional solidarity and psychological identification by virtue of her position"[87] but concluded that:

> While the prospect of such subconscious influence can never be completely excluded, the possibility remains remote, tenuous and speculative. The outcome of this arbitration cannot be expected to have any material impact on the fortunes of UBS. Just as *de minimis* would be the effect on Professor Kaufmann-Kohler's psychological, social or economic well-being.[88]

82. The remaining members also concluded that Professor Kaufmann-Kohler had not violated any ICSID obligation of disclosure and that, in any event, "we cannot accept that her non-disclosure of the Board membership indicated a manifest lack of reliability in the exercise of independent judgment".[89]

### 2. Professor Remón

83. As the Committee has already noted (para. 47, above), the challenge to Professor Remón differs, both procedurally and substantively, from that to Professor Kaufmann-Kohler. It differs procedurally, because it was raised only after the proceedings before the Tribunal had been closed. Accordingly, it could not be considered by the remaining members of the Tribunal under the procedure in Article 58 of the ICSID Convention. It differs substantively, because it involves a somewhat different allegation of a conflict of interest.

84. Prompted by an announcement in the media on 16 April 2012 regarding Argentina's intention to expropriate an investment by the Spanish company Repsol, Professor Remón informed the parties on 18 April 2012 that the law firm in which he is a partner, Uría Menéndez, had traditionally provided legal services to Repsol and that he had personally represented Repsol in various proceedings. He then stated that should Repsol request the assistance of Uría Menéndez regarding the Argentine Republic's measures, he would refrain from taking part in the matter as long as the arbitration proceeding between EDFI and Argentina was ongoing.[90] In light of these statements, Argentina requested the resignation of Professor Remón on 27

[87] Disqualification Decision, para. 72.
[88] Disqualification Decision, para. 73.
[89] Disqualification Decision, para. 98.
[90] Memorial, para. 62.

April 2012. According to Argentina, "he could no longer be relied upon to exercise independent judgment pursuant to Article 14 of the ICSID Convention".[91]

85. In response, Professor Remón asserted that his impartiality and independence in the EDFI case had not been compromised, because the drafting of the Award had been "completed several weeks before the announcement of the expropriation".[92] Argentina argues, however, that although Professor Remón's letters made reference to information published in the media on 16 April 2012, the arbitration proceedings subsequently commenced by Repsol (in which it was represented by Uría Menéndez) also concerned measures emanating from an earlier date. According to Argentina, this fact, compounded by Professor Remón's position in the law firm and the firm's previous representation of Repsol, points to the conclusion that Professor Remón knew about the dispute between Repsol and the Argentine Republic during the deliberations and the drafting of the Award in the present case, thereby compromising his independence and impartiality.[93]

### *C. Arguments of the Parties*

#### 1. Argentina

##### *a. General*

86. As the Committee has already noted, Argentina bases this part of its case for the annulment of the Award on both Article 52(1)(a) and 52(1)(d) of the ICSID Convention. It maintains that a tribunal cannot be regarded as properly constituted for the purposes of Article 52(1)(a) if one of its members did not offer the guarantee of independence and impartiality required by Article 14(1) of the Convention.[94] In addition, it contends that for a tribunal to hear a case when one of its members could not be relied upon to be independent and impartial entailed a serious departure from a fundamental rule of procedure affecting due process and a respondent's right of defence, warranting annulment of the award under Article 52(1)(d).[95]

87. According to Argentina, the standard required by Article 14(1) is that an arbitrator must be someone who can be relied upon to be impartial and to exercise independent judgement.

[91] Memorial, para. 63.
[92] Letter of 11 May 2012, RA 535.
[93] Memorial, para. 65; Reply, para. 25.
[94] Memorial, para. 11. For the text of Article 14(1), see para. 107, below.
[95] Memorial, para. 59; Transcript, p. 82.

Under Article 57, there has to be a manifest lack of those qualities. That exists where it can be discerned with little effort and without deeper analysis.[96] Argentina contends that the decision on disqualification by the Chairman in *Blue Bank*[97] confirms that, when a party challenges an arbitrator it need not prove actual bias but only the appearance of bias.[98]

88. According to Argentina, an *ad hoc* committee is empowered to determine whether or not such a conflict of interest exists and to annul the award if it concludes that one of the members of the tribunal manifestly lacked the qualities required by Article 14(1). That is the case irrespective of whether a challenge has been rejected by the remaining members of the tribunal in proceedings under Article 58 of the ICSID Convention.[99] In such a case, Argentina maintains that an *ad hoc* committee has to approach the matter *de novo* and is not bound to follow the findings of fact or the ruling on the law made by the remaining members of the tribunal.[100] Argentina contends that, if an *ad hoc* committee concludes that one of the members of the tribunal manifestly lacked the qualities required by Article 14(1), then it is required to annul the award. It denies that the committee has a discretion not to annul in such a case.[101]

***b. Professor Kaufmann-Kohler***

89. With regard to the position of Professor Kaufmann-Kohler, Argentina contrasts the findings made by Professor Park and Professor Remón in the Disqualification Decision with the analysis of a very similar allegation of conflict of interests, also arising out of Professor Kaufmann-Kohler's membership of the UBS Board, by the *ad hoc* committee in *Vivendi II.*[102] In its decision in that case, the *ad hoc* committee was, according to Argentina, highly critical of Professor Kaufmann-Kohler's conduct. The *Vivendi II* committee had before it evidence

[96] Memorial, para. 43.
[97] *Blue Bank International and Trust v. Venezuela* (ICSID Case No. ARB/12/20), Decision of the Chairman of 12 November 2013 ("*Blue Bank*").
[98] Reply, paras. 28-29.
[99] Transcript, pp. 82-87.
[100] Reply, para. 6; Transcript, pp. 83-84.
[101] Transcript, p. 273-274.
[102] *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 19 August 2010 ("*Vivendi II*").

from Professor Wolfram and Professor Mistelis on the independence of arbitrators.[103] The *Vivendi II* Committee commented:

> As to the basic issue of the compatibility of a directorship in a major international bank and the function of international arbitrator, Professor Wolfram, strongly supported by Professor Mistelis during the hearing, makes the obvious point that a director in the exercise of his or her function is under a fiduciary duty *vis-à-vis* the shareholders of the bank to further the interests of the bank and therefore postpone [sic] conflicting interests.
>
> That is fundamentally at variance with his or her duty as independent arbitrator in an arbitration involving a party in which the bank has a shareholding or other interest, however small it may be. Since a major international bank has connections with or an interest in virtually any major international company (which companies are also the most likely to end up in international arbitrations), this suggests that the positions of a director of such a bank, and that of an international arbitrator, may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined.[104]

90. The *Vivendi II* decision continued:

> The *ad hoc* Committee thus understands the argument that the … Tribunal was no longer properly constituted after the board appointment of Professor Kaufmann-Kohler, and that there was a serious departure from a fundamental rule of procedure and considers that this could lead to annulment whenever justified within the context of the case under consideration.[105]

91. The *Vivendi II* Committee did not, however, annul the award in that case, because it concluded that Professor Kaufmann-Kohler had not become aware of the existence of UBS interests in the claimant companies until after the award had been rendered and the Committee consequently accepted "that the relationship between UBS and the Claimants had no material effect on the final decision of the Tribunal, which was in any event unanimous".[106] Argentina points out that no such consideration applies in the present case, since Professor Kaufmann-Kohler became aware of the connection between UBS and EDFI

[103] A report by Judge Wolfram was submitted to the remaining members of the Tribunal in the present case and was part of the record before the *ad hoc* Committee in the annulment proceedings. Professor Mistelis did not testify in the present case and his evidence in *Vivendi II* is not part of the record in the present case; it cannot therefore be considered by the Committee; see Transcript, pp. 290-291.
[104] *Vivendi II*, note 102, above, paras. 217-218.
[105] *Vivendi II*, note 102, above, para. 232.
[106] *Vivendi II*, note 102, above, para. 235.

not later than December 2007 when she received the letter from Dr Karin Eugster and Dr Bernhard Schmid.[107] Argentina therefore maintains that the conflict of interest created by Professor Kaufmann-Kohler's membership of the UBS Board should lead to the annulment of the Award.[108]

### *c. Professor Remón*

92. With regard to Professor Remón, Argentina begins by explaining that it was unable to submit a proposal for his disqualification to the remaining members of the Tribunal, because it only became aware of his involvement with Repsol when it received his letter of 18 April 2012 whereas the proceedings had been declared closed on 13 March 2012. It had, however, expressly reserved its rights under Article 52(1)(a) and (d).[109]

93. Given the professional links between Professor Remón and his law firm, and between the latter and Repsol, Argentina maintains that a third party would perceive an obvious appearance of lack of impartiality.[110] Further, Argentina asserts that the Repsol dispute materialized at the end of 2011, before the deliberations and drafting of the Award in the present case were concluded.[111]

94. In any event, Argentina maintains that, given the advice Professor Remón and his firm were providing Repsol during the deliberations, and given the fact that Repsol was during that time planning and implementing a legal strategy against Argentina, the date when the dispute finally materialized is almost irrelevant.[112] Additionally, Professor Remón's obligation of impartiality and independence did not end when the Tribunal concluded its deliberations and drafting, but when the Award was actually rendered, which happened only after the disclosure.[113]

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[107] See para. 77, above.
[108] Memorial, para. 57-59.
[109] Memorial, para. 66.
[110] Reply, para. 30.
[111] Reply, para. 34.
[112] Reply, para. 35 and 38.
[113] Reply, para. 36.

### 2. The Claimants

#### *a. General*

95. The Claimants disagree with Argentina regarding the role and powers of an *ad hoc* committee confronted with the argument that a member, or members, of a tribunal lacked the requisite qualities of independence and impartiality. In their view, Articles 57 and 58 of the ICSID Convention, together with Rule 9 of the Arbitration Rules, require that any challenge to an arbitrator be made in a timely fashion (otherwise it will be deemed to have been waived, by virtue of Rule 27 of the Arbitration Rules) and that it be made to the remaining members of the tribunal (or, in certain circumstances to the Chairman of the ICSID Administrative Council). While the Claimants accept that, if the facts on which a challenge is based do not come to light until after proceedings have closed, recourse to this procedure is impossible and the matter can therefore be brought before an *ad hoc* committee, they maintain that the only ground on which annulment can be sought is that of a serious departure from the fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention). The Claimants deny that Article 52(1)(a) is relevant, since the reference to the tribunal having been "properly constituted" refers to whether the correct procedures for the appointment of arbitrators were followed, not to whether the arbitrators meet the requirements of independence under Article 14(1) of the ICSID Convention.[114]

96. Moreover, where a challenge was made to, and rejected by, the remaining members of the tribunal, the Claimants contend that the role of the *ad hoc* committee is even more limited. Initially, the Claimants contended that, in such a case, it is not open to the aggrieved party to raise the issue at all in annulment proceedings since annulment is available only in respect of the award itself and not in respect of the separate decision on disqualification.[115] In this respect, the Claimants refer to the decision of the *ad hoc* committee in *Azurix*.[116] The *Azurix* Committee held that Article 52(1)(a) of the ICSID Convention was concerned only with the procedure for appointment of arbitrators and not with whether the requirements of Article 14(1) of the Convention were satisfied. It concluded that "a Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with

[114] Transcript, pp. 157-158.
[115] Counter-Memorial, paras. 25-27; Rejoinder, para. 6.
[116] *Azurix Corporation* v. *Argentine Republic* (ICSID Case No. ARB/01/12), Decision on Annulment of 1 September 2009 ("*Azurix*").

the procedure for challenging members of the tribunal set out in the other provisions of the ICSID Convention".[117]

97. At the hearing, the Claimants to some extent resiled from this position. They now accept that an *ad hoc* committee can review the question whether an arbitrator met the requirements of Article 14(1) of the ICSID Convention in a case where the conclusion of the remaining members of the tribunal that that arbitrator did meet those requirements is so untenable that it is one which no reasonable decision-maker could have reached.[118] However, the Claimants consider that the committee may not approach the matter *de novo,* that it is bound by the factual findings of the original decision-maker (*i.e.* the remaining members of the tribunal or the Chairman of the Administrative Council) and that it should defer to the legal findings of that body.[119] According to the Claimants, the *Vivendi II* decision, far from supporting Argentina's case, merely serves to demonstrate how high is the standard for challenge to an arbitrator in annulment proceedings.[120] It is necessary for the party seeking annulment to show that there was a manifest lack of the qualities required by Article 14(1) of the ICSID Convention and that the lack of independence and impartiality of the arbitrator had a material effect on the outcome of the proceedings.[121] The Claimants also maintain that the burden of proof lies with the party challenging an award and that, in case of doubt, there is a presumption in favour of the validity of an award.[122] Finally, the Claimants contend that even where a ground for annulment is made out, a committee has a discretion whether or not to annul the award and that, in the present case, the length of the proceedings and the hardship which annulment would cause to the Claimant suggest that it would be proper for the Committee to exercise its discretion not to annul the award even if it finds that one of the grounds for annulment has been made out.[123]

### *b. Professor Kaufmann-Kohler*

98. With regard to Professor Kaufmann-Kohler, the Claimants maintain that "given that the factual predicate upon which this claim is based was squarely rejected by the authority

[117] *Ibid*, para. 280
[118] Transcript, pp. 161-162 and 292-293.
[119] Transcript, p. 158-160.
[120] Counter-Memorial, para. 49.
[121] Rejoinder, para. 16.
[122] Transcript, pp. 114-115.
[123] Transcript, p. 118.

empowered to decide that issue, Argentina's claims must be dismissed as an impermissible attempt at appeal".[124] The Claimants point to the findings in the Disqualification Decision that the links between Professor Kaufmann-Kohler's participation in the UBS Board and EDFI were minimal and indirect and the finding that there was no evidential basis for holding that those links would have affected Professor Kaufmann-Kohler's approach to the case. The Claimants emphasise that the test of appearance of bias is an objective one; it is not enough that a party states that it considers there is an appearance of bias; it is necessary to establish that a reasonable person in possession of all the facts would conclude that there was a reasonable likelihood of bias.

99. The Claimants deny that the analysis in the Disqualification Decision is in any way untenable. They point to the fact that the remaining members of the tribunal in *Suez Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA* v. *Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA* v. *Argentine Republic* (ICSID Case No. ARB/03/19), decision of 12 May 2008 ("*Suez II*"), confronted with a challenge to Professor Kaufmann-Kohler based upon her membership of the UBS Board, rejected that challenge on grounds very similar to those in the Disqualification Decision in the present case. According to the Claimants, the fact that another tribunal reached the same conclusion on closely similar facts is a powerful indication that the decision in the present case was not unreasonable.

100. The Claimants distinguish *Vivendi II* on the basis that the links between UBS and Vivendi were closer than the links on which reliance is placed in the present case. They also emphasise that the *Vivendi II* Committee did not, in the event, annul the award in that case. In this context, the Claimants point to the considerable weight given by the Committee in *Vivendi II* to the fact that the award in that case was unanimous and stress that the same is true of the Award in the present proceedings.

101. Finally, the Claimants endorse the finding of the remaining members of the Tribunal that the failure to disclose Professor Kaufmann-Kohler's appointment to the UBS Board was not a ground for annulment of the Award and point to the fact that the *Suez II* decision was to the same effect.

[124] Counter-Memorial, para. 42.

### *c. Professor Remón*

102. According to the Claimants, Argentina's challenge to Professor Remón merely invokes Article 52 of the ICSID Convention as a ground for seeking annulment but fails to substantiate its claim; Argentina asks the Tribunal to assume certain facts that allegedly prove Professor Remón's lack of impartiality.[125]

103. The Claimants argue that even on the limited discussion provided by Argentina, the circumstances surrounding Professor Remón's disclosure do not justify annulment.[126] The drafting of the Award had been concluded well before 16 April 2012 when the media reported the Argentine Government's intention to expropriate the stake that Repsol had in the Argentine company YPF. On 18 April 2012, Professor Remón sent his disclosure to the parties.[127] On 27 April 2012, Argentina requested the resignation of Professor Remón.[128] On 11 May 2012, Professor Remón responded to the parties comments and informed them of the completion of the deliberations and drafting of the Award several weeks before the expropriation announcement,[129] something which was confirmed by Professor Kaufmann-Kohler in a letter which she sent to the Tribunal on the same date.[130] The Award was signed thereafter by all three Tribunal members.[131] According to the Claimants, even if there was a conflict of interest, which it denies, such conflict could not have had a material effect on the outcome.[132]

104. Regarding Argentina's argument that the requirement that an arbitrator be independent and impartial exists until the award is rendered, the Claimants counter that neither they nor Professor Remón have ever suggested otherwise. In fact, Professor Remón stated in his letter that he would refrain from taking part in the Repsol matter as long as these "proceedings are ongoing".[133]

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[125] Counter-Memorial, paras. 64-66; Rejoinder, para. 32.
[126] Counter-Memorial, para. 69.
[127] RA 531.
[128] RA 532.
[129] RA 533.
[130] AC 16.
[131] Counter-Memorial, paras. 70, 71, 73; Rejoinder, para. 31.
[132] Counter-Memorial, para. 74; Rejoinder, paras. 30, 43.
[133] Rejoinder, para. 34.

105. The Claimants state that if, as argued by Argentina, it were the case that the conflict materialized in 2011, Argentina should have raised the issue then. By failing to do so, Argentina waived its right to challenge the Award on the basis of an alleged conflict of interests which had already arisen before the Award was completed.[134]

106. In any event, the Claimants argue, Argentina has not met the high threshold for annulment to be warranted in this case. Indeed, Professor Remón stated that he would not assume representation of Repsol as long as the present arbitration was ongoing. Contrary to what Argentina suggests, this declaration was not an admission that Prof. Remón would become adverse to Argentina as soon as this case was over. Moreover, the IBA Guidelines on Conflict of Interests impose no obligation of independence and impartiality once the arbitration has concluded and the tribunal becomes *functus officio*.[135] Finally, the Claimants again highlight the fact that the Award was rendered unanimously.[136]

### *D. The Decision of the Committee*

#### 1. The Legal Framework

##### *a. Article 14(1) of the Convention*

107. The qualifications which members of ICSID arbitration tribunals are required to possess are set out in Article 14(1) of the Convention. The English text of Article 14(1) provides that:

> Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, *who may be relied upon to exercise independent judgment.* Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators. (Emphasis added.)

Although that provision deals with the qualifications which must be possessed by persons appointed to the Panel of Arbitrators [137] maintained by ICSID in accordance with Articles 12 and 13 of the Convention, Article 40(2) requires that "arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14".

[134] Rejoinder, paras. 36-37.
[135] Rejoinder, para. 42.
[136] Rejoinder, para. 44.
[137] Article 14(1) is also applicable to persons appointed to the Panel of Conciliators.

108. There is a difference between the Spanish and English texts of Article 14(1). Where the English text refers to persons who "may be relied upon to exercise independent judgment", the Spanish version speaks of persons who "inspirar plena confianza en su imparcialidad de juicio". Since the Convention is equally authentic in English, French and Spanish,[138] the general practice has been to require that arbitrators may be relied upon to exercise independent judgment and inspire full confidence in their impartiality.[139] While the concepts of impartiality and independence have sometimes been viewed as one and the same, [140] the Committee considers that, though closely related, they are in fact distinct. As one recent decision puts it:

> Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both 'protect parties against arbitrators being influenced by factors other than those related to the merits of the case'.[141]

109. Article 14(1) does not require proof of actual dependence or bias; it is sufficient to establish the appearance of dependence or bias.[142] The test, however, is an objective one. It is not enough that the party challenging an arbitrator perceives that that arbitrator lacks the requisite qualities of independence and impartiality.[143] As the *Blue Bank* decision put it:

> The applicable legal standard is an 'objective standard based on a reasonable evaluation of the evidence by a third party'. As a consequence, the subjective belief of the party requesting the disqualification is not enough to satisfy the requirements of the Convention.[144]

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[138] The French text requires persons who "offrir toute garantie d'indépendance dans l'exercice de leurs fonctions" and is thus substantially identical to the English.

[139] See *Suez Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v. Argentine Republic* (ICSID Case No. ARB/03/17) and *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic* (ICSID Case No. ARB/03/19), decision of the unchallenged arbitrators of 22 October 2007 ("*Suez I*"), para. 28; *Blue Bank*, note 97, above, para. 58; and *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/05), decision of the Chairman of 13 December 2013, para. 65 ("*Burlington*").

[140] See, e.g., *Urbaser SA v. Argentine Republic* (ICSID Case No. ARB/07/26), decision of the unchallenged arbitrators of 12 August 2010, para. 38 (*Urbaser*").

[141] *Blue Bank*, para. 59. See also *Suez I*, note 139, above, para. 29; and *Burlington*, note 139, above, para. 66.

[142] *Blue Bank*, note 97, above, para. 59.

[143] See, e.g., the decision the unchallenged members of the *ad hoc* Committee in relation to the challenge to the President of that Committee in *Vivendi I*, note 70, above, para. 25, and *Suez I*, note 139, above, para. 41.

[144] *Blue Bank*, note 97, above, para. 60, quoting *Suez I*, note 139 above, at para. 39.

110. The standard of appraisal was also the subject of detailed analysis in the decision of the two remaining arbitrators on a challenge to an arbitrator in *SGS v. Pakistan*:

> The standard of appraisal of a challenge set forth in Article 57 of the Convention may be seen to have two constituent elements: (a) there must be a fact or facts (b) which are of such a nature as to 'indicat[e] a manifest lack of the qualities required by' Article 14(1). The party challenging an arbitrator must establish facts, of a kind or character as reasonably to give rise to the inference that the person challenged clearly may not be relied upon to exercise independent judgment in the particular case where the challenge is made. The first requisite that facts must be established by the party proposing disqualification, is in effect a prescription that mere speculation or inference cannot be a substitute for such facts. The second requisite of course essentially consists of an inference, but that inference must rest upon, or be anchored to, the facts established. An arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences.[145]

111. The Parties in the present case were largely agreed upon this standard. In the course of responding to a question put by a Member of the Committee at the hearing, the Claimants maintained that the *Blue Bank* decision and some other recent decisions went further in the direction of disqualification for the appearance of bias than had previous decisions and suggested that it would be unfair to apply the same approach to an evaluation of the decision on the challenge to Professor Kaufmann-Kohler (to which the Committee will shortly turn).[146] However, the Committee does not understand the Claimants to suggest that the statement from *Blue Bank* quoted in paragraph 109, above, was incorrect. On the contrary, the Claimants expressly accepted that "the notion that an arbitrator should not only serve justice but appear to serve justice is a long-standing one".[147] The Committee considers that the Claimants accepted that the standard to be applied is the one described above but took issue with certain recent applications of that standard. In the opinion of the Committee, the standard applied under Article 14(1) is whether a reasonable third party, with knowledge of all the facts, would consider that there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality.

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[145] *SGS Société Générale SA v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision on challenge to an arbitrator of 19 December 2002, 8 ICSID Reports 402 ("*SGS*").
[146] Transcript, pp. 187-8 (Di Rosa).
[147] Transcript, p. 186 (Di Rosa).

### *b. The Convention Machinery for Challenging an Arbitrator*

112. In addition to specifying the qualities which an arbitrator must possess, the Convention also lays down a machinery by which a party may challenge an arbitrator about whom it considers there is reason to doubt that he or she lacks one or more of those qualities. Article 57 of the Convention provides in relevant part that:

> A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.

That provision has to be read together with Article 58, which states that:

> The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

113. A number of points need to be borne in mind regarding these provisions. First, these provisions make clear that the decision on a challenge to an arbitrator for failure to meet the requirements of Article 14(1) should normally be taken by the two remaining members of the Tribunal, while providing a default decision-maker, in the form of the President of the World Bank in his capacity as Chairman of the ICSID Administrative Council,[148] to resolve that question in the cases specified in Article 58.

114. Secondly, because only a duly constituted tribunal can take a decision, a challenge may be brought under Article 57 only once the tribunal in the case has been constituted. Moreover, Rule 9(1) of the Arbitration Rules is explicit that a proposal under Article 57 may not be made after the proceedings have been declared closed.

115. Thirdly, the mechanism created by Articles 57 and 58 is clearly designed to ensure that a challenge can be swiftly resolved before the case proceeds any further. The emphasis on a swift resolution is confirmed by the Arbitration Rules. Rule 9 requires that "a party

[148] ICSID Convention Article 5.

proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretariat". A party that fails to file its request within a reasonable time of becoming aware of the circumstances which it maintains should lead to disqualification will be held, in accordance with Rule 27, to have waived its right to challenge the arbitrator.[149]

116. Lastly, Article 57 expressly requires that a proposal for disqualification be based upon facts indicating a "manifest" lack of the qualities required by Article 14(1) of the ICSID Convention. The term "manifest" is not defined in Article 57. Schreuer's *Commentary* points out that the case-law on the meaning of the same term in Article 52(1)(b) (annulment on the ground that a tribunal "manifestly exceeded its powers") has not always been consistent, sometimes treating "manifest" as referring to the ease with which the fault can be perceived and sometimes as related to the gravity of the fault.[150] In the context of Article 57, however, the prevailing view is that "manifest" means "evident" or "obvious" and that, in the words of the *Blue Bank* decision "it relates to the ease with which the alleged lack of the qualities can be perceived".[151] In the present case, both Parties have adopted this approach and the Committee agrees that it represents the correct interpretation of Article 57.

### *c. The Role of an ad hoc Committee*

117. Since Articles 57 and 58 establish a machinery for dealing with challenges to arbitrators, the next question to be considered is whether there is any role for an *ad hoc* committee, or, to put the matter differently, can the fact that there is reason to doubt whether one or more of the members of a tribunal possessed the qualities required by Article 14(1) of the Convention constitute a ground for annulment under Article 52?

118. The *Azurix* Committee considered that that question had to be answered in the negative. Since the role of annulment was strictly limited under the Convention and Articles 57 and 58 created a machinery for the resolution of challenges to arbitrators, the *Azurix* Committee concluded that an *ad hoc* committee was limited to examining whether or not there had been a serious departure from a fundamental rule of procedure in the way in which the challenge

[149] See, e.g., *Suez 1*, note 139, above, paras. 23-26.
[150] Schreuer, *Commentary*, note 53, above, Article 52, paras. 134-154.
[151] *Blue Bank*, note 97, above, para. 61.

had been addressed.[152] Even where the facts said to demonstrate that an arbitrator lacked the requisite qualities came to light only after the proceedings had closed, and thus could not be dealt with under Articles 57 and 58, the *Azurix* Committee considered that the matter could not be a basis for annulment but could only be raised by way of proceedings for the revision of the award under Article 51.[153] By contrast, the *Vivendi II* Committee, faced with a challenge to Professor Kaufmann-Kohler based upon facts which had come to light only after the proceedings had closed, was clear that such matters could constitute grounds for annulment.[154]

119. Whether the existence of facts suggesting that an arbitrator lacks the qualities required by Article 14(1) of the ICSID Convention is capable of being a ground for annulment depends, first, on whether this matter falls within any of the five grounds for annulment set out in Article 52.

120. As set out above, Argentina has relied upon two of these grounds. It argues, first, that if there is reason to believe that one of the arbitrators lacks the requisite qualities, then the tribunal has not been properly constituted (Article 52(1)(a)). Secondly, Argentina maintains that since the right to an independent and impartial tribunal is a fundamental rule of due process, if a case were decided by a tribunal whose members did not meet the requirements of independence and impartiality in Article 14(1), there would necessarily have been a serious departure from a fundamental rule of procedure (Article 52(1)(d)). The Claimants accept that annulment might be possible under Article 52(1)(d), although (at least initially) they maintained that this was true only where the relevant facts were discovered after the close of proceedings and thus could not have been dealt with under Articles 57 and 58. However, like the *Azurix* Committee, they dispute the relevance of Article 52(1)(a), arguing that that provision is limited to cases in which the procedure for constitution of the tribunal, laid down in Articles 37-39 had not been followed and that it does not provide that a tribunal is not properly constituted simply because one of its members does not possess all of the qualities required by Article 14(1). The Claimants suggest, however, that in practice it makes no

[152] *Azurix*, note 116, above, para. 280.
[153] *Azurix*, note 116, above, para. 281.
[154] *Vivendi II*, note 102, above, para. 232.

difference whether the qualifications of an arbitrator are considered relevant to Article 52(1)(a) or (d) (or both) since the standard of review is the same under both provisions.

121. The Committee accepts that it may well make no difference whether these issues are considered under paragraph (a) or paragraph (d) of Article 52(1) but the matter was fully argued before it and has been the subject of differing views in the case-law and literature. It will, therefore, examine the relevance of both provisions.

122. There is general acceptance that Article 52(1)(d) may be applicable to a case in which a challenge to an arbitrator has been dealt with under Articles 57 and 58 of the Convention in a manner which itself involves a serious departure from a fundamental rule of procedure, for example because one party was not given the opportunity to be heard. Such cases are, however, likely to be extremely rare and no allegation of that kind is made in the present case. The more important question, both as a matter of general principle and in connection with the present case, is whether the fact that a case has been heard by a tribunal one or more of whose members failed to meet the requirements of independence and impartiality in Article 14(1) means that the procedure as a whole is flawed.

123. Article 52(1)(d) gives a committee power to annul an award where there has been a *serious* departure from a *fundamental* rule of procedure. It is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal. The Committee accordingly considers that, in principle, an *ad hoc* committee can examine under Article 52(1)(d) not only allegations that the procedure by which a challenge to an arbitrator was determined was flawed but, more importantly, allegations that the lack of independence and impartiality of an arbitrator meant that there was a serious departure from a fundamental rule of procedure in the arbitration as a whole.

124. In that context, it is important to recall that it is only an award which can be the subject of annulment and not any previous decision of a tribunal (see paragraph 62 above). There can, therefore, be no question of an *ad hoc* committee annulling the decision taken by the remaining members of a tribunal under Article 58 to reject a proposal for disqualification. The only way in which that decision can be called into question in annulment proceedings is if it is considered to taint the award which is subsequently adopted. Any consideration of the role of Article 52(1)(d) must take that into account. If an award may be tainted by the fact

that a decision whether or not to disqualify an arbitrator was taken in a manner which was procedurally deficient, *a fortiori* an award may be tainted by the fact that the award itself was adopted by a tribunal one or more of whose members did not meet the requisite standard of impartiality and independence.

125. The Committee therefore considers that the fact that there is reasonable doubt about whether an arbitrator possessed the qualities of independence and impartiality required by Article 14(1) is a ground on which an award might be annulled under Article 52(1)(d).

126. Turning to Article 52(1)(a), the Committee considers that the Claimants take too narrow a view of the scope of that provision. In providing for annulment on the ground that "the Tribunal was not properly constituted", that paragraph must be taken as referring to compliance with all of the requirements of Chapter IV, Section 2, of the Convention, entitled "Constitution of the Tribunal". One of the provisions in that section is Article 40. Article 40(1) provides that arbitrators may be appointed from outside the Panel of Arbitrators maintained by ICSID but Article 40(2) then requires that "arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14". That provision is mandatory and is one of those relating to the constitution of a tribunal. It follows that an appointment from outside the Panel of an arbitrator who does not possess the qualities stated in Article 14(1) will mean that the tribunal has not been properly constituted in that it has not been constituted in accordance with all of the requirements of Chapter IV, Section 2. In the case of arbitrators appointed from the Panel of Arbitrators, since Article 14(1) already requires that they possess the qualities stated in that provision, it might be thought that whether a person does or does not possess those qualities is relevant to his appointment to the Panel rather than to the constitution of a particular tribunal. However, independence and impartiality are not qualities the existence of which can be assessed purely in an abstract or general way; what matters most is that an arbitrator can be relied upon to be independent and impartial in relation to the particular parties and issues arising in a given arbitration. Accordingly, whether appointed from the Panel or from outside it, an arbitrator must possess those qualities in relation to the specific case for which he or she is appointed. If he or she does not do so, then, in the view of the Committee, the tribunal has not been properly constituted.

127. The Committee therefore concludes that the fact that an arbitrator does not meet the standard required under Article 14(1), as set out in para. 111, above, is also a ground on which an award might be annulled under Article 52(1)(a).

128. Moreover, the Committee does not consider that the question whether or not a tribunal has been properly constituted is one which can be answered only at the outset of proceedings. While it is obviously necessary to establish that a tribunal is properly constituted at the time that it begins work,[155] once it is accepted that the proper constitution of the tribunal requires that each of its members fulfil the requirements of Article 14(1), it becomes clear that changes in the circumstances of an arbitrator may mean that a tribunal which was properly constituted at the outset may cease to be so during the course of the proceedings.

129. That still, however, leaves the question how an *ad hoc* committee is to discharge its role under Article 52 in respect of allegations about the independence and impartiality of an arbitrator. In this respect, the Committee considers that there is an important difference between those cases in which the issue of disqualification has been raised under Article 57 and rejected under Article 58 and those in which it has not. That distinction is particularly important in the present case, because Argentina's case for annulment in respect of its challenge to Professor Kaufmann-Kohler falls into the first category, whereas its case with regard to Professor Remón falls into the second.

*(1) The role of an* ad hoc *committee where no challenge has been made under Article 57*

130. It is convenient to begin with this second category. Article 9 of the Arbitration Rules requires that any challenge to an arbitrator must be raised "promptly, and in any event before the proceeding is declared closed". The Committee does not consider that this wording precludes a party from raising the matter on annulment in a case where the facts on which a challenge can be based came to light only after the proceedings had been declared closed. As has been explained in Part III, above, an *ad hoc* committee is the guardian of the integrity of the procedure. The Committee has already expressed the view that there is no rule of procedure so fundamental as that which stipulates that a case shall be decided by an

[155] In the present case, the Parties confirmed their agreement that the Tribunal had been properly constituted at the first session of the Tribunal, Decision on Jurisdiction, para. 22.

independent and impartial tribunal as well as that a tribunal cannot be regarded as properly constituted if one or more of its members does not possess the requisite qualities of independence and impartiality. Accordingly, the Committee cannot read Rule 9 as precluding a party from raising this issue in annulment proceedings where it was not able to raise it before the closure of the main proceedings. The Committee has taken careful note of the views of the *Azurix* Committee (discussed in para. 118, above) that in such a case the issue should be raised in proceedings for revision under Article 51 and not for annulment but it respectfully disagrees and prefers the approach of the *Vivendi II* Committee on this point.

131. Nevertheless, the Committee must also take into account the requirement of promptness in Rule 9 and the provision of Rule 27 that –

> A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceedings, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed – subject to Article 45 of the Convention – to have waived its right to object.

Accordingly, a party which is, or should have been, aware of the facts which it claims give rise to reasonable doubt about whether an arbitrator possesses the requisite qualities of independence and impartiality has a duty to raise the issue promptly. If it fails to do so, it will have waived its right to object. A party which could have raised the matter under Articles 57 and 58 before the proceedings were declared closed but failed to do so cannot, therefore, raise it on annulment. The mechanism created by the ICSID Convention for resolving challenges to arbitrators does not permit a party to keep such a challenge up its sleeve for use only at the annulment stage.[156] The first task for an *ad hoc* committee faced with an application for annulment based upon allegations regarding the independence and impartiality of a member of the tribunal which was not raised during the proceedings before the tribunal is, therefore, to determine whether there has been a waiver under Rule 27.

132. If the committee concludes that there has been no waiver, then it must proceed to consider the application under either or both of Article 52(1)(a) and (d). Since there has been no prior

[156] See *CDC Group* v. *Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment, 29 June 2005, 11 ICSID Reps. 206, paras. 51-55 ("*CDC*"). See also, Schreuer, *Commentary*, note 53, above, Article 57, paras. 11-12 and Article 52, paras. 119-129.

consideration of the issue under Articles 57 and 58, the committee must necessarily approach *de novo* the question whether there exist grounds which a reasonable third party would consider give rise to reasonable doubts whether a member of the tribunal was sufficiently independent and impartial (the standard which the Committee has already determined is the one applicable under the Convention, see para. 108, above). That is so both in terms of finding the relevant facts and making the required legal rulings. The burden of proof in respect of any assertion is on the party making that assertion.

133. The Claimants contend that, even if it concludes that there were reasonable grounds to doubt the impartiality or independence of a member of the tribunal, a committee may annul only if it concludes that there was a material effect on the award. The Committee has difficulty in accepting this proposition, at least in the terms in which it was put by the Claimants.[157] It has already been established that the test is not one of whether an arbitrator actually lacked independence or impartiality but whether a reasonable third person, with knowledge of all the facts, would consider there were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality (see paras. 109 and 111, above). The Committee notes that it will generally be difficult to show how reasonable doubts about the independence or impartiality of an arbitrator – as opposed to actual bias or lack of independence – had a material effect on the award. Even in the case of actual bias or lack of independence, it may still be difficult to establish that such an effect existed, because of the confidentiality of the deliberations.

134. What can sometimes be established, however, is that even if the doubts about an arbitrator are well-founded – in other words if that arbitrator really did lack impartiality or independence – the award could not have been affected. That would be the case, for example, where the facts affecting the arbitrator's lack of independence or impartiality only came into existence after the award had been finalised but before it was actually rendered. While the Committee agrees with Argentina that the duty of independence and impartiality subsists throughout the proceedings until the award is rendered, it considers that if an arbitrator ceased to be independent or impartial only after the award has been finalised, his lack of the requisite qualities could not have affected the award and would not, therefore, constitute a ground for

[157] See, e.g., Transcript, p. 293.

annulment. In short, the party seeking annulment is not required to prove that a lack of impartiality or independence *did* have a material effect on the award but it must establish that it *could* have done so.

135. In that context, it is necessary to consider a further argument advanced by the Claimants, namely that a lack of impartiality or independence on the part of one arbitrator could not have had an effect upon the award if the award was unanimous. That argument receives a degree of support from the decision of the *Vivendi II* Committee since one of the reasons it gave for its decision not to annul the award was that the tribunal had been unanimous. The Committee does not consider that that factor was decisive. The main reason given by the *Vivendi II* Committee for its decision was that Professor Kaufmann-Kohler became aware of the links between UBS and the claimant companies in that case only after the award had been rendered (a consideration which does not apply in the present case). There is nothing in the decision to suggest that the *Vivendi II* Committee considered that the fact that an award had been adopted unanimously meant that doubts regarding the independence or impartiality of one of the members of the tribunal would never be grounds for annulment. The present Committee does not consider that such a broad proposition could be correct. It is impossible to tell what degree of influence on one or both colleagues an arbitrator might have had in the course of what are necessarily confidential deliberations. The fact that an award was rendered unanimously may be a relevant consideration in relation to the exercise of the discretion not to annul an award but the Committee does not accept that unanimity necessarily precludes annulment.

136. Accordingly, in a case in which an application for annulment is made on the basis that there were reasonable grounds to doubt the independence or impartiality of one of the arbitrators and no proposal for disqualification had been made before the proceedings were declared closed, the role of an *ad hoc* committee is to decide the following questions:-

(a) was the right to raise this matter waived because the party concerned had not raised it sufficiently promptly ?

(b) if not, has the party seeking annulment established facts the existence of which would cause a reasonable person, with knowledge of all the facts, to consider that there

were reasonable grounds for doubting that an arbitrator possessed the requisite qualities of independence and impartiality ? and

(c) if so, could the lack of impartiality or independence on the part of that arbitrator – assuming for this purpose that the doubts were well-founded – have had a material effect on the award ?

With respect to each question, the committee must approach the matter *de novo*.

*(2) The role of an* ad hoc *committee where a challenge has been made, and rejected, under Article 57*

137. We turn then to the other category of case, namely one in which the party seeking annulment had proposed disqualification of the arbitrator during the proceedings but the remaining members of the tribunal (or the Chairman of the Administrative Council in those cases for which Article 58 so provides) hearing the matter under Article 58 of the ICSID Convention had dismissed the proposal. Here the entire procedural context is different. There is an existing evidential record which has been considered by the remaining members of the tribunal (or the Chairman) and their decision will contain findings of fact, as well as rulings on the legal issues arising from the facts as found. The question, therefore, is what is the relationship between those findings and rulings by the Article 58 decision-maker and the role of the *ad hoc* committee at the annulment stage?

138. On this question the Parties are in marked disagreement. Argentina argues that the role of the *ad hoc* committee is the same as it is in a case where no previous challenge has been made, namely to examine the issues *de novo* and take a decision. The Claimants, on the other hand, now contend (see paras. 96 to 97, above) that the committee's role is to review whether or not the decision taken under Article 58 was tenable, in the sense that it was one which a reasonable decision-maker could take. According to the Claimants, it is not open to a committee to reconsider the facts or to substitute its own view for that of the body charged with taking the decision under Article 58.

139. The Committee considers that with regard to this question two points are of fundamental importance. First, the drafters of the ICSID Convention considered that challenges to the independence or impartiality of an arbitrator should be heard by the remaining members of

the tribunal (or the Chairman of the Administrative Council), and should be addressed promptly, and before the case proceeds any further. In this context, the Committee notes that the *Vivendi II* Committee seemingly accepted the suggestion that arbitrators called upon to determine a challenge to another member of their tribunal might be more inclined than would an *ad hoc* committee to raise the threshold for a challenge.[158] That observation by the *Vivendi II* Committee was based upon the evidence of Professor Mistelis which, as the Committee has already observed (para. 89 and footnote 103, above), is not part of the record in the present proceedings and cannot, therefore, be taken into account. Nevertheless, even if the Committee had before it evidence of such a tendency on the part of arbitrators, that could not detract from the fact that the ICSID Convention entrusts decisions on proposals to disqualify an arbitrator to the remaining members of the tribunal (except where, as already explained, the Chairman of the Administrative Council acts as the default decision-maker). An *ad hoc* committee must respect that choice and work within the framework laid down by the Convention.

140. Secondly, however, the ICSID Convention also establishes the *ad hoc* committee as the guardian of the integrity of the arbitral procedure (see para. 65, above). As the Committee has already stated, the independence and impartiality of the members of the tribunal is a matter which goes to the very heart of the integrity of the arbitral procedure. The question, therefore, is how should an *ad hoc* committee act in order to respect both of these fundamental considerations.

141. The Committee considers that the second consideration must lead it to reject the approach taken by the *Azurix* Committee, namely that an *ad hoc* committee has no role in respect of a challenge to an arbitrator which had been considered by the remaining members of the tribunal under Articles 57 and 58 of the Convention beyond examining whether there had been a serious departure from a fundamental rule of procedure in the manner in which the remaining members had dealt with the proposal for disqualification. The Committee considers that such an approach is incompatible with the duty of an *ad hoc* committee to safeguard the integrity of the arbitral procedure. It thus rejects the position initially adopted

[158] *Vivendi II*, note 102, above, paras. 208-210.

on this issue by the Claimants, while observing, as it has already noted, that the Claimants resiled from that position at the hearing (see para. 97, above).

142. Nor, however, can the Committee accept that, as Argentina has suggested, an *ad hoc* committee should approach the issue of an arbitrator's independence and impartiality *de novo*, thus disregarding entirely the outcome of the proceedings under Articles 57 and 58. To do so would be incompatible with the scheme for resolving challenges to arbitrators devised by those who concluded the ICSID Convention. That scheme was designed to resolve such challenges swiftly and at the earliest possible stage of the proceedings, so that the parties were not involved in the expense and loss of time necessarily involved in obtaining a final award from the tribunal before it was established that the tribunal – as constituted – was entitled to hear the case. By contrast, reference to an *ad hoc* committee can be made only after a final award has been made by a tribunal. During the negotiation of the ICSID Convention a proposal that a party be given an immediate right of recourse to an *ad hoc* committee after the tribunal had decided that it was properly constituted, without having to wait for the award, was defeated.[159] To allow a party which had unsuccessfully challenged an arbitrator at an early stage of the proceedings to raise the same challenge for consideration *de novo* before an *ad hoc* committee, after what may well have been lengthy and expensive proceedings on the merits, would run completely counter to the scheme for early resolution of a challenge. In effect, the proceedings under Articles 57 and 58 would serve no useful purpose, other than to ensure that the right to challenge the arbitrator was not waived; it would be as if such proceedings had never taken place.

143. Moreover, it must be recalled that annulment proceedings are not an appeal (see Part III, above). The role of an *ad hoc* committee in proceedings for the annulment of an award is not to determine whether the tribunal was correct in the decisions that it took; it is a supervisory role, limited to determining whether or not one of the grounds of annulment has been made out. The fact that questions as to whether or not a member of the tribunal which issued the award possessed the requisite qualities of independence and impartiality goes to a matter of fundamental importance does not alter the relationship between the role of the *ad hoc* committee and that of the body entrusted with making the original decision. The question

[159] Documents concerning the Origin and Formulation of the ICSID Convention, vol. II, pp. 851-853.

whether a tribunal has exceeded its jurisdiction is equally fundamental. Just as Article 57 entrusts decisions on challenges to an arbitrator to the remaining members of the tribunal (or the Chairman of the Administrative Council), so Article 41 empowers the tribunal to determine a challenge to its jurisdiction. *Ad hoc* committees have, however, declined to accept that every jurisdictional error has to be considered annullable, or to treat applications for annulment based on jurisdictional error as more akin to appeals.[160]

144. In short, the role of an *ad hoc* committee is not to determine whether or not an arbitrator possesses the requisite qualities of independence and impartiality; Articles 57 and 58 entrust that function to the remaining members of the tribunal, or to the Chairman of the Administrative Council. Only if the matter is raised for the first time after the proceedings are closed does the *ad hoc* committee become the primary decision-maker in respect of this issue.

145. The Committee therefore considers that its role in relation to an application for annulment based on the alleged lack of independence or impartiality of an arbitrator is a more limited one in a case where the remaining members of the tribunal, or the Chairman of the Administrative Council, have already taken a decision on whether that arbitrator should be disqualified than in a case where the issue of independence or impartiality is raised only after the proceedings have closed. In the former type of case, an *ad hoc* committee does not write on a blank sheet: it is faced with existing findings of fact and assessment of those facts, as well as with an application of the law to those facts. While a committee is not bound to uphold the decision of the remaining members of the tribunal (or the Chairman of the Administrative Council), nor can it simply disregard that decision. It is limited to the facts found in the original decision on disqualification. Moreover, commensurate with the principle that an *ad hoc* committee is not an appellate body, it may not find a ground of annulment exists under either Article 52(1)(a) or 52(1)(d) unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision.

[160] *Soufraki*, para. 118.

146. It is within this legal framework that the Committee has considered Argentina's application for annulment on the basis of the alleged lack by Professor Kaufmann-Kohler and Professor Remón of the requisite qualities of independence and impartiality.

### 2. Professor Kaufmann-Kohler

147. The facts on which Argentina bases its claim that Professor Kaufmann-Kohler lacked the requisite qualities of independence and impartiality are set out in paras. 76 to 82, above. They are not in dispute. The grounds of Argentina's claim before the Committee are the same as those raised (see para. 81, above) before the remaining members of the Tribunal.[161] The Disqualification Decision given by the remaining members, after reviewing the facts and the procedure which had been followed for dealing with Argentina's challenge, noted that the relevant test was "whether Professor Kaufmann-Kohler 'may be relied upon to exercise independent judgment'" and stated that "if reasonable doubts exist on this matter, she should cease to serve in these proceedings".[162] As noted in paras. 81 to 82, above, Professors Park and Remón concluded that Professor Kaufmann-Kohler's non-executive directorship at UBS gave her no financial interest in any of the Claimant companies and that she would not benefit in any way from an award in their favour.[163] They also rejected as "remote, tenuous and speculative" the suggestion that, even without any prospect of financial benefit, Professor Kaufmann-Kohler might favour EDFI on the ground that she had a sense of solidarity with UBS.

148. Professors Park and Remón then reviewed each of the five grounds (see para. 78, above) on which Argentina maintained that there existed between UBS and EDFI connections sufficient to give rise to a conflict of interest on the part of Professor Kaufmann-Kohler once she had become a director of UBS. They concluded as follows:-

(a) with regard to the fact that UBS recommended EDF, the parent company of EDFI, as a good investment opportunity, they noted that this gave Professor Kaufmann-Kohler no direct incentive to favour EDFI and concluded that "the connection remains

[161] There was at that time no challenge to Professor Remón and the grounds on which he was subsequently challenged by Argentina relate to events said to have occurred several years after he and Professor Park had ruled on the challenge to Professor Kaufmann-Kohler.
[162] Disqualification Decision, para. 64.
[163] Disqualification Decision, para. 71.

speculative and indirect, and thus not determinative for the purposes of this challenge".[164] They considered, however, that "a different conclusion might be indicated if an arbitrator held a substantial equity stake in a bank which owned and actively promoted a company that was party to the relevant proceedings".[165]

(b) with regard to the fact that UBS and a subsidiary of EDF both held shares in AEM Milan, they noted that UBS's stake in AEM was below 1.5% and was held in the ordinary course of its business activity as one of the largest banks in the world. They did not consider that it could affect the independence of Professor Kaufmann-Kohler.[166]

(c) they reached a similar conclusion with regard to the fact that UBS and EDF had both held shares in Motor Columbus,[167] a conclusion which was reinforced by the fact that UBS had sold its shareholding before Professor Kaufmann-Kohler became a director.[168]

(d) with regard to the involvement of UBS in a consortium that assisted in the placement of EDF shares on the French market, they noted that UBS had not itself bought shares in the course of this placement and concluded that "we are unable to perceive any link between that consortium's activity and the way Professor Kaufmann-Kohler will evaluate the issues in this case".[169]

(e) it was the fact that the UBS Investment Foundation held an investment in EDF that the remaining members of the Tribunal considered "stands on a somewhat different footing from Respondent's other arguments". They noted, however, that

> the Foundation is an institution for the collective investment of assets by Swiss pension funds. Ultimately, the assets of the Foundation will benefit the various Swiss pension funds that have joined in the institutions which participate in the Foundation.[170]

They also noted that the total investment in EDF fell below 1.5%. Even had the investment in EDF been held by UBS itself, Professors Park and Remón considered that "a stake of less

[164] Disqualification Decision, para. 76.
[165] Disqualification Decision, para. 78.
[166] Disqualification Decision, paras. 79-81.
[167] Disqualification Decision, para. 82.
[168] Disqualification Decision, para. 83.
[169] Disqualification Decision, para. 87.
[170] Disqualification Decision, para. 93.

than 1.5% would not be significant enough to have an impact on the independence of Professor Kaufmann-Kohler."[171]

149. Finally, Professors Park and Remón considered whether Professor Kaufmann-Kohler's failure to disclose her directorship of UBS was, in itself a sufficient ground for disqualification. They concluded that it was not:

> With respect to the alleged failure to disclose, we cannot accept that non-disclosure of the Board membership indicates a manifest lack of reliability in the exercise of independent judgment, the standard to be applied in this challenge. Whatever level of disclosure might be required under the ICSID Convention, a failure to inform the parties about this Board membership does not rise to that plane.[172]

150. Professors Park and Remón also considered in detail the report by Professor Wolfram, submitted by Argentina, the decision of the United States Court of Appeals in *New Regency Productions Limited v. Nippon Herald Films Inc.*, 501 F 3d 211 (9th Circuit, 2007) to which Argentina had drawn their attention, and the press release regarding Professor Kaufmann-Kohler's role in removing certain officials of UBS but concluded that none of them altered the conclusions they had reached.

151. The Committee notes that there is no suggestion that, in considering the proposal to disqualify Professor Kaufmann-Kohler, Professors Park and Remón failed in any way to accord due process to both Parties. There is no hint here of any serious departure from a fundamental rule of procedure in the way in which the proposal for disqualification was handled.

152. Nor is there any suggestion that the remaining members of the Tribunal applied the wrong standard. It is true that in setting out that standard the Disqualification Decision refers only to whether Professor Kaufmann-Kohler "may be relied upon to exercise independent judgment" and makes no separate mention of a requirement of impartiality,[173] whereas the Committee has held that the standard laid down in Article 14 of the Convention, taking account of the English, French and Spanish texts, is one of independence and impartiality

[171] Disqualification Decision, para. 96.
[172] Disqualification Decision, para. 98.
[173] Disqualification Decision, para. 64.

(see para. 108, above). However, other passages in the Disqualification Decision make clear that Professors Park and Remón had both impartiality and independence in mind. Thus, they opined that "non-disclosure in itself cannot be a ground for disqualification, it must relate to facts that would be material to a reasonable likelihood of *impartiality or lack of independence*, which is not the case here".[174] In the circumstances, the Committee does not consider that the fact that the remaining members of the Tribunal formulated the standard as they did can sustain the conclusion that their decision was one which no reasonable decision-maker could have made.

153. Nor is there a plausible argument that the Disqualification Decision did not address the different elements in Argentina's proposal to disqualify Professor Kaufmann-Kohler. As the Committee has endeavoured to show, that decision meticulously addressed each and every element which was said to demonstrate that Professor Kaufmann-Kohler lacked the requisite qualities of independence and impartiality.

154. Argentina's case before the Committee comes down, therefore, to an argument that the Disqualification Decision came to the wrong conclusion. In advancing that argument, Argentina relies heavily upon the decision of the *ad hoc* Committee in *Vivendi II*. As the Committee has already explained (see paragraphs 89 to 91, above), that decision took a far more critical view of Professor Kaufmann-Kohler's position than did the Disqualification Decision in the present case, although the *Vivendi II* Committee ultimately decided not to annul the award. Since the fact of Professor Kaufmann-Kohler's appointment to the UBS Board did not come to light until after the proceedings in *Vivendi II* had been closed, the *ad hoc* Committee in that case necessarily had to approach the question whether there was reason to doubt Professor Kaufmann-Kohler's independence or impartiality *de novo*.

155. The Committee has studied the decision in *Vivendi II* with care. It notes, however, that, although, as in the present case, *Vivendi II* was concerned with Professor Kaufmann-Kohler's directorship of UBS, there are nevertheless differences between the two cases. In particular, there is a difference between the investment which UBS was found to have in the claimants in *Vivendi II* and its investment in EDF in the present case. As has already been explained, the investment in the present case consisted of a share of less than 1.5% in EDF, the parent

[174] Disqualification Decision, para. 123 (emphasis added).

company of the Claimant, EDFI. That investment was held by the UBS Foundation for the benefit of various Swiss pension funds. The other UBS shareholdings – in AEM Milan and its former shareholding in Motor Columbus – were in companies that were part-owned by the parent company of EDFI and were not involved in the arbitration. By contrast, in *Vivendi II*, it seems that UBS was the largest shareholder in the Claimant itself.[175] In commenting on the decisions on disqualification in the present case and in *Suez II*, the *Vivendi II* Committee commented that

> Each relationship was different and must, like the relationship between UBS and Vivendi, be considered individually. *Notably, a larger or smaller participation of UBS in the one or in the other company may have relevance in this connection*. (Emphasis added)[176]

The Tribunal in the present case also considered that the size of an investment might be important in this regard. [177]

156. In addition, the Committee notes that the *Vivendi II* Committee placed considerable weight on what it described as "the obvious point that a director in the exercise of his or her function is under a fiduciary duty *vis-à-vis* the shareholders of the bank to further the interests of the bank and therefore postpone [*sic*] conflicting interests" and considered that "that is fundamentally at variance with his or her duty as independent arbitrator in an arbitration involving a party in which the bank has a shareholding or other interest, however small it may be".[178] On that basis, the *Vivendi II* Committee considered that

> Since a major international bank has connections with or an interest in virtually any major international company (which companies are also the most likely to end up in international arbitrations), this suggests that the positions of a director of such a bank, and that of an international arbitrator, may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined.[179]

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[175] *Vivendi II*, note 102, above, para. 20. See, however, para. 99. These paragraphs set out the submissions of the parties. The Tribunal did not make a finding about the extent of the UBS holding in Vivendi or whether any part of it was held on behalf of third parties.
[176] *Vivendi II*, note 102, above, para. 214.
[177] Disqualification Decision, para. 78.
[178] *Vivendi II*, note 102, above, paras. 217-218.
[179] *Vivendi II*, note 102, above, para. 218.

157. The *Vivendi II* Committee emphasised, in this context, the report of Professor Wolfram (which is also part of the record in the present case) and the evidence of Professor Mistelis (which is not). Since the present Committee has not seen the evidence of Professor Mistelis, it cannot tell on what basis he suggested that there might be a conflict between the fiduciary duty of a director and the duty of an arbitrator and, specifically, whether he based his comments on any particular legal system's rules on fiduciary obligations. Before the present Committee, Argentina rightly did not attempt to rely upon Professor Mistelis [180] and there is no evidence before the Committee regarding fiduciary duties under any particular system of law. The Committee can only, therefore, consider this issue as a matter of general principle and in the light of the report of Professor Wolfram. On that level, however, the Committee is not persuaded that a director of a bank would have a fiduciary duty to the shareholders of the bank to act in any particular way when sitting as an arbitrator. The point which was emphasised by the *Vivendi II* Committee was that "a director *in the exercise of his or her function* is under a fiduciary duty *vis-à-vis* the shareholders of the bank" (emphasis added). The phrase "in the exercise of his or her function" can only refer to that person's function as a director. If a non-executive director of a bank sits as an arbitrator, they are not acting in the exercise of their function as a director when they exercise the quite different function of arbitrator. Of course, a conflict of interest *might* arise in such a case – it would obviously do so if the bank was a party to the arbitration in question – but, at least as a matter of general principle, it would not be the existence of any fiduciary duty to the shareholders of the bank which would be the basis of that conflict.

158. The Committee also notes the observation of the *Vivendi II* Committee that the roles of director of a major international bank and arbitrator "may not be compatible and should not be, or in a modern international arbitration environment, should no longer be combined". It may be the case that, in future, such positions will not be combined. The Committee notes that Professor Kaufmann-Kohler has resigned from the UBS Board. However, what the position should be in the future is not the issue. What matters for the purposes of the present proceedings is whether the remaining members of the Tribunal acted unreasonably in concluding that Professor Kaufmann-Kohler's directorship of UBS did not require her disqualification.

[180] Transcript, pp. 281 and 286.

159. That another reasonable tribunal could have reached the same decision as Professors Park and Remón is clear from the fact that another tribunal did in fact do so. In the *Suez II* decision on disqualification, which again involved a proposal to disqualify Professor Kaufmann-Kohler on the grounds of her directorship of UBS, the remaining members of the tribunal – Professors Salacuse and Nikken – dismissed the proposal to disqualify. They held (for the same reasons as this Committee, see para. 108, above) that an arbitrator was required to be both independent and impartial.[181] Having noted the size of UBS and the enormous range of its investments,[182] they held that Professor Kaufmann-Kohler's membership of the UBS Board did not in itself give rise to a conflict of interest, as UBS was not involved in the arbitration, but was relevant only because it might suggest a degree of connection between Professor Kaufmann-Kohler and the claimants since UBS held shares in the claimants on behalf of third parties. [183] They then stated:

> But the fact of an alleged connection between a party and an arbitrator in and of itself is not sufficient to establish a fact that would establish a manifest lack of that arbitrator's impartiality and independence. Arbitrators are not disembodied spirits dwelling on Mars who descend to earth to arbitrate a case and then immediately return to their Martian retreat to await inertly the call to arbitrate another. Like other professionals living and working in the world, arbitrators have a variety of complex connections with all sorts of persons and institutions.[184]

160. What was necessary, according to Professors Salacuse and Nikken, was to evaluate the degree of connection between the arbitrator and the party to the arbitration by reference to the proximity, intensity, dependence and materiality of that connection. In relation to Professor Kaufmann-Kohler's connection with the claimants as a result of her membership of the UBS Board, they found that the link fell short of anything which would give rise to reasonable doubts about her impartiality or independence. The UBS investment was not strategic and "with respect to any alleged benefit flowing to UBS as a result of this arbitration, it should be pointed out that UBS's holding in Suez and Vivendi would have an insignificant effect on UBS profitability given the enormous size and scope of UBS global operations".[185] Under

[181] *Suez II*, para. 28.
[182] *Suez II*, para. 10.
[183] *Suez II*, para. 31.
[184] *Suez II*, para. 32.
[185] *Suez II*, para. 36.

the system which prevails in Switzerland of separation of the Board of Directors from the management of a company, Professor Kaufmann-Kohler had no knowledge of the UBS shareholdings in the claimants until the challenge, had no role in making them or in monitoring their performance, and "no direct relationship with the claimants by virtue of her directorship".[186] There was no frequency of interaction between Professor Kaufmann-Kohler and the claimants and Professor Kaufmann-Kohler would derive no benefit from an award in favour of the claimants. Professors Salacuse and Nikken also rejected the argument that Professor Kaufmann-Kohler's failure to disclose her membership of the UBS Board was indicative of a lack of impartiality or independence. Such a duty arose only where the arbitrator reasonably believed that circumstances existed which might cause a reasonable person to doubt whether that arbitrator would behave independently and impartially. Professor Kaufmann-Kohler had inquired with UBS about conflicts of interest and been told that (with the exception of her participation in the Americas Cup Jury) there were none; it had been reasonable for her to rely upon that advice.[187]

161. The Committee considers that both the Disqualification Decision in this case and the one in *Suez II* are carefully reasoned and comprehensive in their consideration of the issues. The Disqualification Decision in the present case carefully assesses the significance of the indirect links which Professor Kaufmann-Kohler's membership of the Board of UBS created with EDFI. The Committee considers that Professors Park and Remón were plainly correct in identifying the ownership by the UBS Foundation of shares in EDFI's parent company, EDF, as the critical issue. The fact that UBS and another subsidiary of EDF held shares in AEM Milan did not give UBS an interest of any kind in the success or failure of EDF or EDFI. *A fortiori*, no conflict of interest could arise from the fact that UBS had held shares in Motor Columbus, in which EDF also had a substantial shareholding, given that it had disposed of those shares before Professor Kaufmann-Kohler became a director of UBS. The participation of UBS in the financial consortium which assisted in the placement of EDF shares on the French market similarly created no community of interest between UBS and EDF, while the fact that UBS listed EDF as a good investment opportunity is too remote a connection to give rise to a conflict of interest. None of the findings in the Disqualification

[186] *Suez II*, para. 40.
[187] *Suez II*, para. 48.

Decision on these points are ones which it could plausibly be said that no reasonable tribunal would have made.

162. The fact that the UBS Foundation held shares in EDF, as the Tribunal remarked, "stands on a somewhat different footing". Nevertheless, the Committee considers that, as Professors Park and Remón held, the fact that the ultimate beneficiary of any rise in the value of those shares would be the Swiss funds which participated in the Foundation and not UBS itself, the relative insignificance of the investment when seen in the context of the overall size of UBS's investments and the fact that Professor Kaufmann-Kohler had no responsibility for, or involvement in, the management of this or other investments were grounds on which any reasonable decision-maker could, and would be likely to, conclude that there was no basis for holding that Professor Kaufmann-Kohler manifestly lacked the requisite independence and impartiality. It is noticeable that at least one other decision-maker, namely the tribunal in *Suez II*, did indeed reach such a conclusion.

163. The same is true of the failure by Professor Kaufmann-Kohler to disclose her appointment to the UBS Board. Both Professors Park and Remón in the present case, and Professors Salacuse and Nikken in *Suez II*, carefully explained why that failure was not sufficient to indicate a lack of independence or impartiality.

164. The Committee has taken note of the fact that the *Vivendi II* Committee, though eventually deciding not to annul the award in that case, took a far more critical view of Professor Kaufmann-Kohler's conduct. Nevertheless, the Committee considers that the *Vivendi II* decision does not cause it to conclude that the Disqualification Decision in the present case was unreasonable. It therefore dismisses the application that the Award should be annulled on account of Professor Kaufmann-Kohler's directorship of UBS or her non-disclosure of that directorship.

### 3. Professor Remón

165. The Committee turns, therefore, to Argentina's challenge to Professor Remón. As has already been explained, this challenge is raised for the first time before the Committee and must therefore be considered *de novo*. The challenge came about because of a letter written

by Professor Remón to the Secretary of the Tribunal on 18 April 2012.[188] It is therefore worth quoting that letter in full:-

> On 16 April 2012, the media have informed that Argentina has announced the expropriation of the 51% stake that the Spanish company Repsol has in Ypf. I hereby wish to inform:
>
> 1. That the law firm Uría Menéndez, of which I am a partner, is among the firms that have traditionally provided legal advisory services to Repsol. I have actually acted as counsel for Repsol in various proceedings.
> 2. Naturally this fact does not affect nor shall it affect my impartiality or independence in any way whatsoever in this arbitration (ICSID case No. ARB/03/23).
> 3. If Repsol were to request any kind of assistance from Uría Menéndez in connection with the mentioned decision to expropriate, I would refrain from taking part in the matter while these proceedings are ongoing.

Professor Remón concluded by expressing his wish that this information be communicated to the Parties.

166. On 27 April 2012, Argentina wrote requesting Professor Remón's resignation on the basis that his relationship, through the firm Uría Menéndez, with Repsol, a company now in an adversarial situation vis-à-vis Argentina, created reasonable doubts about his independence and impartiality.[189] The Claimants also submitted observations, on 2 May 2012, rejecting the suggestion that Professor Remón should resign.[190] Professor Remón responded, on 11 May 2012, in the following terms:

> After the analysis of the communications of the parties, dated 27 April and 2 May, bearing in mind that the deliberations of the Tribunal and the drafting of the award were completed several weeks before the announcement of the expropriation, I confirm that the facts that, for the sake of transparency, I included in my letter of disclosure do not affect my impartiality or independence as arbitrator in these proceedings.

The Award was signed by Professor Park, the Chairman, on 8 May 2012, by Professor Kaufmann-Kohler on 11 May 2012 and by Professor Remón on 14 May 2012. It was handed down to the Parties on 11 June 2012. On 4 December 2012 Repsol commenced

[188] RA 531.
[189] RA 532.
[190] AC 9.

arbitration proceedings against Argentina. Uría Menéndez represented Repsol in those proceedings.

167. Those who have been required to take decisions on whether or not to disqualify an arbitrator on account of the involvement of his or her law firm in separate proceedings against one of the parties have unsurprisingly taken the view that the fact that the law firm of which an arbitrator is a member is acting against one of the parties to the arbitration in separate proceedings will frequently raise reasonable doubts about the independence and impartiality of the arbitrator, especially where the arbitration concerns legal issues similar to those involved in the other proceedings.[191] However, those cases involved arbitrators whose law firms were already engaged in proceedings in which they acted for a party adverse to one of the parties in the arbitration before the arbitration proceedings had concluded. In the present case, the timetable is very different.

168. There is no indication in Professor Remón's letter of 18 April 2012 that Uría Menéndez was at that stage actually representing or advising Repsol in a manner adverse to Argentina, only that it might at some future stage be asked to do so. That possibility does not, in itself, create a conflict of interests. Nor does the Committee accept Argentina's submission that Professor Remón's comment that "if Repsol were to request any kind of assistance from Uría Menéndez in connection with the mentioned decision to expropriate, I would refrain from taking part in the matter while these proceedings [i.e. those in the case between the present Claimants and Argentina] are ongoing" indicates that once the arbitration in the present case had concluded he would be in a position adverse to Argentina. The Committee accepts that the fact that Repsol did not commence arbitration proceedings until 4 December 2012, nearly six months after the Award in the present case had been given to the Parties, is not in itself decisive. If an arbitrator's law firm is advising an entity in preparation for the commencement of legal proceedings against one of the parties to the arbitration, that fact would present a conflict of interests irrespective of whether those proceedings had actually been commenced at that time. However, the conflict of interests would not arise until the firm started to give such advice or otherwise to act for that entity in a matter in which it was adversarial to the party to the arbitration.

[191] See *Blue Bank*, note 97, above, paras. 67-68 and *ICS Inspection Control Services Ltd. v. Argentina*, Decision of the Appointing Authority, 17 December 2009, pp. 4-5.

169. Argentina points to the attendance of a partner in Uría Menéndez, acting as Repsol's proxy, at a meeting of the shareholders of YPF on 6 June 2012, that is five days before the Award was given to the Parties. According to the minutes of that meeting,[192] that partner made reference to a dispute between Repsol and Argentina. Argentina maintains that the duty of an arbitrator to act independently and impartially does not cease when the award is completed but only when the award is given to the parties. While the Committee agrees that the duty to act independently and impartially continues until the award has been delivered, it does not accept the conclusion which Argentina seeks to draw with regard to the present case. By 6 June 2012, the Award had already been completed and signed by all three members of the Tribunal. While an arbitrator remains obliged to act independently and impartially up to the moment that the award is delivered, once that arbitrator has signed the award there is normally no further occasion for the arbitrator to act in relation to the arbitration proceedings; certainly there is no evidence before the Committee that Professor Remón was called upon to perform any act as arbitrator after he had appended his signature to the Award on 14 May 2012.

170. Moreover, for the reasons already given (paragraphs 133 to 134, above), a conflict of interests would constitute a ground for annulment only if it could have had an effect upon the award. In the present case, Professor Remón's letter of 11 May 2012 makes clear that the drafting of the Award had been completed several weeks before the announcement of 16 April 2012. There is no reason to doubt the truth of that statement, which is confirmed on this point by Professor Kaufmann-Kohler's letter of the same date. On the contrary, the length (over 300 pages) and complexity of the Award, together with the fact that it was to be rendered in both English and Spanish and thus had to be translated from the language in which it had been drafted, also point to the conclusion that the drafting must have been completed before 16 April if the Award was to be delivered on 11 June 2012. It follows that, even if Uría Menéndez became involved in advising Repsol about possible proceedings against Argentina between 16 April and 11 June 2012, the conflict of interest thus created for Professor Remón could not have influenced the Award and cannot, therefore, constitute a ground for annulment.

[192] RA 542.

171. Nevertheless, there is one further matter to consider. Argentina points to the fact that Repsol's Notice of Arbitration referred not just to formal expropriation but also to other steps taken before the announcement of 16 April 2012 and going back to the last weeks of 2011. Since Uría Menéndez was, according to Professor Remón's letter of 18 April 2012, one of the firms which "traditionally provided legal advisory services to Repsol", it should be inferred that they were already engaged in advising Repsol regarding its relations with Argentina and the legal strategy it should adopt as early as November 2011.[193]

172. The Claimants counter that this is pure speculation and that, even if it were well-founded, since Argentina knew what it intended to do vis-à-vis Repsol, it must be taken to have waived any objection to Professor Remón as regards any conflict of interest arising out of events in late 2011 or early 2012.

173. The Committee does not accept the Claimants' waiver argument. That argument would have been well-founded had Uría Menéndez been representing Repsol in court or arbitration proceedings in the period November 2011 to March 2012, since Argentina would have been aware of the firm's involvement in proceedings against Argentina. The same cannot be said, however, regarding any advisory role that Uría Menéndez might have had. There is no reason to assume that Argentina would have known which law firm, if any, was advising Repsol regarding its relations with Argentina in that period, unless that firm was openly engaged in correspondence or meetings and there is no evidence to suggest that that was the case.

174. Nevertheless, the Committee agrees with the Claimants that Argentina's argument about the role that Uría Menéndez may have played before the announcement of 16 April 2012 is purely speculative. No evidence whatever has been put before the Committee that would enable it to conclude that Uría Menéndez was advising Repsol regarding a legal strategy *vis-à-vis* Argentina during that period. The Committee agrees with the observation of the *SGS* Tribunal quoted at paragraph 110, above, and, in particular, with that tribunal's comment that

[193] Memorial, paras. 62-67.

"an arbitrator cannot, under Article 57 of the Convention, be successfully challenged as a result of inferences which themselves rest merely on other inferences".[194]

175. Accordingly, the Committee also dismisses Argentina's application to annul the Award on the ground of a supposed lack of independence and impartiality on the part of Professor Remón.

## V. Applicable Law Issues

### *A. Introduction*

176. Argentina maintains that, in deciding on the applicable law, the Tribunal manifestly exceeded its powers (ICSID Article 52(1)(b)), failed to state the reasons on which the Award was based (ICSID Article 52(1)(e)) and was guilty of a serious departure from a fundamental rule of procedure (ICSID Article 52(1)(d)).[195]

177. These allegations concern three aspects of the Award. The first concerns the decision of the Tribunal that the "Claimants' claims may be decided solely on the basis of the Argentina-France BIT",[196] thereby excluding application of the Argentina-Luxembourg BIT. The second concerns the failure of the Tribunal to apply Argentine law, which Argentina had argued was "essential in determining the nature and scope of Claimants' treaty-based rights as well as in deciding whether a breach of such rights has occurred".[197] In addressing that argument, the Tribunal concluded that -

> … in the context of its mandate under the Argentine-France BIT, the terms of that treaty provide the lodestar for decision. It may well be that a national court deciding analogous issues would come to a different conclusion. However, in the present dispute the BIT supplies the primary foundation and framework for the Tribunal's consideration of investor protection.[198]

[194] *SGS*, note 145, above, 8 ICSID Reports 402.
[195] Application, paras. 32-47.
[196] Award, para. 887.
[197] Award, para. 903.
[198] Award, para. 904.

The third aspect of the Award challenged under this heading is the Tribunal's conclusion that, in its Jurisdictional Decision, it had "laid down no general requirement of discrimination as a basis for liability under relevant treaty provisions".[199]

### *B. Parties' Arguments*

#### 1. Argentina

178. Argentina maintains that it is now well-established that one form of manifest excess of powers is the failure of a tribunal to apply the applicable law [200] and that the Tribunal so failed in three respects. First, it held that León's claim was governed by the Argentina-France BIT, rather than the Argentina-Luxembourg BIT, notwithstanding that León was a Luxembourg corporation. Secondly, it failed to apply Argentine law in breach of a clear directive in the BITs. Argentina also maintains that the Tribunal failed to state reasons for this aspect of its decision.

179. Argentina contends that León, which remained a Claimant throughout the proceedings and thus benefits from the Award, could not have had standing to claim under the Argentina-France BIT, because it was at all times a Luxembourg corporation. To apply the Argentina-France BIT to León's claims was, therefore, a manifest excess of power. According to Argentina, it was also contrary to the approach taken in the Jurisdiction Decision, where the Tribunal had found that it possessed jurisdiction over León's claims under the Argentine-Luxembourg BIT.

180. In addition to exceeding its powers in this respect, the Tribunal also failed to explain how the Argentina-France BIT could apply to León.[201] To the extent that it could be said to have attempted to do so, its reasoning was contradictory in that it referred to León's cession of its rights to EDFI after proceedings had commenced, whereas the Tribunal had made clear in the Jurisdiction Decision that it was the state of affairs at the time of the commencement of proceedings that was decisive.

[199] Award, para. 920.
[200] Memorial, paras. 138-9.
[201] Transcript, pp. 68-75.

181. While the application by the Tribunal of the Argentina-France BIT was one aspect of a manifest excess of powers, the failure to apply the Argentina-Luxembourg BIT to León's claims was another. According to Argentina, it was that treaty which plainly constituted the applicable law in respect of León and the Tribunal's failure to apply it deprived Argentina of the ability to rely on the "public order" defence afforded by Article 3(2) of the Argentine-Luxembourg BIT, which the Tribunal expressly recognized might have made a difference to the outcome of the case.[202] Again, this decision entailed not just a manifest excess of powers but also a failure to state reasons. In particular, Argentina refers to what it characterizes as contradictions between different parts of the Award and between the Award and the Jurisdiction Decision.

182. As a distinct ground for annulment, Argentina challenges the Tribunal's decision that the case was to be decided by reference only to the Argentina-France BIT and international law and not to apply the law of Argentina. According to Argentina, this approach ignored the provisions of Article 42(1) of the Convention which requires a tribunal – in the absence of agreement by the parties – to "apply the law of the Contracting State (including its rules on the conflict of laws) and such rules of international law as may be applicable". The result was that the Tribunal failed to apply Argentine law as the law governing the Concession Agreement and, more fundamentally, disregarded the extensive powers which the Constitution of Argentina gave to the government to deal with emergencies such as that of 2001-02. The Tribunal had also failed to state its reasons since it referred only to the principle of international law that, in the event of a conflict, international law prevails over national law without giving any indication of what conflict it considered to exist between international law and the law of Argentina.

183. Finally, Argentina refers to what it terms a contradiction between the Jurisdiction Decision and the Award with regard to the issue of discrimination. According to Argentina, in the Jurisdiction Decision, the Tribunal held that the Claimants would have to prove discrimination in order to establish a case of breach of either BIT. In the Award, however, it repudiated that finding and held that discrimination was not a requirement for the establishment of a breach of the fair and equitable treatment standard or certain other

[202] Award, para. 888.

provisions of the treaties. Argentina again characterises this decision as a manifest excess of power and argues that the Tribunal failed to give a coherent and non-contradictory statement of its reasons, as well as departing in a serious way from a fundamental rule of procedure.

### 2. The Claimants

184. The Claimants reject the suggestion that the Tribunal erred in any annullable fashion in relation to the applicable law. They maintain that Argentina invokes three separate paragraphs of Article 52(1) but treats them as largely indistinguishable. According to the Claimants, even though an application for annulment may raise more than one paragraph of Article 52(1), each is a separate ground for annulment which must be independently established.[203] In particular, the Claimants maintain that Argentina has not properly pleaded, let alone substantiated, its argument that the Tribunal departed in a serious way from a fundamental rule of procedure.[204] Moreover, according to the Claimants, Argentina's arguments fail to distinguish between a failure to apply the applicable law and misapplication of that law, as well as ignoring the limitations placed on annulment by the relevant parts of Article 52(1).

185. While the Claimants accept that Article 52(1)(b) applies to a manifest failure to apply the applicable law, they maintain that it has no application to "incorrect" application, departure from the view taken by other tribunals regarding the same or a similar issue, or failure to cite any text to support a proposition that it considers to derive from the treaty.[205]

186. The Claimants argue that León was added as a claimant in the Amended Request only because Crédit Lyonnais, its French parent company, had transferred to León its shares in MENDINVERT. The Amended Request invoked the Argentina-France BIT and only pleaded the Argentina-Luxembourg BIT as a fallback position to be relied upon in the event that the Tribunal were to decide that León could not rely upon the Argentina-France BIT.[206]

187. With regard to the non-application of Argentine law, the Claimants maintain that the claims were for violation of the Argentina-France BIT and were therefore necessarily to be decided

[203] Counter-Memorial, paras. 119-120.
[204] Rejoinder, para. 77.
[205] Counter-Memorial, paras. 126-130.
[206] Rejoinder, paras. 83-85.

in accordance with the terms of that treaty and the principles of international law. The Tribunal had carefully analysed and explained its decision not to apply Argentine law.

188. On the issue of discrimination, the Claimants maintain that Argentina misrepresents the Jurisdiction Decision and submit that the Award clearly explained that the Jurisdiction Decision was not laying down a general requirement of discrimination.

189. Finally, the Claimants contend that Argentina's claim that there was a serious departure from a fundamental rule of procedure is misconceived. There was no indication "what aspect of Argentina's right of defense was impaired".[207] Indeed, the whole issue of applicable law was extensively briefed by both Parties.[208]

### *C. The Decision of the Committee*

#### 1. The Legal Framework

190. Before turning to the detail of this particular head of Argentina's Application for annulment of the Award, it is necessary first to make some observations regarding the three paragraphs of Article 52(1) of the ICSID Convention invoked by Argentina, although there appeared to be little if any difference between the Parties regarding the requirements of each paragraph (as opposed to their application to the facts of the present case).

##### *a. Manifest excess of powers (Article 52(1)(b) of the Convention)*

191. The terms of Article 52(1)(b) make plain that the paragraph lays down two requirements which must be met if an Award is to be annulled on this ground. First, the tribunal must have exceeded its powers and, secondly, that excess of power must be "manifest". The most obvious instance of an excess of power by a tribunal is the decision of an issue which falls outside the jurisdiction of the tribunal under the ICSID Convention or the relevant BIT (or other instrument conferring jurisdiction). However, decisions of *ad hoc* committees in other cases have made clear that it is also an excess of power for a tribunal to fail to apply the law applicable to the case or to the particular issue in the case.

[207] Rejoinder, para. 106.
[208] Rejoinder, para. 107.

192. The requirement that the excess of powers be "manifest" refers to how readily apparent the excess is, rather than to its gravity. In the words of one leading commentary on the ICSID Convention –

> In accordance with its dictionary meaning, "manifest" may mean "plain", "clear", "obvious", "evident" and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. … An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.[209]

This view has been endorsed in several decisions of *ad hoc* committees. Thus, in *Wena Hotels Ltd*. v. *Egypt*, the committee stated that –

> The excess of power must be self evident rather than the product of elaborate interpretation one way or the other. When the latter happens, the excess of power is no longer manifest.[210]

Similarly, the committee in *CDC Group v. Seychelles* stated –

> As interpreted by various *ad hoc* committees, the term "manifest" means clear or "self-evident". Thus, even if a tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a tribunal's conduct, if susceptible of argument "one way or the other" is not manifest. As one commentator has put it, "if the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive."[211]

193. While the Committee agrees that an excess of powers will be manifest only if it can readily be discerned, it considers that this does not mean that the excess must, as it were, leap out of the page on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being "manifest".[212] Moreover, in any case some examination of the materials

[209] Schreuer, *Commentary*, note 53, above, Article 52, para. 135.
[210] *Wena Hotels Ltd. v. Egypt* (ICSID Case No. ARB/98/4) 6 ICSID Reports 129 at para. 25 ("*Wena*").
[211] *CDC*, note 156, above, para. 41.
[212] See, e.g., the Decision of the *ad hoc* committee in *Vivendi I*, note 70, above.

on which the tribunal's decision was based may be necessary. The Committee in *Duke Energy Ltd v. Peru* put the point in the following terms –

> An *ad hoc* committee will not therefore annul an award if the tribunal's disposition on a question of law is tenable, even if the committee considers it incorrect as a matter of law. The existence of a manifest excess of powers can only be assessed by an *ad hoc* committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties' submissions. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be "manifest".[213]

The Committee agrees with this analysis. It notes also that the *Duke* Committee stated that –

> No distinction is to be drawn in this regard between the standard to be applied to determining an excess of power based on alleged excess of jurisdiction and any other excess of power. In both cases, the excess must be manifest.[214]

***b. Failure to state reasons (Article 52(1)(e) of the Convention)***

194. The provision of Article 52(1)(e) that an award may be annulled if it "fails to state the reasons on which it is based" is closely tied to the provision of Article 48(3), which requires that "the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based".

195. The requirement to state reasons is an important one but it is equally important that an *ad hoc* committee is not drawn into using Article 52(1)(e) as a means for conducting an appeal. Article 52(1)(e) empowers a committee to annul an award if there has been a *failure* to state the reasons on which the award is based; it does not entitle a committee to annul an award because it finds the reasoning unconvincing. The point was very clearly made by the *Vivendi I* Committee in the following passage –

> A greater source of concern is perhaps the ground of "failure to state reasons", which is not qualified by any such phrase as "manifestly" or "serious".

[213] *Duke Energy International Peru Investments No. 1 Limited v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment of 1 March 2011, para. 99 ("*Duke*").
[214] *Ibid*, para. 98.

> However, it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears repeating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.
>
> In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.[215]

196. Similarly, the *Wena* committee explained that –

> The ground for annulment of Article 52(1)(e) does not allow any review of the challenged award which would lead the *ad hoc* committee to reconsider whether the reasons underlying the tribunal's decisions were appropriate or not, convincing or not. As stated by the *ad hoc* committee in *MINE*, this ground for annulment refers to a "minimum requirement" only. This requirement is based on the tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the tribunal to its decision. If such a sequence of reasons has been given by the tribunal, there is no room left for a request for annulment under Article 52(1)(e).
>
> …
>
> Neither Article 48(3) nor Article 52(1)(e) specify the manner in which the Tribunal's reasons are to be stated. The object of both provisions is to ensure that the parties will be able to understand the tribunal's reasoning. This goal does not require that each reason be stated expressly. The tribunal's reasons may be implicit in the consideration and conclusions contained in the award, provided they can be reasonably inferred from the terms used in the decision.[216]

[215] *Vivendi I*, note 70, above, paras. 64-65.
[216] *Wena*, note 210, above, paras. 79 and 81.

197. A tribunal is required to answer each "question" put to it and must therefore give sufficient reasons to meet the "minimum requirement" referred to by the *Wena* committee in respect of each question. It is not, however, required to deal explicitly with every detail of every argument advanced by the parties or to refer to every authority which they invoke. As the *Enron* committee explained –

> … a tribunal has a duty to deal with each of the *questions* ("*pretensions*") submitted to it, but it 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 of each individual item of evidence or each individual legal authority or legal provision relied on by the parties, or did not expressly state a view on every single legal and factual issue raised by 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*.[217]

198. The Committee agrees with these observations regarding the scope and purpose of Article 52(1)(e). Nevertheless, it remains an important part of the annulment process and, as the decision of the *ad hoc* committee in *CMS* demonstrates, where a tribunal has failed to give reasons which enable the parties to understand the decision on a question before it, that part of its award is liable to annulment.[218]

### *c. Serious departure from a fundamental rule of procedure (Article 52(1)(d))*

199. The English text of Article 52(1)(d) provides that an award may be annulled if "there has been a serious departure from a fundamental rule of procedure". The French text is to the same effect, requiring "inobservation grave d'une règle fondamentale de procedure". However, the Spanish text speaks only of "quebrantamiento grave de una norma de

[217] *Enron Creditors Recovery Corp. and Ponderosa Assets LP v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment of 30 July 2010, para. 222 ("*Enron*").
[218] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment of 25 September 2007, para. 96 ("*CMS*").

procedimiento". While all three texts thus require that the breach must have been "serious" ("grave" in French and Spanish), only the English and French texts require that the rule of procedure involved must have been "fundamental". The English, French and Spanish texts of the Convention are equally authentic, so the difference between them has to be resolved by application of the principles of international law regarding treaty interpretation. The relevant principle is generally understood to have been codified in Article 33 of the Vienna Convention on the Law of Treaties 1969, paragraph (4) of which provides that "when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty shall be adopted". In the case of Article 52(1)(d) of the ICSID Convention, the English and French texts unequivocally require a departure from a "fundamental" rule of procedure and are thus narrower than the Spanish text, which refers only to a rule of procedure. Since the common ground between the three texts is that they all permit annulment in the case of a serious breach of a "fundamental" rule of procedure, it would appear that the meaning which best reconciles the three texts is one which requires a "serious" departure from a "fundamental" rule of procedure. The Committee also considers that this interpretation sits more happily with the object and purpose of the Convention, which assigns a restricted role to annulment proceedings, as discussed in Part III of this Decision. This interpretation is also the one consistently adopted in the jurisprudence of *ad hoc* committees.[219]

200. The Committee therefore proceeds on the basis that Article 52(1)(d) authorizes annulment only if two conditions are met: the rule of procedure involved must have been fundamental and the breach of that rule must have been serious. The implications of this two-fold requirement were summarized by the *MINE* Committee in the following terms –

> A first comment on this provision concerns the term "serious". In order to constitute a ground for annulment the departure from a "fundamental rule of procedure" must be serious. The Committee considers that this establishes both quantitative and qualitative criteria: the departure must be substantial and must be such as to deprive a party of the benefit or protection which the rule was intended to provide.

[219] See, in particular, *Repsol YPF Ecuador SA v. Petroecuador* (ICSID Case No. ARB/01/10), Decision on annulment of 8 January 2007, para. 81 ("*Repsol*") and Schreuer, *Commentary*, note 53, above, Article 52, paras. 280-281.

> A second comment concerns the term "fundamental"; even a serious departure from a rule of procedure will not give rise to annulment, unless that rule is "fundamental". The Committee considers that a clear example of such a fundamental rule is to be found in Article 18 of the UNCITRAL Model Law on International Commercial Arbitration which provides: "the parties shall be treated with equality and each party shall be given full opportunity of presenting his case." The term "fundamental rule of procedure" is not to be understood as necessarily including all of the Arbitration Rules adopted by the Centre.[220]

### 2. Application of the Argentina-France BIT and Non-Application of the Argentine-Luxembourg BIT

201. In its Award, the Tribunal noted that "the Parties are for the most part in accord that this case can and should be decided solely on the basis of the Argentine-France BIT".[221] It went on, however, to observe that an important exception lay in Argentina's

> "affirmative defense, asserted exclusively against Claimant León, namely that Article 3(2) of the Argentina-Luxembourg BIT applies to expressly exempt Argentina from any liability which might result from "…measures necessary to maintain public order".[222]

202. The Tribunal held, however, that the entire case fell to be decided under the Argentina-France BIT and that it was not necessary to apply the Argentina-Luxembourg BIT.[223] Article 3(2) of the latter treaty thus became irrelevant to the decision, although the Tribunal noted that –

> Had the Tribunal decided to grant relief on the basis of Article 3(2) of the Argentina-Luxembourg BIT, then the "public order" defense of that provision might have had consequences. Such is not the case, however.[224]

203. In its Application, and in the written pleadings, Argentina complains of the failure to apply the Argentina-Luxembourg BIT.[225] At the oral hearings, however, while maintaining that complaint, Argentina added an argument that the Tribunal committed a manifest excess of

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[220] *MINE*, note 70, above, paras. 5.05-5.06.
[221] Award, para. 179.
[222] Award, para. 180.
[223] Award, paras. 884-887.
[224] Award, para. 888.
[225] Application, paras. 33-34; Memorial, paras. 141-144; Reply, paras. 90-99.

power in deciding that the Argentina-France BIT applied to León's claims; since León was a Luxembourg company, Argentina argues, there was no basis on which its claim could fall within that treaty.[226]

204. The Claimants maintain that it was not open to Argentina to challenge the Award on this basis at so late a stage in the proceedings.[227] The Committee does not agree. While it is a matter for regret that the issue was not more clearly pleaded, the Committee considers that the complaint about the *application* of the Argentina-France BIT is merely the other side of the coin from the complaint about the *failure to apply* the Argentina-Luxembourg BIT to León's claims. The issue was therefore raised in a timely fashion.[228]

205. The Claimants also argue that the position of León was irrelevant, because in 2005, long before the date of the Award or even of the pleadings on the merits, León's interests in SODEMSA had been transferred to IADESA and its right to maintain the ICSID claim to EDFI, so that, by the time of the hearings on the merits, EDFI owned the rights to the entire ICSID claim.[229] On that basis, the Claimants argue that "the Tribunal reached the logical conclusion that it didn't need to apply the Luxembourg BIT because there was nothing there to apply it to".[230] Argentina counters that León remained a claimant throughout the proceedings, that the *dispositif* granted relief, including the declaratory relief in its first paragraph, to "the Claimants" without distinguishing between them and that the Jurisdiction Decision had ruled that the critical date was that of the request for arbitration, which was why León and SAURI had remained claimants.[231]

206. In order to analyse this argument, it is necessary to recall the history of the Claimants' involvement in EDEMSA. In July 1998, when the Government of Mendoza concluded with EDEMSA the Concession Agreement which was at the heart of the case before the Tribunal, 51% of the shares in EDEMSA were purchased by a consortium of EDFI, SAURI and Crédit

[226] Transcript, p. 60.
[227] Transcript, p. 211.
[228] The Claimants also suggested that Argentina raised the issue of the application of the Argentina-France BIT in response to a question from the Committee (Transcript, p. 212). However, the transcript shows that counsel for Argentina had raised this point shortly before the Committee put the question to which the Claimants refer (see Transcript, pp. 60-61.
[229] Transcript, pp. 212-215.
[230] Transcript, p. 215.
[231] Transcript, pp. 60-68 and 265-270.

Lyonnais (all of which are, and were then, French companies) and Argentine co-investors. That shareholding was held by SODEMSA, a company incorporated in Argentina. EDFI held 45% of the shares in SODEMSA and SAURI 15%. The remaining 40% were held by another Argentine company, MENDINVERT. Crédit Lyonnais held a 70% shareholding in MENDINVERT with the remaining 30% being held by Argentine investors. Crédit Lyonnais subsequently transferred its shareholding in MENDINVERT to León, a company incorporated in Luxembourg that was wholly owned by Crédit Lyonnais. That was how matters stood at the time the Amended Request for Arbitration was filed on 4 August 2003. The Amended Request sought to add Léon as a claimant to the proceedings already instituted by EDFI and SAURI on 16 June 2003. The Tribunal noted that:

> Claimant León is said to be an assignee of the investment made in Argentina by its French parent company, Crédit Lyonnais, and hence, has standing to file arbitrations under the Argentina-France BIT. See Amended Request footnote 1. Nevertheless, to the extent its Luxembourgian corporate nationality is found to preclude standing, León invokes the provisions of the [Argentina-Luxembourg BIT].[232]

207. In 2004 León became a wholly-owned subsidiary of EDFI.[233] Subsequently León sold its shares in MENDINVERT to an Argentine company, IADESA, but transferred its right to the present ICSID claim to EDFI.[234] At the same time, EDFI, which had earlier acquired SAURI's shares in SODEMSA, sold its entire shareholding in SODEMSA to IADESA, while retaining the right to the ICSID claims.[235]

208. In its Jurisdiction Decision, the Tribunal held that "as a general matter, the date when proceedings are instituted serves as the relevant time to establish jurisdiction"[236] and cited both arbitral and International Court of Justice authority to that effect. Accordingly, the Tribunal concluded that, notwithstanding the transfers in 2004, SAURI and León should remain claimants.[237] Nevertheless, it added that "whether SAURI and León still have

[232] Award, para. 9.
[233] Jurisdiction Decision, para. 7.
[234] Jurisdiction Decision, para. 88.
[235] Jurisdiction Decision, para. 91. In the Jurisdiction Decision, the Tribunal rejected Argentina's argument, based on the award in *Loewen Group v. United States of America*, 128 *International Law Reports* 334, that the lack of continuous ownership from the date the dispute arose to the culmination of arbitration proceedings precluded jurisdiction. No challenge is made to that ruling in the present proceedings.
[236] Jurisdiction Decision, para. 93.
[237] Jurisdiction Decision, paras. 92 and 95.

substantive rights is a different issue, which the Tribunal will need to review together with the merits".[238]

209. When addressing the merits in its Award, the Tribunal held:

> 884. The Tribunal notes that Claimants do not base their substantive request for relief on the Argentina-Luxembourg BIT, except to the extent of provisions that might be incorporated by reason of the Most Favored Nation clause in the Argentina-France BIT. See Claimants' Post-Hearing Brief on the Merits at paragraph 59.
>
> 885. While Claimants did invoke the Argentina-Luxembourg BIT in their Request for Arbitration, as well as certain subsequent pleadings, they did so only insofar as that BIT might have been relevant to claims by León. Claimant [sic] further noted that the relevant interests were held at the outset entirely by French companies.
>
> 886. At present, French investors again own all of the shares considered by the Tribunal in its findings of liability and quantum, including any which for a time were owned by León. Crédit Lyonnais (incorporated in France) was the initial owner of the relevant shares which were subsequently transferred to León, its wholly-owned subsidiary. Ultimately, those shares were acquired by EDFI, a French investor which now possesses all relevant rights. See Claimants' Post-Hearing Brief on the Merits, paragraphs 59-60.
>
> 887. Accordingly, Claimants' claims may be decided solely on the basis of the Argentina-France BIT.[239]

210. There is no doubt that this passage demonstrates that the Tribunal considered that the real claim which it had to consider was that of EDFI which, by the time of the Award, possessed all relevant rights to the ICSID claims. The Committee sees no contradiction between that recognition and the finding, in the Jurisdiction Decision, that the critical date for purposes of ascertaining jurisdiction was the date on which the arbitration proceedings were commenced. As the Tribunal made clear in its Jurisdiction Decision, the issue of jurisdiction is separate from the question what, if any, substantive rights each Claimant possessed.[240] Nevertheless, while the Tribunal quite rightly focussed on the position of EDFI, the Committee does not accept the Claimants' contention that the position of León (and by implication also of

[238] Jurisdiction Decision, para. 95.
[239] See also Award, paras. 1151-1152.
[240] Jurisdiction Decision, para. 95.

SAURI, though no challenge has been made in respect of this company) became irrelevant. León and SAURI remained Claimants and the relief granted in the *dispositif* was granted to "Claimants" without any distinction between them. While León might be unable to enforce the award of damages given that it has assigned its rights to EDFI, all three Claimants may be said to have the benefit of the declaratory relief granted in paragraph I of the *dispositif*, which records the Tribunal's decision that –

> Respondent has breached its obligations to (i) respect specific commitments undertaken in connection with Claimants' investment and (ii) afford Claimants Fair and Equitable Treatment with respect to their investment.

The Committee is not persuaded by the Claimants' argument that this paragraph was not declaratory relief but "really just articulation of the conclusion by the Tribunal that Argentina had violated the BIT" and that "it didn't actually confer any relief as such".[241] The form of the paragraph and its place in the *dispositif* means that it cannot be dismissed so readily. Moreover, the Claimants' Reply on the Merits in the proceedings before the Tribunal had concluded with a section entitled "Claimants' Request for Relief" which expressly requested that the Tribunal make the determination which appeared at paragraph I of the *dispositif* [242] and the Award duly recited that request.[243]

211. The question, therefore, is whether, in the light of its earlier ruling on jurisdiction, the Tribunal manifestly exceeded its powers by holding that León possessed rights under the Argentina-France BIT. In the Committee's view the Tribunal did not do so.

212. It is necessary to recall that at all relevant times León was wholly owned by a company with its seat in France – initially Crédit Lyonnais and, later, EDFI. It held its investment in Argentina (the shares in MENDINVERT which in turn held shares in SODEMSA, which in turn held shares in EDEMSA) by virtue of an assignment from its then parent company, Crédit Lyonnais, and later assigned its rights to the ICSID claims to EDFI. In other words, this was an essentially French investment, ultimate ownership and control of which rested at all times with a French company. It would be an unduly formalistic approach to hold that, in

[241] Transcript, p. 214.
[242] Claimants' Reply on the Merits, para. 712; AC 15.
[243] Award, para. 880.

these circumstances, the claim fell outside the scope of the Argentina-France BIT unless the terms of that treaty compelled such a decision. The Committee does not consider that they do so.

213. On the contrary, the Committee notes that standing to claim under the Argentina-France BIT is governed by Article 8(1) of the BIT which covers "any dispute concerning investments in the terms of this Agreement between one Contracting Party and *an investor of the other Contracting Party*" (emphasis added). The term "investor" is defined by Article 1(2) of the BIT, paragraph (c) of which provides, in relevant part, that:

> The term "investors" means:
>
> c) artificial persons effectively controlled directly or indirectly by … artificial persons having their seat in the territory of either of the Contracting Parties and constituted in accordance with its legislation.

The Committee considers that this provision encompasses León, because it was effectively controlled at the time of the Amended Request by Crédit Lyonnais and subsequently by EDFI, both of which were companies constituted under the law of France and having their seats in France.

214. In these circumstances, the Committee considers that the Tribunal's decision that León's claims fell within the ambit of the Argentina-France BIT cannot be considered to involve a manifest excess of power. Since, as the Committee has already explained – and as is clear from Argentina's own submissions – the Tribunal's decision not to apply the Argentina-Luxembourg BIT is just the other side of the coin of its decision to apply the Argentina-France BIT, the Committee also concludes that that decision involved no manifest excess of powers.

215. The Committee does not accept that the Tribunal failed to state the reasons for its decision on the application of one BIT and the non-application of the other. The Tribunal made clear, first, that the claim was brought under the Argentina-France BIT with reliance being placed on the Argentina-Luxembourg BIT only as an alternative.[244] It traced carefully the

[244] Award, para. 9.

ownership of León and its position vis-à-vis the other Claimants.[245] Its reasoning shows that its conclusion that the only BIT to be applied was that between Argentina and France was based upon the fact that the investment was originally held entirely by French companies and that León was involved only by virtue of a transfer from its parent company by which it continued to be owned and controlled, and that, by the time of the hearing, the relevant rights were held entirely by EDFI. The Committee considers that this reasoning is sufficient to enable the reader to follow the logic behind this aspect of the Award.

216. Nor is the Committee persuaded by Argentina's argument that the Tribunal contradicted itself. The Committee sees no contradiction between the references to the Argentina-Luxembourg BIT in the Jurisdiction Decision and the conclusion in the Award that the law applicable to the substantive issues was that contained in the Argentina-France BIT. The fact that, even after concluding that the case fell to be determined by reference to the latter treaty, the Tribunal continued to refer to the interpretation of the Argentina-Luxembourg BIT [246] is explained by the fact that the Claimants were invoking the umbrella clause in that treaty. But they did so by relying upon the MFN Clause in the Argentina-France BIT and it was on that BIT that they based their claim. As for the supposed conflict between paras. 886 and 1099 of the Award, to which Argentina referred at the hearing,[247] the Committee can discern no such contradiction. The two paragraphs are dealing with different matters: the first shows that EDFI ultimately acquired all of León's rights to the ICSID claim, while the latter makes clear that León and EDFI did not transfer the rights to the ICSID claim when they sold their shares in MENDINVERT and SODEMSA respectively to IADESA.

217. Finally, the Committee does not accept Argentina's argument that there was a serious departure from a fundamental rule of procedure in respect of this issue. Although such a departure was alleged in the Application and the Memorial, it was not seriously developed until a brief passage in paragraphs 98-99 of the Reply, where Argentina alleged that the "decision to depart from the critical date in the Decision on Jurisdiction and not to apply the Argentina-Luxembourg BIT impaired due process". That impairment is said to result from the fact that Argentina was denied a defence (under Article 3(2) of the Argentina-

[245] Jurisdiction Decision, paras. 9, 82-92; Award, paras. 72, 171-175, 884-887 and 1151.
[246] See, for example, Award, para. 889.
[247] Transcript, p. 59.

Luxembourg BIT) that might have affected the quantum of damages. That, however, is not really an argument about due process but about the substance of the Tribunal's decision. Argentina considers that the Tribunal's decision on applicable law was wrong but that does not make it an abuse of process. There is no evidence that the matter was not fully argued or that Argentina was in any way denied the opportunity to put its case. Consequently, there is no ground for annulment under Article 52(1)(d).

### 3. Non-Application of Argentine Law

218. Argentina also challenges what it characterises as the failure of the Tribunal to apply the law of Argentina and its failure to state its reasons for so doing. In this context it is important to recall the provisions of the ICSID Convention and the BIT on applicable law. Article 42(1) of the ICSID Convention provides –

> 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 available.[248]

Article 8(4) of the Argentine-France BIT provides –

> The arbitration organization shall rule based on the provisions of this Agreement, on the laws of the Contracting Party that is a party to the dispute – including rules relating to the conflicts of laws – and on the terms of any special agreements made in connection with the investment, and on the principles of international law on the subject.

The authentic texts are as follows –

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[248] The French text reads –

Le Tribunal statue sur le différend conformément aux règles de droit adoptées par les parties. Faute d'accord entre les parties, le Tribunal applique le droit de l'Etat contractant partie au différend—y compris les règles relatives aux conflits de lois—ainsi que les principes de droit international en la matière.

The Spanish text reads –

El Tribunal decidirá la diferencia de acuerdo con las normas de derecho acordadas por las partes. A falta de acuerdo, el Tribunal aplicará la legislación del Estado que sea parte en la diferencia, incluyendo sus normas de derecho internacional privado, y aquellas normas de derecho internacional que pudieren ser aplicables.

There appears to be no difference between the three texts.

> L'organe d'arbitrage statuera, sur la base des dispositions du présent Accord, du droit de la Partie contractante partie au différend – y compris les règles relatives au conflits de loi - , des termes des accords particuliers éventuels qui auraient été conclus au sujet de l'investissement ainsi que des principes de droit international en la matière.

and

> El órgano arbitral decidirá en base a las disposiciones del presente Acuerdo, al derecho de la Parte Contratante que sea parte en la controversia – incluidas las normas relativas a conflictos de leyes – y a los términos de eventuales acuerdos particulares concluidos con relación a la inversión como así también a los principios del Derecho Internacional en la materia.

While the English translation may be a little inelegant (e.g. in using "laws", rather than "law" as the translation of "droit" and "derecho"), in substance there is no difference between these texts.

219. Article 8(4) of the BIT constitutes the agreement between the Parties regarding the applicable law, since the BIT constitutes the text of the arbitration agreement.[249] The applicable law thus consists of the text of the BIT itself, the law of Argentina and the principles of international law, as well as the terms of any relevant special agreement, such as the Concession Agreement. However, the fact that a particular legal system supplies part of the applicable law does not mean that that law governs a given issue in dispute between the Parties. Which of the various applicable laws determines the answer to any particular question will depend upon the nature of that question. Thus, the interpretation and application of the Concession Agreement clearly fall to be determined by reference to Argentine law as the proper law of that contract. By contrast, if the issue to be determined concerns the interpretation or application of the BIT, those are questions governed by international law.

220. It is in that light that the Tribunal's findings that "in the context of its mandate under the Argentine-France BIT, the terms of that treaty provide the lodestar for decision" and that "in the present dispute, the BIT supplies the primary foundation and framework for the

[249] Schreuer, *Commentary*, note 53, above, p. 558, Article 42, para. 23.

Tribunal's consideration of investor protection" [250] are to be understood. The issues before the Tribunal concerned allegations of breaches of the BIT. Those issues could only be resolved by reference to the terms of the BIT and the principles of international law on subjects such as treaty interpretation. Before the Tribunal Argentina had argued that Argentine law conferred broad powers for addressing an emergency such as the economic crisis confronting Argentina in 2001-2002. The Tribunal concluded, however, that even if Argentine law would have permitted the various actions taken by the Federal and Mendoza authorities which affected the Claimants' investment, that would not have prevented those actions from constituting a breach of the BIT. That conclusion followed from the principle of international law, reflected in Article 27 of the Vienna Convention on the Law of Treaties 1969 and Article 3 of The International Law Commission Articles on State Responsibility, that a State cannot rely upon its internal law to justify a failure to perform its treaty obligations and that the wrongfulness of an act under international law is not affected by the characterisation of that act as lawful by national law.[251] There was, therefore, no manifest excess of power in the form of a failure to apply the applicable law. The Tribunal had noted the relevant principles of Argentine law in its Award but its conclusion was that those principles did not affect the specific issues which the Tribunal had to decide because those issues were governed by the terms of the BIT interpreted and applied in the light of the relevant principles of international law. That conclusion is amply supported by authority [252] and appears to the Committee irreproachable as a matter of logic.

221. Nor is the Committee persuaded that the Tribunal failed adequately to state the reasons for this conclusion. Argentina argues that the Tribunal referred to the primacy of international law in the event of a conflict between Argentine law and international law without anywhere indicating what conflict existed. However, the Tribunal's reasoning is quite clear. The Tribunal considered that whatever Argentine law provided would make no difference to the outcome on the issues before the Tribunal: if Argentine law pointed to the same outcome as international law, then it plainly made no difference, and if it pointed to a different outcome then international law prevailed. That reasoning plainly did not convince Argentina but

[250] Award, para. 904.
[251] Award, paras. 905-908.
[252] See, e.g., the authorities cited in para. 908 of the Award and the discussion in Schreuer, *Commentary*, note 53, above, pp. 617-630, Article 42, paras. 204-230.

Article 52(1)(e) does not permit annulment on the ground that a tribunal's reasoning appears unconvincing. As the Committee has already explained (see paras. 199 to 200, above), the only question is whether "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".[253]

222. The Committee cannot discern any basis on which the Tribunal could be said seriously to have departed from any fundamental rule of procedure in respect of this part of its decision.

### 4. Discrimination

223. Argentina's final challenge under this heading is to the Tribunal's decision on whether or not the Claimants had to prove discrimination in order to establish the existence of a breach of the BIT.

224. This challenge is founded upon paragraph 146 of the Jurisdiction Decision, in which the Tribunal stated –

> To establish treaty breaches, Claimants must prove that Respondent's enactment and implementation of the Emergency Measures constituted discriminatory behaviour as defined in the French and Luxembourg investment treaties. The Tribunal would need to examine *inter alia* Respondent's motives and the impact of the Emergency Measures, and whether they constituted an attempt to deprive Claimants of their rights simply because they were foreign investors.

225. In the Award, the Tribunal dismissed the Claimants' claim that the measures taken violated the prohibition of discrimination.[254] However, it rejected Argentina's argument that the passage just quoted from the Jurisdiction Decision laid down a general requirement of discriminatory intent as a pre-requisite to recovery under any of the provisions of the BIT. It is worth quoting the entire passage in the Award in which this issue was addressed. The Tribunal quoted paragraph 146 of the Jurisdiction Decision (set out above) and continued -

> 916. When read in context, the quoted language does not require discrimination as a necessary pre-requisite to recovery. Rather, the relevant language addressed Respondent's jurisdictional objection pursuant to Article 25(1) of the ICSID Convention.

[253] *Vivendi I*, note 70, above, para. 64.
[254] Award, paras. 1101-1107.

> 917. In that connection, the Tribunal had to consider whether Claimants had demonstrated *prima facie* that the present dispute bore a direct relationship to their investments. Decision on Jurisdiction of 5 August 2008, at paragraph 142.
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> 918. In finding that such a relationship existed, and for that purpose alone, the Tribunal noted Claimants' allegation about a pattern of discriminatory conduct.
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> 919. The Tribunal went on to say that the Respondent would be given an opportunity to test such contentions, with Claimants bearing the burden of proving the alleged discrimination.
>
> 920. The Tribunal laid down no general requirement of discrimination as a basis for liability under relevant treaty provisions, but simply stated that any allegations of treaty breach based on discrimination would need to be proven by Claimants.

226. The Committee considers that the conclusion reached by the Tribunal is entirely compatible with the terms of the BIT and with the relevant parts of the Jurisdiction Decision. It thus entailed no manifest excess of powers. The reasoning is clear and enables the reader to understand what the Tribunal decided, so that there is no annullable failure to state reasons under Article 52(1)(e) of the ICSID Convention. Nor can the Tribunal see anything which might suggest a serious departure from a fundamental rule of procedure.

227. Accordingly, the Committee dismisses the application for annulment of the Award on the grounds discussed in this section of the Decision.

## VI. Derivative Rights and Umbrella Clause Issues

### *A. The Relevant Treaty Provisions*

228. This part of the case turns on the decision of the Tribunal that, by virtue of the MFN Clause in Article 4 of the Argentina-France BIT, the Claimants could rely upon the umbrella clauses in the Argentina-Luxembourg BIT and the Argentina-Germany BIT. It then held that Argentina had violated its obligation to respect the commitments referred to in those umbrella clauses. Article 4 of the Argentina-France BIT provides in relevant part –

> Within its territory and in its maritime zone, each Contracting Party shall provide to the investors of the other Party, with respect to their investments and activities associated with such investments, a treatment no less favourable than that accorded to its own investors or the treatment accorded to investors of the most favoured Nation if the latter is more advantageous. …

There is no suggestion that this English version is not a satisfactory translation of the authentic French and Spanish texts.

229. The umbrella clause in the Argentina-Luxembourg BIT (Article 10(2)) reads as follows –

> Each of the Contracting Parties shall respect at all times the commitments it has undertaken with respect to investors of the other Party.

This English translation was the one used throughout the arbitration proceedings. The Claimants referred to it as an agreed translation [255] but that was contested by Argentina [256] and it seems from the Jurisdiction Decision that it was in fact a translation provided by the Claimants.[257] It is true, however, that it was the translation used, apparently without adverse comment, by both Parties throughout the proceedings before the Tribunal and, indeed, a copy of it was included in the bundle of core materials provided to the Committee by Argentina at the hearings on annulment. Nevertheless, during the course of the hearings, Argentina suggested that the translation was not an entirely accurate reflection of the authentic texts. The Spanish text reads –

> Cada una de las Partes Contratantes respetará en todo momento los compromisos contraídos con los inversores de la otra Parte Contratante.

According to Argentina, a more accurate translation would be –

> Each Contracting Party shall respect at all times the commitments entered into with the investors of the other Contracting Party.[258]

230. A similar issue arose with regard to the umbrella clause in the Argentina-Germany BIT (Article 7(2)). The translation used in the proceedings before the Tribunal reads –

[255] Transcript, p. 328.
[256] Transcript, p. 331.
[257] Jurisdiction Decision, p. 21, n. 14.
[258] Transcript, p. 239 and slide 9 from the Respondent's Closing Statement folder.

> Each Contracting Party shall comply with any other commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party in the former's territory.

The Spanish text reads –

> Cada Parte Contratante cumplirá cualquier otro compromiso que haya contraído con relación a las inversiones de nacionales o sociedades de la otra Parte Contratante en su territorio.

According to Argentina, a more accurate translation would be –

> Each Contracting Party shall comply with any other commitment it has entered into in relation to the investments of nationals or companies of the other Contracting Party in the former's territory.[259]

231. The Claimants object to the introduction by Argentina of these new translations during the oral proceedings, especially as they were introduced during the second round of argument.[260] The Committee agrees that it is highly unfortunate that, if there was a problem with the translations into English, that point was not raised far earlier in the proceedings. It does not consider, however, that it can prevent Argentina from raising the point now. The Argentina-Luxembourg BIT is authentic in Dutch, French and Spanish, while the Argentina-Germany BIT is authentic in German and Spanish. In each case the translation into English is unofficial. To the extent that the issue is whether the Tribunal manifestly exceeded its powers, the Committee considers that it cannot disregard a possible difference between the unofficial translation and the authentic texts. It is a different matter when the issue is whether the Tribunal failed to state its reasons. The Committee considers that a tribunal cannot be faulted, so far as the question whether it adequately stated its reasons is concerned, for having used a translation which neither Party had at any time during the proceedings before the Tribunal, suggested might be inaccurate. In the end, for the reasons given below, nothing turns on the differences between the various translations provided.

[259] Transcript, p. 239 and slide 9 from the Respondent's Closing Statement folder.
[260] Transcript, p. 328.

### *B. The Issues raised by Argentina and the Decision of the Committee*

232. Argentina's challenge under this heading has three different limbs. Since each of these three limbs raises discrete issues, it is more convenient to organize this part of the Decision by addressing each limb in a separate section, rather than reviewing the Parties' arguments on all three points and then proceeding to the analysis of the Committee.

233. In respect of each limb, Argentina appears to argue that the Tribunal manifestly exceeded its powers, failed to state the reasons for its decision and was guilty of a serious departure from a fundamental rule of procedure.[261] No particulars are given, however, and no supporting argument advanced in respect of the claim of a serious departure from a fundamental rule of procedure. The Committee therefore dismisses this aspect of Argentina's challenge, although it would add, for the sake of completeness, that it considers that there is nothing in the record which might suggest – let alone establish – a serious departure from a fundamental rule of procedure.

#### *a. The MFN Clause and the Umbrella Clauses*

##### *(1) Parties' Positions*

234. Argentina's first argument is that an MFN clause cannot be used to import into the treaty in which it is located a form of protection different from those which are already provided for in that treaty.[262] In that respect, it employs an *ejusdem generis* argument and invokes the decision in *Hochtief v. Argentine Republic*,[263] in which an ICSID tribunal, called upon to determine the scope of the MFN clause in the Argentina-Germany BIT, observed –

> … it cannot be assumed that Argentina and Germany intended that the MFN clause should create wholly new rights where none otherwise existed under the Argentina-Germany BIT. … The MFN clause is not a *renvoi* to a range of totally distinct sources and systems of rights and duties; it is a principle applicable to the exercise of rights and duties that are actually secured by the BIT in which the MFN clause is found.[264]

[261] Application, paras. 23-25.
[262] Application, para. 23; Memorial, para. 95; Transcript, pp. 38-40 and 243-246.
[263] *Hochtief Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Jurisdiction of 24 October 2011 ("Hochtief").
[264] *Ibid*, para. 81.

235. According to Argentina, the application of the MFN clause by the Tribunal thus involved a manifest excess of powers. In addition, Argentina complains that the Tribunal never properly stated the reasons for its decision on this point.

236. The Claimants counter that this argument is precisely the one that was rejected in the Jurisdiction Decision.[265] Whereas *Hochtief* concerned the use of an MFN clause to import an investor-State arbitration provision from another BIT (a matter which has proved very controversial), the Tribunal in the present case used the MFN clause in the Argentina-France BIT to import a substantive standard of protection entirely compatible with those already provided for in the Argentina-France BIT. According to the Claimants, that is precisely what such clauses have always been used to achieve and there is no controversy about the legality of such use. Moreover, the Tribunal explained in detail in its Award the reasoning which led it to its conclusion on the MFN clause.

*(2) The Decision of the Committee*

237. The Committee considers that the Tribunal's employment of the MFN clause involved no annullable error. The language of the MFN clause, which is quoted in paragraph 228, above, is quite broad enough to embrace the use of an umbrella clause in another BIT. The clause refers to "treatment" accorded to investors of the most favoured nation. If German investors in Argentina have the benefit of a treaty provision requiring the Host State to honour commitments undertaken (or entered into) in relation to their investment, then they are being accorded a form of treatment which is not expressly granted to French investors by the Argentina-France BIT. That situation falls squarely within the terms of the MFN clause. Even if Argentina is right in arguing that MFN clauses should be subjected to an *ejusdem generis* limitation – as to which, it is unnecessary for the Committee to comment – the umbrella clause is part of the same *genus* of provisions on substantive protection of investments as the fair and equitable treatment clause and other similar provisions which feature in the Argentina-France BIT.

238. The Committee considers that *Hochtief* dealt with an entirely different issue, namely whether an MFN clause can be employed so as to give the investor claiming under one BIT the benefit of a more generous arbitration provision in another BIT. That issue has divided

[265] Counter-Memorial, paras. 87-89; Rejoinder, paras. 55-57; Transcript, pp. 334-335.

tribunals with roughly equal numbers of decisions upholding and rejecting the application of the MFN clause to an arbitration provision.[266] The present case, however, concerns the use of an MFN clause to take advantage of a provision on substantive treatment. On that question, there has been a far greater degree of unanimity. It is true that the comment in *Hochtief* quoted above (see paragraph 234, above) is cast in broader terms but it has to be seen in the context of the issue actually confronting the tribunal in that case. Moreover, as the Committee has already stated, the obligation to honour commitments undertaken with regard to investments is part of the same *genus* of treatment of investments protected by provisions in the Argentina-France BIT. The Committee thus rejects the argument that there was a manifest excess of powers when the Tribunal applied the MFN provision to allow the Claimants to rely upon the umbrella clauses in other Argentine BITs.

239. Nor was there any failure on the part of the Tribunal to state the reasons for its decision on this point. On the contrary, these are set out in some detail at paragraphs 921 to 937 of the Award.

### ***b. Derivative Rights***

#### *(1) Parties' Positions*

240. The second limb of Argentina's argument under this heading is encapsulated in the following passage in the Memorial –

> General international law does not allow indirect actions like those exercised by the Claimants in this arbitration and allowed by the Tribunal. To be able to lodge a claim in this respect, Claimants should have been holders of the rights invoked.[267]

241. Argentina maintains that this principle is based upon the decisions of the International Court of Justice in *Barcelona Traction*,[268] *ELSI*, [269] and *Diallo*.[270] According to Argentina, these cases, reflecting the position under municipal law, draw a sharp distinction between the

[266] Compare the decisions on this point in *Siemens AG* v. *Argentina*, ICSID Case No. ARB/02/8, 3 August 2004, and *Hochtief* with those in *Wintershall AG* v. *Argentina,* ICSID Case No. ARB/04/14, 8 December 2008, and *Daimler Financial Services* v. *Argentina,* ICSID Case No. ARB/05/01, 22 August 2010. All four cases were decided under the Argentina-Germany BIT.
[267] Memorial, para. 70. See also Reply, para. 61.
[268] *Barcelona Traction*, note 12, above.
[269] *ELSI,* note 13, above.
[270] *Diallo,* note 14, above.

shareholder and the company and should have been applied by the Tribunal to preclude the Claimants from claiming for wrongs allegedly done to EDEMSA.

242. In addition, Argentina contends that the approach adopted by the Tribunal had the effect of rendering otiose the final clause of Article 25(2)(b) of the ICSID Convention, which provides that –

> "National of another Contracting State" means:
> …
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and *any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.* (Emphasis added)

According to Argentina, this provision was inserted in the Convention precisely because the general rule was that shareholders cannot claim for wrongs done to the company and a means had therefore to be found to enable a company incorporated in the respondent State to claim in its own right.

243. To allow shareholders to claim, according to Argentina, carries the risk of double recovery for the same wrong. Argentina accuses the Tribunal of having failed to recognize this risk in its Award. It also maintains that the Tribunal's reasoning is contradictory in that "the Tribunal firstly mixed up and then separated EDEMSA and its shareholders in a particularly arbitrary way".[271] In particular, it complains that the Tribunal ignored the increase in tariffs permitted to EDEMSA in 2005 on the ground that the Claimants had already divested themselves of their interests in the company by then.[272]

244. Argentina maintains that, by allowing the Claimants to claim for wrongs allegedly done to EDEMSA rather than to themselves, the Tribunal manifestly exceeded its powers and also failed to state its reasons for so doing.

[271] Memorial, para. 74.
[272] Memorial, para. 75.

245. The Claimants maintain that the Tribunal correctly dismissed Argentina's argument on this point in its Jurisdiction Decision.[273] According to them, the decisions of the International Court of Justice were concerned with the right of a State to diplomatic protection of nationals and not the right of investors to bring claims on their own behalf pursuant to provisions in a BIT. The provisions of the Argentine-France BIT define "investor" and "investment" in sufficiently broad terms that investors such as the Claimants were empowered to bring claims in respect of their investments notwithstanding the existence of a local company as the vehicle for that investment. Moreover, the Claimants maintain that it was Argentina which had insisted that the Concession could be held only through the medium of a locally-incorporated company.[274]

246. The Claimants also reject the suggestion that the Tribunal ignored the measures adopted to EDEMSA's benefit after the Claimants had divested themselves of their interests. On the contrary, they assert that the Tribunal rejected the Claimants' argument that it should disregard events after that date and insisted on reducing the amount of damages payable as a result.[275]

247. The Claimants thus deny that there was any manifest excess of powers and contend that the Tribunal adequately stated the reasons for its decision.

*(2) The Decision of the Committee*

248. The Tribunal rightly considered that whether or not the Claimants could maintain a claim in respect of measures which directly affected EDEMSA is a matter governed by the terms of the ICSID Convention and the Argentina-France BIT.

249. Within the Convention, the governing provision is Article 25, the relevant part of which provides that –

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the

[273] Counter-Memorial, paras. 109-111.
[274] Transcript, p. 210.
[275] Counter-Memorial, paras. 112-116.

> dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) "National of another Contracting State" means:
>
> …
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

250. It is not contested that all of the Claimants are juridical persons which, on the relevant date, had the nationality of a Contracting State other than Argentina. It is also uncontested that EDEMSA was an Argentine juridical person and that there was no agreement of the kind mentioned in the final clause of Article 25(2)(b) which would have enabled EDEMSA to be a party to the proceedings. Finally, the Committee recalls that, in its Jurisdiction Decision, the Tribunal held that Article 25 required that "the dispute must arise directly from an investment but the investment itself need not be direct".[276] That is plainly a correct reading of the language of the provision.

251. The Committee does not agree that the Tribunal's approach rendered the final clause of Article 25(2) redundant. That clause deals with the situations in which a company, such as EDEMSA, incorporated in the respondent State can maintain a claim under the Convention. To hold, as the Tribunal did, that the investors who ultimately controlled EDEMSA can claim in their own right for a breach of treaty allegedly committed against EDEMSA is not at all the same as allowing EDEMSA itself to claim. For example, had there been an agreement of the kind envisaged in the final clause of Article 25(2), EDEMSA could have maintained a claim for breach of contract, something which the Claimants were unable to do.

252. The Committee thus concludes that the Tribunal committed no manifest excess of powers in ruling that the requirements of Article 25 of the Convention were satisfied.

[276] Jurisdiction Decision, para. 159.

253. Article 8(1) of the BIT provides that the dispute settlement provisions in Article 8 apply to "any dispute concerning investments in the terms of this Agreement between one Contracting Party and an investor of the other Contracting Party". The "terms of this Agreement" which govern the meaning of "investments" are those of Article 1(1), which provides –

> The term "investments" means the assets such as goods, rights, and interests of any nature, including but not limited to:
>
> (a) movable and immovable property and any property rights such as mortgages, privileges, usufructs, bonds, and analogous rights;
>
> (b) shares, issue premiums, and other forms of participation, even minority or indirect participation, in companies established in the territory of one of the Contracting States;
>
> (c) debentures, claims, and rights to any performance under contract having a financial value;
>
> (d) copyrights, industrial property rights (such as invention patents, licenses, registered trademarks, industrial models and designs), technical processes, registered names and goodwill;
>
> (e) concessions granted by law or under contract, in particular concessions to search for, cultivate, extract, or exploit natural resources, including those located in the maritime zone of the Contracting Parties.
>
> With the understanding that such assets must be or must have been invested and, in compliance with the provisions of this Agreement, the associated rights defined in accordance with the legislation of the Contracting Party in whose territory or maritime zone the investment was made before or after the entry into force of this Agreement.

254. The term "investors" is defined by Article 1(2), the relevant part of which provides that –

> The term "investors" means:
>
> (b) artificial persons constituted in the territory of either of the Contracting Parties in accordance with its legislation and having their seat in that country;
>
> (c) artificial persons effectively controlled directly or indirectly by nationals of either of the Contracting Parties or by artificial persons having

> their seat in the territory of either of the Contracting Parties and constituted in accordance with its legislation.

255. The Committee considers it plain that this language is broad enough to include a claim maintained by the Claimants in respect of damage allegedly caused to their investment, held through SODEMSA (and in one case through MENDINVERT and SODEMSA) in EDEMSA.

256. The Committee does not consider that the line of decisions in the International Court of Justice, beginning with *Barcelona Traction,* lays down a general principle of international law which precludes investors like the Claimants from maintaining a claim under the terms of a BIT if those terms are wide enough to permit them to do so. The International Court of Justice was not dealing in those cases with claims brought by shareholders under the terms of a BIT but with the exercise of diplomatic protection by a State which asserts that a wrong has been done to the State itself through the treatment of its national. That these cases are not addressing the situation of investors claiming under a BIT is made clear in the following passage from the 2007 Judgment in *Diallo* –

> The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as treaties for the promotion and protection of foreign investments, and the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes, which created an International Centre for Settlement of Investment Disputes (ICSID), and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative. It is in this particular and relatively limited context that the question of protection by substitution might be raised. The theory of protection by substitution seeks indeed to offer protection to the foreign shareholders of a company who could not rely on the benefit of an international treaty and to whom no other remedy is available, the allegedly unlawful acts having been committed against the company by the State of its nationality. Protection by "substitution" would therefore appear to constitute the very last resort for the protection of foreign investments.[277]

[277] *I.C.J. Reports 2007*, pp. 614-615, para. 88.

The *Barcelona Traction* and *Diallo* judgments establish that there is no right *under customary international law* for a State to exercise diplomatic protection in respect of a wrong done to a company on the basis that the shareholders of the company are its nationals. They in no way preclude the possibility that States may agree by treaty to grant such a right to a State (as the Court found was the case in *ELSI*) or to the shareholders themselves. Whether they are considered to have done so will depend upon the terms of the treaty, which in this case are clear.

257. The Committee notes that the consistent practice of other tribunals and *ad hoc* committees has been the same in this respect as the approach taken by the Tribunal in the present case. Thus, the *ad hoc* committee in *CMS* held that –

> … nothing in general international law prohibits the conclusion of treaties allowing "claims by shareholders independently from those of the corporation concerned … even if those shareholders are minority or non-controlling shareholders". Such treaties and in particular the ICSID Convention must be applied as *lex specialis*.[278]

A similar approach can be found in the other cases which have considered this issue.[279]

258. The Committee understands the concern voiced by Argentina that claims by shareholders for wrongs done to the company might lead to double recovery. However, that risk is one against which any competent tribunal will be on its guard. The Tribunal in the present case was clearly aware of this risk and took steps to guard against it. Thus, it carefully discusses double recovery in paragraphs 1098-1100 and 1137-1143. There is no indication in the Award or in the pleadings before the Committee that there has been any double recovery.

259. Thus, the Committee concludes that there has been no manifest excess of power in this aspect of the Tribunal's decision.

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[278] *CMS*, note 218, above, para. 69 (quoting the Jurisdiction Decision in that case).

[279] See, e.g., *Azurix Corporation v. Argentine Republic* (ICSID Case No. ARB/01/12) Decision on Jurisdiction of 8 December 2003, paras. 64-65; *El Paso Energy International Company v. Argentine Republic* (ICSID Case NO. ARB 03/15), Decision on Jurisdiction of 27 April 2006, para. 138; *Siemens AG v. Argentine Republic* (ICSID Case No. ARB/02/8), Decision on Jurisdiction of 3 August 2004; *Hochtief*, Decision on Liability of 29 December 2014, paras. 172.

260. The Committee also considers that the Tribunal has satisfied the requirements of the Convention to state the reasons for its decision. Those reasons are carefully set out at paragraphs 164-176 of the Jurisdiction Decision and are reflected in the Award. The Committee does not agree that the Tribunal's reasoning on this point is in any respect contradictory. It notes Argentina's argument that there is a contradiction between paragraphs 930 and 939 of the Award. Paragraph 930 states –

> In this connection, it is necessary to reject Respondent's argument based on the forum selection clause in Article 40 of the Concession Agreement. Claimants were not party to that Concession. Their claim rests on breach of investment treaties, which as such clearly fall within the Tribunal's jurisdiction.

Paragraph 939 states –

> Concession agreements granted to foreign investors for specific investments, such as those at issue in this arbitration, fall within the protection of an umbrella clause.

261. Argentina contends that the latter paragraph suggests, contrary to the reasoning of the earlier one, that the Claimants were themselves parties to the Concession Agreement. The Committee does not agree. Read in context, paragraph 939 of the Award is describing what the Tribunal considered to be the underlying economic reality, namely that the Claimants had invested in the Concession (in this respect, see also paras. 174-175 of the Jurisdiction decision, quoted in para. 28, above). It was not dealing with the issue of who was party to the contract in the strict sense. The Committee notices that Argentina itself sometimes used terms in a similarly general way. Thus, in its Counter-Memorial in the proceedings before the Tribunal, Argentina referred to "the year when SODEMSA was awarded the concession", [280] whereas it was EDEMSA, not SODEMSA, which was party to the Concession Agreement.

262. The Committee thus dismisses Argentina's claim to annul the Award on this ground.

[280] Counter-Memorial on the Merits, para. 179, quoted in the Award at para. 958.

### *c. Privity of Contract*

#### *(1) Parties' Positions*

263. Lastly, Argentina argues that even if the umbrella clauses could be incorporated into the Argentina-France BIT, they would not alter the nature of the commitments undertaken (or entered into) in the Concession Agreement which were obligations undertaken by the Province of Mendoza to EDEMSA and not to the Claimants. According to Argentina, the application of an umbrella clause does not alter the requirement of privity of contract.[281]

264. Argentina's main argument in this respect is that the Tribunal failed to state the reasons for its decision.[282] It relies heavily on the decision of the *ad hoc* committee in *CMS* in which similar issues were raised regarding the effect of the umbrella clause in the Argentina-USA BIT. The *CMS* Committee stated that –

> The effect of the umbrella clause is not to transform the obligation which is relied on into something else; the content of the obligation is unaffected as is its proper law. If this is so, it would appear that the *parties* to the obligation (*i.e.* the persons bound by it and entitled to rely on it) are likewise not changed by reason of the umbrella clause.[283]

It considered that the tribunal in that case had failed properly to grapple with that issue, so that "in the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN" [284] with the result that there existed "a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point."[285]

265. According to Argentina, the same failure is discernible in the Award in the present case. Argentina argues that the Tribunal confused the question of whether the obligations in question arose under the Concession Agreement or under the BIT. Argentina emphasised that it was "not questioning the nature of the claims put forward but the person that has put them forward, *i.e.* EDF instead of EDEMSA".[286] It invokes two other cases in which

[281] Application, paras. 23-25; Memorial, paras. 72-91; Reply, paras. 43-70.
[282] Transcript, p. 236.
[283] *CMS*, note 218, above, para. 95(c).
[284] *CMS*, note 218, above, para. 96.
[285] *CMS*, note 218, above, para. 97.
[286] Reply, para. 58.

tribunals faced with what it describes as umbrella clauses in effectively similar terms to those in the BITs at issue in the present case, held that an umbrella clause did not give a claimant the right to enforce, as treaty obligations, obligations contained in contracts to which that claimant was not party.[287] It questioned why the Award in the present case made no reference to the first of those cases.[288] Finally, Argentina contended that "the Argentine Republic did not undertake any obligation whatsoever vis-à-vis the Claimants".[289]

266. Although Argentina's main argument concerned the alleged failure of the Tribunal to state the reasons for its decision, it also maintained that the Tribunal's decision to apply the umbrella clauses in the Argentina-Luxembourg BIT and the Argentina-Germany BIT so as to allow the Claimants to enforce against Argentina obligations to which they were not party involved a manifest excess of powers.

267. The Claimants deny that there was either a failure to state reasons or a manifest excess of powers by the Tribunal.[290] They point, first, to what they maintain are significant differences between the umbrella clauses at issue in the present case and those in *CMS*, *Azurix* and *Burlington*, in particular, the fact that the umbrella clauses in the present case speak of commitments "undertaken", whereas those in the other cases use the phrase "entered into".[291] They also refer to the award in *Continental Casualty* [292]as taking a different view of the scope of umbrella clauses, although the claim for a breach of the umbrella clause in that case was unsuccessful.

268. The Claimants maintain that the Tribunal set out the reasons which led it to its decision on the scope of the umbrella clause, adopting the reasoning of Professor Dolzer, who appeared as an expert witness for the Claimants, that the application of the clause was not dependent upon privity of contract. They contend that Argentina expressly argued the *CMS* point before

[287] See Memorial, para. 88, and Transcript pp. 29-30, citing *Azurix Corporation v. Argentine Republic* (ICSID Case No. ARB/01/12) Award of 14 July 2006, 14 ICSID Reports 374, para. 384, and *Burlington v. Ecuador* (ICSID Case No. ARB/08/05), Decision on Liability of 24 December 2012. Argentina also referred to the award in *Hamester v. Ghana* (ICSID Case No. ARB/07/24) Award of 18 June 2010, though without close analysis of the umbrella clause at issue in that case.
[288] Transcript, p. 31, referring to the *Azurix* award; the decision in *Burlington* did not appear until after the Award in the present case.
[289] Memorial, para. 87.
[290] Counter-Memorial, paras. 78-117; Rejoinder, paras. 47-67; Transcript, pp. 206-210 and 327-335.
[291] Transcript, pp. 206-7.
[292] *Continental Casualty*, note 5, above, paras. 286-303.

the Tribunal which took full account thereof. With regard to the failure to cite the *Azurix* award, the Claimants emphasise that the duty to state reasons does not entail the requirement to refer expressly to every authority cited by the parties.

*(2) The Decision of the Committee*

269. The Committee considers that it should begin its consideration of this issue by addressing the Parties' submissions regarding the texts of the different umbrella clauses at issue in the present case and in the cases of *CMS, Azurix* and *Burlington*. In *CMS* and *Azurix*, the umbrella clause was that contained in the Argentina-USA BIT. In *Burlington* it was the umbrella clause in the Ecuador-USA BIT. In the present case, of course, the umbrella clauses are those found in the Argentina-Luxembourg and Argentina-Germany BITs. Although the Award refers to the English texts of those clauses, that text is not an official one, whereas in the case of the Argentina-USA and Ecuador-USA BITs English was one of the authentic languages of the treaty. By contrast, all four treaties are authentic in Spanish. For that reason, the Committee has already held (see paragraph 231, above) that, notwithstanding the late stage at which Argentina raised this point, it cannot exclude Argentina's argument that the English text referred to in the Award is not an entirely accurate translation.

270. The relevant clauses in the BITs at issue in *CMS, Azurix* and *Burlington* are in the same terms –

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

271. The Claimants have sought to distinguish those cases by highlighting the fact that the two BITs at issue in the present case use the term "undertaken", rather than "entered into". The Committee does not attach any weight to this point. The Spanish texts of all four treaties use the same term, "contraido" (or "contraidos"). No significance can therefore attach to the fact that the unofficial English texts of the Argentina-Luxembourg and Argentina-Germany BITs employ the word "undertaken" as a translation. In any event, the Committee does not see a meaningful distinction between "entered into" and "undertaken" in the context of the issues in this case.

272. Although the point was not discussed in the annulment proceedings in the present case, the Committee also considers that the use of the term "commitments", in the two BITs at issue in the present case, as opposed to "obligations" (the term used in the BITs at issue in *CMS*, *Azurix* and *Burlington*) cannot be regarded as significant since, once again, the Spanish texts of all four treaties use the same term, "compromisos".

273. The Committee has therefore proceeded on the basis that the umbrella clauses in the present case are substantially the same as those in the *CMS*, *Azurix* and *Burlington* cases.

274. Since Argentina has relied principally upon Article 52(1)(e) of the Convention, the Committee will begin by considering whether the Tribunal has failed to state the reasons for its decision that Argentina had violated its obligation to "respect specific commitments undertaken in connection with Claimants' investment".[293]

275. The Award deals with the reasons which led the Tribunal to its conclusion as follows:-

> (1) the Claimants were claiming not for breach of contract but for breach of treaty;[294]
>
> (2) concession agreements constitute commitments undertaken (or obligations entered into) with respect to the investment; [295]
>
> (3) not all contractual breaches necessarily rise to the level of treaty breaches but the "serious repudiation of concessions [sic] obligations implicated by failure to respect the currency clause … must clearly be seen as a violation of 'commitments … undertaken with respect to investors' (Article 10(2) Argentina-Luxembourg BIT) and "a commitment undertaken in connection with the investments made by nationals or companies from the other Contracting Party" (Article 7(2) Argentina-Luxembourg BIT);[296]

[293] Award, *Dispositif*, para. I(i).
[294] Award, para. 930.
[295] Award, para. 939.
[296] Award, para. 940.

(4) the Concession was carefully constructed so that the risk of currency fluctuation, in the sense of an end to the parity exchange rate and convertibility, was placed upon the Province and not the investors;[297]

(5) the acts of which complaint was made were sovereign acts rather than acts carried out by Mendoza in the capacity of a party to the Concession Agreement;[298]

(6) the Concession Agreement, though concluded with EDEMSA was clearly adopted with the shareholders in mind. Article 12 of the Agreement prohibited the transfer of shares without prior consent for a fixed period;[299]

(7) the principal guarantees in the Concession Agreement were specifically employed in order to attract the Claimants as investors. As the Tribunal put it –

> The Province of Mendoza had clearly embarked on a campaign to attract foreign investors in purchasing 51% of EDEMSA "Class A" shares. … Key features of the sales pitch included (i) the creation of a regulatory agency; (ii) the Currency Clause; (iii) the Cost Adjustment Clause; (iv) the Extraordinary Tariff Adjustment Clause; (v) an initial tariff schedule with a fixed term of five years; (vi) a concession with a duration of thirty years.[300]

276. Taken together, these parts of the Award seem to the Committee to state the reasons for the Tribunal's conclusion in a way which enables the reader to follow the reasoning and thus sets the Award apart from the award in *CMS*. In particular, the Award highlights the extent to which the Province of Mendoza, whose acts are – for the purposes of international law – attributable to the Argentine Republic, went out of its way to make commitments to the Claimants as prospective foreign investors that the Concession regime would be a financially stable one.[301]

[297] Award, paras. 943-969.
[298] Award, para. 941.
[299] Award, para. 942.
[300] Award, para. 1008.
[301] In addition to Award, para. 1008, see paras. 63-66.

277. The broad language of the umbrella clauses, particularly that in the Argentina-Germany BIT, which spoke of commitments undertaken (or entered into) with regard to *investments*, rather than with *investors*, was also emphasised.[302]

278. In these circumstances, the Committee cannot conclude that the Award is one in which, to borrow the language of the *CMS* Committee, "it is quite unclear how the Tribunal arrived at its conclusion". That conclusion is not altered by the fact that the Award does not expressly distinguish the *Azurix* award or the *CMS* decision. As the Committee has already explained (see paragraphs 194 to 198, above), it is not necessary for an award to address every authority cited to it in order to comply with the requirement to state the reasons on which it is based.

279. Nor does the Committee consider that there was a manifest excess of powers. It is true that the reasoning of the Award on this point is somewhat different from that in *CMS*, *Azurix*, and *Burlington*. However, each of these cases has to be assessed in the light of its own facts. Moreover, the Award is similar in its reasoning to the statements made by the tribunal in *Continental Casualty*, although the tribunal there came to a different conclusion on the facts. The most that can be said is that an opposite approach to that adopted is also arguable and that is not enough to warrant annulment on the grounds of manifest excess of powers.

280. The Committee thus dismisses this part of Argentina's application for annulment. For the sake of completeness, it would add that, had it taken a different view, it would have annulled only the first part of paragraph I of the *dispositif* and not, as Argentina urges, the whole Award. Argentina points to the passage at the start of that part of the Award in which the Tribunal states that "[Argentina's] breach of certain obligations under the applicable umbrella clause operates in tandem with breach of Article 3 of the Argentine-France BIT, providing a duty to accord Fair and Equitable Treatment".[303] Argentina argues that this passage shows that the finding of a breach of the duty to accord fair and equitable treatment is dependent upon, and inseparable from, the finding of a breach of the umbrella clauses. The Committee does not read it that way. Rather, the Committee considers that this passage, together with the section on fair and equitable treatment which follows, demonstrates that the inducements offered to investors – and specifically to the Claimants – to invest in EDEMSA were one of

[302] Award, para. 938.
[303] Award, para. 994.

the reasons why the Tribunal considered that there had been a breach of the fair and equitable treatment standard. Even if the stricter approach to umbrella clauses espoused in some other cases had been adopted, the Committee considers that the significance of these inducements and the expectations which they engendered, would have remained valid, as the *CMS* Committee recognized.[304] Since the award of damages in paragraph II of the *dispositif* would be sustained by a finding of breach of the fair and equitable treatment obligation without any finding of a breach of the umbrella clauses, even if the Committee had upheld Argentina's case on the umbrella clauses, there would have been no basis to annul the whole of the Award.

## VII. Necessity Issue

### *A. The Issues Raised by Argentina*

281. The next argument raised by Argentina concerns the Tribunal's treatment of three "affirmative defences" advanced by Argentina, each of which concerned the effects of the economic emergency which arose in Argentina and to which the Committee has already referred.[305] Argentina complains of:-

(1) the Tribunal's failure to apply Article 3(2) of the Argentina-Luxembourg BIT [306] which the Tribunal acknowledged "might have had consequences" [307] had the Tribunal found the Argentina-Luxembourg BIT applicable;

(2) the Tribunal's failure to apply Article 5(3) of the Argentina-France BIT,[308] which Argentina maintains afforded it a defence; and

(3) the Tribunal's handling of Argentina's defence based upon customary international law principles regarding the state of necessity.

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[304] *CMS*, note 218, above, para. 89.
[305] See paras. 39-41, above.
[306] Article 3(2) provides:
"Without prejudice to measures necessary to maintain public order, investments shall enjoy permanent protection and security, to the exclusion of any unjustified or discriminatory measure that could impede in fact or in law its management, maintenance, use, enjoyment or liquidation." (Unofficial translation into English provided by Argentina).
[307] Award, para. 888.
[308] See para. 283, below.

282. The Committee has already held (see paragraphs 201 to 217, above) that the Tribunal committed no annullable error in deciding that the case fell to be determined by reference to the Argentina-France BIT and that the Argentina-Luxembourg BIT was inapplicable. It is not, therefore, necessary to address in this part of the Decision the first point raised by Argentina. Accordingly, the Committee will here confine itself to the second and third points set out in the preceding paragraph.

### *B. Parties' Arguments*

#### 1. Argentina

283. According to Argentina, because the measures which were the subject of the Claimants' main case were taken in response to the national emergency which confronted Argentina, the Tribunal should have applied Article 5(3) of the Argentina-France BIT, the English translation of which provides:

> Investors of one Contracting Party whose investments have suffered losses owing to war or any other armed conflict, revolution, state of national emergency, or rebellion occurring in the territory or in the maritime zone of the other Contracting Party shall be accorded by the latter Contracting Party treatment no less favourable than that granted to its own investors or to those of the most favoured Nation.

Although there appears to be no ground for criticism of this translation, the importance of the provision makes it useful also to quote the official French and Spanish texts of Article 5(3), which provide:

> Les investisseurs de l'une des Parties contractantes dont les investissements auront subi des pertes dues à la guerre ou à tout autre conflit armé, révolution, état d'urgence nationale ou révolte survenu sur le territoire ou dans la zone maritime de l'autre Partie contractante, bénéficient, de la parte de cette dernière, d'un traitement non moins favourable que celui accordé à ses propres investisseurs ou à ceux de la nation la plus favorisée.

and

> Los inversores de una Parte Contratante cuyas inversiones hubiesen sufrido pérdidas a causa de una guerra o de cualquier otro conflicto armado, revolución, estado de emergencia nacional o rebelión ocurrido en el territorio o en la zona marítima de la otra Parte Contratante, recibirán de esta última un tratamiento no menos favorable que el acordado a sus propios inversores o a los de la Nación más favorable.

284. Argentina maintains that the situation which it faced was a "national emergency" ("estado de emergencia nacional") within the meaning of this provision and that, consequently, in taking measures to address that emergency, Argentina's only obligation to the Claimants was one of non-discrimination.[309] In other words, the effect of Article 5(3) was that measures taken to address a national emergency were not subject to the obligations of fair and equitable treatment, full protection and security and the prohibition of expropriation set out in Article 5(1) and (2), or to any obligation arising out of an umbrella clause in another BIT which might have been given effect by virtue of Article 4 of the Argentina-France BIT. That was the analysis arrived at in respect of a provision substantially identical to Article 5(3) by the tribunal in *L.E.S.I. S.p.A. and Astaldi S.p.A. v. Algeria*.[310] The Tribunal, however, rejected Argentina's argument, holding that –

> The plain language of Article 5(3) makes clear that it serves as a non-discrimination provision, not a shield against host State liability for treaty violation.[311]

285. Argentina maintains that this decision renders Article 5(3) superfluous, because the Claimants were already entitled to non-discrimination by virtue of the provisions of Article 4 of the BIT.[312] Argentina maintains that it had put that argument to the Tribunal, which had failed to address it in the Award. The Tribunal had failed to explain why Article 5(3) was not applicable and had not dealt with the authorities relied upon by Argentina.[313] Moreover, the Tribunal had contradicted itself by saying that, while Article 5(3) did not operate to exempt Argentina from liability in respect of non-discriminatory measures taken to address the national emergency, that provision nevertheless had to be understood against the background

[309] Memorial, paras. 162-163.
[310] *L.E.S.I. S.p.A. and Astaldi S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/03), Award of 12 November 2008 ("*L.E.S.I.*").
[311] Award, para. 1157.
[312] Reply, para. 114.
[313] In particular, the award in *L.E.S.I.*, note 310, above; see Memorial, para. 165.

of customary international law rules on State responsibility in times of war or national emergency,[314] even though the Claimants' own expert [315] had accepted that those rules provided for a degree of exemption from liability.[316]

286. Furthermore, Argentina maintains that the Tribunal distorted its argument by saying that Argentina had likened Article 5(3) of the Argentina-France BIT to Article XI of the Argentina-USA BIT.[317] Article XI 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.

This provision was at the heart of the awards in *Continental Casualty Company v. Argentine Republic* [318] and *LG&E v. Argentine Republic,* [319] in which tribunals assessing Argentina's emergency measures against the yardstick of the Argentina-USA BIT held that Argentina was relieved of its liability in respect of those measures by virtue of the provisions of Article XI. The Tribunal in the present case held that "the substance of Article 5(3) bears no resemblance to Article XI of the Argentina-US BIT".[320] Argentina maintains, however, that it did not argue that Article 5(3) and Article XI were analogous but referred to the *Continental Casualty* and *LG&E* awards in order to draw similarities with the factual assumptions analysed in those cases.[321]

287. Argentina similarly criticises the Tribunal's approach to necessity under customary international law. The Tribunal held that customary international law recognized the state of necessity as a circumstance precluding wrongfulness. In applying this aspect of customary international law, it relied upon Article 25 of the International Law Commission ("ILC") Articles on State Responsibility. Article 25 provides:

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[314] Award, para. 1158.
[315] Professor Dolzer, whose first report is exhibit RA 543.
[316] Memorial, para. 168; Transcript, p. 94.
[317] See, e.g., Award, para 1155.
[318] *Continental Casualty*, note 5, above.
[319] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006 ("*LG&E*").
[320] Award, para. 1161.
[321] Reply, para. 116.

> (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 means 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.

The Tribunal noted that the question how far the provisions of Article 25 codified customary international law was a subject of debate [322] but considered it did not need to enter into that debate, because

> … both sides in this arbitration stipulate that the Tribunal's analysis should take as applicable legal norms the State of Necessity defense presented by the contours articulated in ILC Article 25. Neither side has argued for application of a standard more favorable to host states than the norms of Article 25.[323]

288. The Tribunal concluded that Argentina's conduct fell outside the scope of the defence of necessity on three grounds, First, it was "not convinced that those measures, as presented and explained in these proceedings, were the only means by which [Argentina] could have protected its public interests".[324] Secondly, and "equally as important" according to the Tribunal, it had "difficulty finding that [Argentina] did not contribute to the situation which produced the 2001 crisis".[325] Lastly, the Tribunal considered that even if Argentina's conduct could have been justified under the state of necessity, Argentina was nevertheless

[322] Award, para. 1167.
[323] Award, para. 1168.
[324] Award, para. 1172.
[325] Award, para. 1173.

obliged to return to the *status quo* once that became possible and that Argentina had failed to do so.[326]

289. Argentina maintains that the Tribunal distorted its position. While Argentina had referred to Article 25, it denies it had accepted that Article 25 codified the customary international law on the state of necessity. The Tribunal had therefore not been justified in proceeding to deal with Argentina's customary international law defence on the basis of Article 25 without explaining why that provision was authoritative, or in applying its provisions as though it was a treaty.[327]

290. Argentina also criticises the Tribunal's application of the necessity standard. Invoking the decision of the *ad hoc* committee in *Enron v. Argentine Republic*, [328] Argentina maintains that the Tribunal failed to identify the legal standard to be applied in order to determine whether the emergency measures were the "only means" by which Argentina could safeguard its essential interests, failed to evaluate the evidence submitted by Argentina and failed to state reasons for its decisions. In particular, it did not set out the alternative measures which it considers could have been adopted.[329] With regard to the requirement of "non-contribution", Argentina again argues that the Tribunal failed to identify the legal standard to be applied and did not properly explain its reasons. It maintains that the Tribunal wrongly considered, on the basis of an expert report tendered by Argentina, that Argentina had accepted that it was partly to blame for the crisis and should not have placed so much weight on a statement by the then President of Argentina in early 2002, regarding which counsel for Argentina referred to "the relatively low weight that politicians' words have".[330]

291. Lastly, Argentina maintains that the Tribunal invented a new exception to the defence of necessity, over and above those in Article 25, when it held that even if there had been a state of necessity, Argentina was under a duty to re-establish the *status quo*, once the emergency had passed.[331]

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[326] Award, para. 1177.
[327] Memorial, paras. 170-176; Reply, paras. 120-122.
[328] *Enron*, note 217, above.
[329] Transcript, pp. 96-97; Memorial, paras. 177-178.
[330] Transcript, p. 98; Memorial, paras. 177-179; Reply, paras. 123-124.
[331] Memorial, paras. 175-176; Reply, para. 121.

292. In summary, with regard to both Article 5(3) and customary international law, Argentina contends that "the Tribunal not only failed to state the reasons for its decision in this respect but manifestly exceeded its powers in failing to consider the laws it was required to apply and distorting the arguments presented by Argentina, thus departing from a fundamental rule of procedure".[332]

### 2. The Claimants

293. The Claimants counter that the Tribunal committed no annullable error in respect of this part of the case. With regard to Article 5(3) of the Argentina-France BIT, the Claimants argue that the Tribunal was right to conclude, after extensive consideration, that Article 5(3) was a non-discrimination provision and not a charter for dispensing with the protections afforded by other provisions of the BIT.[333] The Tribunal did not distort Argentina's argument regarding Article 5(3) and Article XI of the Argentina-USA BIT; on the contrary, it accurately recorded Argentina's position that the Tribunal should apply, *mutatis mutandis*, the analysis in the *Continental Casualty* and *LG&E*, awards which had turned on Article XI.[334] Argentina had thus been seeking to persuade the Tribunal to give Article 5(3) the same effect that the tribunals in *Continental Casualty* and *LG&E* had accorded to Article XI. The Tribunal had also addressed Argentina's argument that a restrictive interpretation of Article 5(3) would render that provision superfluous given the non-discrimination obligation already inherent in Article 4,[335] and rejected it. Lastly, the Claimants contend that, even if this analysis was wrong (which they maintain was not the case), it was not ground for annulment.[336]

294. On the customary international law of necessity, the Claimants maintain that Argentina had in fact accepted that Article 25 of the ILC Articles reflected customary international law and had submitted arguments regarding each part of the provisions of Article 25.[337] The Claimants deny that the Award is not fully reasoned. They contend that the Tribunal was clear about the standard to be applied and held that "necessity must be construed strictly and

[332] Memorial, para. 180.
[333] Transcript, p. 217.
[334] Counter-Memorial, paras. 180-181; Rejoinder, paras. 114-119; Transcript, pp. 217-218.
[335] Rejoinder, paras. 112-113, citing para. 1157 of the Award.
[336] Rejoinder, para. 113.
[337] Counter-Memorial, paras. 162-165; Rejoinder, paras. 122-123; Transcript, pp. 218-219.

objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult".[338] With regard to the *Enron* Committee's decision, they criticise it as containing internal contradictions [339] and emphasise that even that decision makes the point that reasons may be implicit.[340] According to the Claimants, the Tribunal dealt carefully with the arguments regarding whether the measures adopted by Argentina were the only way of dealing with the crisis and whether Argentina had contributed to the crisis by its own actions. The statement by the President regarding the latter point was only one of the factors taken into account and, in any event, the Committee lacks jurisdiction to re-assess the probative value which the Tribunal accorded to evidence before it.[341]

### *C. Committee's Decision*

#### 1. The *CMS* and *Enron* Decisions

295. The Committee begins by noting that the issues raised in this part of the case have been the subject of considerable attention from tribunals and *ad hoc* committees in other cases. In particular, the Parties have referred at some length to the decisions of the *ad hoc* committees in *CMS* and *Enron*, both of which concerned the same Argentine crisis. While there is no concept of binding precedent in ICSID jurisprudence, it is important that the Committee takes note of what other committees have said in respect of the issues which it is now required to consider. The Committee will, therefore, begin with a brief analysis of the *CMS* and *Enron* decisions.

296. The *CMS* case concerned a claim brought under the Argentina-USA BIT in response to which Argentina raised arguments under Article XI of that treaty and the customary international law of necessity. Those arguments were rejected by the Tribunal and raised again by Argentina in the annulment proceedings in which Argentina alleged that the tribunal had failed to state the reasons for its decision and manifestly exceeded its powers. The *CMS* Committee rejected the application for annulment on those grounds (although it annulled the award in part on a different ground).

[338] Award, para. 1171.
[339] Transcript, pp. 219-220.
[340] Transcript, p. 221.
[341] Rejoinder, para. 126.

297. The *CMS* Committee was critical of what it saw as the tribunal's failure properly to analyse the relationship between Article XI of the BIT and the customary international law on necessity. In the view of the Committee, Article XI of the BIT was a threshold requirement in that, if it applied, the substantive obligations under the rest of the BIT were rendered inapplicable. By contrast, Article 25 of the ILC Articles on State Responsibility provided for an excuse which became applicable only once it was established that there had otherwise been a breach of the obligations under the BIT.[342] It considered that the tribunal had failed to understand or explain this relationship and had thereby made an error of law.[343] Moreover, by treating necessity and Article XI as existing on the same footing it had made a further error, since if necessity meant that there had not even been a *prima facie* breach of the treaty, then it occupied the same field as Article XI, which was *lex specialis* and should have been accorded priority.[344] The tribunal's failure to appreciate this relationship also entailed a misinterpretation of Article XI. Nevertheless, while recognizing that these errors "could have had a decisive impact on the operative part of the Award," [345] the *CMS* Committee held that it was not empowered to annul the award. It summed up the position in the following terms:

> The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.[346]

298. The Committee also declined to annul for failure to state reasons. It was critical of the tribunal's brief explanation of why Article XI was considered inapplicable on the facts [347] but held that "although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal".[348]

299. The *Enron* case likewise concerned a claim brought under the Argentine-US BIT. Again the Tribunal had rejected Argentina's arguments based on Articles IV(3) and XI of that BIT and

[342] *CMS*, note 218, above, para. 129.
[343] *CMS*, note 218, above, paras. 131-132.
[344] *CMS*, note 218, above, paras. 133-134.
[345] *CMS*, note 218, above, para. 135.
[346] *CMS*, note 218, above, para. 136.
[347] *CMS*, note 218, above, para. 125.
[348] *CMS*, note 218, above, para. 127.

the customary international law of necessity, and again Argentina sought annulment of the award on the grounds of failure to state reasons and manifest excess of powers. Unlike the *CMS* Committee, however, the *Enron* Committee annulled the award for manifest excess of powers in relation to the findings on Article XI and the customary international law on necessity, as well as for failure to state reasons.[349]

300. The *Enron* Committee began by noting that both Parties had treated Article 25 of the ILC Articles on State Responsibility as representing the customary international law on necessity and the tribunal had proceeded on that basis. The *Enron* Committee observed that, even if the Committee had taken a different view of the status of Article 25, "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." [350]

301. The *Enron* Committee held, however, that the tribunal's application of the Article 25 criteria was flawed in important respects. First, it considered that the tribunal had failed to "address a number of issues that are essential to the question of whether the 'only way' requirement was met".[351] In this context, the *Enron* Committee considered that the requirement that the measures taken be, in the words of Article 25, "the only means for the State to safeguard an essential interest against a grave and imminent peril" was open to more than one interpretation and that the tribunal had failed to identify what legal standard was to be applied, whether the relative effectiveness of different measures was a factor to be taken into account and who was to determine whether or not alternative means had actually been open to the State at the relevant time.[352] The Committee concluded that –

> 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 the case.[353]

The *Enron* Committee considered that the tribunal had placed too much reliance on the report of an economic expert whose view could not be said to have been an analysis of

[349] *Enron*, note 217, above, operative part, paras. 1 and 2.
[350] *Enron*, note 217, above, para. 356.
[351] *Enron*, note 217, above, para. 368.
[352] *Enron*, note 217, above, paras. 370-372.
[353] *Enron*, note 217, above, para. 373.

whether other means were open to Argentina as a matter of law. The *Enron* Committee accepted that the parties had not identified these issues in their pleadings but nevertheless stated that "the Tribunal is required to apply the applicable law, and is required to state sufficient reasons for its decision".[354]

302. Secondly, the *Enron* Committee held that the tribunal in that case had failed to make a clear finding on whether or not the measures taken by Argentina had "seriously impair[ed] an essential interest of the State or States towards which the obligation exists, or of the international community as a whole" and had confused this issue with that of non-justiciability in a different context.[355] The Committee held that –

> 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 …[356]

303. Lastly, the *Enron* Committee considered that the tribunal's finding that Argentina had contributed to the emergency and was therefore precluded by the principle stated in Article 25(2)(b) from relying on the defence of necessity was flawed. The tribunal had failed to address the question what was the legal standard to apply and had again uncritically adopted the findings of the economic expert witness.[357]

304. The *Enron* Committee thus concluded that the tribunal's finding on necessity under customary international law involved a manifest excess of powers (in the form of a failure to apply the applicable law) and a failure to state reasons. Since that finding by the tribunal also laid the foundations for its finding that Argentina could not rely upon Article XI of the Argentina-USA BIT, the *Enron* Committee also annulled the finding regarding Article XI.[358]

305. As has already been explained, the analysis of these issues by the *CMS* Committee and the *Enron* Committee are not binding upon the Committee in the present case. The Committee

[354] *Enron*, note 217, above, para. 376.
[355] *Enron*, note 217, above, paras. 379-384.
[356] *Enron*, note 217, above, para. 384.
[357] *Enron*, note 217, above, paras. 385-393.
[358] *Enron*, note 217, above, para. 405.

has, however, taken them into account in its own examination of the issues raised concerning Article 5(3) of the Argentina-France BIT and necessity under customary international law.

### 2. Article 5(3) of the Argentina-France BIT

306. With the analysis of the *CMS* Committee in mind, the Committee considers that it must begin with the question whether the Tribunal committed an annullable error in its treatment of Argentina's reliance on Article 5(3) of the Argentina-France BIT (the text of which is set out at para. 283, above).

307. The Tribunal did not make the mistake for which the *CMS* Committee criticised the tribunal in that case [359] of confusing the application of this provision with the question whether the customary international law of necessity was applicable. On the contrary, the Tribunal began by determining whether or not Article 5(3) meant that Argentina was not *prima facie* in breach of treaty [360] before considering whether, if there was a *prima facie* breach of treaty, the wrongfulness of the act was precluded by the circumstance of necessity.[361]

308. The Tribunal rejected Argentina's proposed interpretation of Article 5(3) as providing that, in the event of an emergency of the kind described in that provision, the host State's only duty towards the investor was one of non-discrimination. It found, instead, that "the plain language of Article 5(3) makes clear that it serves as a non-discrimination provision, not a shield against host state liability for treaty violation".[362] It determined that

> Article 5(3) may best be understood against the background of the rules of customary international law on State responsibility toward foreign investors during periods of war, insurrection and other extraordinary circumstances, which determines host State responsibility toward aliens.[363]

309. Contrary to what has been suggested by Argentina, the Committee sees no contradiction between these two paragraphs of the Award. It is important to bear in mind that much of the jurisprudence on customary international law on State responsibility towards aliens during times of war and other emergency was concerned with the obligations of the State to

[359] See para. 297, above.
[360] Award, paras. 1152-1162.
[361] Award, paras. 1163-1181.
[362] Award, para. 1157.
[363] Award, para. 1158.

compensate for damage caused by acts which were not attributable to the State itself (e.g., damage done to a foreign investor's property by rioters or insurgents). In general, customary international law did not require compensation in such circumstances.[364] The Tribunal's reasoning that "Article 5(3) leaves those customary rules untouched and indeed supplements their content by requiring equality of treatment in response to such circumstances" [365] is in no way incompatible with its decision that it does not operate as a "shield against host state liability for treaty violation" [366] by disapplying other substantive protections afforded by the BIT.

310. As the Tribunal pointed out, the contrast with Article XI of the Argentina-USA BIT (the text of which appears at para. 286, above) is striking. The latter provision expressly states that the other provisions of that treaty "shall not preclude the application … of measures necessary for the maintenance of public order". No such language appears in Article 5(3).

311. Turning to Argentina's contention that the Tribunal distorted its argument regarding Article 5(3), the Committee doubts whether, even if this contention were accepted, such a distortion would amount to a manifest excess of powers, a failure to state reasons or (to the extent that Argentina makes such a case) a serious departure from a fundamental rule of procedure. The Committee does not, however, accept that the Tribunal distorted Argentina's argument. It is true that the Tribunal observed that Argentina "argues that Article 5(3) is analogous to Article XI" [367] whereas Argentina had denied an allegation by the Claimants that it sought to assimilate the two provisions.[368] Nevertheless, the essence of Argentina's argument before the Tribunal was that Article 5(3) had the same effect as Article XI in that, according to Argentina, in the conditions of emergency described therein, Article 5(3) rendered inapplicable the other provisions of the BIT affording investors substantive protections and replaced them with a significantly more limited obligation of non-discrimination.[369] In these circumstances, the Tribunal's analysis that Argentina treated Article 5(3) as "analogous" to Article XI cannot be regarded as a distortion.

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[364] See, e.g., the *Award in the Home Missionary Society of the United Brethren in Christ (United States) v. United Kingdom*, (1920 VI Reports of International Arbitral Awards), p. 42.
[365] Award, para. 1159.
[366] Award, para. 1157.
[367] Award, para. 1155.
[368] Rejoinder on the Merits (RA 524), para. 641.
[369] Counter-Memorial on the Merits (RA 523), para. 256.

312. The Tribunal's interpretation of Article 5(3) is an entirely plausible one. It accords more naturally with the text of the provision than does that advanced by Argentina. The Committee is not persuaded by Argentina's contextual argument, namely that if Article 5(3) were treated as no more than a non-discrimination provision it would be otiose since Article 4 of the Argentina-France BIT requires each Party to provide to investors of the other Party "treatment no less favourable than that accorded to its own investors". It is by no means unusual for the parties to a treaty to include, *ex abundante cautela,* a provision which may not be strictly necessary. Indeed, the Argentina-USA BIT includes a provision (Article IV(3)) [370] which is quite similar to Article 5(3) of the Argentina-France BIT, notwithstanding that it contains not only a general non-discrimination provision but also the more sweeping exclusionary provision of Article XI. The Committee also notes that the *Enron* tribunal (in a part of the award which was not annulled by the *ad hoc* committee in that case) reached a very similar interpretation of the comparable provision in the Argentina-USA BIT.

313. The Committee is aware that the tribunal in *L.E.S.I. S.p.A. and Astaldi S.p.A. v. Algeria* [371] took a different view of the scope of a provision substantially identical to Article 5(3) (a fact noted by the Tribunal [372]). In an annulment proceeding, however, an *ad hoc* Committee is not required to choose between two such different interpretations. The question is not whether the Tribunal was correct in its interpretation of Article 5(3) but whether it applied that provision. In the words of the *Enron* Committee –

> It may well be that different interpretations of this provision are possible. However, … 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.[373]

314. The Committee thus concludes that the Tribunal's treatment of Article 5(3) of the Argentina-France BIT involved no manifest excess of powers.

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[370] Article IV(3) provides –
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 emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such 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 favourable treatment, as regards any measures it adopts in relation to such losses.
[371] *L.E.S.I.*, note 218, above.
[372] Award, para. 485, footnote 54.
[373] *Enron*, note 217, above, para. 398.

315. Nor does the Committee consider that the Tribunal failed to state reasons as required by Article 48(3) and Article 52(1)(e) of the ICSID Convention. As the Committee has already explained, what is required is that a reader can follow the Tribunal's reasoning, not that he or she must be persuaded by it.[374] The reasoning in the Award on the scope and application of Article 5(3) is perfectly comprehensible. The Committee does not accept that the Tribunal committed an annullable error by not referring expressly to Argentina's contextual argument (outlined in paragraph 312 above). As the *Enron* Committee explained, while a tribunal has a duty to deal with each question put to it, "it is not required to comment on all arguments of the parties in relation to each of those questions".[375] In the present case, the questions which required an answer were: what was the meaning of Article 5(3) and how did it apply to the facts of the present case. The Tribunal answered those questions and stated sufficient reasons for the answers which it gave.

316. Finally, and for the sake of completeness,[376] the Committee observes that it can see no trace of a serious departure on the part of the Tribunal from a fundamental rule of procedure in the Tribunal's handling of the Article 5(3) issue.

### 3. Necessity under Customary International Law

317. Since it had held that Article 5(3) of the BIT did not relieve Argentina of liability and that there was a *prima facie* breach of the BIT, it was therefore necessary for the Tribunal to consider Argentina's subsidiary plea [377] of necessity under customary international law.

318. In addressing this plea, the Tribunal applied the provisions of Article 25 of the ILC Articles on State Responsibility (the text of which is set out at paragraph 287, above). It did so, without entering into the "theoretical question of how far the various aspect of ILC Article 25 codify customary defences related to necessity,"[378] because "neither side has argued for application of a standard more favorable to host states than the norms of Article 25".[379] As a

[374] See paras. 194 to 197, above.
[375] *Enron*, note 217, above, para. 222.
[376] It is not entirely clear whether Argentina intended to raise this issue as a separate ground for annulment under Article 52(1) (d) of the Convention.
[377] So termed by Argentina in its Counter-Memorial on the Merits (RA 523), para. 620.
[378] Award, para. 1167.
[379] Award, para. 1168.

threshold question, it is necessary to consider whether the Tribunal committed an annullable error in taking this approach, since Argentina had maintained that –

> There is no doubt that the ILC Draft takes from customary law the state of necessity institute. However, international custom does not make such a detailed statement as to the requirements or exceptions of such cause which excludes illegality, as it appears in each of the paragraphs which constitute the ILC articles.[380]

319. The Committee does not consider that the Tribunal can be faulted for having taken the provisions of ILC Article 25 as its point of reference. It is true that Argentina questioned whether all of the detail of Article 25 reflected customary international law and disputed what it described as the Claimants' propensity to "refer to each of the paragraphs of Article 25 as though it were the final text of a treaty in full force and effect".[381] At no point, however, did Argentina indicate what aspects of Article 25 it considered did not reflect customary international law. Nor, more importantly, did it at any stage advance a positive case in favour of a standard of necessity materially different from that set out in Article 25. On the contrary, Argentina joined issue with the Claimants on each of the principal requirements of Article 25 and it summed up the differences between the Parties in the following terms:

> … the discussion between the Parties as to whether the *state of necessity* can be applied as a principle of customary international law seems to be limited to knowing: (a) whether the measures were necessary; (b) whether the Argentine Republic did not "substantially" contribute to cause the crisis; (c) whether those measures were the only suitable means.[382]

Those are precisely the key issues under Article 25. The Committee therefore concludes that the Tribunal was correct in stating that "neither side has argued for application of a standard more favorable to host states than the norms of Article 25" and committed no annullable error in treating Article 25 as a statement of the applicable customary international law.

320. The Tribunal then stated the test it had to apply and its overall conclusions in the following terms:

[380] Counter-Memorial on the Merits (RA 523), footnote 679.
[381] See Rejoinder on the Merits (RA 524), para. 629.
[382] Comments of the Argentine Republic on Claimants' Post-Hearing Brief (RA 529), para. 146.

> Necessity must be construed strictly and objectively, not as an easy escape hatch for host states wishing to avoid treaty obligations which prove difficult. In this connection, [Argentina] has failed to meet its burden to demonstrate three key elements of ILC Articles 25 and 27: (i) that the wrongful act was the only way to safeguard Argentina's essential interest under Article 25(1)(a); (ii) that [Argentina] did not contribute to the situation of necessity; and (iii) that [Argentina did not return to the *status quo* when possible, or compensate Claimants for damage suffered as a result of the relevant measures.[383]

321. Elaborating upon its reasons, the Tribunal made the following comments:

> 1172. The Tribunal does not call into question [Argentina's] good faith in asserting that the tariff freeze was enacted to safeguard the country's vital interests, such as protecting of Argentina's indigent population (Respondent's Post Hearing Reply on the Merits at paragraph 148). However, regardless of whether the Emergency Measures related to the concession did much to affect the macro-economic conditions in Argentina, the Tribunal is not convinced that those measures, as presented and explained in these proceedings, were the only means by which [Argentina] could have protected its public interests.
>
> 1173. Equally as important, the Tribunal has difficulty finding that [Argentina] did not contribute to the situation which produced the 2001 crisis. Quite significantly, in May 2002 the then President of the Argentine Republic, Mr Eduardo Duhalde, affirmed in *The Washington Post* that, "[O]*ur crisis is homegrown – made in Argentina, by Argentines*". See Claimants' Post Hearing Brief on Merits at paragraph 167 and Exhibit CL-35. Although external factors may have aggravated the economic turmoil, Argentina's contribution to its economic situation is clear or was far from negligible.

322. In paragraphs 1174-1176, the Tribunal discussed further the nature of Argentina's contribution to the emergency, referring to the Argentine Government's continued failure to achieve primary surpluses sufficient to stop an unsustainable debt ratio (para. 1174), the fixed exchange regime, policies which decreased employer contributions to the social security scheme and increases in public spending (para. 1175) and concluding (para. 1176) that –

> Although it is not for this Tribunal to opine acceptable or unacceptable economic risks as a general matter, the duty to consider the State of Necessity Defense raised by [Argentina] requires the Tribunal to take note of the role played by [Argentina] in bringing about its own economic adversity.

323. The Tribunal then turned to the duration of any state of necessity. It held that –

[383] Award, para. 1171.

> 1177. Finally, even if [Argentina's] conduct might be excused under the State of Necessity Defense, [Argentina] remains obligated to return to the pre-necessity *status quo* when possible. Moreover, the successful invocation of the necessity defense does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State.
>
> 1178. The Tribunal considers that, at some reasonable point in time, [Argentina] should have compensated Claimants for injury suffered as a result of measures enacted during any arguable period of necessity in late December 2001. As mentioned earlier, ILC Draft Article 27 provides that "[t]he invocation of a circumstance precluding wrongfulness [is without prejudice to] compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists".

The Tribunal considered that Argentina had failed to restore compliance once it had become possible to do so, as there had been no increase in tariffs until more than three years had elapsed and the Claimants had sold their interests in an attempt to mitigate damages. [384]

324. Finally, the Tribunal observed that eight other tribunals had rejected Argentina's necessity defence under Article 25 and that the only two tribunals to have upheld a state of necessity defence had done so by invoking Article XI of the Argentina-USA BIT.[385]

325. Argentina attacks this part of the Award as a failure to apply the applicable law, thus entailing a manifest excess of powers, and for a failure to state the reasons on which the Award was based. In doing so, it relies heavily upon the decision of the *Enron* Committee, maintaining that the Tribunal in the present case fell into the same error in respect of its findings on "only way" and "contribution" that had led to the annulment of the award in *Enron*. Argentina also contends that the Tribunal invented the requirement of restoring the *status quo*.

326. At the outset, three points require emphasis. First, the three findings by the Tribunal – namely, that the measures adopted were not the only means by which Argentina might have responded to the crisis, that Argentina had itself contributed to the economic crisis, and that Argentina had failed to take steps to restore the *status quo* or compensate the Claimants once

[384] Award, paras. 1179-1180.
[385] Award, para. 1181.

it became possible to do so – have to be considered together. The question before the Tribunal, at this point in the Award, was whether Argentina could successfully rely upon the customary law defence of necessity in order to preclude the wrongfulness of its acts. The Tribunal considered that Argentina could not do so, because it had failed to discharge its burden in relation to each of these three requirements.

327. Secondly, there can be no doubt that the Tribunal did make clear findings in respect of each of these matters. There is no scope here for the Committee to arrive at the conclusion reached by the *Enron* Committee that it is unclear whether the Tribunal made any finding at all. Nor, again in contrast to the *Enron* case, did the Tribunal simply adopt the evidence of an expert as to economic matters and treat that as conclusive of a legal question.

328. Lastly, it is again important to recall that the standard on annulment is not whether a tribunal applied the applicable law correctly, but whether it applied it at all, and not whether its reasons are persuasive but whether they explain the basis on which the tribunal arrived at its conclusions.

329. The Committee considers that there is no doubt that the Tribunal applied the customary international law of necessity. The first two tests which it applied - whether the measures taken by Argentina were the only means to address the crisis and whether Argentina had contributed to its own economic plight – not only feature in Article 25 of the ILC Articles but also in all contemporary discussion of necessity and were expressly identified by Argentina (as well as the Claimants) as key issues for decision.[386] The fact that the Tribunal's reasoning on these points was concise cannot, in the Committee's opinion, amount to a failure to apply the law and thus a manifest excess of powers. In that regard, the Committee respectfully differs from the approach of the *Enron* Committee and prefers that of the *CMS* Committee.[387]

330. The third requirement, namely to restore the *status quo* or compensate the Claimants, requires more discussion. That requirement, which the Committee derived from Article 27 of the ILC Articles, had not been the subject of such detailed argument by Argentina (although it had been raised by the Claimants). Nevertheless, the Committee cannot accept that it was "invented" by the Tribunal. The Tribunal's analysis on this point seems to the Committee to

[386] See para. 319, above.
[387] See para. 297, above, quoting para. 136 of the *CMS* Decision, note 218, above.

reflect what is inherent in the very concept of necessity. If a departure from a legal obligation can be justified by a state of necessity, it can be justified for only so long as that state of necessity exists. That limitation is clearly stated in the correspondence between the British and United States Governments in the *Caroline* case, which is generally regarded as a critical instance of State practice leading to the development of the modern law of necessity.[388] Moreover, the Committee observes that the Tribunal's finding on this point was *obiter*, since the Tribunal had already found that Argentina was not entitled to rely upon the defence of necessity in any event.

331. Finally, the Committee considers that the Tribunal cannot be faulted for having approached this part of the case on the basis that the burden was on Argentina to establish that its conduct satisfied the requirements of customary law, as it is for the Party which seeks to rely upon a defence to establish that its conduct satisfies the requirements of the law for the application of that defence.

332. Accordingly, the Committee rejects the argument that the Tribunal manifestly exceeded its powers.

333. The Committee therefore turns to the question whether the Tribunal failed adequately to state the reasons for its decision. The Tribunal's reasoning on each of the three issues on which it held that Argentina had failed to establish its case – namely whether the emergency measures adopted were the "only means" by which Argentina could have protected its essential interests, whether Argentina had contributed to the emergency in which it found itself and whether Argentina should have restored the *status quo* after the immediate emergency had passed or paid compensation – is concise. Relying, in particular, on the *Enron* Committee's decision, Argentina is critical of this brevity. It points, for example, to the fact that the Tribunal's findings on the "only means" issue are set out in a single paragraph which gives no indication of any alternative means which might have been available and states simply that "the Tribunal is not convinced that those measures, as presented and explained in these

[388] See Crawford, *State Responsibility: The General Part* (Cambridge, 2013), p. 310 and the correspondence between the British and United States Governments quoted therein.

proceedings, were the only means by which [Argentina] could have protected its public interests."[389]

334. That brevity must, however, be seen in context. As the Committee has already explained, the question which the Tribunal was required to answer was whether or not Argentina could successfully rely upon the customary law defence of necessity in order to preclude the wrongfulness of its acts. The burden was on Argentina to establish that it could do so. The Tribunal found that it had failed to discharge that burden. It gave two principal reasons for that decision. Those reasons were, first, that it was not convinced that the measures adopted satisfied the "only means" requirement; and secondly, that it was not convinced that Argentina had not contributed to the emergency. It added that, even if – contrary to its principal conclusion – Argentina had satisfied it on those two points, it would still have been unable to rely upon the defence of necessity in respect of its failure either to restore the *status quo* or pay compensation once the state of necessity had come to an end. A reader would have no difficulty following this line of reasoning (whether or not they were persuaded by it). While each of the reasons on which the Tribunal based its conclusion regarding necessity might have been more fully explained, a tribunal is required only to state the reasons for its decision, not to give reasons for each and every one of those reasons.[390]

335. Moreover, the part of the Award in which the Tribunal set out its decision on necessity (paras. 1163-1181) has to be read together with the earlier section (paras. 493-592) in which it reviews the arguments of the Parties and summarises the evidence before it. It is clear, for example, if one reads paragraph 1172 together with paragraphs 530-556 that the Tribunal's finding regarding the "only means" reason did not come out of the blue but was based upon a careful analysis of the evidence before it regarding whether other avenues had been open to Argentina. The Committee understands the point, made by the *Enron* Committee, that the concept of "only means" is open to more than one interpretation but it notes that other courts and tribunals have found it unnecessary to elaborate upon those interpretations in reaching a conclusion regarding whether the measures before them were the only means open to the party claiming necessity. The International Court of Justice, for example, did not elaborate upon the meaning of this requirement in its judgment in *Gabčikovo-Nagymaros*

[389] Award, para. 1172.
[390] See *Soufraki*, note 58, above, para. 131 and *Enron*, note 217, above, para. 222.

(*Hungary/Slovakia*)[391] or in its advisory opinion in *Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory*.[392] In the light of the principle that necessity is an exceptional plea which must be strictly applied (a principle expressly stated in paragraph 1171 of the Award), one leading commentary on the law of State responsibility observes succinctly that "here 'only' means 'only'; it is not enough if another lawful means is more expensive or less convenient".[393]

336. Having examined both the finding of the Tribunal and its analysis of the evidence, the Committee considers that it is implicit in the reasoning of the Tribunal in the present case that the Tribunal considered that, whatever test was applied, the evidence submitted by Argentina failed to establish that the measures which it had taken were the only means of protecting its essential interests in the face of the economic crisis. Since even the *Enron* Committee accepted that it was sufficient that reasons be implicit, the Committee concludes that there was no failure to state reasons on this point. The same applies to the Tribunal's findings regarding Argentina's contribution to the crisis and the failure to restore the *status quo* or pay compensation. Accordingly, the Committee rejects Argentina's argument that the Tribunal failed to state reasons for this part of the Award.

337. Lastly, and in the event that Argentina is raising a challenge under Article 52(1)(d) of the ICSID Convention,[394] the Committee concludes that there is nothing in the record to suggest that the Tribunal was guilty of a serious departure from a fundamental rule of procedure in relation to this part of the Award.

## VIII. Failure to Address Evidence

### *A. The Issues Raised by Argentina*

338. Argentina also seeks the annulment of the Award on account of what it describes as the failure of the Tribunal to consider "fundamental evidence … which could have had a decisive influence" on the outcome of the case.[395] This ground relates to (a) evidence tendered by

[391] *I.C.J. Reports 1997*, pp. 44-45, para. 56.
[392] *I.C.J.* Reports 2004, p. 195, para. 140.
[393] Note 388, p. 311.
[394] See para. 316and footnote 376, above.
[395] Memorial, para. 113.

Argentina regarding the criticism of EDF and EDFI's management and global investment strategy and (b) the evidence given under cross-examination by Engineer Neme (a witness called by the Claimants but who had been involved on behalf of the Province of Mendoza in the privatisation of electricity provision) concerning the link between the Currency Clause in the Concession and the Argentine Convertibility Law regarding convertibility between the Argentine peso and the United States dollar. Argentina maintains that the failure of the Tribunal to consider this evidence is cause for annulment on the ground of (i) manifest excess of powers (Article 52(1)(b) of the Convention), (ii) failure to state the reasons on which the Award was based (Article 52(1)(e)), and (iii) serious departure from a fundamental rule of procedure (Article 52(1)(d)).

### *B. Parties' Arguments*

#### 1. Argentina

339. Argentina's first complaint concerns the failure of the Tribunal to mention a number of reports from French State entities (notably the National Assembly Investigation Committee on the Management of State-Owned Companies and the Court of Audit) on the management of EDF. These reports were highly critical of EDF's investments in certain parts of the world and blamed EDF management for poor investment decisions.[396] According to Argentina, they demonstrated that the investment in Argentina had been a bad decision and that EDF withdrew from Argentina in 2005 for reasons unconnected with the emergency measures.

340. The second point raised by Argentina concerns the response given by Engineer Neme to questions from Argentina's counsel regarding the scope and purpose of the Currency Clause in the Concession. Engineer Neme had said that when the Concession was drafted, no-one had contemplated that the peso would cease to be convertible, although they did envisage that the exchange rate might alter. He added that, had anyone contemplated the possibility of an end to convertibility, he doubted that the Currency Clause would have been included.[397] According to Argentina, this testimony was "conclusive evidence submitted by Claimants

[396] Memorial, paras. 113-119; Reply, para. 72.
[397] Hearing on the Merits, English Transcript, Day 3, pp. 942-943, excerpted in Memorial, para. 131.

that the reference to the calculation in U.S. dollars would never have been conceived to be applied within the framework of the abandonment of convertibility".[398]

341. Neither the French State reports, nor the evidence of Engineer Neme, is referred to by the Tribunal in its Award.

342. Argentina makes clear that it does not seek annulment on the ground that the Tribunal should have given weight to these two pieces of evidence but only on the ground that the Tribunal should not have ignored them.[399] It maintains that, by doing so, the Tribunal made three errors. First, it failed to deal with all of the questions submitted to it by the Parties, thereby contravening Article 48(3) of the Convention which requires a tribunal to deal with every question submitted to it. As was demonstrated by the decision of the *ad hoc* committee in *Amco I* [400] and confirmed by the leading commentary on the Convention,[401] such a failure can amount to a manifest excess of powers. Secondly, the absence of any discussion of these items of evidence meant that there was a failure on the part of the Tribunal to state the reasons on which the Award was based. Lastly, by failing to consider or evaluate evidence which was "a central part of [Argentina's] defense", the Tribunal was guilty of a serious departure from a fundamental rule of procedure.[402]

### 2. The Claimants

343. The Claimants maintain that there was no annullable error in the Tribunal's handling of the evidence. Although a tribunal has a duty to deal with every question that was submitted to it, it is not obliged to deal expressly with each argument or piece of evidence put before it in respect of each question.[403] It was for the Tribunal to decide upon the admissibility and probative weight of each item of evidence put before it.[404] The Tribunal had carefully analysed and evaluated all the evidence put to it and had decided all of the questions submitted by the Parties. The Claimants therefore maintain that the Tribunal's reasoning was clear and met the requirements of Article 48(3) of the ICSID Convention. They therefore

[398] Memorial, para. 132.
[399] Reply, paras. 77-78.
[400] *Amco Asia Corporation and Others v. Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 16 May 1986, para. 32, 1 ICSID Reports 509 (*"Amco I").*
[401] Schreuer, *Commentary*, note 53, above, pp. 816-817, para. 47.
[402] Reply, para. 74. See also Transcript, pp. 40-54.
[403] Counter-Memorial, paras. 184-190; Rejoinder, paras. 70-74.
[404] Counter-Memorial, para. 184; Rejoinder, para. 70.

contend that there was no excess of powers, failure to state reasons or departure from a fundamental rule of procedure.

### *C. Committee's Decision*

344. Although Argentina raises three separate grounds for annulment in respect of the Tribunal's handling of the evidence, these are closely related, as is shown by the decisions of the *Amco I* and *Klöckner I* Committees, to which Argentina refers.[405]

345. With regard to Argentina's claim that the Tribunal manifestly exceeded its powers, the Committee accepts that a failure on the part of a tribunal to decide one or more of the questions submitted to it by the Parties could constitute such an excess (just as a failure to exercise jurisdiction is capable of amounting to an excess of powers),[406] although it notes that the principal remedy in such a case appears to lie in an application for a supplementary decision under Article 49, rather than for annulment under Article 52(1)(b).[407]

346. Nevertheless, Article 48(3) requires only that a tribunal decide every *question* submitted to it. A "question" within the meaning of Article 48(3) is an issue which must be decided in order to determine all aspects of the rights and liabilities of the parties relevant to the case in hand. In making its case in relation to such a question, a party may advance several distinct arguments and refer to one or more items of evidence and legal authorities in support thereof. A tribunal is not required to rule separately on each argument of law or point of fact on which the parties are in disagreement, so long as it decides the question to which those arguments relate. What does, or does not, constitute a question that has to be decided is an objective matter and not one which can be shaped by the way in which a party chooses to put its case or the emphasis which it places on any particular point.[408]

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[405] *Amco I*, note 400, above, para. 32; *Klöckner Industrie-Anlagen GmbH v. Cameroon* (ICSID Case No. ARB 81/2), Decision on Annulment of 3 May 1985, para. 115, 2 ICSID Reports 95.
[406] See *Vivendi I*, note 70, above, para. 86.
[407] See Schreuer, *Commentary*, note 53, above, p. 816, para. 43 and *Wena Hotels*, note 210, para. 75. A proposal to make the failure to decide every question a separate ground for annulment was rejected (*History of the ICSID Convention*, vol. II, pp. 848-849).
[408] The *ad hoc* committee in *CDC*, note 156, above, para. 57, made the point that the terminology used by a party could not define the question the tribunal was obliged to answer; "the Tribunal was required to answer a legal question, or to put it another way, come to a conclusion about the Parties' rights and liabilities".

347. The reports of the various French State bodies regarding the management of EDF and EDFI constituted part of the evidence put forward by Argentina in support of an argument that the Claimants were partly to blame for their own predicament and that they divested themselves of their participation in SODEMSA for reasons that had nothing to do with the emergency measures but rather reflected a changed investment strategy in light of the criticism of the management made in those reports. The significance of that evidence was not a question in its own right but merely one of the factors put forward by one Party in support of its arguments. The Tribunal rejected the argument that the rights and liabilities of the Parties were affected by the quality of EDF's decision to invest.[409] As such, the Tribunal decided the question submitted to it and was not obliged to mention all of the evidence which had been put forward.

348. The same is true of the evidence of Engineer Neme. The answers given by Engineer Neme in cross-examination suggested that the Province of Mendoza had not approached the Currency Clause with a view to its application in the event of the convertibility of the peso being ended. That evidence was, however, only part of the evidence invoked by Argentina in support of an argument that the Currency Clause was tied to the continuation of the Convertibility Law and therefore did not apply to measures taken after the peso ceased to be convertible. In other words, the question which the Tribunal had to decide was whether, in light of all that evidence, the Currency Clause was or was not applicable when the peso ceased to be convertible in January 2002. The Tribunal considered that issue at some length in paragraphs 943-969 of the Award and rejected Argentina's interpretation of the Currency Clause (see, in particular, paragraphs 953 and 958-960). It therefore decided the question which had to be determined in order to arrive at a conclusion as to the rights and liabilities of the Parties. Accordingly, the Committee considers that the Tribunal was not guilty of an excess of powers.

349. The same reasoning must also lead the Committee to reject Argentina's argument that the Award should be annulled for failure to state the reasons on which it was based. As the Committee has already explained, the requirement to state reasons is limited in scope. So long as a reader can follow the reasoning in the Award, the fact that it does not deal with each

[409] Award, paras. 992-993; see also paras 1223-1229.

authority or every item of evidence is immaterial.[410] The fact that the Tribunal did not find it necessary to deal with Engineer Neme's evidence as to what was or was not within the contemplation of the Mendoza authorities at the time of the drafting of the Concession is not, therefore, a failure to comply with the requirement of Article 48(3) or grounds for annulment under Article 52(1)(e).

350. Nor does the Committee consider that there was a serious departure from a fundamental rule of procedure. Of course a tribunal must comply with the rules of due process [411] and those include the duty to afford the parties an equal opportunity to present their case, to call witnesses and to cross-examine the witnesses of the other party. That does not, however, require a tribunal to discuss any particular item of evidence in detail, or at all, where it is not necessary to do so in order to decide the questions before it. Article 52(1)(d) of the Convention cannot be used to impose a duty to give reasons which goes beyond the duty already set out in Article 48(3) and given effect, in the context of annulment, by Article 52(1)(e).

351. The Committee therefore rejects Argentina's application for annulment on the basis of an alleged failure to consider certain evidence.

## IX. Causation and Damages

### *A. The Issues Raised by Respondent*

352. Finally, Argentina seeks the annulment of the Award on the grounds that, in assessing the damages payable in respect of the breaches which it identified, (i) the Tribunal manifestly exceeded its powers by failing to apply the applicable law, (ii) failed to state the reasons on which this part of the Award was based, and (iii) was guilty of a serious departure from a fundamental rule of procedure.

[410] See the authorities cited in paras. 194 to 198, above and, in particular, *Enron*, note 217, above, para. 222.
[411] See paras. 199 to 200, above.

### *B. Parties' Arguments*

#### 1. Argentina

353. Argentina maintains that the Tribunal relied exclusively on the evidence of the Claimants' valuation experts (LECG), without properly considering the fact that their methodology had been challenged by Argentina and its experts (MBG).[412] Argentina alleges, in particular, that the Tribunal committed the following errors.

354. First, it ignored what Argentina characterises as serious flaws in LECG's macroeconomic analysis and, in particular, LECG's assumption that if there had been an increase in tariffs after the start of the emergency, that would not have resulted in a sharp drop in demand for electricity, thefts and failures to collect payment from customers. Argentina contends that it challenged these assumptions on the part of LECG but that the Tribunal ignored its counter-arguments.[413]

355. Secondly, Argentina points to the fact that, in rejecting Argentina's argument that by December 2001 EDEMSA had no value, the Tribunal relied on the ratings given to EDEMSA at that time by the credit ratings agencies and ignored Argentina's argument that the agencies' methodologies were flawed and their rating unreliable as an indicator of value.[414]

356. Thirdly, according to Argentina, LECG failed to take proper account of the debt accrued by EDEMSA between the date of the Claimants making their investment in 1998 and the end of 2001 and the Tribunal failed to address this criticism of the LECG Report.[415]

357. Lastly, Argentina maintains that the Tribunal awarded over US$ 2 million in respect of pre-emergency measures notwithstanding its comment that the Claimants' expert reports "took a significant number of twists and turns in this respect",[416] and took account of contractual issues which were not assessed even by the Claimants.[417]

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[412] Memorial, paras. 181-187; Reply, paras. 133-156.
[413] Memorial, para. 183-185.
[414] Memorial, para. 186.
[415] Memorial, para. 187.
[416] Award, para. 1321.
[417] Memorial, para. 188.

358. In addition, Argentina maintains that the Tribunal committed a manifest excess of powers by failing to apply the law applicable to determining the standard of compensation in respect of a breach of the requirement of fair and equitable treatment. According to Argentina, the Tribunal took as the standard the "genuine value" standard provided for by Article 5(2) of the Argentina-France BIT in respect of expropriation, without explaining how that standard could be applied to a case in which the allegation of expropriation had been rejected.[418] In doing so, the Tribunal ignored the distinction between primary and secondary rules and failed to apply the international law standard of reparation for unfair or inequitable treatment.[419]

359. Argentina also criticises the Tribunal for taking the value of the Claimants' investment in EDEMSA as at 1998 when the Tribunal had itself accepted that the appropriate date was 31 December 2001, thereby requiring Argentina to compensate the Claimants for losses suffered as a result of the changed economic conditions in the country, as well as for those caused by the emergency measures.[420]

360. With regard to the Claimants' duty to mitigate their loss, Argentina accuses the Tribunal of having accepted the principle but then failing properly to apply it. The Claimants had sold their share in EDEMSA in March 2005, shortly before the revision of tariffs, for US$ 2 million to IADESA. IADESA had then resold the shares in 2007 for a much higher price. Although the Tribunal had accepted that damages had to be reduced to take account of the difference between the 2005 and 2007 sale prices, it had without explanation reduced that difference by 50% and then applied a discount to arrive at a 2001 price.[421]

361. Finally, Argentina maintains that the Tribunal reversed the burden of proof by holding that Argentina had failed to offer any convincing explanation as to why the official valuation figure of 1998 should be used as the basis for valuation rather than the amount actually paid by the Claimants, whereas the burden was on the Claimants to justify the figure which they asserted should be used as the basis of valuation.[422]

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[418] Memorial, paras. 189-193.
[419] In this respect, Argentina pointed in particular to the award in *Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award of 28 March 2011, paras. 148-149. See Reply, para. 151.
[420] Memorial, para. 194.
[421] Memorial, para. 196.
[422] Memorial, para. 197.

### 2. The Claimants

362. The Claimants contend that Argentina's complaints are no more than a reflection of its disappointment that the Tribunal rejected its preferred methodology for calculating compensation and do not point to any annullable error.[423] They point to authorities which show that a tribunal enjoys a broad discretion in relation to the assessment of compensation[424] and to a series of awards which had adopted the same approach to compensation for unfair or inequitable treatment as that taken by the Tribunal.[425]

363. According to the Claimants, the Tribunal carefully analysed both the Claimants' and Argentina's experts' reports and gave reasons for preferring the analysis of LECG to that of Argentina's expert (MBG).[426] The Claimants cite the observation of the *Vivendi II* Committee that

> … a Tribunal may rely in this connection on expert and other testimony with which it agrees and may disregard other testimony. That is one of its principal tasks; cf also [Arbitration] Rule 34. It is generally accepted that a Tribunal has in these matters substantial discretion and does not need to explain expert views. … where a Tribunal agrees with one of the parties or with experts, it is not improper or unexpected for it to adopt the language used by them in the pleadings or in written testimony.[427]

364. With regard to mitigation of loss, the Claimants maintain that the Tribunal agreed with Argentina and substantially reduced the Claimants' damages accordingly.[428]

365. The Claimants deny that the Tribunal exceeded its powers, failed to state the reasons on which this part of the Award was based or committed a serious departure from a fundamental rule of procedure.

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[423] Counter-Memorial, para. 197.
[424] In particular, the decision of the *ad hoc* committee in *Impregilo SpA v. Argentina* (ICSID Case No. 07/17), Decision on annulment of 24 January 2014 ("*Impregilo*"), para. 160.
[425] In particular, *Ron Fuchs v. Georgia* (ICSID Case No. ARB/07/15), Award of 3 March 2010, paras. 532-537.
[426] Counter-Memorial, paras. 197-205.
[427] *Vivendi II*, note 102, above, para. 249.
[428] Counter-Memorial, paras. 114-117; Rejoinder, para. 134.

### *C. Committee's Decision*

366. Unsurprisingly, given the nature of the case before it, the part of the Award which deals with the issue of damages is complex. In paragraphs 593-877, the Tribunal reviews in detail the arguments of the Parties. Its own analysis and findings are set out at paragraphs 1182-1336. Before considering Argentina's challenge to that part of the Award, the Committee considers it useful to set out the Tribunal's own summary of its findings. The Tribunal held:

> 1182. Given the number of moving parts in determining quantum, the Tribunal sets forth the following road map of its computation, with details and justification included later in this section of the Award.
>
> **Claimants Total Damages as of December 2001**
>
> | | |
> |---|---|
> | Damages caused by Emergency Measures | US$ 133,635,633 |
> | Damages caused by Pre-Emergency Measures | US$ 2,502,797 |
> | Total Damages as of 31 December 2001 | US$ 136,138,430 |
>
> 1183. In calculating the quantum of damages, the Tribunal has generally adopted the LECG model as follows, taking 31 December 2001 as the valuation date.
>
> (i) Damages caused by the Emergency Measures will be calculated as the difference between two values: the value of Claimants' stake in EDEMSA under a scenario free of the Emergency Measures ("*but for*" scenario) and the value of the same stake under a scenario with the Emergency Measures ("*actual*" scenario), taking 31 December 2001 as the valuation date.
>
> (ii) The "but for" value (EDEMSA in the absence of the Emergency Measures) determined by DCF [429] method discounted as of 31 December 2001;
>
> (iii) From that amount the Tribunal subtracts the amount which should reasonably have been received by the Claimants in the 2005 sale of its EDEMSA shares discounted to 31 December 2001;
>
> (iv) To that amount, the Tribunal adds damages attributable to Pre-Emergency Measures, again valued as of 31 December 2001.
>
> 1184. Following this three-step approach yields figures as follows:

[429] Discounted Cash Flow.

**Step 1:** DCF calculation of Claimants' investments in the absence of the Emergency Measures as of 31 December 2001

| | |
|---|---|
| Firm value (Discount rate, WACC [430] 11.34%) | US$ 448,855,587 |
| Financial Debt (Dec 2001 book value) | US$ (119,644,020) |
| Equity Value | US$ 329,211,567 |
| Value of Claimants' Investment in EDEMSA (44.88% share) | US$ 147,750,151 |

**Step 2:** Subtracting price which might reasonably have been received in the 2005 sale valued as of 31 December 2001

| | |
|---|---|
| Value of Claimants' Investment in EDEMSA | US$ 147,750,151 |
| 2005 Sale discounted to 31 December 2001 | US$ 14,114,518 |
| Total damages caused by Emergency Measures | US$ 133,635,633 |
| **Step 3:** Inclusion of Pre-Emergency Damages | US$ 2,502,797.00 |
| Total: | **US$ 136,138,430** |

367. The Committee also considers it important to recall the limits which the annulment process necessarily imposes upon its task in considering this aspect of the case. Those limits were aptly summed up by the *Impregilo* Committee in the following terms:

> The Committee cannot review *de novo* the facts, evidence and criteria used by the Tribunal in assessing the damages nor the amount of compensation awarded to Impregilo. It is clear that Argentina disagrees with the causal connection found by the Tribunal between the damages and the disputed measures; that it considers that there was a gap in the analysis of causation and that the evidence produced should have resulted in a different compensation; and that it disagrees with the interpretation by the Tribunal of the applicable law in the assessment of the damages. However, a disagreement with the analysis of the Tribunal as to causation, or with respect to the assessment of the evidence or the interpretation of the law does not constitute ground for annulment under Article 52. … Of course, the assessment of damages cannot be arbitrary, but a Tribunal's determination of the amount of compensation allows for a high level of discretion and a disagreement with the criteria used by the Tribunal cannot be a ground for annulment of an award.[431]

[430] Weighted Average Cost of Capital.
[431] *Impregilo*, note 424, above, para. 160.

368. That is not to say that an award cannot be annulled on the basis of the tribunal's treatment of the issue of damages. As the last sentence of the passage from *Impregilo* quoted above makes clear, assessment of damages cannot be arbitrary. If a tribunal, in assessing damages, manifestly exceeds its powers by failing to apply (as opposed to arguably misapplying) the applicable law, fails to state the reasons on which its award is based, or is guilty of a serious departure from a fundamental rule of procedure, then the award can be annulled and awards have been annulled on account of such errors in the treatment of damages. Nevertheless, criticisms of the way in which the tribunal has applied the law or disagreements with its handling of the evidence, the methodology selected, or its computation of damages – even if well-founded – cannot lead to annulment. Nor is a tribunal required to address each point raised in evidence in order to comply with the requirement to state reasons for its award.

369. With those considerations in mind, the Committee begins with what it regards as Argentina's most fundamental criticism of this part of the Award, namely that the Tribunal failed to apply the applicable law in order to determine the standard of damages and thus manifestly exceeded its powers. That criticism turns on paragraph 1210 of the Award, in which the Tribunal, after noting that it had found that Argentina was responsible for denying the Claimants fair and equitable treatment, said:

> The fairest measure of damages for that breach would be the genuine value of the investment. Such a standard has been recognized in Article 5 of the Argentina-France BIT as the appropriate measure of compensation in cases of dispossession. Article 4 [sic][432] of the Argentina-France BIT does not present any alternative formulation for determining the valuation of a business diminished by unfair or inequitable treatment. Consequently, the Tribunal finds it appropriate to examine the value of EDEMSA had it not been reduced by the Emergency Measures.

370. Since the Tribunal had already held that the Claimants had not been dispossessed, [433] Argentina complains that this finding constitutes a manifest excess of power, because the Tribunal applied the standard of compensation laid down for one type of breach to another, quite different, one without any warrant for doing so.

[432] Fair and equitable treatment is actually dealt with in Article 3.
[433] Award, paras. 1113-1118.

371. Paragraph 1210 must, however, be taken in context. The Tribunal did not simply take the BIT standard of compensation for expropriation and apply it to a denial of fair and equitable treatment without justification. It had already explained (in paragraph 1183 of the Award, which is quoted in paragraph 366, above) that damages would be calculated on the basis of the difference between the actual value of the Claimants' investment in EDEMSA (i.e. after the effect of the emergency measures) and the value which that investment would have had "but for" the effect of those measures. That is no more than an application of the principle that the purpose of damages is to place the injured party, as nearly as possible, in the position which it would have occupied had the wrongful act not occurred. That principle is so well established in international law [434] as to require no discussion. There is no reason to think that, as a matter of general principle, it does not apply to a denial of fair and equitable treatment and nothing in the Argentina-France BIT requires a tribunal to apply a different standard in such a case, as the Tribunal noted in paragraph 1210 of the Award. In the Committee's view, in selecting this standard as the basis for calculating damages, the Tribunal correctly applied international law, which was the law applicable to determining the consequences of a breach of treaty. Moreover, even if it were open to argument that the Tribunal had misunderstood the relevant international law, that would have been a case of misapplication rather than non-application of the applicable law and would thus have entailed no excess of powers within Article 52(1)(b) of the ICSID Convention.

372. The Committee therefore rejects the argument that, in determining the standard of compensation the Tribunal committed a manifest excess of powers. It also rejects the argument that there was a failure to state reasons on this point. Taken as a whole, this part of the Award makes quite clear the basis on which damages were awarded. Nor can the Committee see any basis here for a finding that there was a serious departure from a fundamental rule of procedure.

373. Turning to the way in which the Tribunal applied the standard just set out and the methodology it used to determine the actual and "but for" valuations, it is true that the Tribunal generally adopted the approach set out in the LECG Report and rejected the alternative methodology suggested by Argentina and MBG. The Committee cannot accept,

[434] See, e.g., the Judgment of the Permanent Court of International Justice in the *Factory at Chorzow, P.C.I.J. Series A, No. 17,* p. 47 and Article 36 of the ILC Articles on State Responsibility and the commentary thereon.

however, that the Tribunal did so uncritically, or that it failed to explain why it preferred one approach to the other. On the contrary, paragraphs 1189-1208 of the Award explain – in considerable detail – why the Tribunal considered that MBG's methodology could not be accepted. The Tribunal identified a number of specific flaws in MBG's methodology. It then stated that "the difficulties with the MBG models are further highlighted by the fact that said experts of [Argentina] abandoned their earlier model" during the proceedings and "failed to advance any principled reason for their willingness to abandon the assumptions and results calculated in the merits phase".[435] It then went on, in paragraphs 1209-1222 (as well as in the subsequent analysis), to show why it was relying upon the LECG approach and to verify different aspects of that approach.

374. With regard to the four specific points made by Argentina (and summarised in paragraphs 354 to 357, above), the Committee would make the following observations. First, the Tribunal explained (in paragraph 1191 of the Award) why it rejected Argentina's argument that a rise in the tariffs would have led to a dramatic drop in demand and its criticisms of the macroeconomic assumptions in the LECG reports.

375. Secondly, the Tribunal explained (in paragraphs 1192 to 1197 of the Award) why, contrary to the position advanced by Argentina, it considered that the credit agencies' ratings of EDEMSA were probative of the value of that company and thus of the Claimant's investment. It commented, in particular, on the fact that one agency, "Fitch", had relied upon the guaranteed cash flows to which EDEMSA was entitled under the Concession as a key element in its high valuation in late 2001 and had removed those cash flows following the emergency measures, when it gave EDEMSA a far lower rating.[436]

376. Thirdly, contrary to what is suggested by Argentina, the Award shows that the debt burden taken on by EDEMSA was taken into account in arriving at a valuation of the Claimants' investment as of 31 December 2001, as the calculations in paragraph 1183 of the Award (set out in paragraph 366, above) make clear.

[435] Award, paras. 1198 and 1200.
[436] Award, para. 1194.

377. Lastly, the fact that the Tribunal found that the Claimants' experts engaged in a number of "twists and turns" in relation to quantification of the effect of the pre-emergency measures in no way invalidates the Tribunals' own analysis of this issue at paragraphs 1318-1323.

378. Of course, Argentina disagrees with the analysis of the Tribunal on all of these points and disputes the reasoning it adopted and the evaluation it made of the different expert reports but, as the Committee has already explained,[437] that is not a basis on which the Committee could annul the Award even if it agreed with every one of those criticisms.

379. Similarly, the Committee sees no basis for annulling the Award on the basis of the way in which the Tribunal calculated the value of the Claimants' investment or its approach to causation. The essence of Argentina's challenge on this point is that the Tribunal, having accepted Argentina's submission that the investment had to be valued as at 31 December 2001,[438] based its valuation on the price which the Claimants had paid in 1998. However, the Tribunal did not take the 1998 price as the "but for" valuation but only as a starting point for arriving at the "but for" figure. That is clear from the following passage in the Award:

> 1232. To determine genuine value one usually asks what a willing buyer would have paid for a business as of a particular date, which in our case would be the end of December 2001. For an electricity company, such a buyer would look to revenue streams that might be generated and thus examine the local tariff regulatory regime to see what cash might be expected. The buyer would note that Article 43 of the Mendoza Provincial Electricity Law says that investors receive a reasonable rate of return (una tasa de rentabilidad razonable) on the amount invested. Since we do not have an actual investment in December 2001, the next best starting point would be the amount actually paid for the investment on which a reasonable return can be calculated. Bidders normally determine their price as a function of forecasts of a project's viability in the light of variables which include projected revenue and costs.
>
> 1233. The willing buyer would also look at other aspects of the regulatory framework. Provincial Decree 197/98 allow [sic] share capital to be increased in an amount that reflects "the societies' assets, the value of the concession granted by the Province of Mendoza, *determined by the proportional amount of the willing economic bid of the tender,"* Emphasis added.

[437] See para. 367, above.
[438] Award, paras. 1183 and 1279.

> 1234. Of course, the amount invested is not the end of the story. Other elements have to be taken into consideration. Indeed, the method adopted by the Tribunal has yielded a value of approximately $ 147 million, down from the $ 209 million pro rata investment attributable to Claimants' shares in EDEMSA. For the sake of good order, the Tribunal again notes that Claimants' stake was 44.88% of the capital, and that the $ 237 million bid was for 51% of EDEMSA Class "A" shares offered by the Province of Mendoza.
>
> 1235. In other words, the Tribunal has adopted a quantum of approximately two-thirds (2/3) of the actual price paid.

380. There was, therefore, no contradiction between the decision that the "but for" valuation had to be made as of 31 December 2001 and the way in which the Tribunal made use of the price actually paid by the Claimants in 1998, nor has the Tribunal ignored factors (other than the emergency measures) which came into being between 1998 and the end of 2001 and affected the valuation.

381. The Committee also rejects Argentina's criticism of the Tribunal for employing the actual price paid, rather than the official valuation, as the starting point, as well as its allegation that the Tribunal improperly reversed the burden of proof in this regard. The Tribunal explained (in paragraphs 1213-1214 and in paragraphs 1227 and 1232-1234) why the price paid for the investment was relevant to the valuation. That was because the Provincial law and the terms of the Concession provided for a reasonable rate of return on the investment, so that (as explained in paragraphs 1232-1233) a willing buyer would have taken account of the scale of the investment in calculating the income stream which could reasonably be expected. That in turn raised the question whether the reasonable rate of return was to be calculated on the actual price paid by the investor or the official valuation at the time of bidding. Unsurprisingly, Argentina preferred the latter (which was far smaller) and the Claimants the former.

382. This part of Argentina's case before the Committee centres on paragraph 1215 of the Award:

> The Tribunal is unconvinced by [Argentina's] assertion that Claimants' return should be limited to the official valuation amount. This finding is supported by the fact that several sophisticated multinational companies also bid far in excess of the valuation amount. Moreover, [Argentina] has failed to offer any sound explanation as to why investors would have been willing to do that if the return on their investment would be limited to the official valuation amount. In the Tribunal's view, no rational investor would have been willing to agree with

> such restriction, which would have rendered it impossible for the investor to earn a return on its overall investment.

383. That paragraph has to be read in context. The Tribunal had already (in paragraphs 1213-1214) given an indication that it was persuaded by the Claimants' case that the actual price was the basis for calculation of the reasonable rate of return. In paragraphs 1216-1218, the Tribunal went on to explain why it considered that the language of the official valuation decree, the way in which it was described to investors and the testimony of Argentina's own experts (in the case of Mr Bello, in the proceedings before the *EDFI* Tribunal, and, in the case of Mr Quiroga, in another arbitration) supported the Claimants' position. In paragraph 1215 it was showing that Argentina had advanced no explanation in support of its alternative view. There is no reversal of proof in that. Nor was the Tribunal's approach to this issue one which could give rise to annulment on other grounds.

384. Lastly, the Committee considers that the Tribunal's calculation of the "actual value" and its approach to mitigation is not tainted by annullable error. The Claimants had asserted that the actual value of their investment as of 31 December 2001 was US$ 2 million, the figure for which they sold that investment to IADESA in March 2005. The Tribunal considered that "in the absence of any tariff revision, perhaps the Tribunal might find that figure a reasonable measure of the fair market value of EDEMSA in 2005".[439] However, the Tribunal considered that, as the sale was made between shareholders in EDEMSA in the middle of a tariff renegotiation procedure, each party to that transaction should have been aware of what was going on and of the prospect of a tariff revision.[440] Moreover, it held that "it would be patently unfair to allow Claimants to recover damages for loss that could have been avoided by taking reasonable steps" and that "the injured party must be held responsible for its own contribution to the loss".[441]

385. The Tribunal noted that IADESA sold the shareholding in EDEMSA which it had purchased from the Claimants, together with its own 6.12% shareholding, in 2007 for US$ 60 million.[442]

[439] Award, para. 1287.
[440] Award, para. 1298.
[441] Award, para. 1301.
[442] Award, para. 1300.

On that basis, the Claimants' shareholding was valued at US$ 52.8 million [443] in 2007 after the tariff revision had taken place. The Tribunal determined that the actual value of the Claimants' investment as at March 2005 had to be greater than US$ 2 million. It held:

> In determining the extent to which the share price should be deemed adjusted (and thus damages should be reduced) the Tribunal looks to the background of the renegotiation in course over the concession. A reasonable seller would try to retain some of the possible benefits and, therefore, in arm's-length transactions a seller and a buyer would accept to partake any substantial benefit. Absent any special circumstances, the Tribunal considers equitable to impute to each of the parties an equal share of 50% in those potential benefits. The buyer would still have enough incentives to buy and the seller would have taken a reasonable step to minimize its losses.[444]

386. In short, far from the 50% reduction being unexplained, as Argentina suggests, it was based upon the Tribunal's calculation of how, in an arm's length transaction, a buyer and seller might have approached the value of the shareholding knowing that a tariff increase was possible but far from certain. Of course, one can argue over whether 50% is too large (or too small) a reduction but it cannot be said to fall outside the scope of the Tribunal's discretion to calculate damages. Nor is the Tribunal's figure one which is unexplained. In addition, the Tribunal naturally discounted the price to arrive at a 2001 figure, something which was both necessary and inevitable as the object of this part of the valuation was to determine what the investment was actually worth at the critical date of 31 December 2001.

387. The Committee therefore rejects Argentina's application to annul the Award under any or all of Articles 52(1)(b), (d) and (e) in relation to the treatment of the damages and causation issues.

## X. Costs

388. The Committee turns, finally, to the question of costs. In accordance with Administrative and Financial Regulation 14(3)(e), Argentina, as the Party seeking the annulment of the Award, has been responsible to date for all of the advance payments required to cover the

[443] The Claimants' shareholding in EDEMSA (44.88% of the total) had been 88% of the 51% shareholding which IADESA owned after March 2005 and sold in 2007. 88% of US$ 60 million yields a figure of US$ 52.8 million.
[444] Award, para. 1311.

costs of the Committee and the Centre. The Committee, however, has discretion, under Article 61(2) of the Convention and the Rule 28 of the Arbitration Rules to apportion these costs between the Parties. The Committee also has discretion to order that one Party bear all, or part, of the costs incurred by the other Party in respect of its legal representation.

389. There is no general rule in ICSID proceedings that the losing party should pay the successful party's costs, nor is there even a presumption in favour of such an outcome.[445] The decisions of past *ad hoc* committees cannot be said to have given rise to a *jurisprudence constante*, although they do suggest that committees have sometimes drawn a distinction between the costs of the committee and of the Centre, on the one hand, and the costs of representation of the parties on the other, with the unsuccessful party more frequently being required to pay the whole of the former than to reimburse all or part of the latter. Some committees have also suggested that a relevant consideration is whether or not the application for annulment was made in good faith and whether it was so "fundamentally lacking in merit" that it was "to any reasonable and impartial observer, most unlikely to succeed".[446]

390. The Committee has no hesitation in saying that it regards the request for annulment in the present case as having been advanced in good faith and having been based on arguments that were generally plausible. This is not a case in which the annulment application was "fundamentally lacking in merit" and the fact that the Committee has dealt with Argentina's arguments at such length is an indication that it does not consider that they were doomed to failure from the outset.

391. In these circumstances, but taking account of the fact that Argentina has been unsuccessful in respect of all of the grounds on which it has sought annulment, the Committee considers that it would be equitable to order that Argentina should bear the entire costs of the Committee and the Centre but to leave each Party to meet its own costs of representation.

[445] In contrast to the position under Article 40 of the UNCITRAL Rules, under which the starting point is a presumption that the unsuccessful party must bear the whole costs of the tribunal.
[446] *CDC*, note 156, above, para. 89.

## XI. Dispositif

392. For the reasons set forth in the foregoing paragraphs of this Decision, the Committee unanimously decides:-

(1) to dismiss in its entirety the Application for Annulment of the Award of 11 June 2012 submitted by the Argentine Republic;

(2) that the Argentine Republic shall bear the costs of the proceedings, comprising the fees and expenses of the Members of the Committee, and the costs of the Centre; and

(3) that each Party shall bear its own legal costs and expenses.

[Signed]

Prof. Teresa Cheng
Member of the *ad hoc* Committee
Date: 12/01/2016

[Signed]

Prof. Yasuhei Taniguchi
Member of the *ad hoc* Committee
Date: 15/01/2016

[Signed]

Sir Christopher Greenwood
President of the *ad hoc* Committee
Date: 08/01/2016