INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

SUEZ, SOCIEDAD GENERAL DE AGUAS DE BARCELONA S.A.
AND VIVENDI UNIVERSAL S.A.

Claimants

and

ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/03/19

DECISION ON ARGENTINA'S APPLICATION FOR ANNULMENT

Members of the Committee
Professor Dr. Klaus Sachs, President
Mr. Rodrigo Oreamuno B., Member of the Committee
Sir Trevor Carmichael, Member of the Committee

Secretary of the Committee
Mr. Francisco Grob, ICSID

Date of dispatch to the Parties: May 5, 2017

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TABLE OF ABBREVIATIONS

AASA	Aguas Argentinas S.A.
AGBAR	Sociedad General de Aguas de Barcelona, S.A.
Argentina-France BIT	Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments, signed on 3 July 1991 and in force since 3 March 1993
Argentina-Spain BIT	Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, signed on 3 October 1991 and in force since 28 September 1992
Argentina's Application	Argentina's Application on Annulment dated 7 August 2015
Argentina's Memorial	Argentina's Memorial on Annulment dated 24 February 2016
Argentina's Reply	Argentina's Reply on Annulment dated 18 July 2016
Award	Award dated 9 April 2015 rendered in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)
BITs	Argentina-France BIT and Argentina-Spain BIT
Claimants' Counter-Memorial	Claimants' Counter-Memorial on Annulment dated 24 May 2016
Claimants' Rejoinder	Claimants' Rejoinder on Annulment dated 12 September 2016
Committee	*Ad hoc* committee in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)
Decision on Disqualification	Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal dated 12 May 2008 rendered in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)
Decision on Jurisdiction	Decision on Jurisdiction dated 3 August 2006 rendered in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)

Decision on Liability	Decision on Liability dated 30 July 2010 rendered in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)
ETOSS	*Ente Tripartito de Obras y Servicios Sanitario*, the regulatory authority in Argentina
FET	Fair and Equitable Treatment
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration adopted by resolution of the IBA Council on 22 May 2004
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of April 10, 2006
ICSID Background Paper on Annulment	Background Paper on Annulment for the ICSID Administrative Council (updated version, May 2016)
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
IDB	Inter-American Development Bank
ILC Draft Articles	Draft Articles of Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001
MFN	Most Favored Nation
Resolution 602/99	Resolution ETOSS No. 602/99 dated 8 July 1999
Tribunal	Arbitral tribunal in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/19)
Vienna Convention	Vienna Convention on the Law of Treaties signed on 23 May 1969 and entered into force on 27 January 1980
Vivendi	Vivendi Universal, S.A.

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an arbitration submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**") on the basis of the *Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments*, signed on 3 July 1991 and in force since 3 March 1993 (the "**Argentina-France BIT**"), and the *Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments*, signed on 3 October 1991 and in force since 28 September 1992 (the "**Argentina-Spain BIT**"), as well as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "**ICSID Convention**").

2. The Parties in this proceeding are **Suez**, a company incorporated under the laws of France, **Sociedad General de Aguas de Barcelona, S.A.** ("**AGBAR**"), a company incorporated under the laws of Spain, **Vivendi Universal, S.A.** ("**Vivendi**"), a company incorporated under the laws of France (together "**Claimants**"), and the Argentine Republic ("**Respondent**" or "**Argentina**"), (each a "**Party**" and together, the "**Parties**").

II. PROCEDURAL HISTORY

3. On 21 August 2015, pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**ICSID Arbitration Rules**"), ICSID registered an application from the Argentina for the annulment of the Award dated 9 April 2015 (the "**Award**"), as well as the Decision on Jurisdiction dated 3 August 2006 (the "**Decision on Jurisdiction**") and the Decision on Liability dated 30 July 2010 (the "**Decision on Liability**"), which form an integral part of the Award, rendered by the tribunal (the "**Tribunal**") in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19 ("**Argentina's Application**").

4. Argentina's Application was made within the time period provided in Article 52(2) of the ICSID Convention.

5. In its Application, Argentina seeks annulment of the Award on four grounds set out in Article 52(1) of the ICSID Convention, specifically claiming that:

   a) the Tribunal was not properly constituted;

   b) the Tribunal has manifestly exceeded its powers;

   c) there has been a serious departure from fundamental rules of procedure; and

d) the Award has failed to state the reasons on which it is based.

6. Argentina's Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Arbitration Rules for a stay of enforcement of the Award until Argentina's Application is decided.

7. Upon registering Argentina's Application, in accordance with Rule 50(2) of the ICSID Arbitration Rules, the Secretary-General of ICSID transmitted a Notice of Registration to the Parties. The Parties were also notified that, pursuant to Rule 54(2) of the ICSID Arbitration Rules, the enforcement of the Award was provisionally stayed.

8. By letter dated 23 October 2015, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the Parties were notified that an *ad hoc* Committee composed of Professor Dr. Klaus Sachs (a national of Germany), Sir Trevor Carmichael (a national of Barbados), and Mr. Rodrigo Oreamuno B. (a national of Costa Rica) (the "**Committee**") had been constituted. On the same date, the Parties were informed that Mr. Francisco Grob, Legal Counsel, ICSID, would serve as Secretary of the Committee. The Parties were notified in this same letter that Prof. Dr. Sachs had been designated President of the Committee. Enclosed with the same letter, the Parties were provided with copies of the Declaration pursuant to Rules 52(2) and 6(2) of the ICSID Arbitration Rules signed by each member of the Committee.

9. By letter of 3 November 2015, the Secretary of the Committee asked the Parties whether they would agree to retain the services of an assistant to the President of the Committee, Ms. Susanne Häusler. Argentina and Claimants agreed to Ms. Häusler's appointment by communications of 10 and 11 November 2015, respectively.

10. The first session of the Committee was held, with the agreement of the Parties, on 24 November 2015, by telephone conference. The Parties agreed that the annulment proceedings would be conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006. A schedule was set for the Parties' main submissions on Argentina's Application. The Parties were also asked to agree on a date for the hearing on annulment and on a procedural schedule for the filing of their submissions concerning the continuation/termination of the stay of enforcement of the Award.

11. On 7 December 2015, the Parties informed the Committee of their agreement on the schedule for the filing of written submissions on Argentina's request for a stay of enforcement of the Award. On 9 December 2015, the Committee approved the schedule of proceedings agreed upon by the Parties and fixed a date for a hearing on Argentina's request for continuation of the stay of the enforcement of the Award.

12. By letter of 4 January 2016, the Committee approved the Parties' joint proposal to schedule the hearing on annulment for 8 and 9 November 2016.

A. Procedure on Argentina's Request for a Continuation of the Stay of Enforcement of the Award

13. As per the agreed and approved schedule for written pleadings:

    a) on 22 December 2015, Argentina submitted its First Brief on Continuation of the Stay of Enforcement of the Award;

    b) on 19 January 2016, Claimants submitted their Response to the Argentine Republic's Request to Continue the Stay of Enforcement of the Award;

    c) on 10 February 2016, Argentina submitted its Second Brief on Continuation of the Stay of Enforcement of the Award; and

    d) on 3 March 2016, Claimants submitted their Second Submission on the Argentine Republic's Request to Continue the Stay of Enforcement of the Award.

14. On 23 March 2016, the Committee held an oral hearing with the Parties in Washington DC on Argentina's request for continuation of the stay of the enforcement of the Award.

15. On 25 March 2016, Claimants submitted final versions of the slides presented during their opening presentation and their responses to the Committee's questions and offered to provide copies of the legal authorities referenced but not on the record during the hearing. On 28 March 2016, Argentina submitted the slides presented during its opening presentation and its responses to the questions asked by the Committee at the hearing.

16. On 1 April 2016, Claimants provided copies of the legal authorities referenced in the slides presented by them at the hearing.

17. On 8 April 2016, Argentina submitted its comments about the final versions of the slides presented by Claimants in response to the Committee's questions and, upon leave of the Committee, Claimants submitted a brief response on 12 April 2016.

18. On 22 April 2016, Claimants submitted copies of two legal authorities, which had not been available on 1 April 2016, and upon leave of the Committee, Argentina filed its comments together with two annexes on 29 April 2016.

19. On 7 June 2016, the Committee rendered its Decision on the Stay of Enforcement of the Award, by which it dismissed Respondent's request to continue the stay of enforcement of

the Award and ordered that the stay of enforcement of the Award be terminated as of the date thereof.

B. Procedure on Argentina's Application for Annulment of the Award

20. As per the agreed and approved schedule for written pleadings, as further amended by the Parties with the approval of the Committee on 1 July 2016:

    a) on 24 February 2016, Respondent filed its Memorial on Annulment ("**Argentina's Memorial**");

    b) on 24 May 2016, Claimants filed their Counter-Memorial on Annulment ("**Claimants' Counter-Memorial**");

    c) on 18 July 2016, Respondent filed its Reply on Annulment ("**Argentina's Reply**"); and

    d) on 12 September 2016, Claimants filed their Rejoinder on Annulment ("**Claimants' Rejoinder**").

21. On 3 October 2016, Claimants informed the Committee that they wished to introduce a new legal authority into the record, *i.e.*, a decision issued by the US District Court for the District of Columbia on 30 September 2016 in *Republic of Argentina v. AWG Group Ltd.*, Civil Action No. 15-1057 (BAH) (D.D.C.).

22. On 7 October 2016, Respondent objected to Claimants' request to introduce a new legal authority into the record.

23. On 12 October 2016, the Committee permitted Claimants to submit the new legal authority into the record by 14 October 2016 and noted that both sides would have the opportunity to comment on it as part of their oral submissions during the hearing in November 2016.

24. On 14 October 2016, Claimants submitted the new legal authority into the record.

25. On 8 and 9 November 2016, the Committee held an oral hearing with the Parties in Washington DC on Respondent's Application for annulment of the Award.

26. On 10 and 11 November, 2016, Argentina and Claimants, respectively, submitted the demonstrative exhibits used during the hearing.

27. By letter dated 18 November 2016, the Committee informed the Parties that it had no further questions for them to address in post-hearing submissions. The Parties were thus invited to submit their statements of costs.

28. On 30 November 2016, Claimants submitted the Parties' agreed revised version of the Spanish and English transcripts, which Argentina confirmed the following day.

29. On 2 and 3 December 2016, Argentina and Claimants submitted their Statement of Costs, respectively.

30. The Committee declared the proceeding closed on 1 May 2017, in accordance with Rules 53 and 38(1) of the ICSID Arbitration Rules.

31. The members of the Committee have deliberated by various means of communication and have taken into consideration the Parties' entire written and oral arguments and submissions.

III. THE DECISION ON JURISDICTION, THE DECISION ON LIABILITY, AND THE AWARD

32. Respondent requests annulment of the Award dated 9 April 2015, as well as of the Decision on Jurisdiction dated 3 August 2006 and the Decision on Liability dated 30 July 2016, which it describes as an integral part of the Award.[1]

A. Decision on Jurisdiction Dated 3 August 2006

33. In its Decision on Jurisdiction, the Tribunal rejected all of Argentina's objections, except for one which had become moot. The Tribunal found that the dispute was of legal nature and arose directly out of Claimants' investments in the water distribution and waste water systems of the city of Buenos Aires and surrounding municipalities. The existence of a dispute resolution clause in the concession contract concluded by Aguas Argentinas S.A. ("**AASA**"), a company incorporated in Argentina in which Claimants were shareholders, and the Argentine Government for the operation of the water concessions did not preclude Claimants from bringing this arbitration. In the Tribunal's view, Claimants had standing to protect their interest as shareholders on their own right under the Argentina-France and the Argentina-Spain BITs, as applicable, and AGBAR was entitled to invoke the more favorable treatment afforded in the Argentina-France BIT to bring an arbitration without the need of first having recourse to the local courts of Argentina.

[1] Argentina's Application, ¶ 1.

B. Decision on Liability Dated 30 July 2010

34. The Tribunal determined in its Decision on Liability that Argentina did not expropriate Claimants' investment nor did it deny them full protection and security as required by the applicable investment treaties. It found, however, that Argentina denied Claimants fair and equitable treatment ("**FET**"). The Tribunal rejected Argentina's necessity defense, including its allegation that Article 5(3) of the Argentina-France BIT, as well as international law, exempted Argentina from its BIT obligations during times of emergency. Although Claimants had argued that Argentina's unilateral termination of the Concession also violated their rights under the investment treaties, the Tribunal rejected that claim, stating that it had no jurisdiction to judge whether Argentina's actions had breached the Concession Contract.

C. Award Dated 9 April 2015

35. The Tribunal awarded damages to Claimants in excess of USD 380 million, plus compound interest. Suez was awarded USD 223,043,289 for losses on guaranteed (sponsored) debt, equity and management fees. AGBAR was awarded USD 123,276,448 for losses on guaranteed debt and equity, and Vivendi was awarded USD 37,261,504 for losses on guaranteed debt and equity. On the issue of costs, the Tribunal determined that each party should bear its own costs and that the cost of the proceedings shall be divided equally.

IV. THE PARTIES' CONTENTIONS AND RELIEF SOUGHT

36. Respondent seeks the annulment of the Award, which is resisted by Claimants.

A. Summary of Respondent's Contentions

37. Respondent requests annulment of the Award invoking the following grounds:[2]

    (i) The Tribunal was not properly constituted (Article 52(1)(a) of the ICSID Convention);

    (ii) The Tribunal has manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention);

    (iii) There has been a serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention); and

[2] Argentina's Reply, ¶ 8; Argentina's Memorial, ¶ 2; Argentina's Application, ¶ 3.

(iv) The Award has failed to state the reasons on which it is based (Article 52(1)(e) of the ICSID Convention.

38. In relation to the scope of annulment proceedings, Respondent contends that the remedy of annulment seeks to preserve the integrity of the ICSID dispute settlement mechanism in all its facets, including the integrity of the tribunal, the process and the award.[3]

39. Respondent invokes four separate sets of reasons that warrant, in its view, the annulment of the Award in this case.

40. First, Respondent claims that the appointment of Prof. Kaufmann-Kohler as director of UBS on 19 April 2006, a Swiss bank which held shares and other interests in two of the Claimants (Suez and Vivendi), and her alleged failure to disclose such appointment to the Parties to the arbitration and to properly investigate the connections between UBS and the Parties to this arbitration created justifiable doubts regarding her ability to act as an impartial and independent arbitrator under Article 14(1) of the ICSID Convention. Consequently, the Tribunal was no longer properly constituted and a serious departure from fundamental rules of procedure occurred (Articles 52(1)(a) and (d) of the ICSID Convention).[4]

41. Second, Respondent alleges that the Tribunal improperly applied the most-favored-nation ("**MFN**") clause of the Argentina-Spain BIT to a dispute settlement provision, enabling AGBAR to circumvent the 18-month local court requirement of Article X of the Argentina-Spain BIT. According to Respondent, in doing so the Tribunal manifestly exceeded its powers, failed to state the reasons on which its decision was based and seriously departed from fundamental rules of procedure (Article 52(1)(b), (d) and (e) of the ICSID Convention).[5]

42. Third, Respondent claims that the Tribunal failed to state the legal standards and to consider the evidence submitted by Respondent in the context of its state of necessity defense and that the Tribunal did not consider Respondent's obligation to guarantee the human right to water. In Respondent's view, the Tribunal thereby failed to state the reasons on which its decision was based (Article 52(1)(e) of the ICSID Convention).[6]

43. Fourth, Respondent invokes reasons relating to the valuation of damages, specifically: (i) the valuation period because the Tribunal allegedly awarded damages for losses sustained after

[3] Argentina's Reply, ¶ 1-7.
[4] Argentina's Application, ¶¶ 23-33; Argentina's Reply, ¶¶ 67-105.
[5] Argentina's Application, ¶¶ 34-42; Argentina's Reply, ¶¶ 106-130.
[6] Argentina's Application, ¶¶ 43-47; Argentina's Reply, ¶¶ 131-164.

the termination of the Concession Contract while finding that such termination did not amount to a breach of the Treaty; (ii) the construction of the valuation exercise because it allegedly adopted a series of presumptions for which it gave no reasons and which contradicted other statements made by the Tribunal; and (iii) the management fees because the Tribunal awarded losses in relation to the Management Contract without having previously determined that it was a protected investment under the Treaty. In Respondent's view, the Tribunal thereby manifestly exceeded its powers and failed to state the reasons for the Award (Article 52(1)(b) and (e) of the ICSID Convention).[7]

B. Respondent's Relief Sought

44. Respondent requests:[8]

(i) that, pursuant to Article 52 of the ICSID Convention and Rule 50 of the Arbitration Rules, the Award, as well as the Decision on Jurisdiction and the Decision on Liability which are an integral part thereof, be annulled; and

(ii) that Claimants bear all their legal costs and attorneys' fees arising from this proceeding.

C. Summary of Claimants' Contentions

45. Claimants take the view that Respondent's Application is abusive, arguing that it is based on disagreement with the Tribunal's findings rather than on annullable errors in the Award, and emphasize that the ICSID Convention does not allow for the substantive or *de novo* review that Respondent is seeking.[9]

46. First, Claimants consider that Respondent's arguments relating to the Tribunal's decision to reject Respondent's challenge to Prof. Kaufmann-Kohler do not satisfy the standards for annulment under either Article 52(1)(a) or (d) of the ICSID Convention. According to Claimant, no "*egregious violations of basic principles*" have been committed; regardless whether the approach of the *Azurix* Committee is followed or that of the *EDF* Committee, the decision stands because all challenged procedures were observed in this case and the decision is certainly not so plainly unreasonable that no decision-maker could have come to the unchallenged members' conclusion. Claimants emphasize that in their final analysis, all

[7] Argentina's Application, ¶¶ 48-59; Argentina's Reply, ¶¶ 165-219.
[8] Argentina's Reply, ¶ 235.
[9] Claimants' Counter-Memorial, ¶¶ 1-3; Claimants' Rejoinder, ¶¶ 1-6.

of the decision-makers who have heard Argentina's arguments on Prof. Kaufmann-Kohler's appointment to the board of UBS have rejected them.[10]

47. Second, Claimants deny that the Tribunal manifestly exceeded its powers by (i) permitting AGBAR to access arbitration without having recourse to the Argentine courts for 18 months first; or (ii) when awarding damages to Claimants. In Claimants' view, Respondent attempts to re-argue these points because it is not satisfied with the Tribunal's decision, not because the Tribunal exceeded its powers. In doing so, Respondent willfully ignores, among others, that an excess of power must be clear and obvious to be manifest and only a failure to apply the law *in toto* can lead to annulment.[11]

48. Third, Claimants submit that the Tribunal did not depart from any fundamental rule of procedure when (i) deciding on the challenge to Prof. Kaufmann-Kohler; (ii) exercising jurisdiction over AGBAR's claims; or (iii) applying an interest rate higher than that allegedly agreed by the Parties.[12] Claimants argue that Prof. Kaufmann-Kohler's purported non-disclosure cannot meet the standard for annulment under Article 52(1)(d) of the ICSID Convention where, as here, the undisclosed facts would not evidence a conflict of interest or anything close to it and the applicable procedures were followed.[13] Similarly, Argentina fails to identify what fundamental rules of procedure have presumably been violated by the Tribunal's exercise of jurisdiction over AGBAR's claims. As for the last point, Claimants argue that the Tribunal did not disregard any alleged agreement concerning the applicable interest rate because there was none at the time the Tribunal had to render its decision and the Parties had ample opportunity to comment upon this issue anyhow.[14]

49. Fourth, Claimants consider that the Tribunal did not fail to state reasons, arguing that this annulment ground requires either a total absence of reasons or a lacking in coherence preventing the reader from following it – contrary to the Tribunal's detailed reasoning as to why it (i) exercised jurisdiction over AGBAR's claims; (ii) rejected Respondent's necessity defense; and (iii) chose the valuation date, adopted the but-for scenario and awarded compensation for the management fees the way it did in its Award.[15]

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[10] Claimants' Counter-Memorial, ¶ 58, ¶¶ 72-89; Claimants' Rejoinder, ¶¶ 7-24, ¶¶ 25-39.
[11] Claimants' Counter-Memorial, ¶¶ 106-107, ¶¶ 121-122, ¶ 135; Claimants' Rejoinder, ¶¶ 44-81.
[12] Claimants' Counter-Memorial, ¶¶ 142-144; Claimants' Rejoinder, ¶¶ 82-86.
[13] Claimants' Counter-Memorial, ¶¶ 142-143; Claimants' Rejoinder, ¶¶ 40-43.
[14] Claimants' Rejoinder, ¶¶ 72-74.
[15] Claimants' Counter-Memorial, ¶ 158, ¶ 164, ¶¶ 170-177; Claimants' Rejoinder, ¶¶ 87-129.

D. Claimants' Relief Sought

50. Claimants request that the *ad hoc* Committee:[16]

    (i) reject Argentina's request for annulment in its entirety; and

    (ii) order that Argentina bear all costs and expenses incurred by Claimants in connection with the present annulment proceedings, including the fees of the Centre, the costs and fees of the *ad hoc* Committee, and Claimants' legal fees and expenses.

V. GENERAL REMARKS AND SCOPE OF REVIEW IN ANNULMENT PROCEEDINGS

51. At the outset, the Committee wishes to make a few general remarks regarding the purpose and scope of annulment proceedings under Article 52 of the ICSID Convention. As it is expressly provided in Article 53(1) of the ICSID Convention, ICSID awards are not subject to any appeal, and in line with this provision, it is in fact accepted by both Parties that an annulment committee does not have the power to review the merits of the Award and/or the other decisions rendered by the Tribunal. As stated in a leading commentary on the ICSID Convention, which both Parties cite in various contexts, there are two main elements distinguishing an annulment proceeding from an appeal:

> "*… An appeals body may substitute its own decision on the merits for the decision that it has found to be deficient. Under the ICSID Convention, an* ad hoc *committee only has the power to annul the award. The* ad hoc *committee may not amend or replace the award by its own decision, whether in respect of jurisdiction or the merits. …*
>
> *As to the second element, annulment is only concerned with the legitimacy of the process of decision; it is not concerned with its substantive correctness. Appeal is concerned with both.*"[17]

52. It is therefore not for this Committee to make its own assessment of the factual and/or legal questions of this case or to substitute its own views for the conclusions that the Tribunal has reached in the course of almost twelve years of proceedings.

53. The mandate of an *ad hoc* committee is strictly confined to an assessment of the five grounds for annulment provided in Article 52(1) of the ICSID Convention. In interpreting the scope

[16] Claimants' Rejoinder, ¶ 135.
[17] **AL A RA 40**, Article 52, ¶¶ 10-11.

of its review under these five grounds, the Committee will take into account the intention of the drafters of the ICSID Convention in not providing for an appeal, but rather a very limited annulment proceeding, which is designed to ensure the fundamental integrity of the arbitral proceedings but must not be misused to re-litigate the case on the merits. As it has been stated in the same leading commentary on the ICSID Convention, the annulment proceeding "*is designed to provide emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects.*"[18] The *ad hoc* committee in *Soufraki v. UAE* referred to the "*control of the fundamental integrity of the ICSID arbitral proceedings in all its facets*," which includes: (i) the integrity of the tribunal; (ii) the integrity of the procedure; and (iii) the integrity of the award.[19]

54. In this case, Respondent has invoked four annulment grounds: [20]

(i) The Tribunal was not properly constituted (Article 52(1)(a) of the ICSID Convention);

(ii) The Tribunal has manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention);

(iii) There has been a serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention); and

(iv) The Award has failed to state the reasons on which it is based (Article 52(1)(e) of the ICSID Convention.

55. In order to arrive at this Decision, the Committee reviewed and evaluated all the arguments of the Parties and the documents submitted by them in this proceeding. The fact that the Committee does not specifically mention a given argument or reasoning does not mean that it has not considered the same. In their submissions, the Parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to this decision on annulment. The Committee has considered these documents carefully and may take into account the reasoning and findings of other committees on annulment. However, in coming to a decision on the matter of annulment raised by Respondent, the Committee must perform, and in fact has performed, an independent analysis of the ICSID Convention, the ICSID Arbitration Rules, and the particular facts of this case.

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[18] **AL A RA 40**, Article 52, ¶ 15.
[19] **AL A RA 61**, ¶ 23.
[20] Argentina's Reply, ¶ 8.

56. Before entering into its analysis of the grounds advanced by Respondent, the Committee will first determine the scope of its review under the invoked grounds for annulment. In this regard, it will take into account the recognized principles of interpretation of international treaties embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "**Vienna Convention**"), in particular its Article 31(1) pursuant to which "[a] *treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*."[21]

A. Proper Constitution of the Tribunal (Article 52(1)(a) of the ICSID Convention)

1. Summary of Respondent's Position

57. Respondent submits that the annulment ground in Article 52(1)(a) of the ICSID Convention refers to the provisions on the constitution of the tribunal in Articles 37 to 40 and, *via* Article 40(2), to the qualities that an arbitrator must have pursuant to Articles 14(1) of the ICSID Convention.[22]

58. Respondent notes that the three authentic versions of Article 14(1) of the ICSID Convention are not identical as the English version refers to persons who "*may be relied* [upon] *to exercise independent judgment*"; the French version provides that arbitrators must "*offrir toute garantie d'indépendence dans l'exercice de leur fonctions*"; and the Spanish version states that arbitrators must "*inspirar plena confianza en su imparcialidad de juicio*." Respondent submits that, in accordance with Article 33(4) of the Vienna Convention, these diverging texts shall be given a meaning that "*best reconciles the texts, having regard to the object and purpose of the treaty*." In this case, Respondent argues, persons designated as arbitrators have to meet the requirements in all three versions, *i.e.*, they must be both independent and impartial.[23]

59. According to Respondent, a manifest lack of these qualities serves not only as a ground for a proposal for disqualification but also, upon issuance of the award, as a ground for annulment based on an improper constitution of the tribunal. In particular, Respondent notes that the text in Article 52(1)(a) of the ICSID Convention does not indicate the existence of any limitation on the powers of review of an *ad hoc* committee and claims that such

[21] **AL A RA 49**, Article 31(1).
[22] Argentina's Memorial, ¶ 34; Argentina's Reply, ¶ 12.
[23] Argentina's Memorial, ¶¶ 36-39.

limitation would be contrary to the meaning and scope of Article 52, when interpreted in accordance with Articles 31 and 32 of the Vienna Convention.[24]

60. Respondent refers to the tribunal in *Soufraki v. UAE,* which stated that the "*object and purpose of an ICSID annulment proceeding*" consists in "*the control of the fundamental integrity of the ICSID arbitral process* ***in all its facets***," *i.e.*, the integrity of the tribunal, the integrity of the procedure and the integrity of the award.[25] According to Respondent, this purpose would be defeated and it would be "*inconsistent with the fundamental integrity of ICSID arbitration proceedings*" if a party were not allowed to invoke "*even the most serious and manifest conflict of interest*" in annulment proceedings in a case where it had used the disqualification mechanism before.[26]

61. In addition, Respondent argues that it would be contrary to the principle of effectiveness if a party were prevented from raising an arbitrator's manifest lack of the qualities contained in Article 14(1) as a ground for annulment both in case of a failure to propose the disqualification of such arbitrator on a timely basis (by means of a waiver under Rule 27 of the ICSID Arbitration Rules) and, likewise, in case the party did make use of the disqualification mechanism.[27]

62. Respondent further points to the *travaux préparatoires* of the ICSID Convention, which record that a motion to delete the annulment ground of an improper constitution of the tribunal as well as a motion to include a requirement to raise such issue already in the underlying proceeding before the tribunal, were discussed and defeated.[28] Respondent also relies on Prof. Schreuer, who states in his commentary on the ICSID Convention that if a party has unsuccessfully used the disqualification mechanism, its right to invoke improper constitution of the tribunal as a ground for annulment "*remains unaffected*."[29]

63. With regard to the annulment decision in *EDF v. Argentina*, Respondent first notes that the committee concluded that "*the fact that an arbitrator does not meet the standard required under Article 14(1) … is also a ground on which an award might be annulled under Article 52(1)(a).*"[30] Respondent notes that the *EDF* committee rejected the approach taken by the

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[24] Argentina's Memorial, ¶ 35; Argentina's Reply, ¶¶ 11-12 referring to **AL A RA 49**, Articles 31 and 32.
[25] Argentina's Reply, ¶ 13 quoting from **AL A RA 61**, ¶ 23 (emphasis added by Respondent).
[26] Argentina's Reply, ¶ 13.
[27] Argentina's Reply, ¶ 14.
[28] Argentina's Reply, ¶ 15 quoting from **AL A RA 106**, p. 853.
[29] Argentina's Reply, ¶ 16 quoting from **AL A RA 40**, Art. 52, ¶ 129.
[30] Argentina's Reply, ¶ 17 quoting from **AL A RA 70**, ¶ 127.

Azurix committee as "*incompatible with the duty of an ad hoc committee to safeguard the integrity of the arbitral procedure*."[31] As to the limitation imposed by the *EDF* committee on its power in case of a prior decision on disqualification, Respondent submits that such limitation has no basis in Article 52 or any other provision of the ICSID Convention. In particular, Respondent argues that annulment is not defined in opposition to appeal but rather in accordance with its object and purpose as determined by an interpretative exercise in which the *EDF* committee did not engage.[32]

64. Finally, Respondent claims that a distinction has to be made between a tribunal's decision on the merits of the dispute and the decision on a proposal for disqualification made by the unchallenged arbitrators or the Chairman of the Administrative Council; while the former is not subject to the review of the annulment committee, the latter expressly is – under Article 52(1)(a) of the ICSID Convention. Consequently, Respondent argues that the limitations imposed on an *ad hoc* committee in relation to the merits of the dispute are not applicable in the present case.[33]

65. In Respondent's view, "*the existence of a decision on disqualification in the original proceedings may be a factor to be considered by the annulment committee when verifying whether the tribunal was properly constituted, but such decision is not binding on the committee, nor does it curtail its powers to determine whether the tribunal was properly constituted*." Respondent refers to the *Vivendi II* committee, which recognized that annulment committees have a "*grave responsibility in matters of this natur*e" and "*serve … to address this concern*," which relates to "*the integrity of the ICSID process as a whole, which is the clear and undisputed concern of Article 52 of the ICSID Convention.*"[34]

2. Summary of Claimants' Position

66. Claimants submit that Article 52(1)(a) of the ICSID Convention refers to a failure to comply with the provisions in Articles 37 through 40 (relating to the "*Constitution of the Tribunal*") and Articles 56 through 58 ("*Replacement and Disqualification of Conciliators and Arbitrators*"), as well as Rules 1 through 12 of the ICSID Arbitration Rules ("*Establishment*

[31] Argentina's Memorial, ¶ 92 quoting from **AL A RA 70**, ¶ 141.
[32] Argentina's Reply, ¶¶ 18-20.
[33] Argentina's Reply, ¶¶ 21-22.
[34] Argentina's Reply, ¶ 23 quoting from **AL A RA 67**, ¶¶ 206-207.

of the Tribunal").[35] Claimants further agree with Respondent that Article 14(1) is of relevance to this Committee's analysis.[36]

67. Claimants argue, however, that Article 14(1) does not set the standard of review to be applied by the Committee and that there is no provision in the ICSID Convention that would allow an annulment committee to scrutinize the decision rendered by a tribunal on a challenge "*as though the challenge was a matter of first impression,*" taking into account that Article 58 expressly reserves for the tribunal the right to decide on arbitrator challenges.[37]

68. Claimants refer to "*two lines of authority*" that have emerged on the treatment of arbitrator challenges in an annulment context; in Claimants' view, Respondent's application fails under both.[38] First, Claimants refer to the approach taken by the annulment committee in *Azurix v. Argentina*, which held that its powers were limited to assessing whether the procedures of the ICSID Convention had been complied with. Claimants quote the *Azurix* committee's view that "*if a party proposes a disqualification of an arbitrator under the first sentence of Article 57 of the ICSID Convention, and if that proposal is rejected in accordance with the procedure established in Article 58 of the ICSID Convention and ICSID Arbitration Rule 9 for deciding such proposals, then it cannot be said that the tribunal was* 'not properly constituted' *by reason of non-compliance with the first sentence of Article 57. The Committee considers that Article 52(1)(a) cannot be interpreted as providing the parties with a* de novo *opportunity to challenge members of the tribunal after the tribunal has already given its award.*" Claimants further cite the *Azurix* committee's finding that if a committee were to decide for itself whether or not a decision on a disqualification proposal was correct, "*this would be tantamount to an appeal against such a decision.*"[39]

69. Claimants note that the *Azurix* committee considered exclusively the procedure for constituting a tribunal and for resolving a challenge to an arbitrator – a question distinct from the question whether an arbitrator manifestly lacked the qualities required by Article 14(1), which it considered to be reserved for the remaining tribunal members. According to Claimants, this view is supported by the fact that the *travaux préparatoires* of the ICSID Convention record a proposal to include an arbitrator's lack of the qualities in Article 14(1)

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[35] Claimants' Counter-Memorial, ¶ 60.
[36] Claimants' Rejoinder, ¶ 11.
[37] Claimants' Rejoinder, ¶¶11-12.
[38] Claimants' Counter-Memorial, ¶ 65.
[39] Claimants' Counter-Memorial, ¶ 66 quoting from **A/CLA-69**, ¶¶ 280, 282.

as a ground for annulment – a proposal which was rejected.[40] Therefore, Claimants argue, Respondent's resort to supplementary means of interpretation is also unsuccessful.[41]

70. Second, Claimants refer to the approach taken by the committee in *EDF v. Argentina*, where the committee held that it was empowered to consider the substance of an arbitrator challenge in certain limited circumstances, albeit noting that in the case of an existing decision on a challenge to an arbitrator, the 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*." Claimants further quote the *EDF* committee's finding that "[w]*hile 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. 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***."[42]

71. In Claimants' view, the approach adopted by the *EDF* committee is fully consistent with established jurisprudence on the scope of annulment committee review; consequently and contrary to Respondent's argument, the committee did not need to engage in any further interpretative analysis of the ICSID Convention.[43]

72. By contrast, Claimants consider that Respondent's interpretation of Article 52(1)(a) contradicts the object and purpose of annulment in the ICSID Convention, which is not meant to revisit the merits of any matter that was submitted to the tribunal. Claimants argue that the responsibility for ensuring that only impartial, independent and expert tribunals hear the parties' claims resides within the tribunal or with the Chairman of the Administrative Council, a framework that serves to resolve challenges as early and efficiently as possible – rather than years later after the award has been rendered. According to Claimants, this consideration also applies in the context of annulment proceedings concerning an arbitrator

[40] Claimants' Counter-Memorial, ¶ 67 referring to **A/CLA-70**, p. 852.
[41] Claimants' Rejoinder, ¶ 18.
[42] Claimants' Counter-Memorial, ¶¶ 69-70 quoting from **A/CLA-61**, ¶¶ 137, 145 (emphasis added by Claimants).
[43] Claimants' Rejoinder, ¶ 19.

challenge in that a *de novo* review of the challenge would deprive the proceedings under Article 57 and 58 of any useful purpose.[44]

73. Claimants take the position that Respondent's proposed scheme of a *de novo* review on annulment would be inconsistent with an *ad hoc* committee's role within the ICSID framework and the purpose of annulment, which is "*to provide a limited form of review of awards in order to safeguard the integrity of ICSID proceedings*."[45] Claimants further emphasize that an annulment committee cannot hear evidence and refer to "*settled case law*" pursuant to which an annulment committee may not "*substitute its own view of the law and its own appreciation of the facts for those of the Tribunal*."[46]

74. Claimants reject Respondent's argument that this interpretation would run counter to the principle of effectivity and claim that "*a pre-award challenge is* the *opportunity for a party to present an arbitrator challenge and to have that challenge resolved on a full evidentiary record.*"[47] Likewise, Claimants reject Respondent's argument that there is a distinction between the annulment grounds in Article 52(1)(b) through (e) addressing "*merits*" issues that are subject to a deferential standard of review and the annulment ground in Article 52(1)(a) addressing the proper constitution of the tribunal that allegedly warrants a different standard of review. Claimants note that Respondent does not cite any authority for this distinction, which is in any event not justified because each of the issues addressed by these grounds is "*expressly subject to the decision of an annulment committee*."[48]

75. Claimants note that both the *Azurix* and *EDF* committees, *i.e.*, the two committees to have considered the scenarios presently before this Committee, recognized the limits that the ICSID framework places on the exercise of a committee's powers under Article 52(1)(a), which is why "*deference to the tribunal's decision-making remains an essential aspect of the governing legal standard.*"[49]

3. Committee's Analysis

76. As a preliminary remark, the Committee considers that Respondent is correct in emphasizing that the starting point of the Committee's analysis of its scope of review under this ground for annulment must be the text of Article 52(1)(a) of the ICSID Convention, and not

[44] Claimants' Rejoinder, ¶¶ 13-14 referring to **A/CLA-61**, ¶ 142.
[45] Claimants' Rejoinder, ¶ 17 quoting from **A/CLA-90**, ¶ 41.
[46] Claimants' Rejoinder, ¶ 17 quoting from **AL A RA 31**, ¶ 136.
[47] Claimants' Rejoinder, ¶¶ 15-16 (emphasis in original).
[48] Claimants' Rejoinder, ¶¶ 20-22.
[49] Claimants' Rejoinder, ¶ 23.

jurisprudence on this article as such. Respondent is further correct in pointing out that the text in Article 52(1)(a) does not contain any express qualifications or limitations as regards the scope of an *ad hoc* committee's review of whether the Tribunal was properly constituted. At the same time, the Committee notes, however, that the interpretation exercise does not stop at the wording of the article but extends to the context as well as the object and purpose reflecting the intention of the drafters and of the States that signed the Convention. This in turn has been examined by jurisprudence, and in the interest of consistency and predictability of ICSID jurisprudence, the Committee will take into account the interpretation of Article 52(1)(a) given by other committees. While the Committee is not bound by any of these decisions and, as noted above, has to perform its own interpretation exercise, it may refer to them for guidance.

77. The Parties agree that the term "*properly constituted*" in Article 52(1)(a) is a reference to the requirements in Chapter IV, Section 2 of the ICSID Convention, which includes Article 40(2) referring to the qualities of an arbitrator set out in Article 14(1). Respondent further correctly pointed out that the English and Spanish texts of Article 14(1) are not identical: While the English text provides that arbitrators shall be persons who "*may be relied upon to exercise independent judgment*," the Spanish equivalent requires arbitrators to "*inspirar plena confianza en su imparcialidad de juicio.*" While the English version thus does not include an explicit reference to the requirement of impartiality, there is common ground that Article 14(1) in fact demands that arbitrators be both independent and impartial. In this regard, the Committee agrees with Respondent that the parties' confidence in the independence and impartiality of the arbitrators deciding their case is essential for ensuring the integrity of the proceedings and the dispute resolution mechanism as such; thus, in principle, a lack of the qualities in Article 14(1) may serve as ground for annulment under Article 52(1)(a). This conclusion is in line with the finding made by the *ad hoc* committee in *EDF v. Argentina* and also with the apparent intention of the drafters of the ICSID Convention.[50]

78. As to the applicable standard to be satisfied, the Committee further agrees with the *EDF* committee that "*Article 14(1) does not require proof of actual dependence or bias; it is sufficient to establish the appearance of dependence or bias*." However, as the *EDF* committee noted, there is an objective test to be satisfied:

[50] *Cf.* **AL A RA 70 / A/CLA-61**, ¶¶ 126, 128 and **A/CLA-70**, p. 852.

> "… [T]h*e standard to be 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.*"[51]

This Committee fully agrees with this finding of the *EDF* committee because to demand the *actual* proof of bias would establish an unrealistic burden on the party requesting annulment.

79. However, the Committee notes that there is an additional, important aspect to be taken into account in the present case: the fact that the remaining members of the Tribunal have already taken a decision on Respondent's allegation that Prof. Kaufmann-Kohler manifestly lacked the qualities in Article 14(1) – in their Decision on Respondent's Second Disqualification Proposal dated 12 May 2008 pursuant to Articles 57, 58 of the ICSID Convention (the "**Decision on Disqualification**"). There is common ground between the Parties that this decision must not be ignored by the Committee in its assessment of the annulment ground advanced by Respondent; however, the Parties are in dispute as to the specific impact it has on the scope of review of the Committee.

80. Respondent relies on the leading commentary already quoted above, which provides as follows:

> "… *Appointment of an arbitrator who manifestly does not possess these qualities* [in Article 14(1)] *may be put forward as a ground for annulment* … .
>
> … [A] *party requesting annulment on the ground that the tribunal was not properly constituted will have to explain why it did not raise this objection during the arbitration proceedings. If it has done so unsuccessfully its right to invoke this ground for annulment remains unaffected.* …"[52]

81. According to this authority, the right to request annulment based on an alleged lack of the qualities in Article 14(1) thus remains "*unaffected*" by an unsuccessful challenge, and the standard of review appears to be the same as the one prescribed in Article 57, *i.e.*, limited to a "*manifest*" lack of the qualities described in Article 14(1).

82. Before turning to the existing case law on this issue, the Committee will perform its own interpretative exercise. At the outset, it has to be noted that, in this case Respondent acknowledged during the hearing that the existing decision of the co-arbitrators cannot be

[51] **AL A RA 70 / A/CLA-61**, ¶¶ 109, 111.
[52] **AL A RA 40**, Article 52, ¶¶ 123, 129.

ignored in the Committee's assessment, but also argued that this decision cannot be binding in light of the Committee's function to safeguard the fundamental integrity of ICSID procedure.[53] Consequently, it can be considered common ground that the Committee has to evaluate the decision rendered by the two co-arbitrators. The crucial question is, what is the applicable standard for this evaluation? While Respondent argues that Article 52(1)(a) empowers the Committee to fully review whether the Tribunal was properly constituted, Claimants take the position that the scope of the Committee's review is substantially reduced and refer to the approaches taken by the *Azurix* and *EDF* committees, which will be set out in detail below.

83. In support of its position, Respondent argues that the *travaux préparatoires* of the ICSID Convention include a motion – which was not accepted – to delete the annulment ground under Article 52(1)(a) in order to avoid a "*double attack on the same grounds.*"[54] Contrary to Respondent's position, however, the fact that the drafters of ICSID Convention did not intend to exclude the possibility of requesting an annulment if a decision had already been taken in the underlying proceeding does not necessarily imply that they also intended a full review of the decision.[55] In the Committee's view, such an interpretation of an *ad hoc* committee's scope of review cannot be assumed lightly given that a full review would be contrary to the principle in Article 53 that there is no appeal. Therefore and while being aware that Article 52(1)(a) does not include any qualifiers such as "*manifest*", "*serious*" or "*fundamental*" in the text as the grounds in Article 52(1)(b) and (d) do, the Committee does not consider that there is sufficient evidence to assume that the drafters of the ICSID Convention intended to confer broader powers on the *ad hoc* committee under Article 52(1)(a) than under the other grounds for annulment.

84. The Committee considers that the following aspects have to be taken into account when assessing the scope of review under Article 52(1)(a) in the context of an existing decision on a disqualification proposal: (i) the fact that the drafters included a review mechanism in Articles 57 and 58 of the ICSID Convention pursuant to which the decision on a disqualification proposal is to be taken by the remaining arbitrators or by the Chairman of the Administrative Council; (ii) the overarching principle of Article 53(1) that decisions

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[53] *Cf.* Transcript (Day 2), p. 244 lines 3-10. *See* also Argentina's Reply, ¶ 23.
[54] **AL A RA 106**, p. 853.
[55] It is recorded in the *travaux préparatoires* that "*Mr. BROCHES (Chairman) requested the sense of the meeting with respect to the proposal that (a) of Article 55(1)* [currently Article 52(1)] *be deleted entirely because the point would undoubtedly have been raised in the proceedings and there might be grounds for objecting to a double attack on the same grounds. A vote was then taken and the motion defeated by 18 to 2.*" **AL A RA 106**, p. 853.

made within the regime of the ICSID Convention shall not be subject to any appeal but only to an annulment proceeding (*i.e.*, a proceeding of limited scope, which is again governed by the ICSID Convention regime and does not include any involvement of national courts); and (iii) the existing jurisprudence on this issue, which this Committee should not ignore – not least in the legitimate aim of achieving a certain degree of consistency and legal certainty in ICSID jurisprudence.

85. In light of the above, the Committee considers it more plausible that the intended scope for a review under Article 52(1)(a) was to be subject to the same limitations as the other annulment grounds, *i.e.*, a scope wide enough to safeguard the integrity of the proceedings but not so wide as to re-consider the merits of a decision that was already taken in the underlying proceedings based on the submissions and evidence presented by the Parties.

86. In the Committee's view, Respondent's argument that the proper constitution of the Tribunal is not a merits issue, and thus a review of the Decision on Disqualification would not be a review *on the merits*, is not convincing. For the present purposes, the Committee does not need to express an opinion on whether a review of the issues resolved in the Decision on Disqualification is, or involves, a review of the merits. In any case, the same principle applies: a decision has been made on this issue in the underlying proceedings and in light of the context as well as the object and purpose of the annulment proceeding, it is not for this Committee to perform a *de novo* review of any issues decided in the underlying proceedings in accordance with the provisions of the ICSID Convention.

87. However, this does not yet answer the question as to what is the actual role of this Committee in the present context, *i.e.*, what is the applicable standard to evaluate the Decision on Disqualification rendered by the two remaining members of the Tribunal.

88. At this point, the Committee will also consider existing case law on the particular question of how to deal with the present situation in which the allegations advanced by Respondent were already subject to a decision of the remaining members of the Tribunal in the arbitration proceedings. According to the Background Paper on Annulment for the ICSID Administrative Council (as updated in 2016) ("**ICSID Background Paper on Annulment**"), improper constitution of the tribunal under Article 52(1)(a) was raised in five cases, four of which actually decided on the annulment ground.[56] In two cases, *i.e.*, *Vivendi*

[56] **A/CLA-91**, ¶ 79. In *Sempra v. Argentina*, the tribunal did not decide on this annulment ground because it had already decided to annul the award in full based on another ground.

II v. *Argentina* and *Transgabonais v. Gabon*, the issue was raised only after the award had already been rendered so that there was no prior decision of the co-arbitrators to be taken into account by the committee.[57]. In the two remaining cases, *i.e.*, *Azurix v. Argentina* and *EDF v. Argentina*, the committees were faced with the same issue as this Committee, *i.e.*, an existing decision of the remaining two co-arbitrators on a disqualification proposal.[58] Therefore, the Committee will take a closer look at these two decisions and the two different approaches taken by these committees.

89. The first decision was rendered in *Azurix v. Argentina*. In that case, the committee considered that "*an* ad hoc *committee cannot decide for itself whether or not a decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision. All that an* ad hoc *committee can consider is whether the provisions and procedures prescribed under Articles 57 and 58 of the ICSID Convention and ICSID Arbitration Rule 9 were complied with.*"[59] As for the merits, the *Azurix* committee thereby completely deferred to the decision of the remaining members of the tribunal.

90. If the Committee were to follow the approach taken by the *Azurix* committee, its analysis would be a fairly short exercise given that neither Party in the present case has claimed that the Decision on Disqualification was made in violation of the procedure prescribed in Articles 57 and 58 of the ICSID Convention. In the Committee's view, however, this approach would not be consistent with the conclusion drawn in the interpretative exercise above and in particular with the purpose of annulment proceedings and thus the duty of an *ad hoc* committee to safeguard the integrity of the arbitration proceedings. The Committee rather agrees with the committee in *EDF v. Argentina* and rejects the *Azurix* approach as too narrow and formalistic because it prevents an *ad hoc* committee from playing any role in ensuring the independence and impartiality of the arbitrators – a matter "*which goes to the very heart of the integrity of the arbitral procedure*."[60]

91. The second decision was rendered in *EDF v. Argentina*, where the committee took a broader approach than the *Azurix* committee but also noted that it did not write on a blank sheet given that it was faced with an existing decision of the two co-arbitrators on this matter. The *EDF*

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[57] **AL A RA 67**, ¶ 202; **A/CLA-83**, p. 13. In *Transgabonais*, the argument was raised for the first time at the hearing on annulment and therefore considered by the committee to be time-barred and inadmissible under Article 52(2) of the ICSID Convention.
[58] **AL A RA 84 / A/CLA-69**, ¶ 286; **AL A RA 70 / A/CLA-61**, ¶ 147.
[59] **AL A RA 84 / A/CLA-69**, ¶ 282.
[60] *Cf.* **AL A RA 70 / A/CLA-61**, ¶¶ 140-141.

committee therefore held that it may not find a ground for annulment "*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.*"[61] As a result, the committee therefore also deferred, in principle, to the decision reached by the remaining members of the tribunal, subject however to an assessment whether such decision was "*plainly unreasonable*."

92. As stated above, this Committee agrees with the *EDF* committee that it is for an *ad hoc* committee to safeguard the integrity of the arbitral proceedings, as Respondent has repeatedly emphasized. Having performed the interpretative exercise above, this Committee further agrees with the finding of the *EDF* committee that its approach is "*commensurate with the principle that an* ad hoc *committee is not an appellate body.*"[62] In particular, while being aware and thus agreeing with Respondent that the threshold applied by the *EDF* committee for annulling an award cannot be found in the wording of Article 52, the Committee has assessed above why a scope of review wide enough to safeguard the integrity of the proceedings but not so wide as to re-consider the merits of a decision that was already taken in the underlying proceedings is in line with the object and purpose of the annulment proceeding within the regime of the ICSID Convention and thus also in line with the interpretation principles of Articles 31 and 32 of the Vienna Convention.

93. In the Committee's view, the reasons given by the *EDF* committee for its approach are convincing because they achieve a reasonable balance between an *ad hoc* committee's important task to safeguard the fundamental integrity of the proceedings on the one hand and the appropriate respect for its limited role, given the existence of proceedings under Articles 57 and 58 as well as the generally limited nature of annulment proceedings, on the other. The Committee considers that the threshold of plain unreasonableness leaves sufficient room for taking up the role that is intended for an *ad hoc* committee. Therefore, and also in the interest of achieving a certain consistency in ICSID jurisprudence on this issue, the Committee concurs with the findings of the *EDF* committee in its well-reasoned decision on the question of how to deal with an existing decision rendered by the remaining members of the tribunal in the underlying proceeding.

94. In conclusion and for the reasons set out above, the Committee agrees with the approach taken by the *EDF* committee and finds that the facts advanced by Respondent can amount to a ground for annulment only if the decision not to disqualify Prof. Kaufmann-Kohler was

[61] **AL A RA 70 / A/CLA-61**, ¶ 145.
[62] **AL A RA 70 / A/CLA-61**, ¶ 145.

"*so plainly unreasonable that no reasonable decision-maker could have come to such a decision.*"

B. Manifest Excess of Powers (Article 52(1)(b) of the ICSID Convention)

1. Summary of Respondent's Position

95. Respondent submits that, as explained in the ICSID Background Paper on Annulment, the annulment ground of a manifest excess of powers was intended to apply in the situation where a decision of the tribunal "*went beyond the terms of the parties' arbitration agreement*."[63] According to Respondent, this is the case when either: (i) the tribunal lacks jurisdiction; or (ii) the tribunal fails to apply the applicable law. As regards the former, Respondent refers to the situation in which there is no consent to arbitration because the conditions to which such consent was made subject were not met; as regards the latter, Respondent quotes the ICSID Secretariat's statement that "[w]*here the parties agree on applicable law, a disregard of this law would likely be equivalent to a derogation from the mandate conferred on the Tribunal by the parties.*"[64]

96. Respondent agrees with Claimants that the term "*manifest*" is equal to "*obvious*" or "*self-evident*," but rejects Claimants' additional reference to "*substantial seriousness*" as not being part of the "*manifest*" requirement. In this regard, Respondent refers to the finding of the *EDF* committee that "[t]*he requirement that the excess of powers be* 'manifest' *refers to how readily apparent the excess is, rather than to its gravity*."[65] At the same time, Respondent submits that this requirement "*does not prevent that in some cases an extensive argumentation and analysis may be required to prove that such a manifest excess of powers has in fact occurred.*"[66] Likewise, the *EDF* committee held that "[t]*he 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'."[67]

97. As to the different categories where an excess of powers may be found, Respondent refers to the three parameters established by the *Soufraki* committee, *i.e.*, (i) the scope of the

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[63] Argentina's Memorial, ¶ 40 quoting from **AL A RA 7**, ¶ 19.
[64] Argentina's Memorial, ¶¶ 41-43 quoting from **AL A RA 7**, ¶ 93.
[65] Argentina's Reply, ¶ 25 quoting from **AL A RA 70**, ¶ 192.
[66] Argentina's Reply, ¶ 28 quoting from **AL A RA 30**, ¶ 84. *See* also **AL A RA 90**, ¶¶ 57, 59.
[67] Argentina's Reply, ¶ 28 quoting from **AL A RA 70**, ¶ 193.

tribunal's jurisdiction; (ii) the applicable law; and (iii) the issues raised by the parties. With regard to the first category, Respondent refers to the explanation given by the *Soufraki* committee that an excess of powers can involve the situation in which a tribunal goes beyond its jurisdiction *ratione personae*, *ratione materiae* or *ratione voluntatis* but also, *vice versa*, the situation in which the tribunal does not exercise its jurisdiction over a person, or a matter, or a question that does fall within the ambit of its jurisdiction.[68]

98. Respondent emphasizes that, contrary to Claimants' submission, it does recognize the *compétence-compétence* principle but asks this Committee to decide on the existence of a manifest excess of jurisdictional powers on the part of the Tribunal, in accordance with Article 52(1)(b) of the ICSID Convention.[69]

99. As to the second category of excess of powers, Respondent refers to the committee's statement in *Enron v. Argentina* that the ground for annulment under Article 52(1)(b) "*extends to the situation where a tribunal disregards the applicable law, or bases the award on a law other than the applicable law*."[70] Respondent emphasizes that, contrary to Claimants' argument, it does not invoke an "*erroneous application of the law*," but rather the failure to apply the law; in any event, an error of law can effectively be equivalent to a failure to apply the applicable law and thus also constitute a ground for annulment under Article 52(1)(b).[71]

100. In response to Claimants' submission that only a failure to apply the law *in toto* can justify an annulment, Respondent refers to the fact that the committee in *Sempra v. Argentina* found an excess of powers in respect of a failure to apply Article XI of the applicable BIT and thus annulled the award.[72]

101. As to the third category of excess of powers, Respondent claims that it applies in the situation where a tribunal either decides on issues that the parties did not submit to it for resolution or fails to decide on issues that the parties did place before it.[73]

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[68] Argentina's Reply, ¶ 31 quoting from **AL A RA 61**, ¶ 42. *See* also **AL A RA 90**, ¶¶ 49-50 and **AL A RA 107**, ¶¶ 47-48.
[69] Argentina's Reply. ¶ 35.
[70] Argentina's Reply, ¶ 37 quoting from **AL A RA 33**, ¶ 218.
[71] Argentina's Reply, ¶ 38.
[72] Argentina's Reply, ¶ 40 quoting from **AL A RA 32**, ¶¶ 159, 165.
[73] Argentina's Reply, ¶ 41.

2. Summary of Claimants' Position

102. Claimants emphasize that under Articles 41 and 42 of the ICSID Convention, an ICSID tribunal is empowered to determine its own competence and to decide the dispute in accordance with the applicable law. According to Claimants, the requirement of a "*manifest*" excess of powers was included to safeguard the finality of awards and to limit the review of an annulment committee. Claimants further refer to the statement of the *Impregilo* committee that "*manifest*" means that "*the excess of powers has to be obvious, self-evident, clear, flagrant and substantially serious.*"[74] While acknowledging that there is some debate as to whether the term "*manifest*" includes an inquiry into the gravity of the alleged excess of power, Claimants argue that in any event, *any* Article 52(1) ground requires a finding that the annullable error "*actually had a material impact on the outcome of a case.*"[75]

103. Claimants submit that annulment committees repeatedly confirm that any excess of power must be obvious from a simple reading of the award in question and note that Argentina itself argued in the *Daimler* proceeding that an excess of powers cannot be "*manifest*" if it can be discerned only through "*elaborate interpretation*" of the tribunal's reasoning.[76]

104. In Claimants' view, an excess of powers may not involve the review of evidence before the tribunal because Rule 34 of the ICSID Arbitration Rules entrusts the assessment of the evidence to the tribunal – without any corresponding power being given to annulment committees under the ICSID Convention.[77] Claimants argue that any suggestion to the contrary would be an invitation to conduct an appellate review and thus be inconsistent with the limited scope of annulment under the ICSID Convention.[78]

105. As to the first category of excess of powers invoked by Respondent, Claimants submit that just like an alleged excess relating to the merits, an alleged excess of jurisdiction "*must be obvious on its face and not susceptible to more than one interpretation*"; neither allegation can be subject to a *de novo* review. Claimants rely on the finding made by the committee in *SGS v. Paraguay* that "*nothing in the ICSID Convention indicates that a different standard shall be applied to issues of jurisdiction, and therefore an award can only be annulled if the lack of excess of jurisdiction is manifest.*"[79]

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[74] Claimants' Counter-Memorial, ¶¶ 91-92 quoting from **A/CLA-42 / AL A RA 34**, ¶ 128.
[75] Claimants' Rejoinder, ¶ 46.
[76] Claimants' Counter-Memorial, ¶ 93 quoting from **A/CLA-43**, ¶ 158.
[77] Claimants' Counter-Memorial, ¶ 94.
[78] Claimants' Rejoinder, ¶ 47.
[79] Claimants' Memorial, ¶¶ 96-97; Claimants' Rejoinder, ¶ 49 quoting from **A/CLA-46**, ¶ 114.

106. Claimants emphasize that pursuant to Articles 41(1) and 42(2) of the ICSID Convention, a tribunal's ruling on its own jurisdiction is conclusive and must stand where it has reached a reasonable decision. Claimants refer to the statement of the *Azurix* committee that "*even if it is subsequently seen to be arguable whether or not the tribunal's decision under Article 41 was correct, it cannot be said that the tribunal manifestly lacked jurisdiction, and there is no basis for an* ad hoc *committee in purported exercise of its power under Article 52(1)(b) to substitute its own decision for that of the tribunal*."[80]

107. As to the second category of excess of powers invoked by Respondent, Claimants submit that an erroneous application of the law is not a ground for annulment and refer to the finding of the *Impregilo* committee that "*it is necessary to differentiate between a failure to apply the proper law and an error in applying the law. The first is a ground for annulment under Article 52, the second is not*." The *Impregilo* committee further held that a review of whether the tribunal misapplied or misinterpreted the law would necessarily entail a review resulting in the committee acting as a court of appeal rather than an annulment committee.[81]

108. In response to Respondent's reference to an alleged failure to apply specific provisions or rules of law, Claimants further rely on Prof. Schreuer who stated in his commentary that "[p]*artial non-application and erroneous application are indistinguishable*" – and neither qualifies as a ground for annulment.[82] Claimants submit that a failure to apply the applicable law qualifies as an excess of power only if there has been a failure to apply the law *in toto*; by contrast, a tribunal's decision not to apply a particular legal provision does not constitute a failure to apply the applicable law but falls within the remit of the tribunal to determine the relevance of each provision of the chosen law.[83]

109. With regard to Respondent's reference to the positions taken by the *Soufraki* and *Sempra* committees, Claimants contend that these are outliers, which are not in line with the "*extensive jurisprudence*" rejecting the proposition that nothing less than a failure to apply the law *in toto* can justify an annulment. Claimants further note that the *Sempra* decision was criticized by commentators for conflating the concepts of legal error and manifest excess of powers.[84]

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[80] Claimants' Counter-Memorial, ¶ 98 quoting from **A/CLA-69**, ¶ 69.
[81] Claimants' Counter-Memorial, ¶ 100 quoting from **A/CLA-42 / AL A RA 34**, ¶ 131.
[82] Claimants' Counter-Memorial, ¶ 101 quoting from **A/CLA-97**, p. 964.
[83] Claimants' Counter-Memorial, ¶¶ 102-103.
[84] Claimants' Rejoinder, ¶ 48.

3. Committee's Analysis

110. As stated by the committee in *Soufraki v. United Arab Emirates*, "[t]*he notion of manifest excess of power implies that a tribunal has stepped entirely outside the scope of its authority.*" The Committee further agrees with the *Soufraki* committee that "*the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements, the rules on applicable law, and the issues submitted to the arbitral tribunal*."[85]

111. It is undisputed between the Parties that the meaning of the term "*manifest*" is equal to "*obvious*" or "*evident.*" However, there is a dispute as to whether it is possible within that meaning that a certain amount of argumentation and/or analysis may be required to determine the existence of a "*manifest*" excess of powers. According to the leading commentary, which both Parties cite in different contexts and that was also cited with approval by the committee in *AES v. Hungary*, "[a]*n excess of powers is manifest if it can be discerned with little effort and without deeper analysis.*"[86] Claimants further refer to the committee's finding in *Wena Hotels v. Egypt* that "[t]*he excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest*."[87]

112. Respondent on the other hand refers to *Caratube v. Kazakhstan* where the committee held that it "*agrees with Respondent that the term* 'manifest' *basically corresponds to* 'obvious' *or* 'evident'. *However, this does not prevent that in some cases an extensive argumentation and analysis may be required to prove that such a manifest excess of powers has in fact occurred.*"[88] A similar finding was made by the committee in *Occidental v. Ecuador*.[89] The *EDF* committee further held:

> "*While the Committee agrees that an excess of powers will be manifest only if it can be readily discerned, it considers that this does not mean that the excess must, as it were, leap out of the page on the 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*

[85] **AL A RA 61**, ¶ 37.
[86] **AL A RA 40**, Article 52, ¶ 135; **A/CLA-35**, ¶ 31.
[87] **A/CLA-30**, ¶ 25.
[88] **AL A RA 30**, ¶ 84.
[89] **AL A RA 90**, ¶ 59.

> *decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being* 'manifest'."[90]

113. The Committee takes the view that the question of whether a certain degree of argumentation and/or analysis may be required in a specific case to determine whether a tribunal manifestly exceeded its powers cannot be answered in the abstract but only taking into account the circumstances of the individual case. To the extent it will become relevant, this question will therefore be discussed below in the Committee's analysis of whether Respondent has in fact established that the Tribunal manifestly exceeded its powers.

114. However, as stated by the committee in *Rumeli Telekom v. Kazakhstan*, such an analysis "*should not require the Committee to reconsider the evidence put before the Tribunal. An ad hoc committee will not annul an award if the tribunal's approach is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law.*"[91] The committee in *Duke Energy v. Peru* noted that pursuant to Rule 34 of the ICSID Arbitration Rules, "'[t]*he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value,'*" and held that "[i]*t would not be proper for an annulment committee to re-evaluate that evidence, and nor is it in a position to do so.*"[92]

115. The Parties are further in dispute as to whether the term "*manifest*" also implies a certain gravity or result-determinativeness of the excess of powers. The committee in *SGS v. Paraguay* held that the excess of powers has to be "*textually obvious and substantively serious.*"[93] The committee in *El Paso v. Argentina* also found that "[p]*ursuant to the plain meaning of the word* 'manifest' *in the context of Article 52 of the ICSID Convention and considering the finality and binding nature of awards, features set forth in Article 53 of said Convention, for this Committee, the excess of powers should be obvious, evident, clear, self-evident and extremely serious*."[94] A similar finding can be found in *Impregilo v. Argentina* where the committee stated that the excess of powers has to be, *inter alia*, "*substantially serious*."[95]

116. As implied by the terms "*substantively serious*" and "*extremely serious*," the Committee considers that for an excess of powers to be "*manifest*," it has to have had a certain

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[90] **AL A RA 70 / A/CLA-61**, ¶ 193.
[91] **A/CLA-32**, ¶ 96.
[92] **A/CLA-31**, ¶ 214 (quoting from **A/CLA-32**, ¶ 96).
[93] **A/CLA-46**, ¶ 122.
[94] **AL A RA 35**, ¶ 142.
[95] **AL A RA 34**, ¶ 128.

significance for the decision or award that was rendered. This is in line with the committee's finding in *Libananco v. Turkey* that "*annulment should not occur unless a tribunal has exceeded its power in a clear manner and with serious consequences*."[96] In the context of an excess through a non-exercise of power, the committee in *AES v. Hungary* also held that the term "*manifest*" implies that the non-exercise was "*somehow significant or consequential*." In that case, the parties agreed that the non-exercise had to be "*result-determinative*."[97]

117. Finally, Respondent has advanced the argument that an excess of powers in the context of jurisdiction always qualifies as "*manifest*" and thus is an annulment ground under Article 52(1)(b). However, the Committee agrees with Claimant that there is no indication in either the text of Article 52(1)(b), its context or in the object and purpose of the annulment proceeding within the regime of the ICSID Convention that would support the position that the standard of review to be applied to jurisdiction decisions is different from that applied to merits decisions. To the contrary, Article 41 of the ICSID Convention provides that "[t]*he Tribunal shall be the judge of its own competence*" and Respondent acknowledges that this provision reflects the *compétence-compétence* principle. As stated by the committee in *SGS v. Paraguay*, it follows from Article 41 that "[a tribunal's] *decision on the scope of its jurisdiction cannot be reviewed* de novo *by an Annulment Committee*" and that in the absence of any indication to the contrary, "*an award can only be annulled if the lack or excess of jurisdiction was manifest*."[98] Similar findings were made by the committees in *Azurix v. Argentina*[99] and *Soufraki v. United Arab Emirates*.[100]

118. In line with previous jurisprudence, the Committee therefore finds that the standard of review is the same for all three elements that define the boundaries of the Tribunal's power under the ICSID Convention: an excess of powers can amount to a ground for annulment only if it qualifies as "*manifest,*" which means that such excess of powers has to be obvious, evident and substantially serious.

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[96] **A/CLA-95**, ¶ 102.
[97] **A/CLA-35**, ¶ 30.
[98] **A/CLA-46**, ¶ 114.
[99] **AL A RA 84 / A/CLA-69**, ¶¶ 66, 69.
[100] **AL A RA 61**, ¶¶ 118-119. *See* also *Occidental v. Ecuador* where the parties agreed that "*this important limitation* [of the term 'manifest'] *applies both to a jurisdictional excess of powers and to a failure to apply the proper law. This conclusion, shared by this Committee, has been confirmed by previous committees.*" **AL A RA 90**, ¶ 58.

C. Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d) of the ICSID Convention)

1. Summary of Respondent's Position

119. Respondent submits that this ground for annulment is designed to "*safeguard the substantive fairness and integrity of the arbitral process*" and is not limited to the rules provided for in the ICSID Arbitration Rules but rather refers to "*a set of minimal standards of procedure to be respected as a matter of international law.*"[101] According to Respondent, these standards include, *inter alia*, "*the right to be heard and to be given a suitable opportunity for rebuttal, the guarantee of due process of law, the right of defence, the principle of equality between the parties, deliberation among the members of the tribunal, the independence and impartiality of the members of the tribunal and the consideration of evidence and the burden of proof.*"[102] Respondent further refers to "*an arbitrators' duty of investigation, disclosure and notification in the treatment and management of existing or potential conflicts of interest.*"[103]

120. Specifically with regard to the right to be heard by an independent and impartial tribunal, Respondent claims that a violation of this right amounts to a serious departure from a fundamental rule of procedure and refers to the committee in *Klöckner I*, which stated that "[i]*mpartiality of an arbitrator is a fundamental and essential requirement. Any shortcoming in this regard, that is any sign of partiality, must be considered to constitute, within the meaning of Article 52(1)(d), a* 'serious departure from a fundamental rule of procedure' *in the broad sense of the term* 'procedure,' *i.e., a serious departure from a fundamental rule of arbitration in general, and of ICSID arbitration in particular.*"[104]

121. Respondent further contends that, contrary to Claimants' submission, nothing in Article 52(1)(d) provides for a limitation of the powers of an *ad hoc* committee to verifying the existence of any "*procedural irregularity*" – rather than an analysis whether an arbitrator manifestly lacked the requirements in Article 14(1) of the ICSID Convention. Respondent emphasizes that the *EDF* committee recognized that "*the fact that there is reasonable doubt about whether an arbitrator possessed the qualities of independence and impartiality*

[101] Argentina's Memorial, ¶¶ 51-52; Argentina's Reply, ¶ 43 quoting from **AL A RA 63**, ¶ 57.
[102] Argentina's Memorial, ¶ 53.
[103] Argentina's Reply, ¶ 44 citing **AL A RA 67**, ¶ 204.
[104] Argentina's Memorial, ¶ 54 quoting from **AL A RA 56**, ¶ 95 (albeit without explicit reference).

required by Article 14(1) is a ground on which an award might be annulled under Article 52(1)(d)."[105]

122. With regard to the limitation imposed by the *EDF* Committee on its review under Article 52(1)(a), Respondent reiterates that this limitation has no basis in the ICSID convention and claims that, in any event, it should not restrict an annulment committee's power to verify a serious departure from other fundamental rules of procedure, such as an arbitrator's duties relating to the investigation, disclosure and notification of conflicts of interest.[106]

123. Finally, Respondent rejects Claimants' submission that the term "*serious*" implies that the procedural irregularity must have caused the tribunal to reach a "*substantially different*" result and refers to the committee in *Pey Casado v. Chile*, which held that "*the applicant must demonstrate* 'the impact the issue may have had on the award'."[107] Respondent also cites the decision in *Tulip v. Turkey*, which found that "*the applicant must demonstrate that the observance of the rule had the* potential *of causing the tribunal to render an award substantially different from what it actually decided*."[108]

2. Summary of Claimants' Position

124. Claimants submit that the requirement "*fundamental*" requires that the violated rule relates to an element of due process and agrees with Respondent that this includes "*the equal treatment of parties, the right to be heard, the right to respond, or the right to an independent and impartial tribunal*." Claimants further contend that the requirement "*serious*" requires that the procedural irregularity caused the tribunal to reach a result "*substantially different*" from the result it would have reached in the absence of said irregularity.[109]

125. Insofar as Respondent invokes this annulment ground as a second basis in the context of the challenge to Prof. Kaufmann-Kohler, Claimants note that Respondent does not invoke any procedural irregularity in the procedure for hearing and deciding an arbitrator challenge, but rather argues on the erroneous basis that this Committee is empowered to perform a *de novo* review of the challenge and the question of whether Prof. Kaufmann Kohler manifestly lacked the qualities in Article 14(1) of the ICSID Convention.[110]

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[105] Argentina's Reply, ¶¶ 48-50 quoting from **AL A RA 70**, ¶ 125.
[106] Argentina's Reply, ¶¶ 51-53.
[107] Argentina's Reply, ¶¶ 45-46 quoting from **AL A RA 65**, ¶ 78.
[108] Argentina's Reply, ¶¶ 45, 47 quoting from **A/CLA-90**, ¶ 78 (emphasis in original).
[109] Claimants' Counter-Memorial, ¶¶ 61, 140.
[110] Claimants' Counter-Memorial, ¶¶ 64, 143.

126. Claimants further point out that the standard established by the *EDF* committee was applied to both Articles 52(1)(a) and (d) – in line with "*settled law that annulment can never be a vehicle for unfettered review of the merits of a Tribunal's decision*."[111]

127. In respect of Respondent's reliance on an arbitrator's duty to investigate and disclose conflicts, Claimants emphasize that the *Vivendi II* committee referred to by Respondent was not faced with an existing decision on an arbitrator challenge and did no more than to recognize that there is a duty to disclose conflicts of interests. Claimants argue, however, that this duty is not in itself a fundamental rule of procedure but rather a reflection of the requirement that arbitrators must be independent and impartial; consequently, non-disclosure cannot be a ground for disqualification where the non-disclosed facts do not result in a conflict of interest.[112]

3. Committee's Analysis

128. The Parties agree that the annulment ground in Article 52(1)(d) is intended to ensure that a set of minimal standards of procedure is observed in the arbitral proceedings. As stated by the committee in *Wena Hotels v. Egypt*, this set of standards is "*to be respected as a matter of international law*" and includes that "*each party is given the right to be heard before an independent and impartial tribunal*," which in turn includes "*the right to state its claim or its defense and to produce all arguments and evidence in support of it.*"[113]

129. As pointed out by Claimants, the *Wena Hotels* committee further held that "[i]*n order to be a* 'serious' *departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed*."[114] However, as noted with approval by the committee in *Victor Pey Casado v. Chile*, the *Wena Hotels* committee denied a serious departure from a fundamental rule of procedure because the applicant had failed to demonstrate "*the impact that the issue* may *have had on the award.*"[115]

130. The same standard was applied by the committee in *Caratube v. Kazakhstan*, which held that:

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[111] Claimants' Rejoinder, ¶ 41.
[112] Claimants' Rejoinder, ¶ 42.
[113] **AL A RA 63 / A/CLA-30**, ¶ 57.
[114] **AL A RA 63 / A/CLA-30**, ¶ 58.
[115] **AL A RA 65**, ¶ 78 quoting from **AL A RA 63 / A/CLA-30**, ¶ 61.

> "*A departure is serious if the violation of the fundamental rule of procedure produced a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied. As the* Wena *committee stated, what the applicant must simply demonstrate is* 'the impact that the issue may have had on the Award'."[116]

131. This Committee agrees that the *Caratube* approach is reasonable because, as stated by the committee in *Tulip v. Turkey*, "[t]*o require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof.*"[117]

132. Finally and specifically with regard to the question of whether the alleged lack of the qualities of independence and impartiality of an arbitrator as required by Article 14(1) can give rise to a ground for annulment under Article 52(1)(d), the Committee agrees with the convincing reasons given by the *EDF* committee in this regard:

> "… [I]*t 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 … . 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.*"[118]

133. However, the Committee notes that the considerations expressed above in the context of the scope of review under Article 52(1)(a) apply also in connection with the review of whether there has been a serious departure from a fundamental rule of procedure. In particular, the Committee recalls that it is faced with an existing decision rendered by the remaining members of the Tribunal and that it is not for this Committee to perform a *de novo* review of the factual and legal questions that have already been assessed in this decision. For the

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[116] **AL A RA 30**, ¶ 99.
[117] **A/CLA-90**, ¶ 78.
[118] **AL A RA 70 / A/CLA-61**, ¶ 124.

same reasons that have been detailed above, the Committee therefore again agrees with the *EDF* committee that "*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.*"[119]

D. Failure to State Reasons in the Award (Article 52(1)(e) of the ICSID Convention)

1. Summary of Respondent's Position

134. Respondent notes that, unlike other grounds for annulment, the ground "*failure to state reasons*" is not qualified by a phrase such as "*manifestly*" or "*serious*" and argues that this results from the fact that the requirement to provide reasons is "*an essential aspect of ICSID arbitration.*" Respondent points out that a proposal to include in the ICSID Convention an option for the parties to waive the statement of reasons in the award was rejected and refers to Aron Broches, then chairman of a regional meeting of experts, who opined that this decision "*underscores the importance attached by the drafters to the statement of reasons, and is a factor which may be taken into account by* ad hoc *committees.*"[120]

135. Respondent refers to the four forms of a failure to state reasons established by the *Soufraki* committee: (i) "*a total absence of reasons for the award, including the giving of mere frivolous reasons*"; (ii) "*a total failure to state reasons for a particular point, which is material for the solution*"; (iii) "*contradictory reasons*"; and (iv) "*insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the tribunal.*"[121] Respondent further refers to the annulment committee in *Pey Casado v. Chile*, which held that "*as long as there is no express rationale for the conclusions with respect to a pivotal or outcome-determinative point, an annulment must follow, whether the lack of rationale is due to a complete absence of reasons or the result of frivolous or contradictory explanations*."[122]

136. In Respondent's view, there should be no speculation about any potential reasons that might justify the conclusion reached by the tribunal, but the factors leading to the decision must be expressed "*with a minimum of coherence and consistency (regardless of whether they are*

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[119] **AL A RA 70 / A/CLA-61**, ¶ 145.
[120] Argentina's Memorial, ¶¶ 45-47 quoting from **AL A RA 55**, p. 331.
[121] Argentina's Memorial, ¶ 48; Argentina's Reply, ¶ 55 quoting from **AL A RA 61**, ¶ 126.
[122] Argentina's Reply, ¶ 55 quoting from **AL A RA 65**, ¶ 86.

correct or not)."[123] Respondent refers to the annulment committee in *MINE v. Guinea*, which stated that one must be able to "*follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion*."[124]

137. In response to Claimants' argument that contradictory reasons are often better dealt with under the remedies of rectification or interpretation of awards rather than in annulment proceedings, Respondent takes the view that such remedies are not suitable to verify the tribunal's duty to state non-contradictory reasons, given that the scope of rectification under Article 49(2) is limited to "*rectify*[ing] *clerical, arithmetical or similar error*" and the scope of interpretation under Article 50 does not extend beyond clarifying "*the meaning or scope of an award*." Respondent further refers to the ICSID Background Paper on Annulment, which records that "*a majority of* ad hoc *Committees have concluded that* 'frivolous' *and* 'contradictory' *reasons are equivalent to no reasons and could justify an annulment.*"[125]

138. Specifically in relation to the rectification remedy, Respondent refers to Prof. Schreuer who states in his commentary that "*the procedure of self-correction under Art. 49(2) will be useful only in the case of inadvertent omissions of a technical character but not in the case of a considered omission affecting a fundamental aspect of the tribunal's reasoning … . The grounds for annulment of failure to state reasons (Art. 52(1)(e)), departure from a fundamental rule of procedure (Art. 52(1)(d)) and manifest excess of powers (Art. 52(1)(b)) may be available in case of a failure to decide an essential question.*"[126] Respondent submits that in line with this commentary, annulment committees have found that a tribunal's failure to address a question submitted to it (contrary to Article 48(3) of the ICSID Convention), "*which may affect the final decision of that tribunal*," may amount to any of the three above mentioned annulment grounds.[127]

139. Specifically with regard to the failure to address certain evidence in the damages phase, Respondent quotes from the finding of the annulment committee in *TECO v. Guatemala* that "[w]*hile the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence*

[123] Argentina's Memorial, ¶ 49.
[124] Argentina's Reply, ¶ 54 quoting from **AL A RA 62**, ¶ 5.09.
[125] Argentina's Reply, ¶¶ 56-58 quoting from **A/CLA-91**, ¶ 107.
[126] Argentina's Reply, ¶ 59 quoting from **AL A RA 92**, p. 864.
[127] Argentina's Reply, ¶ 40 citing **A/CLA-91**, ¶ 104.

insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[128]

140. Respondent points out that the *TECO* committee considered it relevant that the tribunal had failed to address expert reports directly pertaining to the loss of value claim and thus "*failed to observe evidence which at least had the potential to be relevant to the final outcome of the case*"; it thus partially annulled the award, stating that the tribunal's failure to address these expert reports "*despite the parties' strong emphasis on expert evidence*" rendered the tribunal's reasoning "*difficult to understand*" and, in the eyes of the committee, not satisfactory under the reasoning requirements of Article 52(1)(e) of the ICSID Convention.[129]

141. In relation to Claimants' argument that the Committee should "*actively seek to get inside the skin of the tribunal*," Respondent takes the view that this would be "*well beyond the scope*" of the Committee's powers and, in fact contrary "*to the very essence*" of the ground for annulment in Article 52(1)(e). Respondent refers to the finding of the *Klöckner I* committee that "*it is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute* 'correct' *reasons for possible* 'incorrect' *reasons, or deal* 'ex post facto' *with questions submitted to the Tribunal which the Award left unanswered."*[130]

2. Summary of Claimants' Position

142. Claimants emphasize that, while "*in highly limited circumstances*," a violation of the duty to provide a reasoned award under Article 48(3) may amount to a ground for annulment under Article 52(1)(e) of the ICSID Convention, an *ad hoc* committee is not authorized to review the quality or persuasiveness of a tribunal's reasoning. Claimants quote from the ICSID Background Paper of Annulment stating that "[t]*he correctness of the reasoning or whether it is convincing is not relevant*" to a committee's inquiry.[131]

143. Claimants take the view that, despite recognizing that a failure to state reasons requires a total absence of reasons, genuinely contradictory reasons (which result in an effective

[128] Argentina's Reply, ¶ 61 quoting from **AL A RA 89**, ¶ 131.
[129] Argentina's Reply, ¶ 62 quoting from **AL A RA 89**, ¶¶ 135, 138.
[130] Argentina's Reply, ¶¶ 63-64 quoting from **AL A RA 56**, ¶ 151.
[131] Claimants' Counter-Memorial, ¶¶ 146-147 quoting from **A/CLA-91**, ¶ 105.

absence of reasons) or reasons "*so lacking in coherence that a reader cannot follow*" them, Respondent does not allege that the Tribunal's reasoning in the Award is unintelligible or absent of reasons but rather attacks the quality of the reasoning. Claimants submit that as long as it is possible to follow the reasoning through to the tribunal's conclusion, there can be no annulment, and refer to the finding of the *Vivendi I* committee that "*Article 52(1)(e) concerns a failure to state* any *reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an* ad hoc *committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issue that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e).*"[132]

144. In response to Respondent's argument that an *ad hoc* committee may not fill any gaps in the tribunal's reasoning, Claimants contend, apart from claiming that there are no such gaps in the present case, that a tribunal's reasons "*may be implicit so long as they are understandable*." Claimants argue that the committee should assess whether such reasons are implicit in the considerations and conclusions contained in the award and refer to Prof. Reisman's statement that annulment committees must "*actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding that its reasoning is insufficient.*"[133] In this context, Claimants refer to the committee in *TECO v. Guatemala*, which stated that "*not all of a tribunal's reasons need to be set out explicitly, as long as they can be understood from the rest of the award*."[134]

145. Claimants further submit that a failure to state reasons must relate to an essential point in the tribunal's decision and claim that where a tribunal fails to address a discrete question not relevant to the final decision, the appropriate remedy would be a request for supplementary decision under Article 49(2) of the ICSID Convention. While acknowledging that contradictory reasons "*may exceptionally constitute a failure to state reasons where they prevent the reader from understanding the tribunal's motives*," Claimants take the position that in many cases, contradictions "*are more appropriately dealt with*" under the remedies of rectification and interpretation of awards provided in Articles 49(2) and 50 of the ICSID Convention rather than in annulment proceedings.[135] Claimants reject Respondent's

[132] Claimants' Counter-Memorial, ¶¶ 148-149 quoting from **AL A RA 57**, ¶ 64 (emphasis in original); Claimants' Rejoinder, ¶ 87.
[133] Claimants' Counter-Memorial, ¶¶ 151-152 quoting from **A/CLA-110**, p. 795.
[134] Claimants' Rejoinder, ¶ 93 quoting from **AL A RA 89**, ¶ 88.
[135] Claimants' Counter-Memorial, ¶¶ 153-154.

argument that these remedies are insufficient to address allegedly contradictory reasoning and refer to the *Impregilo* committee, which confirmed that Articles 49 and 50 provide the parties with an opportunity to address "*omissions, rectify material errors, and clarify the interpretation of an award*."[136]

146. In addition, Claimants quote from the ICSID Background Paper of Annulment, which states that "[w]*hile a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment. Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed. In addition, if there is a dispute between the parties as to the meaning or scope of the award, either party may request interpretation of the award by the original Tribunal.*"[137]

147. In this context, Claimants refer to the *Daimler* committee, which held that "[t]*wo tests must be satisfied before an* ad hoc *committee can annul an award based on contradictory reasons. First, the reasons must be genuinely contradictory in that they cancel each other out so as to amount to no reasons at all. Second, the point with regard to which these reasons are given is necessary for the tribunal's decision.*"[138]

148. In response to Respondent's reliance on the findings of the *TECO* committee leading to a partial annulment of the award, Claimants note that this committee was faced with a complete failure of the tribunal to consider any evidence on an issue central to its decision. In Claimants' view, nothing in this decision suggests that the *TECO* committee considered annulment appropriate anytime a tribunal failed to address evidence on a particular point, which it in fact explicitly denied in line with settled case law.[139]

149. Finally, Claimants argue that tribunals should be afforded a certain degree of discretion over the manner in which they express their reasoning, which may differ depending on the legal tradition, and conclude that "[c]*ommittees should therefore favor an interpretation of the Tribunal's reasoning that confirms the consistency of its decision, rather than engage in a hunt for contradictions.*"[140]

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[136] Claimants' Rejoinder, ¶ 89 quoting from **A/CLA-42 / AL A RA 34**, ¶ 214.
[137] Claimants' Rejoinder, ¶ 91 quoting from **A/CLA-91**, ¶ 103.
[138] Claimants' Counter-Memorial, ¶ 155 quoting from **A/CLA-43**, ¶ 77.
[139] Claimants' Rejoinder, ¶ 92 referring to **AL A RA 89**, ¶¶ 130-138.
[140] Claimants' Counter-Memorial, ¶ 156.

3. Committee's Analysis

150. Respondent submits that a failure to state reasons exists in the four cases identified by the committee in *Soufraki v. United Arab Emirates*: (i) "*a total absence of reasons for the award, including the giving of merely frivolous reasons*"; (ii) "*a total failure to state reasons for a particular point, which is material for the solution*"; (iii) "*contradictory reasons*"; and (iv) "*insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal*."[141]

151. Claimants agree that a failure to state reasons arises: (i) "*where there has been a total absence of reasons*"; (ii) "*where a tribunal's reasoning is genuinely contradictory*"; and (iii) "*where the reasoning is so lacking in coherence that a reader cannot follow it*."[142]

152. While emphasizing that this ground for annulment is not qualified by a term such as "*manifest*" or "*serious,*" Respondent apparently accepts that a failure to state reasons must relate to a "*material*" or, as put by the committee in *Pey Casado v. Chile* that Respondent quotes in this regard, to a "*pivotal or outcome-determinative point*."[143] Claimants, for their part, do not explicitly dispute that a failure to state reasons may relate to only part of the award but rather emphasize that such failure must result in the inability to follow the tribunal's reasons through to its conclusion. In the Committee's view, this is not in contradiction with the statement of the *Pey Casado* committee that "*dès lors qu'il n'existe aucun fondement exprès pour étayer les conclusions sur un point crucial ou déterminant pour le résultat, l'annulation doit être prononcée … .*"[144] If there were no express rationale with respect to a pivotal or outcome-determinative point of the Tribunal's decision, its reasons could not be followed through to its conclusion. Such finding could warrant annulment of the Award.

153. It further appears that Respondent does not dispute the statement of the committee in *Vivendi v. Argentina I* that "*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 and convincing reasons*."[145] In line with the *Vivendi I* committee's further finding that there can be no annulment under Article 52(1)(e) if the reasons given by the

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[141] **AL A RA 61**, ¶ 126.
[142] Claimants' Counter-Memorial, ¶ 148.
[143] Argentina's Reply, ¶ 55 quoting from **AL A RA 65**, ¶¶ 86.
[144] **AL A RA 65**, ¶ 86.
[145] **AL A RA 57**, ¶ 64.

tribunal can be followed and relate to the issues before it, the committee in *MINE v. Guinea* that Respondent quotes in this context held that "*the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law*."[146]

154. In light of the above, the Committee considers it common ground that the issue before this Committee is not to assess the accuracy or quality of the reasons given by the Tribunal but rather to review whether these reasons enable the reader to understand why the Tribunal reached the conclusions that were determinative for its decision(s).

155. The dispute between the Parties primarily focuses on: (i) the role in this context of the remedies of rectification and interpretation of the award under Articles 49(2) and 50 of the ICSID Convention; and (ii) the efforts an *ad hoc* committee should undertake to extract the reasons given by the tribunal from the decision it has rendered and to follow those reasons through to the tribunal's conclusion before finding that a ground for annulment exists.

156. As to the first issue, the Committee agrees with Claimants that to the extent it would have been open to Respondent to correct any alleged flaw in the Award by means of an application for rectification or interpretation under Articles 49(2) or 50, such flaw does not qualify as a ground for annulment. At the same time, however, the Committee notes that the scope of the rectification remedy is expressly limited to "*clerical, arithmetical or similar error*," *i.e*., errors that would not justify an annulment in any event. The interpretation remedy is meant to clarify disputes as to "*the meaning or scope of an award*" but it does not apply in case the meaning and scope of the decision are clear but not supported by reasons that enable the reader to understand how the tribunal reached the underlying conclusions.

157. As for the second issue, the Committee is aware that Claimants cite the statement of a leading authority that annulment committees must "*actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding that its reasoning is insufficient.*"[147] Respondent on the other hand refers to the committee in *Klöckner v. Cameroon I*, which held that "*it is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute* 'correct' *reasons for possibly* 'incorrect' *reasons, or deal* 'ex post facto' *with questions submitted to the Tribunal which the Award left unanswered.*"[148]

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[146] **AL A RA 62**, ¶ 5.09.
[147] **A/CLA-110**, p. 795.
[148] **AL A RA 56**, ¶ 151.

158. In the Committee's view, these statements do not necessarily contradict each other but they rather reflect the difficulty of finding a reasonable and balanced standard of review. While an *ad hoc* committee certainly may not speculate on possible reasons or even replace given reasons by reasons of its own making, it must be borne in mind that an annulment proceeding is meant to safeguard the fundamental integrity of the arbitration proceedings but not to be mistaken for a detailed scrutiny of whether each and every conclusion is supported by fully comprehensible reasons. Consequently, the Committee considers that it can be expected from an *ad hoc* committee to undertake reasonable efforts to follow the reasons given by the tribunal, the extent of which cannot be answered in the abstract but must be determined in the individual circumstances of the case.

159. Finally and specifically with regard to Respondent's allegation that the Tribunal has failed to give reasons addressing certain evidence relevant to Respondent's necessity defense, the Committee generally agrees with the *El Paso* committee that "[t]*he assessment of the evidence and interpretation of the applicable law must be performed only by the Tribunal, not by the Committee*" and that an *ad hoc* committee "*cannot or should not decide whether evidence was well or ill-considered or not considered at all by the Tribunal.*"[149]

160. The Committee further agrees with the finding of the *EDF* committee that "[s]*o long as the reader can follow the reasoning in the Award, the fact that it does not deal with each authority or every item of evidence is immaterial.*" Albeit in the context of Article 52(1)(d), the *EDF* committee then held that the tribunal is not required "*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.*"[150]

161. The Committee is aware that Respondent places particular reliance on a finding made by the committee in *TECO v. Guatemala* that "[w]*hile the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem*

[149] **AL A RA 35**, ¶¶ 191, 196.
[150] **AL A RA 70 / A/CLA-61**, ¶¶ 349, 350.

to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion."[151]

162. However, as the *TECO* committee clarified immediately before the passage quoted by Respondent, "[i]*t was within the Tribunal's discretion to assess whether* [the expert] *testimony was relevant or not, material or not, and that view is not censorable on annulment. However, that is not what is at stake here. The Committee takes issue with the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim.*"[152] Consequently, this decision cannot be deemed to allow for a re-evaluation of the evidence put before the tribunal but it rather concerned the exceptional case in which a total failure to address "*highly relevant*" evidence amounted to a failure to state reasons under Article 52(1)(e) and justified a partial annulment of the award.

163. In conclusion, the Committee therefore maintains the view that as held by previous ICSID jurisprudence, it is not for this Committee to re-consider the evidence put before the Tribunal. Annulment for a failure to state reasons could be warranted only if there was a total failure to address evidence that would have been "*highly relevant*" to the Tribunal's decision, *i.e.*, evidence whose consideration could have had a significant impact on the Award.

VI. THE COMMITTEE'S VIEWS

164. Respondent has invoked four sets of grounds that, in its view, fulfill different grounds for annulment under Article 52(1) of the ICSID Convention. In order to thoroughly address each set of grounds, the Committee will follow the same structure that Respondent applied in its written pleadings and assess the individual grounds of annulment advanced by Respondent.

A. First Set of Grounds for Annulment Relating to the Appointment of Prof. Kaufmann-Kohler as Director of UBS and Her Alleged Failure to Inform and Investigate

1. Summary of Respondent's Position

165. Respondent submits that Prof. Kaufmann-Kohler's appointment in April 2006 as a member of the Board of Directors of UBS AG, which in turn held shares and other interests in two of the Claimants, *i.e.*, Suez and Vivendi, created a "*serious conflict of interest*," which made

[151] **AL A RA 89**, ¶ 131.
[152] **AL A RA 89**, ¶ 131.

it "*manifestly impossible*" for her to be relied upon to exercise independent judgment as required under Article 14(1) of the ICSID Convention. Respondent further claims that Prof. Kaufmann-Kohler breached the "*fundamental duty to disclose that situation in the arbitrations in which she was involved and to properly investigate the connections between UBS and the parties to those proceedings*." According to Respondent, from the moment of Prof. Kaufmann-Kohler's appointment to the Board of Directors, the Tribunal was therefore no longer properly constituted (Article 52(1)(a) of the ICSID Convention) and there was a serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).[153]

166. Respondent emphasizes that, while Prof. Kaufmann-Kohler did provide UBS with a list of her ongoing arbitrations, she did not ask UBS to identify any relationship it had with any of the parties to those arbitrations, nor did she make any independent inquiries of her own in this regard. Respondent refers to the expert report of Prof. Wolfram, who identified both a "*loyalty*" interest and an "*economic*" self-interest in Claimants' favor that each generated a conflict of interest, given that Prof. Kaufmann-Kohler had a responsibility to support UBS's business interests and was financially tied to UBS's financial success, which was in turn connected to Claimants' success in this arbitration.[154]

167. As to the interest of loyalty, Respondent again refers to Prof. Wolfram's report, which pointed out two relevant forms of interest: (i) UBS held stock in Suez and Vivendi on its own account and as wealth-management custodian for its bank clients; and (ii) UBS had publicly recommended to its clients to invest in Claimants' business sector or specifically in their stock. As to the economic self-interest, Respondent notes that Prof. Kaufmann-Kohler received at least 50% and up to 100% of her compensation in UBS stock.[155]

168. Respondent submits that, in its Decision on Respondent's Second Proposal for Disqualification, the Tribunal failed to address Prof. Kaufmann-Kohler's "*fiduciary duty to protect the economic interests of UBS in the Claimants, her natural inclination to do so, her institutional loyalty to advance such interests, or the justifiable doubts this created regarding her ability to act as an impartial arbitrator*." In addition, Respondent takes the view that the Tribunal downplayed the value of UBS's investments in Suez and Vivendi, valued at over

[153] Argentina's Application, ¶¶ 23, 33; Argentina's Memorial, ¶¶ 58-59, 98; Argentina's Reply, ¶¶ 67, 98.
[154] Argentina's Memorial, ¶¶ 65, 70; Argentina's Reply, ¶ 81 referring to **Exhibit A RA 66**, ¶¶ 11-15.
[155] Argentina's Memorial, ¶¶ 71-72; Argentina's Reply, ¶¶ 80, 82 referring to **Exhibit A RA 66**, ¶¶ 8, 15.

USD 2 billion, and incorrectly stated that UBS's shareholdings in Claimants "*in no way affect the compensation that Professor Kaufmann-Kohler earns as a director of UBS.*"[156]

169. As to the four criteria examined by the Tribunal members to evaluate the connection between Prof. Kaufmann-Kohler and Claimants, *i.e.*, proximity, intensity, dependence, and materiality, Respondent notes that they are not based on any authority and in any event, the Tribunal erroneously assessed the facts against them and in addition referred to links between strangers around the world and even aliens – as a result of which the Decision on Respondent's Second Proposal for Disqualification was "*completely lacking in reasonableness.*"[157] In addition to the facts known to Respondent when it filed its Second Proposal for Disqualification, Respondent submits that it learned in May 2008 that Prof. Kaufmann-Kohler had become even more influential at UBS because she had been appointed as chair of the UBS's Nominating Committee, which is in charge of proposing nominations and evaluating the effectiveness of Board Members.[158]

170. Respondent submits that, contrary to the remaining members of the Tribunal, the *Vivendi II* committee recognized the conflicts of interest that affected Prof. Kaufmann-Kohler and stated that "[s]*ince 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 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.*" The committee added that "[a]*s a minimum, the* ad hoc *Committee sees here* reason for extreme caution, especially in ICSID cases where the public interest is often strongly engaged."[159]

171. Respondent further refers to the *Vivendi II* committee's analysis of how an arbitrator should handle such a conflict of interest in terms of: (i) investigating any connections between the bank and the parties to the arbitrations; (ii) disclosing any such connections to the parties; and (iii) notifying the parties of the appointment regardless of any connections found. According to the *Vivendi II* committee, such a situation further imposes a "*continuous duty of investigation*" on the arbitrator, which it considered not fulfilled by merely providing the bank with a list of current arbitrations together with a request to find out whether there were

[156] Argentina's Memorial, ¶¶ 75, 76 quoting from Decision on Disqualification, ¶ 40.
[157] Argentina's Reply, ¶¶ 90-94, 97.
[158] Argentina's Memorial, ¶ 74; Argentina's Reply, ¶ 96.
[159] Argentina's Memorial, ¶¶ 81-83 quoting from **AL A RA 67**, ¶¶ 218-219 (emphasis added by Respondent).

any conflicts on interests. Respondent submits that, in the committee's view, the bank was not in a position to decide whether there were conflicts of interests from the perspective of the parties to the arbitrations but it would have been for the arbitrator personally to consider any connection between the bank and the parties and to disclose such connection to the parties.[160]

172. Respondent points out that based on these considerations, the *Vivendi II* committee understood the argument that the tribunal was no longer properly constituted and there was a serious departure from fundamental rules of procedure, which "*could lead to annulment whenever justified within the context of the case under consideration*." Respondent submits that the committee ultimately decided not to annul the award because it did not have sufficient reason to believe that Prof. Kaufmann-Kohler knew about the connection between UBS and the claims in that case until after the award was rendered and therefore found that this connection did not have any material effect on the final decision of the tribunal.[161] Respondent points out that, by contrast, the Decision on Liability in the present case was issued long after Respondent's Proposal for Disqualification, and Prof. Kaufmann-Kohler's opinion was decisive in light of Prof. Nikken's dissenting opinion.[162]

173. As to Claimants' reliance on the decision in *EDF v. Argentina*, Respondent notes that the underlying facts and thus the conflict of interest were not the same in that case because UBS's participation in the claimant there was only indirect (via its parent company) and with 1.5% substantially less than the direct shareholdings in the present case. Respondent also refers to the *EDF* committee quoting from a statement made by the *Vivendi II* committee that "*a larger or smaller participation of UBS in the one or in the other company may have relevance in this connection*."[163] In Respondent's view, the reasoning of the *EDF* committee actually supports its claim that the Award must be annulled on the basis of the facts underlying the present case.[164]

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[160] Argentina's Memorial, ¶¶ 84-87 quoting from **AL A RA 67**, ¶¶ 204, 222-226.
[161] Argentina's Memorial, ¶¶ 88-89 quoting from **AL A RA 67**, ¶ 232 and citing ¶¶ 234-235.
[162] Argentina's Memorial, ¶ 90; Argentina's Reply, ¶ 98.
[163] Argentina's Memorial, ¶ 93; Argentina's Reply, ¶¶ 99-103 quoting from **AL A RA 70**, ¶ 155. The *EDF* committee noted in the same paragraph that, while in the case before it, the investment in question consisted of a 1.5% shareholding in EDF, the parent company of the claimant EDFI, which was held by the UBS Foundation for the benefit of various Swiss pension funds, it appeared that, by contrast, in *Vivendi II* UBS was the largest shareholder in the claimant itself.
[164] Argentina's Reply, ¶¶ 104-105.

174. According to Respondent, the fact that UBS was the largest shareholder in Vivendi with 2.38% of its shares and a major shareholder in Suez with 2.13% of its shares, valued together at over USD 2 billion, must be considered a "*fairly significant percentage in terms of value*," which arose both from direct investments by UBS and from its purchase of shares for its clients' accounts and cannot be considered *de minimis* as alleged by Claimants. Respondent further emphasizes that UBS also actively promoted and marketed investments in the water sector, which includes the two Claimants.[165]

175. In Respondent's view, these two aspects created direct interests on the part of UBS in the outcome of the arbitration and thus an "*extremely serious situation*" in disregard of "*fundamental aspects of the right to a fair trial*," *i.e.*, the right to an independent and impartial tribunal. As these conflicts of interests for Prof. Kaufmann-Kohler had a "*material impact*" on the Decision on Liability as well as on the Award, Respondent claims that an annulment of the Award is warranted.[166]

176. "[A]*s an aggravating factor*," Respondent invokes the fact that Prof. Kaufmann-Kohler did not disclose her appointment as a member of the UBS Board to the parties to the arbitration – in contrast with her approach to inform UBS about her ongoing arbitrations, indicating that she knew that her appointment could lead in certain cases to a conflict.[167] Respondent refers to its expert Prof. Wolfram who concluded that Prof. Kaufmann-Kohler's failure to investigate or disclose her appointment was an independent cause for disqualification.[168]

177. As to the assessment of the two remaining members of the Tribunal that it was "*perfectly possible for a person to be unaware of the links that connect him or her to others*," Respondent argues that this does not account for the specific duty of investigation, disclosure and notification on the part of the arbitrators within the context of an ICSID arbitration, under which Prof. Kaufmann-Kohler would have been required to ask UBS for the necessary information and to inform the parties to these proceedings of the circumstances at hand.[169]

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[165] Argentina's Memorial, ¶ 94; Argentina's Reply, ¶¶ 70, 73, 76-77.
[166] Argentina's Memorial, ¶¶ 94-97. Respondent argues that the only two cases in which Argentina was held liable to pay compensation on account of a financial debt were *Vivendi* and the present case – in both of which Prof. Kaufmann-Kohler was acting as arbitrator and UBS held a shareholding in Vivendi. Respondent further claims that her involvement led to additional amounts on account of guaranteed debt, which are not insignificant or marginal and would create additional revenues for Suez and Vivendi. Argentina's Reply, ¶ 78.
[167] Argentina's Reply, ¶¶ 71-72.
[168] Argentina's Reply, ¶ 83 referring to **Exhibit A RA 66**, ¶ 13.
[169] Argentina's Reply, ¶ 89 quoting from Decision on Disqualification, ¶ 33.

2. Summary of Claimants' Position

178. Claimants submit that Respondent argues based on its erroneous assumption that the Committee is empowered to perform a *de novo* review of the arbitrator challenge and refuses to engage with the approaches taken by the *Azurix* and *EDF* committees. Claimants reiterate their view that, even if the substance of that challenge were indeed to be considered by this Committee, this consideration would be limited, in line with the *EDF* committee's approach, to whether the Tribunal's decision on Respondent's Proposal for Disqualification was "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision.*"[170] According to Claimants, this means that the Committee "*is not tasked with determining whether Argentina's challenge was correctly decided, but rather if the Tribunal's Second Challenge Decision constituted such an egregious violation of certain basic principles that it cannot stand*."[171]

179. Claimants contend that the findings made by the Tribunal in its Decision on Respondent's Second Proposal for Disqualification are binding in this annulment phase. Specifically, Claimants recall that the Tribunal, in its 28-page decision, qualitatively analyzed the situation and identified four criteria to guide its assessment: proximity, intensity, dependence, and materiality. Based on these criteria, the Tribunal found that Prof. Kaufmann-Kohler's connections to Suez and Vivendi were remote and immaterial, given in particular the nature of UBS's "*passive, portfolio*" investments in Suez and Vivendi that amounted to only 0.056% of UBS's total investments during the relevant period. In addition, it found that Respondent had not been able to prove any impact of the arbitration on the share price of Suez and Vivendi, let alone any effect on UBS or Prof. Kaufmann-Kohler's interests.[172]

180. According to Claimants, the Tribunal's findings were "*firmly grounded in the factual record and cannot be revisited on annulment*," even if there were any factual or legal errors in the Tribunal's assessment. In particular, Claimants note that the expert report of Prof. Wolfram was considered and rejected by the Tribunal and therefore cannot be considered *de novo* by this Committee. In any event, Claimants emphasize that Prof. Wolfram's "*extreme opinions*" were rejected not only by the Tribunal in the present case but also by the *EDF* tribunal and the *EDF* annulment committee.[173]

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[170] Claimants' Counter-Memorial, ¶¶ 73-74 quoting from **A/CLA-61**, ¶ 145; Claimants' Rejoinder, ¶ 26.
[171] Claimants' Rejoinder, ¶ 25.
[172] Claimants' Counter-Memorial, ¶¶ 76-78; Claimants' Rejoinder, ¶¶ 27-32.
[173] Claimants' Counter-Memorial, ¶¶ 80-81; Claimants' Rejoinder, ¶¶ 33-34.

181. As to the fiduciary duty that Respondent heavily relies on in its Application, Claimants argue that Respondent did not establish how Prof. Kaufmann-Kohler would have been under a duty to corrupt an international arbitration proceeding involving a sovereign state, which could have endangered UBS's reputation. In any event, Claimants submit that any fiduciary duty ended when Prof. Kaufmann-Kohler resigned from the UBS Board in 2009, *i.e.*, before both the Decision on Liability and the Award were rendered.[174]

182. With regard to Respondent's reliance on the criticism of Prof. Kaufmann-Kohler's handling of the issue voiced by the *Vivendi II* committee, Claimants argue that this decision was rendered in a "*very different context*," as there was no prior challenge decision in that case and the committee thus had to consider the question "*as a matter of first impression at the annulment stage*." Claimants further emphasize that, despite its criticism, the *Vivendi II* committee nevertheless concluded that Prof. Kaufmann-Kohler's independence and impartiality were not impaired by her relationship with UBS and did not justify an annulment of the Award. By contrast, Claimants reiterate that the only permissible question before this Committee is whether the Tribunal's decision on Respondent's Proposal for Disqualification was "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*."[175]

183. As to Respondent's additional argument that Prof. Kaufmann-Kohler failed to investigate and disclose potential conflicts of interests arising out of her appointment, Claimants submit that the failure to disclose a fact in itself cannot give rise to a lack of independence and impartiality. In any event, Claimants emphasize that Prof. Kaufmann-Kohler did not know about UBS's minor shareholdings in Suez and Vivendi and thus could not be under a duty to disclose a fact of which she was unaware. In addition, Claimants note that the Tribunal considered any such duty satisfied by Prof. Kaufmann-Kohler's approach to provide a list of her ongoing arbitrations to UBS in order for the bank to, *inter alia*, perform a conflict check, and concluded that it was reasonable for her to rely on the investigation results provided by UBS.[176]

184. Finally, Claimants note that the Tribunal's allegedly "*so plainly unreasonable*" decision was in fact consistent with the decision of the *EDF* tribunal – endorsed by the *EDF* committee –

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[174] Claimants' Counter-Memorial, ¶ 82.
[175] Claimants' Counter-Memorial, ¶¶ 83-84 quoting from **A/CLA-61**, ¶ 145.
[176] Claimants' Counter-Memorial, ¶¶ 85-87; Claimants' Rejoinder, ¶ 35 referring to Decision on Disqualification, ¶ 48.

refusing to disqualify Prof. Kaufmann-Kohler in "*virtually identical circumstances*."[177] In Claimants' view, the "*fundamental similarity*" between the two cases is that UBS's interests in the respective claims were *de minimis*. Claimants acknowledge that the *EDF* committee did take note of the differences between the relative size of UBS's interests in the respective claimants, but argue that the *EDF* committee did not engage in any analysis about whether UBS's holding in Suez and Vivendi were greater than *de minimis* – contrary to the Tribunal in the present case, whose finding that they were "*not material to UBS's financial performance, profitability, or share price*" was thus in line with the findings of the *EDF* tribunal.[178]

185. In Claimants' view, the fact that both tribunals, as recognized by the *EDF* committee, "*reached the same decision*" based on a common factual premise is conclusive evidence that the Tribunal's decision "*was, at the very least, reasonable*" and Respondent's Application must therefore be rejected.[179]

3. Committee's Analysis

186. In relation to Prof. Kaufmann-Kohler's appointment to the Board of Directors of UBS, Respondent advances two grounds for annulment: (i) that the Tribunal was no longer properly constituted (Article 52(1)(a) of the ICSID Convention); and (ii) that there was a serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).

187. In its Proposal for Disqualification and again in this annulment proceeding, Respondent has raised two separate arguments on the basis of which it considers that Prof. Kaufmann-Kohler lacked impartiality and independence of judgment as required under Article 14(1): (i) the fact of her directorship in UBS, which is a shareholder in two of the Claimants (Suez and Vivendi) and engages in certain activities relating to the water sector, as of April 2006 (and until April 2009); and (ii) her failure to disclose the fact of her UBS directorship to the Parties and the Tribunal as required under the ICSID regime.

188. The Committee recalls that in order to find that a ground for annulment exists under the standard of review of Articles 52(1)(a) and 52(1)(d) of the ICSID Convention, the Decision on Disqualification rendered by the two remaining members of the Tribunal would have to

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[177] Claimants' Counter-Memorial, ¶ 74 referring to **A/CLA-33** and **A/CLA-61**.
[178] Claimants' Rejoinder, ¶¶ 36-37 quoting from Decision on Disqualification, ¶ 40.
[179] Claimants' Counter-Memorial, ¶¶ 88-89; Claimants' Rejoinder, ¶¶ 38-39.

be "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*."[180] In assessing whether this is the case, the Committee will further bear in mind that the underlying purpose of this standard is to safeguard the fundamental integrity of ICSID arbitration proceedings.

189. In the Committee's view, there are circumstances in which a decision could be considered "*plainly unreasonable*," *e.g.*, if a disqualification proposal was dismissed even though the challenged arbitrator was appointed to the Board of Directors of one of the parties, or was previously consulted by one of the parties on the subject-matter of the case. The seriousness of these examples is corroborated by the fact that they are also captured on the Non-waivable or Waivable Red List of the IBA Guidelines on Conflicts of Interest in International Arbitration ("**IBA Guidelines**"). There may even be circumstances in which a failure of the challenged arbitrator to disclose substantial circumstances to the Parties could render the decision of the remaining arbitrators "*plainly unreasonable*," *e.g.*, if a disqualification proposal was dismissed even though the challenged arbitrator failed to disclose that he or she recently served as counsel for one of the parties. Thus, even situations captured in the Orange List of the IBA Guidelines could, in certain circumstances, be of such a seriousness that it could compromise the fundamental integrity of the proceedings and thus would warrant annulment of the award.

190. It will be for this Committee to assess whether the circumstances of the present case give rise to a conflict of interest that is of a comparable seriousness and threat to the fundamental integrity of ICSID arbitration proceedings, which renders the Tribunal's decision "*plainly unreasonable*."

191. As a preliminary remark, the Committee wishes to emphasize that, contrary to Respondent's allegation, it cannot detect a lack of seriousness in the Tribunal's[181] Decision on Disqualification. The Committee rather considers that the language used in the Decision[182] reflects the attempt to circumscribe the difficulties of assessing conflicts of interest in today's globalized world where it would be impossible to expect from arbitrators to either not have,

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[180] *Cf.* **AL A RA 70 / A/CLA-61**, ¶ 145.

[181] For ease of reference, the Committee will refer to "*the Tribunal*" and its findings in the Decision on Disqualification but it is of course aware that the Decision on Disqualification was rendered by the two remaining members of the Tribunal, *i.e.*, excluding Prof. Kaufmann-Kohler.

[182] The language Respondent refers to reads: "*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.*" Decision on Disqualification, ¶ 32.

or to always be aware of, each and every connection to a business on whose disputes they may be called to decide. The Tribunal used this description as a basis for its finding that the simple existence of just any connection between an arbitrator and a party cannot be sufficient for a successful challenge but that the "*alleged connection must be evaluated* qualitatively."[183]

192. The Committee further notes that the facts underlying the Decision on Disqualification are undisputed between the Parties and considers that these have not significantly changed since the Decision was rendered in May 2008. While Respondent raised two additional facts, *i.e.*, that Prof. Kaufmann-Kohler: (i) "*had come to have an even greater influence in the Board of Directors of UBS*" when she was appointed chair of UBS's Nominating Committee in May 2008;[184] and (ii) decided to end her role at UBS after the expiration of her three-year term in April 2009, it must be noted that Respondent itself, when it became aware of these facts, apparently did not consider them sufficiently severe to file a further proposal for disqualification.

193. In addition, the Committee does not view Prof. Kaufmann-Kohler's decision to step down from the Board as an admission of a conflict of interest but rather as a decision made on the basis of the ongoing agitations her role had caused in the arbitrations she was involved in. If anything, the Committee considers that this additional fact reduces the significance of any potential conflict of interest because her role at UBS persisted only for three out of a total of 12 years of proceedings and, while this time period included the unanimous Decision on Jurisdiction, as well as pleadings and the hearing on the merits, Prof. Kaufmann-Kohler resigned from the UBS board more than a year before the Decision on Liability was issued and approximately six years before the Award was rendered.

194. Consequently, the Committee is of the view that the factual basis underlying the Decision on Disqualification has not changed in a manner that would justify a re-consideration of the facts, *i.e.*, a review beyond the scope identified above.

195. In their submissions, both Parties heavily relied on decisions of previous committees that considered challenges to Prof. Kaufmann-Kohler similar to the one raised in the present case. However, while the Committee does consider the findings made by other committees and tribunals relevant and will turn to them in due course, it will first perform its own analysis

[183] Decision on Disqualification, ¶¶ 32-33 (emphasis in original).
[184] Argentina's Memorial, ¶ 74.

of whether the Decision on Disqualification rendered by the two remaining members of the Tribunal is "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*."[185]

a. The Tribunal's Findings

196. In its qualitative assessment of the connection between Prof. Kaufmann-Kohler and two of the Claimants, the Tribunal noted that neither the ICSID Convention, the ICSID Arbitration Rules nor Respondent in its submissions provided any guidance for evaluating the connection and its effect on Prof. Kaufmann-Kohler's independence and impartiality. The Tribunal therefore identified four criteria that it considered particularly important: (i) proximity of the connection between the challenged arbitrator and the party; (ii) intensity and frequency of the interactions between the challenged arbitrator and the party; (iii) dependence of the challenged arbitrator on the party; and (iv) materiality of the benefits accruing to the challenged arbitrator as a result of the alleged connection.[186] The Tribunal then established the facts underlying Respondent's challenge, *i.e.*, in particular regarding the significance of the shares that UBS held in Suez and Vivendi, as well as the role Prof. Kaufmann-Kohler had as an independent director at UBS. In the context of the former, the Tribunal made, *inter alia*, the following findings:

> "*While the market value of* [UBS's] *shareholdings may seem large in absolute terms, they are not significant in relative terms, bearing in mind that UBS manages hundred of billions of dollars in assets. … Despite the size of its holdings, UBS is a passive, portfolio investor in both companies. … While a part of such shares are held for UBS's own account, a large portion is managed on behalf of clients. …* [T]*he Respondent … offered no quantitative evidence at all as to the potential effect of an award in favor of the Claimants on the price of their shares or the nature of their dividend distributions. …* [I]*t is more likely that this arbitration, whatever its outcome, will have a negligible effect on the share price of Vivendi and Suez and certainly on the financial fortunes of UBS.*"[187]

197. As regards Prof. Kaufmann-Kohler's role as an independent director of UBS, the Tribunal held that pursuant to Swiss law and UBS Articles of Association:

> "*The directors are not full-time employees of the corporations, are not in continuous session, and exercise largely a supervisory function over the*

[185] *Cf.* **AL A RA 70 / A/CLA-61**, ¶ 145.
[186] Decision on Disqualification, ¶ 35.
[187] Decision on Disqualification, ¶ 36.

> *activities of the corporation. As a result, Professor Kaufmann-Kohler is not involved in the day-to-day management of the corporation, such as selecting investments or preparing research reports, does not have responsibilities over the investment and management of corporate or client assets, and in fact was unaware until reading the Respondent's Second Proposal for her disqualification that UBS owned shares in Vivendi or Suez. … Respondent offered no evidence to the contrary with regard to Prof. Kaufmann-Kohler's specific duties and responsibilities as a member of the UBS board of directors.*"[188]

198. Finally, it applied these facts to the four criteria it had identified and found that:

(i) "*any connection between Professor Kaufmann-Kohler and the Claimants Vivendi and Suez is remote and certainly not direct*";

(ii) "*there is no interaction at all between Professor Kaufmann-Kohler and the Claimants by virtue of her UBS directorship*";

(iii) "*Professor Kaufmann-Kohler derives no benefits or advantages from and is in no way dependent on the Claimants as a result of the alleged connection*"; and

(iv) "*UBS shareholdings in Claimant Vivendi and Suez are not material to UBS financial performance, profitability, or share price and in no way affect the compensation that Professor Kaufmann-Kohler earns as a director of UBS.*"

The Tribunal thus concluded that the alleged connection between Prof. Kaufmann-Kohler and the Claimants did not create a manifest lack of independence and impartiality of judgment.[189]

199. In its assessment of whether Prof. Kaufmann Kohler´s failure to disclose the fact of her UBS directorship to the Parties and the Tribunal indicated a manifest lack of the qualities in Article 14(1), the Tribunal held that while Rule 6 of the ICSID Arbitration Rules, as applicable when the arbitration was commenced, did not specifically address the disclosure of facts arising after the constitution of the Tribunal, this provision should be interpreted to impose a continuing obligation of disclosure on the arbitrators.[190] The Tribunal noted, however, that Prof. Kaufmann-Kohler had not been aware of the fact that UBS held shares in Suez and Vivendi prior to Respondent's Proposal for Disqualification and considered that she could thus not have been required to disclose such fact.[191] As regards Prof. Kaufmann-Kohler's

[188] Decision on Disqualification, ¶ 39.
[189] Decision on Disqualification, ¶ 40.
[190] Decision on Disqualification, ¶¶ 42-43.
[191] Decision on Disqualification, ¶ 46.

approach to provide a list of her ongoing arbitrations to UBS to determine, *inter alia*, whether any of them conflicted with her future responsibilities at UBS, the Tribunal held:

> "*We believe that she had reason to rely on the UBS examination of this question since UBS, under Swiss banking law and the corporate and stock exchange rules to which it is subject, had a strong incentive to ascertain her independence because the company would have encountered legal and regulatory difficulties should it represent her as an independent director and later find that a court, regulatory agency, or stock exchange had determined her to be non-independent director of the UBS board of directors. It was therefore reasonable to rely on the investigation by UBS that no conflict existed between Professor Kaufmann-Kohler and the parties in any of her arbitrations (with the exception of the America cup) as a result of becoming a UBS director. Consequently, we do not believe that she had a duty to inquire further. Moreover, even if it were established that she did have such an obligation (which we do not believe is the case), her failure to do was in our opinion the result of an honest exercise of judgment and was not part of a pattern of circumstances raising doubts about impartiality.*"

The Tribunal thus concluded that Prof. Kaufmann-Kohler had no duty to inquire further and thus did not act in violation of Rule 6 of the ICSID Arbitration Rules.[192]

b. The Committee's Considerations on the Tribunal's Findings

200. Contrary to Respondent's allegation and in particular taking into account the absence of any evaluation criteria provided in the applicable rules, by the Parties or by ICSID jurisprudence, the Committee considers that it was within the Tribunal's reasonable discretion to perform a qualitative assessment of whether there was a "*manifest*" lack of the qualities in Article 14(1) as required by Article 57 and to identify certain criteria it considered particularly relevant to its assessment.

201. As for the Tribunal's understanding of the underlying facts as well as the application of these facts to the criteria it had identified, it has to be reiterated that it is not for this Committee to substitute its own views for the conclusions drawn by the Tribunal in this regard. The review of this Committee under Article 52(1)(a) and (d) of the ICSID Convention is rather limited to an assessment of whether the conclusions reached by the Tribunal were "*plainly unreasonable*." Therefore, the fact that the Committee may not share all of the views expressed by the Tribunal and in fact agree with some of the criticism expressed by the

[192] Decision on Disqualification, ¶ 48.

committee in *Vivendi II v. Argentina*, as further set out below, is not decisive. Contrary to the *Vivendi II* committee, this Committee is not called upon to make a first-time assessment of the matters at hand; it is faced with an existing decision, which shall stand unless it is "*plainly unreasonable*."

202. Respondent criticizes in particular that while its expert Prof. Wolfram identified at least two forms of interest that UBS had in Suez and Vivendi, *i.e.*, an "*economic*" self-interest in Claimants' favor and a "*loyalty*" interest, the Tribunal failed to address in its Decision on Disqualification the fiduciary duty and institutional loyalty of Prof. Kaufmann-Kohler to protect and advance UBS's interests in Claimants. In addition, Respondent argues that it was incorrect for the Tribunal to state that Prof. Kaufmann-Kohler's compensation as a UBS director was "*in no way affect*[ed]" by UBS's shareholdings in Claimants because she in fact received between 50% and 100% of her compensation in UBS stock.

203. As noted above, there are circumstances in which a decision not to disqualify a challenged arbitrator could be considered "*plainly unreasonable*," in particular circumstances such as those captured on the Non-waivable and Waivable Red List of the IBA Guidelines. In the Committee's view, the undisputed fact that Prof. Kaufmann-Kohler received a certain amount of her compensation in UBS stock does not indicate a conflict of interest that is of a comparably serious nature and thus a threat to the fundamental integrity of the arbitration proceedings. As found by the Tribunal and not to be re-considered by this Committee, UBS's shareholdings in Suez and Vivendi are "*not material to UBS financial performance, profitability, or share price*."[193] In addition, the Tribunal noted that it had not been presented with evidence that a favorable award would have more than a "*negligible effect*" on Claimants' share price and "*certainly on the financial fortunes of UBS.*"[194]

204. As to the alleged "*loyalty*" interest raised by Prof. Wolfram, which was not addressed by the Tribunal, the Committee recalls its agreement with the finding of the *EDF* committee that Article 52(1)(d) "*does not … require a tribunal to discuss in detail 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.*"[195] It is apparent from the Tribunal's reasoning that in light of the negligible significance of UBS's shareholdings compared to its total investments as well as its role as a passive portfolio investor that held a large portion of such shares on behalf of its clients, the Tribunal considered that there was no significant link between an award in Claimants'

[193] Decision on Disqualification, ¶ 40.
[194] Decision on Disqualification, ¶ 36.
[195] **AL A RA 70 / A/CLA-61**, ¶ 350.

favor and UBS's interests. As a result, there was no need from the Tribunal's perspective to discuss particular forms of interest, none of which would have been affected in a significant manner.

205. In this context, the Committee notes that the IBA Guidelines, on which both Parties relied in their written and oral submissions, include in their Green List of situations in which disclosure is not required when "[t]*he arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed*."[196] If it can be considered that UBS's shareholdings in the Claimants are "*insignificant*" and would not constitute a relevant conflict of interest between those parties, the same must apply, *a fortiori*, to the even more remote connection between Claimants and Prof. Kaufmann-Kohler, who herself did not hold any shares in any of the Claimants but only served as an independent director of the corporation that held such shares. This classification within the ranking of circumstances within the IBA Guidelines, while not being dispositive in itself, corroborates the Committee's finding that the circumstances relied on by Respondent are not comparable to those that can give rise to a "*plainly unreasonable*" decision.

206. As to the second limb of Respondent's allegation, *i.e.*, the fact that Prof. Kaufmann-Kohler failed to disclose her directorship in UBS to the parties to the arbitration, the Committee's review is again limited to assessing whether the Tribunal's assessment that Prof. Kaufmann-Kohler had no duty to disclose her directorship in UBS because she was not aware of UBS's shareholdings in Suez and Vivendi and could reasonably rely on the investigation conducted by UBS is "*plainly unreasonable*." While the Committee again may not share all of the views expressed by the Tribunal and understands the criticism expressed by the *Vivendi II* committee as regards her reliance on the UBS investigation rather than evaluating potential connections herself, and her decision to notify the bank but not the parties to the arbitration, this does not entail that the Tribunal reached a "*plainly unreasonable*" decision.

207. In this regard, the Committee notes that the Tribunal gave detailed reasons as to why it considered it reasonable for Prof. Kaufmann-Kohler to rely on the outcome of the UBS investigation. In particular, it assessed the applicable Swiss banking law as well as the corporate and stock exchange rules that UBS is subject to and concluded that it was in the interest of the bank to ascertain her independence before appointing her as director. While one may take a different view as to the question of whether Prof. Kaufmann-Kohler could

[196] **Exhibit A RA 59**, ¶ 4.5.2. The Committee observes that a revised version of the IBA Guidelines was adopted in 2014. However, as far as the examples referred to in this section are concerned, no substantive changes have been introduced.

reasonably defer to the bank as regards the assessment of whether any possible connections between UBS and any of the parties to her ongoing arbitrations amounted to a conflict of interest, this circumstance alone is not of a seriousness comparable to the examples set out above, that would compromise the fundamental integrity of the arbitration proceedings. Bearing this underlying purpose of the Committee's standard of review in mind, the Tribunal's assessment of the scope of Prof. Kaufmann-Kohler's duties cannot be considered "*plainly unreasonable*," and consequently, does not constitute a manifest excess of powers nor a serious departure from a fundamental rule of procedure.

c. The Committee's Considerations on Relevant Case Law

208. Finally, the Committee will turn to the case law invoked by the Parties, in particular to the decisions rendered in *Vivendi II v. Argentina*, relied on by Respondent, and in *EDF v. Argentina*, relied on by Claimants.

209. The *Vivendi II* committee considered that a director's "*fiduciary duty* vis-à-vis *the shareholders of the bank to further the interests of the bank and therefore postpone conflicting interests … is fundamentally at variance with his or her duty as independent arbitrators in an arbitration involving a party in which the bank has a shareholding or other interest, however small it may be.*" Given the various connections between international banks and international companies, the committee considered that the positions of director and arbitrator should either no longer be combined or, "[a]*s a minimum*," the arbitrator should approach this with "*extreme caution*" and "*make a special effort that the conflicts that may so arise are managed properly and handled with the greatest care*." The committee further held that the continuous duty of investigation prompted thereby "*cannot be considered fulfilled by simply providing the bank at the time of the appointment with a list of current arbitrations accompanied by a request to see whether there may be any conflicts of interests*." Rather, it would have been "*for the arbitrator personally first to consider such a connection in terms of a voluntary resignation as arbitrator. Such connection must otherwise be properly disclosed to the parties through an adequate amendment of earlier declarations under Rule 6*."[197]

210. In addition, the *Vivendi II* committee considered it "*difficult to understand why the bank was notified by Professor Kaufmann-Kohler of her existing arbitrations but not the arbitrating parties of her (impending) directorship of the bank at the same time*." The committee thus

[197] **AL A RA 67**, ¶¶ 217-226.

"*underst*[ood] *the argument that the Second 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 consider*[ed] *that this could lead to annulment whenever justified within the context of the case under consideration*." It ultimately decided that there was not sufficient ground to annul the award, however, because Prof. Kaufmann-Kohler had become aware of the connection between UBS and the claims only after the award was rendered and such connection thus "*had no material effect on the final decision of the Tribunal, which was in any event unanimous*."[198]

211. It has to be reiterated that the *Vivendi II* committee was in a situation different from the one this Committee is faced with because in *Vivendi II*, there was no existing decision of the remaining members of the tribunal to be evaluated but the committee rather had to evaluate the facts underlying Argentina's allegation for the first time in those proceedings.

212. The *EDF* committee on the other hand had to evaluate a situation similar to the present one because it was not only faced with an existing decision and apparently also with similar evidence, but the underlying facts were also quite similar. In particular, the Committee is not convinced that, as alleged by Respondent, it makes a considerable difference that UBS held no direct shares in the claimant in that case but rather in its parent company. The same applies to the fact that UBS's shares in EDF's parent company amounted to 1.5% rather than to 2.13% and 2.38%, respectively, as in this case.

213. While the *EDF* committee had to evaluate a decision rendered by two different arbitrators, it also expressed an opinion on the Decision on Disqualification rendered in the present case and held that both decisions "*are carefully reasoned and comprehensive in their consideration of the issues*."[199] Said committee noted that the fact that at least one other tribunal, *i.e.*, the Tribunal in the present case, had reached the same conclusion as the *EDF* tribunal, supported the conclusion that there 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*."[200] These grounds included the following considerations: (i) UBS held the shares in the claimants' parent company for the benefit of a third party (which is the case for part of the shares in the present case as well); (ii) the investment was relatively insignificant

[198] **AL A RA 67**, ¶¶ 229-235.
[199] **AL A RA 70 / A/CLA-61**, ¶ 161.
[200] **AL A RA 70 / A/CLA-61**, ¶ 162.

when seen in the context of the overall size of UBS's investments; and (iii) Prof. Kaufmann-Kohler was not responsible for, and not even involved in, the management of this investment.

214. As Claimants correctly pointed out, three different bodies, *i.e.*, the Tribunal in the present case, the *EDF* tribunal and the *EDF* committee, have reached the same conclusions and decision on very similar facts. While the Committee considers that this fact alone would not be sufficient in itself to deny Respondent's application for annulment on this ground, it does serve as a strong indication supporting the Committee's conclusion that the Tribunal's decision was not "*so plainly unreasonable that no reasonable decision-maker could have come to such a decision*."

215. In addition, Claimants pointed to the decision rendered by the United States District Court for the District of Columbia in *Argentina v. AWG Group Ltd., i.e.,* the *vacatur* proceeding that was initiated against the Award rendered by the Tribunal, to the extent it concerned the claims of the fourth claimant whose case was decided under the UNCITRAL Rules.[201] The US District Court considered Argentina's application under the FAA Act and the *vacatur* grounds of "*evident partiality*" in its Section 10.[202] While noting that UBS did not hold any shares in AWG Group, it also described the shareholdings in Suez and Vivendi as "*trivial*" and "*tangential*."[203] The Court decided that the evidence submitted by Argentina was "*wholly insufficient*" to establish its claim of "*evident partiality*" because: (i) UBS's "*fairly small, if not fractional*" interests in Suez and Vivendi as well as Prof. Kaufmann-Kohler's role and compensation in UBS stock were "*inconsequential*" in light of the size of UBS's worldwide financial dealings; (ii) Argentina's claim that UBS conducted research in and developed financial products related to the water sector "*contributes little*" to its claim; and (iii) Prof. Kaufmann-Kohler had no duty to disclose "*marginally disclosable*" facts to the Parties as it was "*eminently reasonable*" for her to rely on UBS informing her of "*meaningful conflicts*."[204] The Court concluded that "[t]*he record here does not objectively suggest that the challenged arbitrator had any reason to be biased against Argentina*" and thus agreed with the conclusion reached in the Decision on Disqualification in respect of AWG Group.[205]

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[201] AWG Group Ltd. for its part filed a cross-petition seeking confirmation, recognition and enforcement of the Award. **A/CLA-118**, pp. 1, 10.
[202] The Court also considered the *vacatur* ground that the "*arbitrators exceeded their powers*" in respect of the Tribunal's computation of damages and its evaluation of the necessity defense. **A/CLA-118**, p. 31.
[203] **A/CLA-118**, pp. 16, 26.
[204] **A/CLA-118**, pp. 24-29.
[205] **A/CLA-118**, pp. 30-31.

216. Respondent correctly pointed out that the decision of the US District Court was not rendered within the context of the annulment grounds to be assessed under Article 52 of the ICSID Convention. However, the Committee does not agree that the decision thus lacks any relevance for the present assessment of whether the Tribunal's conclusion was "*plainly unreasonable*." Even though rendered under a different standard, *i.e.*, the standard of "*evident partiality*" under Section 10(2) of the FAA, the Court assessed the same facts and, more importantly, the same Decision on Disqualification that is now before this Committee. Moreover, the Court fully agreed with the Tribunal's conclusion that "[a]*n objective analysis … does not … lead a reasonable, informed person to conclude that a justifiable doubt exists as to Professor Kaufmann-Kohler's impartiality or independence*" with respect to AWG Group.[206]

217. Even though the Court only had to decide on the Award to the extent it concerned AWG Group, it also opined on UBS's interests in Suez and Vivendi and made it clear in its reasoning that it would not have come to a different conclusion with respect to these two Claimants. While the Committee again may not agree with all of the findings made by the US Court, the decision further supports this Committee's conclusion that the decision reached by the Tribunal in its Decision on Disqualification was not "*plainly unreasonable*."

d. Conclusion

218. In conclusion, the Committee again emphasizes that it is not its task to re-consider the facts as presented to the Tribunal and perform a *de novo* assessment of whether Prof. Kaufmann-Kohler "*manifestly*" lacked the qualities of impartiality and independence of judgment. Having carefully examined the Tribunal's Decision on Disqualification and having also taken into account the case law relied on by the Parties, the Committee has not identified any circumstances, which could give rise to a conflict of interest of such a seriousness that it would render the Decision "*plainly unreasonable*" in terms of compromising the fundamental integrity of the arbitration proceedings and that, thus, would warrant annulment of the Award.

219. The Committee therefore finds that the Tribunal was neither improperly constituted nor was there a serious departure from a fundamental rule of procedure. Consequently, the first ground for annulment advanced by Respondent is dismissed.

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[206] **A/CLA-118**, pp. 30-31 quoting from Decision on Disqualification, ¶ 24.

B. Second Set of Grounds for Annulment Relating to the Alleged Failure to Comply with the Requirement to Submit the Case to the Local Courts for 18 Months

1. Summary of Respondent's Position

220. Respondent submits that, by ruling in its Decision on Jurisdiction that the Spanish national AGBAR could benefit from the dispute settlement provisions contained in the Argentina-France BIT by virtue of the MFN clause, the Tribunal exerted jurisdiction without the requirements of Argentina's consent under Article X of the Argentina-Spain BIT being met. According to Respondent, the Tribunal thereby manifestly exceeded its powers (Article 52(1)(a) of the ICSID Convention), failed to state the reasons on which its decision was based (Article 52(1)(e) of the ICSID Convention) and seriously departed from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).[207]

221. Respondent claims that the Tribunal's interpretation that the MFN clause contained in the Argentina-Spain BIT applied to dispute settlement provisions and thus exempted AGBAR from complying with the local-court requirement in Article X(3) amounts to a manifest excess of powers. In Respondent's view, an arbitral tribunal cannot set aside this express requirement of consent, which was voluntarily agreed on by the Contracting States, "*under the unfounded pretext that this situation is unfavourable to the foreign investor*."[208] Respondent argues that by replacing the express terms of consent, an "*essential requirement for international tribun*als" that must be "*clear and unambiguous*," with inferences and assumptions, the Tribunal acted without Argentina's consent and thus exceeded the limits of its jurisdiction.[209]

222. According to Respondent, the Tribunal's excess of power is "*manifest*," in terms of "*apparent on a mere reading of the Award*," given that the Tribunal recognized the local-court requirement as a mandatory condition with which AGBAR had not complied. In addition, Respondent claims that, *ex abundanti cautela*, a tribunal's failure to act within its jurisdiction always amounts to a manifest excess of powers.[210]

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[207] Argentina's Application, ¶ 38; Argentina's Memorial, ¶¶ 102-103; Argentina's Reply, ¶ 106.
[208] Argentina's Application, ¶¶ 39-40.
[209] Argentina's Memorial, ¶¶ 111, 113; Argentina's Reply, ¶ 107.
[210] Argentina's Memorial, ¶ 115; Argentina's Reply, ¶ 120.

223. In addition, Respondent claims that the Tribunal's disregard for a mandatory requirement amounts to a failure to apply the applicable law, which also qualifies as a manifest excess of powers warranting the annulment of the Award.[211]

224. In Respondent's view, the excess of powers also relates to the Tribunal's failure to state reasons in support of its jurisdiction, given that it expressly recognized the local-court requirement in Article X of the Argentina-Spain BIT, *i.e.*, the only provision under which an ICSID tribunal has jurisdiction. Respondent argues that this failure is not remedied by the Tribunal's reference to the MFN clause in Article IV, which is not part of the offer to arbitrate contained in the Treaty. According to Respondent, there has to be a clear, unequivocal intent of the Contracting State that an MFN clause should extend to dispute settlement provisions, which is not present here.[212]

225. Respondent argues that the Tribunal "*never explained how or where the term* 'all matters' *in connection with the term* 'treatment' *in Article IV may be applied to jurisdictional matters, which can be clearly distinguished from* 'substantive matters'." In particular, Respondent takes the view that the Tribunal's finding that "*dispute settlement is as important as other matters governed by the BITs and is an integral part of the investment protection regime that the respective sovereign states have agreed upon*" does not provide such explanation and fails to apply the interpretation principle of Article 31(1) of the Vienna Convention.[213]

226. Likewise, Respondent considers that the Tribunal failed to state reasons for rejecting Respondent's argument based on the *ejusdem generis* principle, given that it simply concluded, without giving any reasons, that it "*finds no basis for applying the* ejusdem generis *principle to arrive at that result.*"[214]

227. Respondent further submits that, while considering the subsequent practice of the United Kingdom to support its finding, the Tribunal did not give any consideration to subsequent practice of Argentina. Respondent refers to several BITs it concluded with third-party States that contained the same local-court requirement as Article X(3) and only one BIT with Chile that did not contain this requirement; in Respondent's view, the Tribunal's failure to discuss this practice and the essential nature of the dispute settlement clause warrants annulment of the Award.[215]

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[211] Argentina's Memorial, ¶ 117.
[212] Argentina's Memorial, ¶¶ 104, 114, 116; Argentina's Reply, ¶¶ 108-109, 129.
[213] Argentina's Memorial, ¶¶ 105-106; Argentina's Reply, ¶¶ 110-111 quoting from Decision on Jurisdiction, ¶ 59.
[214] Argentina's Memorial, ¶ 112 quoting from Decision on Jurisdiction, ¶ 59.
[215] Argentina's Memorial, ¶¶ 108-110 referring to Decision on Jurisdiction, ¶ 58.

228. In response to Claimants' submission that Respondent never raised its subsequent practice before the Tribunal, Respondent refers to its Memorial on Jurisdiction where it stated that "[c]*onsidering that Argentina, Spain and the United Kingdom have signed Bilateral Treaties of Promotion and Reciprocal Protection of Investments previous to the BIT under analysis, in which they dispensed the 18-month period provided by Article X of the BIT with Spain and Article 8 of the BIT with UK, the application of the MFN CLAUSE principle to this case implies a violation of this basic principle of interpretation implied in the regulations provided for in Article 31(1) of the Vienna Convention.*" Evidently, Respondent argues, when negotiating this clause, the Parties must have given it an intended meaning which is submitting the case to local bodies before making any international claims.[216] Respondent submits that the Tribunal should have addressed this practice and not only the practice of the UK before disregarding the "*clear and express terms of the fundamental dispute settlement provision*" of the Argentina-Spain BIT.[217]

229. Respondent further contends that the Tribunal failed to take into account the arguments Respondent presented in its written and oral submissions, in particular the interpretation of the other Contracting State, Spain, in the *Maffezini* case, according to which the MFN clause does not apply to dispute settlement provisions.[218]

230. Finally, with regard to a serious departure from fundamental rules of procedure, Respondent argues that by failing to respect Argentina's consent to the Treaty, the Tribunal departed from a rule of procedure. In Respondent's view, this departure is "*serious*" because the outcome of the arbitration would otherwise have been substantially different, which again warrants annulment of the Award.[219]

231. Respondent rejects Claimants' argument that it intends to have its jurisdictional arguments revisited and states that "[r]*ather, it seeks to demonstrate how, had they been considered by applying the proper law and had procedural rules been complied with, the outcome would have been radically different.*" While acknowledging that Claimants cited precedents, which considered that a tribunal's decision to allow an invocation of the MFN clause to circumvent a local-court requirement is not an annullable error, Respondent argues that these precedents do not justify the rejecting of the arguments it has put forward. In this context, Respondent

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[216] Argentina's Reply, ¶ 113 quoting from **Exhibit A RA 74**, ¶ 142 (emphasis added by Respondent).
[217] Argentina's Reply, ¶ 114.
[218] Argentina's Application, ¶ 41.
[219] Argentina's Memorial, ¶ 118.

refers in particular to its argument that the Tribunal manifestly exceeded its powers in exercising jurisdiction over the case without Respondent's consent.[220]

232. Respondent claims that its position has been recently affirmed by the tribunal in *ICS v. Argentina* and, within the annulment context, by the decision of the Swedish Court of Appeal rendered in *Quasar de Valores et al. v. Russia*, which annulled the award on the grounds that the MFN clause had been used in excess of jurisdiction. Respondent submits that the Court placed emphasis on the importance of the Parties' consent and found that the dispute settlement provision did not extend to the claimants' claim. In respect of the MFN clause invoked by the claimants, the Court held that "*the determining factor is the wording of the MFN clause in the relevant case*," as a result of which it then analyzed the content and scope of the MFN clause. Respondent further points to the Court's finding that the term "*treatment*" included in the MFN clause referred to the FET standard in the treaty, which "*cannot be deemed to include an unconditional right for investors to have their cases decided by an international arbitral tribunal*"; it therefore concluded that the tribunal could not base its jurisdiction on the dispute resolution clause of a different treaty.[221]

2. Summary of Claimants' Position

233. Claimants submit that Respondent seeks to reargue its jurisdictional arguments; it never suggests that the Tribunal lacked the power to reach a decision on these arguments but rather claims that it reached the wrong decision. Claimants emphasize that the correctness of the Tribunal's decision is not to be assessed by this Committee, because a legal error, even if one had been committed, would not amount to an excess of power.[222]

234. In response to Respondent's submission that an "*excess of powers is always manifest where a tribunal does not act within the scope of its jurisdiction*," Claimants argue that, if this formula were applied, it would convert annulment under Article 52(1)(b) into a *de novo* review of all jurisdictional decisions, would thereby remove all content from the "*manifest*" requirement and would contradict "*extensive authority*" pursuant to which not every jurisdictional error amounts to an annullable error.[223]

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[220] Argentina's Reply, ¶¶ 115-121.
[221] Argentina's Reply, ¶¶ 122-128 quoting from **AL A RA 99**, p. 9.
[222] Claimants' Counter-Memorial, ¶ 105-107, 114; Claimants' Rejoinder, ¶¶ 51-53.
[223] Claimants' Rejoinder, ¶ 54.

235. Claimants refer to the committee in *Impregilo v. Argentina*, which stated that "[n]*either applying an MFN clause to jurisdictional issues nor refusing to apply it to assume jurisdiction may be considered, per se, as a manifest excess of powers*." It added that "[t]*he analysis required to reach a conclusion other than the majority's would imply a new and complex analysis of the issues at stake, a review that is far from the responsibility of this Committee according to Article 52.*"[224]

236. Claimants also refer to the *Daimler* committee, which concluded on the subject of applying an MFN clause to dispute resolution provisions – which the tribunal there had refused to do – that "*when more than one interpretation is possible, an award cannot be annulled on the ground that it suffers from an exercise of excess of powers, much less a manifest excess of powers*."[225]

237. In addition, Claimants quote from the ICSID Background Paper on Annulment, which records that "*in light of* [the principle specifically provided by the Convention that the Tribunal is the judge of its own competence], *the drafting history suggests – and most* ad hoc *Committees have reasoned – that in order to annul an award based on a Tribunal's determination of the scope of its own jurisdiction, the excess of powers must be* 'manifest'."[226]

238. In response to Respondent's reliance on the decision of the Swedish Court of Appeal in *Quasar de Valores et al. v. Russia*, Claimants argue that Respondent fails to explain why the interpretation of a different treaty by a national court should be relevant – taking into account that every ICSID tribunal to have considered the exact same provision at issue in the present case has reached the same conclusion as the Tribunal. In any event, Claimants emphasize that, contrary to annulment committees, Swedish courts are permitted to review a tribunal's jurisdictional decision *de novo*.[227]

239. As to Respondent's argument that the Tribunal failed to apply the applicable law, Claimants point out that the Tribunal did in fact examine the local-court requirement but concluded that the MFN clause – which is also part of the applicable law – granted AGBAR access to arbitration without having observed the local-court requirement. In Claimants' view,

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[224] Claimants' Counter-Memorial, ¶ 108 quoting from **A/CLA-42 / AL A RA 34**, ¶ 140.
[225] Claimants' Counter-Memorial, ¶ 110 quoting from **A/CLA-43**, ¶ 187. Claimants further note that, as the party opposing the annulment application in that case, Respondent itself had advanced this position, which the *Daimler* committee then adopted. *See* also Claimants' Rejoinder, ¶ 56.
[226] Claimants' Rejoinder, ¶ 54 quoting from **A/CLA-91**, ¶ 88.
[227] Claimants' Rejoinder, ¶ 55.

Respondent therefore does not actually argue that the Tribunal did not apply the law but rather expresses its disagreement with the interpretation and conclusion reached by the Tribunal concerning the scope of the MFN clause, which is, not for this Committee to review.[228] In any event, Claimants submit that "[e]x*tensive case law*" supports the Tribunal's interpretation, including the unanimous decisions of every one of the five tribunals that up to date decided on the scope of the MFN clause in the Argentina-Spain BIT.[229]

240. With regard to Respondent's claim that the Tribunal seriously departed from fundamental rules of procedure because it failed to respect the consent of Argentina to the Treaty, Claimants note that Respondent does not identify any fundamental rule of procedure at issue, much less establish how the Tribunal seriously departed from it. Consequently, Claimants submit that Argentina's Application under this ground should be rejected summarily.[230]

241. As to Respondent's claim that the Tribunal failed to state reasons for its decision, Claimants note that the Tribunal dedicated an entire chapter of its Decision on Jurisdiction to explaining why AGBAR could overcome the local-court requirement, including a careful textual analysis of the relevant Treaty provisions and a discussion of jurisprudence addressing comparable issues as well as the Parties' respective arguments. In Claimants' view, Respondent's arguments are again an attempt to reargue the merits of the Tribunal's decision because it disagrees with the Tribunal's conclusion.[231]

242. Claimants emphasize that the Tribunal did analyze the term "*all matters*" and the term "*treatment*"; it found that dispute resolution was a "*matter*" covered under the Argentina-Spain BIT and that "*treatment*," pursuant to its ordinary meaning, referred to all rights and obligations conferred upon investors, which includes dispute settlement. Claimants submit that, besides its textual analysis, the Tribunal took into account that there are certain matters to which the MFN clause in Article IV expressly does not apply – but that dispute resolution is not one of them –; it considered that applying Article IV to treatment in Article X was consistent with the Treaty's object and purpose; and it noted that other tribunals had interpreted the MFN clause in the Treaty and other treaties in the same manner. In Claimants'

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[228] Claimants' Counter-Memorial, ¶ 112.
[229] Claimants' Counter-Memorial, ¶ 113 referring to *Teinver v. Argentina* (**A/CLA-36**), ¶ 186; *Telefónica v. Argentina* (**A/CLA-37**, ¶¶ 102-105); *Suez, AGBAR and InterAguas v. Argentina* (**A/CLA-38**), ¶ 66; *Gas Natural v. Argentina* (**A/CLA-39**), ¶¶ 30-31; *Maffezini v. Spain* (**A/CLA-40**), ¶ 64.
[230] Claimants' Counter-Memorial, ¶ 144.
[231] Claimants' Counter-Memorial, ¶¶ 157-160; Claimants' Rejoinder, ¶¶ 95-96.

view, Respondent may disagree with these reasons, but they nevertheless qualify as "*coherent reasons*" for the Tribunal's decision.[232]

243. Finally, with regard to Respondent's reference to its subsequent treaty practice that the Tribunal allegedly failed to take into account, Claimants submit that Respondent never raised such practice before the Tribunal.[233] As to the passage from Respondent's Memorial on Jurisdiction to which it refers, Claimants emphasize that this passage concerned *previous*, rather than *subsequent*, treaty practice.[234]

244. Claimants conclude that Respondent's real complaint is stated in its Reply where is submits that "[t]*here are no reasons to allow an MFN Clause to be used to exclude the provision where the Argentine Republic expressly stated the terms of consent*." In Claimants' view, this is an argument on the merits and thus inadmissible in an annulment proceeding.[235]

3. Committee's Analysis

245. In the context of the Tribunal's decision to allow the Claimant AGBAR, *i.e.*, a Spanish national, to invoke the MFN clause in the Argentina-Spain BIT to benefit from the dispute settlement provisions in the Argentina-France BIT, Respondent advances three annulment grounds: (i) the Tribunal manifestly exceeded its powers (Article 52(1)(a) of the ICSID Convention); (ii) it failed to state the reasons on which its decision was based (Article 52(1)(e) of the ICSID Convention); and (iii) it seriously departed from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).

246. The Committee agrees with the statement quoted by Respondent from the Report of the Executive Directors on the ICSID Convention that "[c]*onsent of the parties is the cornerstone of the jurisdiction of the Centre.*"[236] The Committee further agrees with the statement of the International Court of Justice ("**ICJ**") that "[w]*hen that consent is expressed in a compromissory clause in an international agreement, any conditions to which such consent is subject must be regarded as constituting the limits thereon.*"[237]

247. It is undisputed between the Parties that Respondent's consent to arbitrate in respect of the Claimant AGBAR is given in Article X(3) of the Argentina-Spain BIT, which as recognized

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[232] Claimants' Counter-Memorial, ¶¶ 161-162; Claimants' Rejoinder, ¶ 97.
[233] Claimants' Counter-Memorial, ¶ 163.
[234] Claimants' Rejoinder, ¶ 98.
[235] Claimants' Rejoinder, ¶ 99 quoting from Argentina's Reply, ¶ 129.
[236] **AL A RA 50**, ¶ 23.
[237] **AL A RA 72**, ¶ 88.

by the Tribunal provides for a requirement to bring a judicial proceeding in the host State's local courts and allows the investor to have recourse to arbitration only after a period of 18 months in those courts. It is further common ground that this requirement qualifies as a condition of Respondent's consent to arbitrate disputes with Spanish investors. However, AGBAR has invoked the MFN clause in Article IV(2) of the Argentina-Spain BIT in order to benefit from the more favorable treatment provided in the Argentina-France BIT, which does not include a comparable condition of consent. Article IV reads as follows:

> "*TREATMENT*
>
> *1. Each Party shall guarantee in its territory fair and equitable treatment of investments made by investors of the other Party.*
>
> *2. In all matters governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country.*
>
> *3. Such treatment shall not, however, extend to the privileges which either Party may grant to investors of a third State by virtue of its participation in:*
>
> - *A free trade area;*
> - *A customs union:*
> - *A common market;*
> - *A regional integration agreement; or*
> - *An organization of mutual economic assistance by virtue of an agreement concluded prior to the entry into force of this Agreement, containing terms similar to those accorded by that Party to participants of said organization.*"

a. The Tribunal's Findings

248. The Tribunal interpreted the MFN clause and in particular the term "[i]*n all matters*" to mean that "*treatment*" within the meaning of Article IV(2) includes dispute settlement and therefore that AGBAR is entitled to invoke international arbitration against Argentina on the same terms as the holders of French investments, *i.e.*, without the need to bring the dispute to local courts of Argentina for a period of 18 months.[238]

249. The Tribunal acknowledged that this interpretation was contested by Respondent and addressed the arguments Respondent had advanced in support of its position that the MFN clause does not extend to dispute settlement provisions. The Tribunal first found that there

[238] Decision on Jurisdiction, ¶ 55.

was no evidence that the Contracting States did not intend Article IV to cover dispute settlement, as alleged by Respondent, and noted in particular that dispute settlement is not among the matters listed in Article IV(3), which are explicitly excluded from the scope of the MFN clause.[239] The Tribunal further held that there was no basis for a distinction between dispute settlement matters and any other matters covered by a bilateral investment treaty and thus no basis for applying the *ejusdem generis* principle advanced by Respondent in this regard.[240]

250. Finally, the Tribunal addressed Respondent's claim that the MFN clause should be interpreted strictly and held that there was no reason for interpreting it more strictly than other Treaty provisions; in this context, the Tribunal analyzed the case law relied on by the Parties and found that its conclusion was supported by previous ICSID cases and in particular *Maffezini v. Spain*, which concerned the same Treaty. The Tribunal also discussed the decision in *Plama v. Bulgaria* relied on by Respondent, in which the tribunal had reached a different conclusion, and distinguished that case from the case before it for a number of reasons.[241]

251. In this annulment proceeding, Claimant further pointed out that up to date there are four other cases in which the tribunals had to decide on the scope of Article IV(2) of the Argentina-Spain BIT: *Maffezini v. Spain,*[242] which the Tribunal discussed in detail in its Decision on Jurisdiction, *Teinver v. Argentina*,[243] *Telefónica v. Argentina*,[244] and *Gas Natural v. Argentina*.[245] In all four cases, the tribunals analyzed the scope of the MFN clause in detail and reached the conclusion that it also applied to dispute resolution clauses and permitted the investor to circumvent the local-court requirement in Article X(3).[246]

b. The Committee's Considerations on the Tribunal's Findings

252. The Committee is aware that, contrary to what a recital of the above suggests and as recognized by the tribunals in the above mentioned cases as well as by other tribunals dealing with the same question, ICSID jurisprudence is far from unanimous on the question whether MFN clauses can be invoked by investors to benefit from more favorable dispute settlement

[239] Decision on Jurisdiction, ¶ 58.
[240] Decision on Jurisdiction, ¶ 59.
[241] Decision on Jurisdiction, ¶¶ 61-67.
[242] **A/CLA-40**.
[243] **A/CLA-36**.
[244] **A/CLA-37**.
[245] **A/CLA-39**.
[246] **A/CLA-40**, ¶ 64; **A/CLA-36**, ¶ 186; **A/CLA-37**, ¶ 114; **A/CLA-39**, ¶ 49.

provisions in third-State treaties. However, while the MFN clause in Article IV(2) of the Treaty may well be susceptible to an interpretation that is different from that given by the Tribunal in the present case, it is not for this Committee to re-decide the case but rather to assess whether the Tribunal's decision fulfills any of the annulment grounds advanced by Respondent.

253. As to the alleged manifest excess of powers, the Tribunal did not, as Respondent appears to suggest, simply disregard the condition for consent in Article X(3) of Argentina-Spain BIT but it rather gave detailed reasons as to why it considers that AGBAR was permitted to invoke the MFN clause to overcome this requirement. In this regard, this Committee agrees with the committee in *Impregilo v. Argentina*, which found that, as the application of an MFN clause to dispute settlement provisions is a complex and debated issue, "[n]*either applying an MFN clause to jurisdictional issues nor refusing to apply it to assume jurisdiction may be considered,* per se*, as a manifest excess of powers.*" As further stated by the *Impregilo* committee, it cannot be the task of the Committee under Article 52 of the ICSID Convention to conduct a new and detailed analysis of the arguments advanced by the Parties in the jurisdictional phase.[247] The committee in *Daimler v. Argentina* stated that "*when more than one interpretation is possible, an award cannot be annulled on the ground that it suffers from an exercise of excess of powers, much less a manifest excess of powers*."[248] The Committee agrees with this statement – except perhaps in extreme circumstances, of which there is no indication in the present case.

254. The same applies to the alleged serious departure from a fundamental rule of procedure. While the Committee agrees with Respondent that observance of the Parties' consent does qualify as a fundamental rule of procedure, the Committee cannot follow Respondent's argument that the Tribunal's decision to permit AGBAR to overcome this condition by invoking the MFN clause, which coincides with the interpretation adopted by several other tribunals, amounts to a serious departure from such rule.

255. The Committee further finds that there is no failure to state reasons in the Decision on Jurisdiction because the Tribunal gave comprehensive reasons for its interpretation of the MFN clause and also addressed the arguments advanced by Respondent. While its reasoning may not be as detailed as that given by tribunals in other mentioned cases, this is not sufficient to amount to a failure to state reasons because there is no difficulty in following the Tribunal's reasoning through to its conclusion. In any event, it strongly appears from

[247] **A/CLA-42 /AL A RA 34**, ¶ 140.
[248] **A/CLA-43**, ¶ 187.

Respondent's submission that it does not really disagree with the detail of the reasoning but rather with its contents. However, even if Respondent may not be satisfied with the Tribunal's findings on Respondent's arguments, any such disagreement is irrelevant at this point and does not permit Respondent to seek annulment of the Tribunal's decision.

256. As regards Respondent's argument that the Tribunal failed to consider evidence on Argentina's *subsequent* treaty practice, it appears to the Committee that such evidence was apparently not put before the Tribunal by the Parties. In particular, the submission in the jurisdictional phase of the arbitration that Respondent now invokes explicitly referred to treaties signed by Argentina and Spain "*previous to the BIT under analysis.*"[249]

257. In respect of subsequent treaty practice, the Committee is aware that in its Memorial on Jurisdiction, Respondent also relied on the submissions made by Spain in its role as respondent in *Maffezini v. Spain* where it took the same position as Argentina in the present case, *i.e.*, that the MFN clause in Article IV(2) does not apply to dispute settlement. Respondent argued that its own interventions in *Siemens v. Argentina* and the present case as well as Spain's interventions in *Maffezini*, which coincided in their interpretation of the 18-months requirement, "*constitute the subsequent acts of the Parties that guide the Tribunal concerning the will of the Sovereigns on signing this Treaty*."[250]

258. The Committee notes that the tribunal in *Telefónica v. Argentina*, which was faced with the same argument, held that the States' conduct in ICSID proceedings qualified neither as a "*subsequent agreement*" between the Contracting States within the meaning of Article 31(3)(a) of the Vienna Convention nor as "*subsequent practice*" in applying the Treaty under Article 31(3)(b) of the same Convention. In particular as regards the latter, the *Telefónica* tribunal was "*not convinced that positions on interpretation of a treaty provision, expressed by a Contracting State in its defensive brief in an international direct arbitration initiated against it by an investor of her other Contracting State, amounts to* 'practice' *of that State, as this requirement is understood in public international law, nor does it appear relevant in order to ascertain* 'how the treaty has been interpreted in practice' *by the parties thereto.*"[251] The Committee agrees with this finding and, while the Tribunal in the present case may not have explicitly explained why it considered the submissions made by Spain and Argentina in the mentioned ICSID cases not to be relevant, this does not amount to a failure to consider

[249] **Exhibit A RA 74**, ¶ 142.
[250] **Exhibit A RA 74**, ¶ 161.
[251] **A/CLA-37**, ¶ 112.

relevant evidence and thus cannot be qualified as a failure to state reasons on an outcome-determinative point.

259. Apart from Respondent's reference to the positions taken by the two States as respondents in ICSID proceedings, Respondent has not pointed to any evidence it submitted regarding the intentions of the States in entering the Treaty nor regarding their subsequent practice in the context of other bilateral investment treaties.

260. It is not entirely clear to the Committee whether Respondent suggests that the Tribunal should have investigated on its own motion subsequent treaties entered into by Argentina; in any event, the Committee agrees with Claimants that it cannot be for the Tribunal to investigate evidence not placed before it by the Parties. In line with the generally accepted principle of "*who asserts must prove,*" which is reflected in several provisions of the ICSID Convention, it is for the parties to present their case, including evidence to prove what they assert.[252] Consequently, it would have been for Respondent to prove its assertion that subsequent treaty practice confirms its interpretation of Article X(3). In the absence of any evidence submitted in respect of such subsequent practice, there was no failure on the part of the Tribunal to consider such evidence and to state the reasons for its conclusions.

c. Conclusion

261. In conclusion, the Committee finds that the Tribunal's decision to allow the Claimant AGBAR to override the procedural requirement in Article X(3) of the Argentina-Spain BIT by virtue of the MFN clause in Article IV(2) does not amount to either a manifest excess of powers, a serious departure from a fundamental rule of procedure or a failure to state reasons. Consequently, the second annulment ground advanced by Respondent is dismissed.

C. Third Set of Grounds for Annulment Relating to the State of Necessity under Customary International Law

1. Summary of Respondent's Position

262. Respondent submits that, by rejecting Argentina's state of necessity defense without stating the legal standards to be met under the "*only way*" and the "*non-contribution*" requirements that it considered not fulfilled and by not taking into account the evidence presented by Respondent in this regard, the Tribunal failed to state the reasons for its decision (Article

[252] *Cf.* **AL A RA 84 / A/CLA-69**, ¶ 215.

52(1)(e) of the ICSID Convention). Respondent notes that this, together with a finding of an excess of powers, was precisely the grounds on which the *Enron* committee decided to annul the award.[253]

263. Respondent argues that, contrary to Claimants' submission, the Tribunal should have established the legal standards applicable to both the "*only way*" and the "*non-contribution*" requirements before concluding that these requirements had not been met, but failed to do so in its Decision on Liability.[254]

264. Respondent refers to the finding of the *Enron* committee that the non-contribution requirement "*is potentially capable of more than one interpretation*" and that the tribunal in that case "*was necessarily required, either expressly or* sub silentio*, to decide or assume the correct interpretation in order to apply the provision to the facts of the case*." More specifically, the *Enron* committee considered that the tribunal should have asked the question whether the conduct of the State would have had to be "*deliberate*," "*reckless or negligent*" or "*some even lesser degree of fault*" in order to qualify as a contribution to the situation.[255] Respondent notes that it submitted to the Tribunal the question to be assessed, *i.e.*, "*whether Argentina has contributed to (thereby provoking) the crisis in such a way so as to make it unjust to invoke the doctrine of necessity*"; however, the Tribunal did not address this concern or the legal standard that it would later apply to the facts.[256]

265. Similarly, Respondent argues that the "*only way*" requirement is capable of differing interpretations and therefore had to be addressed by the Tribunal before applying the facts to it. Respondent refers to its submission on the possible interpretations before the Tribunal as well as to the questions raised by the *Enron* committee relating to: (i) the legal definition; (ii) the relevance of the relative effectiveness of alternative measures; and (iii) who was to make a decision on relevant alternatives and in accordance with what test.[257]

266. Respondent further refers to the findings of the *Enron* committee that the tribunal in that case had not in fact applied the legal elements of the requirement in Article 25(2)(b) of the Draft Articles of Responsibility of States for Internationally Wrongful Acts adopted by the

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[253] Argentina's Application, ¶¶ 43-47; Argentina's Memorial, ¶ 123 referring to **AL A RA 33**, ¶¶ 385-395; Argentina's Reply, ¶¶ 131-132, 146-147.
[254] Argentina's Reply, ¶¶ 136-139.
[255] Argentina's Memorial, ¶ 124; Argentina's Reply, ¶ 142 quoting from **AL A RA 33**, ¶¶ 386, 389.
[256] Argentina's Memorial, ¶¶ 125-126 quoting from its Post-Hearing Memorial, ¶ 777; Argentina's Reply, ¶¶ 143-144.
[257] Argentina's Memorial, ¶ 127 quoting from its Post-Hearing Memorial, ¶ 764; Argentina's Reply, ¶ 140 quoting from **AL A RA 33**, ¶¶ 369-372.

International Law Commission (the "**ILC Draft Articles**") to the facts but had rather applied an expert opinion on this issue and therefore had failed to apply the applicable law, which constituted a ground for annulment.[258] In Respondent's view, the Tribunal's failure in the present case is even more serious because it failed to follow the first two of the three steps of reasoning indicated by the *Enron* committee (finding the relevant facts; applying the legal elements to the facts; concluding whether or not the requirements under Article 25 were met) and went directly to the third – making it impossible to follow the Tribunal to its conclusion.[259]

267. Respondent further notes that the Tribunal did recognize the influence of external forces on the Argentine economy and intended to "*show that Argentina itself contributed to its situation of emergency.*"[260] Nevertheless, Respondent claims that the Tribunal ignored the evidence submitted by Argentina in support of its submissions on the origins of the crisis and in response to Claimants' arguments: a witness statement, three expert reports (and two rebuttal/supplemental reports) as well as documentary evidence. Claimants, on the other hand, did not provide any economic or social export report. Respondent further refers to the *amicus curiae* brief filed by five non-governmental organization in relation the human right to water that Respondent had raised in this context.[261]

268. Specifically with regard to the "*only way*" requirement, Respondent invokes an "*absolute failure*" on the part of the Tribunal to address Respondent's evidence that the measures Argentina adopted during the crisis were, as described by Prof. Roubini, "*unavoidable*" – without any analysis or justification. Instead, Respondent contends that the Tribunal directly accepted Claimants' submissions "*almost copying their submissions word for word*" even though such submissions were not supported by any evidence.[262] According to Respondent, the same applies to the Tribunal's conclusions on the "*non-contribution*" requirement where the Tribunal "*virtually copied and pasted the statements made by the Claimants*," while disregarding the evidence presented by Respondent, without making any reference to it.[263]

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[258] Argentina's Memorial, ¶ 128 quoting from **AL A RA 33**, ¶ 392.
[259] Argentina's Memorial, ¶ 129; Argentina's Reply, ¶¶ 133-134, 159-160.
[260] Argentina's Memorial, ¶ 130.
[261] Argentina's Memorial, ¶¶ 121-122 referring to **Exhibits R TE-6**, **R TE-7**, **R TE-8**, **R-TE 21**, **R-TE 22** and **R-TE 23**; Argentina's Reply, ¶ 149.
[262] Argentina's Memorial, ¶ 132 quoting from **Exhibit R-TE 22**, ¶¶ 28-29; Argentina's Reply, ¶¶ 150-152.
[263] Argentina's Reply, ¶¶ 154-156 quoting from Decision on Liability, ¶ 264 and Claimants' Reply on the Merits (**Exhibit A RA 76**), ¶ 505.

269. Respondent submits that, in line with the finding of the *TECO* committee that a tribunal "*cannot simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory*," the Tribunal's decision on the state of necessity defense does not satisfy the requirement to state reasons under Article 52(1)(e) of the ICSID Convention.[264]

270. Finally, as to the invoked priority of the human right to water over investment treaties, Respondent argues that the Tribunal did not state reasons for its conclusion that "*Argentina could have respected both types of obligations*," which in its view were not "*inconsistent, contradictory, or mutually exclusive.*"[265]

2. Summary of Claimants' Position

271. Claimants submit that the Tribunal stated its reasons for rejecting Respondent's state of necessity defense, and did so "*comprehensively and in full consideration of the elements of the defense*" under Article 25 of the ILC Draft Articles. Claimants emphasize that this defense is exceptional under international law because it excuses a State from conduct that would otherwise be breaching its international obligations and may therefore be invoked "*under only the most strict conditions*." According to Claimants, the findings of fact that the Tribunal made with regard to the "*only way*" and "*non-contribution*" requirements precluded a successful necessity defense.[266]

272. Claimants reject Respondent's argument that the Tribunal failed to establish the legal standards to be applied to the facts, given that it is "*evident from the decision*" that the Tribunal interpreted the "*only way*" requirement "*at face value*," *i.e.*, as a measure that is "*the sole available response for addressing a situation of necessity*," which made any further elaboration unnecessary.[267]

273. As to the "*non-contribution*" requirement, Claimants submit that the Tribunal did explicitly state its reasons and interpreted this requirement, when it referred to the Commentary on the ILC Draft Articles pursuant to which a contribution must be "suff*iciently substantial and not merely incidental or peripheral*" and considered it "*an important question … whether*

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[264] Argentina's Reply, ¶¶ 157-158 quoting from **AL A RA 89**, ¶ 131
[265] Argentina's Memorial, ¶ 133; Argentina's Reply, ¶¶ 161, 163 quoting from Decision on Liability, ¶ 262.
[266] Claimants' Counter-Memorial, ¶¶ 164-165.
[267] Claimants' Counter-Memorial, ¶ 166; Claimants' Rejoinder, ¶ 102.

Argentina contributed to the crisis of 2001-2003 to an extent sufficiently substantial to rule out a necessity defense in compliance with international law."[268]

274. In response to Respondent's reliance on the decision of the *Enron* committee, Claimants points out that this decision was "*widely criticized*" and moreover did not annul the award on the basis of a failure to state reasons but rather based on "*the questionable theory that the tribunal had exceeded its power by not applying what the committee in Enron considered to be the correct interpretation of Article 25 of the ILC Articles.*"[269]

275. Claimants argue that Respondent's real objective to reargue the merits is displayed in a passage from its Memorial where it stated that "*the Tribunal did not follow the reasoning indicated by the annulment committee in Enron, so the Award in this case should be [annulled] along the same lines as that of Enron*." In Claimants' view, declining to follow the reasoning of the *Enron* committee cannot be considered a failure to state reasons under Article 52(1)(e) of the ICSID Convention.[270]

276. As to Respondent's argument that the Tribunal disregarded the evidence presented by Argentina, Claimants refer to the Tribunal's finding that it was "*not persuaded*" by Argentina's claim that "*there was nothing else it could have done*."[271] Claimants submit that the *El Paso* committee rejected "*virtually identical arguments*" from Argentina when stating that "[t]*he assessment of the evidence and interpretation of the applicable law must be performed only by the Tribunal, not by the Committee*." The committee further held that "*it is not an appeal tribunal and therefore cannot or should not decide whether evidence was well or ill-considered or not considered at all by the Tribunal. Rule 34(1) of the Arbitration Rules is clear when it indicates that the tribunal alone is empowered to decide on two fundamental issues related to the allegation of Argentina: the admissibility of evidence and its probative value.*"[272]

277. In any event, Claimants contend that the Tribunal did weigh the evidence submitted in relation to the "*only way*" requirement, as evidenced by its finding that "[t]*here is strong*

[268] Claimants' Rejoinder, ¶¶ 103-104 quoting from Decision on Liability, ¶ 263.
[269] Claimants' Counter-Memorial, ¶ 167 referring to **AL A RA 33**, ¶ 393; Claimants' Rejoinder, ¶ 105.
[270] Claimants' Counter-Memorial, ¶¶ 168-169 quoting from Argentina's Memorial, ¶ 129.
[271] Claimants' Rejoinder, ¶ 107 quoting from Decision on Liability, ¶ 235.
[272] Claimants' Rejoinder, ¶ 107 quoting from **AL A RA 35**, ¶¶ 191, 196.

evidence that Argentina might have employed more flexible means that would have protected both its interests and those of the Claimants."[273]

278. In Claimants' view, this and other similar findings show that the Tribunal considered and rejected Respondent's suggestion that there were "*no alternative measures*" it could have taken; as the Tribunal reached a reasoned conclusion that can be followed through by the reader, it was not required under the ICSID Convention to review and discuss every exhibit and argument presented in the pleadings.[274]

279. Claimants reject Respondent's argument that the Tribunal copied the submissions made in Claimants' Reply on the Merits and add that their submissions were in fact supported by "*extensive evidence*" relating to the contribution of Argentina to the economic crisis. In addition, Claimants note that the Tribunal found that "*a combination of endogenous and exogenous factors contributed to the Argentine crisis*," which demonstrates that it did consider the evidence before it.[275]

280. In response to Respondent's reliance on the approach applied by the *TECO* committee, Claimants argue that this decision is "*clearly distinguishable*" from the case at hand because the committee there "*struggled to understand the Tribunal's line of reasoning*," given the tribunal's finding that there was no evidence on certain points even though the parties had in fact placed such evidence on the record. By contrast, Claimants consider the reasoning of the Tribunal in the present case "*straightforward and easy to follow*" and, in addition, emphasize that Respondent itself acknowledged its own contribution to the crisis when stating that the situation was "*mainly*" generated by external factors. In Claimants' view, this concession meant that Respondent simply could not satisfy the "*non-contribution*" requirement as interpreted by the Tribunal.[276]

281. Similarly, Claimants contend that in the underlying arbitration Respondent made purely legal arguments in relation to the "*only way*" requirement and did not present evidence that would have satisfied the legal standard ultimately adopted by the Tribunal; thus, when the Tribunal decided not to follow Respondent's legal argument, there was no relevant evidence from Respondent to be considered by the Tribunal.[277]

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[273] Claimants' Rejoinder, ¶ 109 quoting from Decision on Liability, ¶ 235.
[274] Claimants' Rejoinder, ¶ 110.
[275] Claimants' Rejoinder, ¶¶ 111-112.
[276] Claimants' Rejoinder, ¶¶ 113-115 quoting from **AL A RA 89**, ¶ 128 and Argentina's Rejoinder Memorial (**Exhibit A/C-47**), ¶ 1101.
[277] Claimants' Rejoinder, ¶¶ 117-118.

282. Finally, Claimants reject Respondent's submission that the Tribunal rejected its invocation of the human right to water without giving reasons for its decision. Claimants refer to the findings of the Tribunal that Respondent could not invoke one obligation as an excuse for not fulfilling the other and, in addition, that Respondent could have respected both obligations. As to the second conclusion, Claimants contend that the Tribunal's reasons are "*implicit in the Tribunal's finding that Argentina had alternative means to address the alleged situation of necessity (and thus protect the human right to water) without violating the Claimants' treaty rights.*"[278]

3. Committee's Analysis

283. As regards the Tribunal's decision to reject Respondent's necessity defense, Respondent advances one annulment ground, *i.e.*, that the Tribunal failed to state the reasons on which its decision is based (Article 52(1)(e) of the ICSID Convention). In this context, Respondent argues that: (i) the Tribunal failed to establish the applicable legal standards to be met in order to satisfy the requirements of Article 25 of the ILC Draft Articles, in particular the "*only way*" and "*non-contribution*" requirements; and (ii) the Tribunal failed to address the evidence submitted by Respondent in support of its submissions. In addition, Respondent claims that the Tribunal has failed to state reasons for its conclusion that Argentina could have complied with both the BIT and its human rights obligations.

a. The Tribunal's Findings

284. In its Decision on Liability, the Tribunal acknowledged that Argentina was facing "*one of the most severe* [crises] *in its history*" at the time it adopted the measures the Tribunal found to be in violation of the Treaty but emphasized that this fact alone did not allow the State to invoke the plea of necessity. The Tribunal noted that in line with the exceptional nature of this defense, additional strict conditions were imposed by Article 25 of the ILC Draft Articles in order to avoid the possibility that the State can simply escape from its treaty obligations whenever a crisis occurs.[279]

285. The Tribunal then analyzed each of the four requirements set out in Article 25. As to the first requirement in Article 25(1)(a), *i.e.*, that the measures adopted by Argentina were "*the only way for the State to safeguard an essential interest against a grave and imminent peril*," the Tribunal was not satisfied that this requirement was met. It held:

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[278] Claimants' Rejoinder, ¶ 119.
[279] Decision on Liability, ¶¶ 257-258.

> "*The provision of water and sewage services to the metropolitan area of Buenos Aires certainly was vital to the health and well-being of nearly ten million people and was therefore an essential interest of the Argentine State. On the other hand, the Tribunal is not convinced that the only way that Argentina could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants' investments to fair and equitable treatment. As discussed above, Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive. Thus the Tribunal finds that Argentina has not satisfied the first condition for the defense of necessity.*"[280]

286. The Tribunal then analyzed the second and third requirements under Articles 25(1)(b) and 25(2)(a), *i.e.*, that the adopted measure did "*not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole*" and that "[t]*he international obligation in question* [does not] *exclude the possibility of invoking necessity*", and found that these requirements were both met.[281]

287. Finally, the Tribunal assessed the fourth requirement under Article 25(2)(b), *i.e.*, that "[t]*he State has* [not] *contributed to the situation of necessity*" and concluded that it was not satisfied in the present case. It reasoned:

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[280] Decision on Liability, ¶ 260. It was established during the hearing that the phrase "[a]s *discussed above*" refers to paragraph 235, which reads:

> "*Moreover, there is strong evidence that Argentina might have employed more flexible means that would have protected both its interests and those of the Claimants. For example, if Argentina's concern was to avoid an increase in tariffs during a time of crisis, it might have relieved AASA, at least temporarily, of investment commitments that were placing a crippling burden on the Concession so long as tariffs did not increase. If Argentina's concern was to protect the poor from increased tariffs, it might have allowed tariff increases for other consumers while applying a social tariff or a subsidy to the poor, a solution clearly permitted by the regulatory framework. There is evidence that governmental agencies were among the consumers with the largest unpaid invoices owing to AASA. Argentina might have taken measures to assure that its own governmental organizations paid their legitimate debts to AASA. All of these options were suggested to the Argentine authorities and all were rejected. In short, there appears to have been very little desire or effort after the outbreak of the crisis for Argentina to* 'work together' *with AASA and the Claimants. Once the crisis had ended and economic growth returned to the Argentine economy, the government showed no greater willingness to find a way to work together with AASA and the Claimants. While Argentina seems to suggest that there was nothing else that it could have done in its relationship with AASA and the Claimants, the Tribunal is not persuaded that an amicable solution could not have been reached.*"

[281] Decision on Liability, ¶¶ 259-262.

"*To invoke the defense of necessity, a state must not have contributed to its situation of necessity. The operative word of this condition is* 'contribute'*, not* 'cause' *or* 'create.' *Thus, the fact that other actors, besides the state in question, may have contributed to that state's situation of necessity does not automatically mean that such state has not contributed to it. The Commentary to the ILC Articles makes it clear that such contribution must* '…be sufficiently substantial and not merely incidental or peripheral.' *Thus, an important question is whether Argentina contributed to the crisis of 2001-2003 to an extent sufficiently substantial to rule out a necessity defense in compliance with international law. This being said, the Claimants in their pleadings viewed the crisis as created primarily by endogamous factors, primarily the economic policies of various Argentine governments. The Respondent, on the other hand, portrayed the crisis as caused by exogenous factors, primarily the various global crises, such as the one which struck Russia in 1999.*

The Tribunal finds that a combination of endogenous and exogenous factors contributed to the Argentine crisis at the beginning of this century. Among Argentina's contributing factors to the crisis were excessive public spending, inefficient tax collection, delays in responding to the early signs of the crisis, insufficient efforts at developing an export market, and internal political dissension and problems inhibiting effective policy making. In listing these factors, the Tribunal does not by any means intend to minimize the substantial external forces that were buffeting the Argentine economy. Its intent is to show that Argentina itself contributed to its situation of emergency. In this regard, this Tribunal must agree with the tribunal in CMS v. Argentina, *which stated that* '[t]he issue, however, is whether the contribution to the crisis by Argentina has or has not been sufficiently substantial. The Tribunal, when reviewing the circumstances of present dispute, must conclude that this was the case. The crisis was not of the making of one particular administration and found its roots in the earlier crisis of the 1980s and evolving governmental policies of the 1990s that reached a zenith in 2002 and thereafter. Therefore, the Tribunal observes that government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter.' *One might also suggest if external, global factors alone had created Argentina's crisis, it is surprising that other countries did not experience a crisis of equal magnitude at the time.*"[282]

288. Based on its findings that two out of the four requirements under Article 25 of the ILC Draft Articles were not met because: (i) the measures adopted by Argentina were not the "*only*

[282] Decision on Liability, ¶¶ 263-264.

way" to satisfy its essential interests; and (ii) Argentina itself "*contributed*" to the emergency situation it was facing in 2001 to 2003, the Tribunal denied Respondent's necessity defense.[283]

b. The Committee's Considerations on the Tribunal's Findings

289. At the outset, the Committee notes that there is agreement between the Parties regarding the applicability of Article 25 of the ILC Draft Articles to the Tribunal's assessment of Respondent's necessity defense.[284] It is disputed, however, whether the Tribunal would have been required to: (i) interpret the requirements of Article 25 in terms of establishing more concrete legal standards, in particular as regards the "*only way*" and "*contribution*" requirements; and (ii) address the evidence advanced by Respondent in support of its position, before concluding that these requirements were not met.

i. The Tribunal's Alleged Failure to Establish the Legal Standards

290. As to Respondent's first argument that the Tribunal in this case failed to identify the legal standards to be met in order to satisfy both the "*only way*" and the "*non-contribution*" requirements under Article 25, the Committee agrees with Respondent and with the committee in *Enron v. Argentina* on whose decision Respondent relies, that both requirements are indeed susceptible to a certain degree of interpretation.

291. It is further true that the Tribunal did not explicitly identify the interpretation it adopted. However, the Committee notes that Respondent has not pointed to any submissions made by the Parties on this point in the underlying proceedings. In this regard, it is not entirely clear to the Committee whether the *Enron* committee considered similar circumstances a ground for annulment, as suggested by Respondent,[285] and thus took the position that a tribunal fails to apply the applicable law and to state sufficient reasons for its decision if it fails to address possible different interpretations of a legal provision even when such interpretation was not subject to a debate between the parties.[286] In any event, this Committee firmly confirms its

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[283] Decision on Liability, ¶ 265.
[284] There was a slight doubt as to this continuing agreement as Respondent stated during the hearing "*…that doesn't mean that this draft Article is binding in its entirety as drafted.*" However, Respondent made no further submissions in this regard and, immediately following this statement, returned to its argument that the Tribunal would have been required to determine "*what was the legal standard applicable under customary international law in respect to each of these requirements* [under Article 25 of the ILC Draft Articles]." Transcript (Day 1), p. 70 lines 20 -22, p. 71 lines 2-4.
[285] *Cf.* Argentina's Reply, ¶ 141
[286] *Cf.* **AL A RA 33**, ¶¶ 375-376.

view that it is not for a tribunal to establish the issues to be decided, and that an interpretation issue that was not raised by the Parties cannot be considered "*outcome-determinative*" with the consequence that a failure to address such issue would amount to a manifest excess of powers under Article 52(1)(b) or to a failure to state reasons under Article 52(1)(e).

292. The Committee further agrees with the committee in *Impregilo v. Argentina* that "*the failure to fully conceptualize the content of a standard is not a ground for annulment of an award.*"[287] In addition, the Committee recalls its finding above that an *ad hoc* committee should undertake reasonable efforts to follow the reasons given by the tribunal. In the present context, this means that it is sufficient if the Committee can reasonably infer the interpretation adopted by the Tribunal from its reasoning.

293. As to the "*only way*" requirement, the Tribunal found that "*Argentina could have attempted to apply more flexible means*" to satisfy the essential interest in question and "*at the same time respected its obligations of fair and equitable treatment*." The Tribunal further referred to a discussion in the context of its analysis on whether Respondent accorded fair and equitable treatment to Claimants, where it stated, *inter alia*, that such flexible means could have "*protected both its interests and those of the Claimants*" and that contrary to Respondent's allegation, it was not persuaded that an amicable solution could not have been reached.[288]

294. As to the "*non-contribution*" requirement, the Tribunal first noted that the term "*contributed*" does not automatically exclude the possibility that more than one actor contributed to the state of necessity. It then referred to the Commentary to the ILC Draft Articles pursuant to which the contribution of the State must "*be sufficiently substantial and not merely incidental or peripheral*." The Tribunal thus held that it had to assess "*whether Argentina contributed to the crisis of 2001-2003 to an extent sufficiently substantial to rule out a necessity defense in compliance with international law.*"[289]

295. Regardless of the merits of the interpretation adopted by the Tribunal, which is not for this Committee to re-consider, the Committee is of the view that the Tribunal thereby sufficiently established the standard it was going to apply to the facts of the case.

296. Consequently, Respondent's first argument that the Tribunal failed to state the legal standards it was going to apply to assess Respondent's necessity defense is dismissed.

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[287] **A/CLA-42 / AL A RA 34**, ¶ 158.
[288] Decision on Liability, ¶¶ 260, 235.
[289] Decision on Liability, ¶ 263.

ii. The Tribunal's Alleged Failure to Consider Relevant Evidence

297. With regard to Respondent's second argument that the Tribunal failed to address relevant evidence Respondent filed in support of its submissions, the Committee notes that Respondent heavily relied on what the *Enron* committee considered to be the requirements for a proper analysis of Article 25 of the ILC Draft Articles. However, while the *Enron* committee placed great emphasis on its finding that the tribunal had directly accepted the conclusions of an economic expert opinion rather than applying the legal requirements of Article 25 to the facts of the case,[290] Respondent's argument in the present case is a different one.

298. Specifically with regard to the consideration of evidence, Respondent further relies on the finding made by the *TECO* committee that a tribunal cannot "*simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory*."[291] According to Respondent, the Tribunal did exactly that because it did not even refer to any of the five expert reports (including two rebuttal/supplemental reports), the witness statement or the documentary evidence submitted by Respondent in support of its submissions on the origins of the crisis and the unavoidability of the measures it adopted; likewise, the Tribunal failed to consider the *amicus curiae* brief filed by five non-governmental organizations.

299. At this point, the Committee first wishes to reiterate that it is not for an *ad hoc* committee to re-consider the evidence put before the Tribunal nor to determine whether the Tribunal assessed each and every piece of evidence that the Parties considered relevant to their case. As noted above, the *TECO* committee did not call this general principle into question but rather had to deal with an exceptional case, *i.e.*, "*the complete absence of any discussion of the Parties' expert reports within the Tribunal's analysis of the loss of value claim*."[292]

300. Contrary to the *TECO* case, the Tribunal in the present case did not consider that there was "*no sufficient evidence*" for a certain issue, without specifying why the expert reports submitted by the parties did not qualify as such evidence.[293] It can rather be reasonably inferred from the Tribunal's reasoning that it did consider the evidence before it and reached

[290] **AL A RA 33**, ¶¶ 376-377, ¶ 393.
[291] **AL A RA 89**, ¶ 131.
[292] **AL A RA 89**, ¶ 131.
[293] *Cf.* **AL A RA 89**, ¶ 130.

its conclusions on that evidentiary basis, albeit without discussing in detail any particular item filed by either Party.

301. Claimants correctly pointed out that in its discussion about the "*only way*" requirement, the Tribunal made reference to an earlier discussion in the context of the FET standard on possible alternative means that Argentina could have employed without violating its obligations under the Treaty. In that context, the Tribunal referred to "*strong evidence*" that Respondent could have applied more flexible means that would have protected the interests of both sides.[294] The Tribunal's subsequent discussion of possible alternative means that Respondent could have employed demonstrates that the Tribunal did take the contents of the evidence as well as of the *amicus curiae* brief into account. Its subsequent finding that Argentina's measures were not the "*only way*" in which Respondent could have acted complemented its earlier finding on the FET violation.

302. In the context of the "*non-contribution*" requirement, the Tribunal further held that "*a combination of endogenous and exogenous factors contributed to the Argentine crisis*" and explicitly acknowledged the "*substantial external forces that were buffeting the Argentine economy*" at the time.[295] This demonstrates that the Tribunal did not, as alleged by Respondent, simply adopt Claimants' submissions but rather took the arguments advanced by Respondent and its experts into account.

303. In addition, the Committee concurs with the finding of the *TECO* committee that a tribunal can be required to address certain pieces of evidence only to the extent that they are deemed "*highly relevant.*" In the Committee's view, this means that such evidence must have the potential to have an impact on the outcome of the Award. This is not the case here to the extent that Respondent and its experts acknowledged that the Argentine State contributed to the crisis. In this regard, Claimants correctly pointed to Argentina's Rejoinder on the Merits where it stated:

> "*Claimants state that Argentina describes the crisis suffered as a purely external fact. That is not true. Argentina argues, on the other hand, that this is a situation generated mainly by external factors, which was followed by an impossibility to maintain the prevailing economic policy in a new macroeconomic scenario*."[296]

304. Respondent's experts Profs. Mario Damill and Roberto Frenkel stated in their expert report:

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[294] Decision on Liability, ¶ 260 referring to ¶ 235.
[295] Decision on Liability, ¶ 264.
[296] **Exhibit A/C-47**, ¶ 1101.

> "*The successive fiscal efforts made allowed for a significant improvement in the primary result of public accounts (that is, an improvement in the result, without taking into account the payments of interest on the public debt.) Even so, those efforts were partly unsuccessful and partly counterproductive. They were unsuccessful because the rise in interest rates on public debt associated with the adverse change in the external financial scenario substantially* 'absorbed' *income obtained on account of successive measures designed to reduce primary public expenditure (without taking interest into account) and increase taxes. They were counterproductive because, in reducing the aggregate demand, such actions contributed to the consolidation of the recession, and thus fed the adverse expectations of economic agents regarding the future course of the economy. This, in turn, fed again the perception of risk and, as a consequence, the rises in interest rates. This clear vicious circle rendered fiscal policy useless and led to a worsening situation.*"[297]

305. During the hearing on the merits, Respondent's witness Mr. Eduardo A. Ratti was presented with a list of endogenous causes of the crisis in Argentina as alleged by Claimants and was asked whether he agreed that "*amongst other things, they were causes of the Argentine crisis*." Mr. Ratti responded: "*Causes and effects? Yes, yes, I share that point of view. I think it's not just that, but I think that—those are among them*."[298]

306. In light of these statements, it is apparent to the Committee that the question for the Tribunal to assess was whether the acknowledged endogenous factors amounted to a "*significant*" contribution within the meaning of Article 25(2)(b) and thus excluded the state of necessity defense. This, however, is a legal assessment on which neither of the economic expert reports could opine. In fact, if the Tribunal had looked for guidance on this legal question in any of the expert reports, it could have been found to have committed the same annullable error that the *Enron* committee found, *i.e.*, deference to an economic expert report where the tribunal should have made its own legal assessment of a requirement under international law.

307. Consequently, the Committee cannot follow Respondent's argument that the Tribunal committed the same, or even a more serious, error that the *Enron* tribunal was found to have made. To the contrary, the Tribunal made its own assessment of the evidence put before it, which is not to be re-evaluated by this Committee, and applied the legal requirements of Article 25 to the facts as found by it.

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[297] **Exhibit R-TE-21**, ¶ 28.

[298] Respondent's opening presentation, slide 104 reproducing a quote of the hearing transcript in Argentina's Post-Hearing Brief on the Merits, ¶ 775.

308. Finally, the Committee does not agree with Respondent that the Tribunal failed to state reasons for its conclusion that Argentina could have respected both its Treaty and its human rights obligations and in that context failed to give sufficient weight to the *amicus curiae* brief filed by five non-governmental organizations in 2007. Besides explicitly mentioning the *amicus curiae* brief and its contents in its reasoning on the requirements of Article 25,[299] the Tribunal referred in its reasoning to more flexible means that either did not include a tariff increase at all or at least for the poor part of the population, *i.e.*, it addressed the concerns raised in the *amicus curiae* brief.[300] In addition, the Tribunal expressly considered and dismissed the suggestion made in Respondent's submissions and the *amicus curiae* brief that Argentina's human rights obligations somehow trumped its obligations under the BIT.[301]

309. Consequently, Respondent's argument that the Tribunal failed to make its own assessment of the facts based on the evidence presented by the Parties and to apply the legal elements of Article 25 of the ILC Draft Articles to these facts is dismissed.

c. Conclusion

310. In conclusion, the Committee finds that the Tribunal did not fail to state the reasons for its decision to deny Respondent's necessity defense and therefore Respondent's third ground for annulment is dismissed.

D. Fourth Set of Grounds for Annulment Relating to the Valuation of Damages

1. Summary of Respondent's Position

311. Respondent submits that in determining Claimants' alleged losses pursuant to its Decision on Liability, the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention) and failed to state the reasons for its decision (Article 52(1)(e) of the ICSID Convention) in connection with: (i) the valuation period; (ii) the construction of the valuation exercise; and (iii) the management fees.[302]

312. Respondent claims that the contradictions in the Tribunal's reasoning render it "*impossible for any reader to understand or even find the rationale of the Award*" in connection with a "*pivotal or outcome-determinative point*." According to Respondent, the two elements

[299] Decision on Liability, ¶¶ 256, 262.
[300] *Cf.* Decision on Liability, ¶ 235.
[301] *Cf.* Decision on Liability, ¶ 262.
[302] Argentina's Application, ¶ 48; Argentina's Memorial, ¶ 136.

justifying the annulment of the Award for a failure to state reasons, *i.e.*, (i) a lack of rationale for a particular point of the decision, which is (ii) necessary to the tribunal's decision, are therefore fulfilled. In addition, Respondent contends that annulment is also warranted based on the Tribunal's application of legislation that was inapplicable to this case and its ruling on issues over which it did not have jurisdiction, which amounts to a manifest excess of powers.[303]

a. Compensation for the Effects of a Measure that Did Not Violate the BITs

313. As to the valuation period, Respondent claims that the Tribunal held that the damages awarded to Claimants should include losses that were allegedly incurred after the termination of the Concession Contract in 2006 up to the end of the concession period in 2023 – despite the fact that it had ruled in its Decision on Liability that the record was insufficient to establish that the termination amounted to a violation of the FET standard.[304] According to Respondent, the Tribunal's finding, together with its statement that damages may only be awarded for harm caused by internationally wrongful acts, would have necessarily resulted in the valuation period ending together with the termination of the Concession Contract, *i.e.*, in 2006.[305]

314. Respondent argues that the contradiction lies in the fact that the Tribunal removed the termination of the Concession Contract from the "*without measures*" scenario, by which it intended to determine "*the value of the investment in the hypothetical situation where Argentina did not take measures that violated its treaty obligations*." In Respondent's view, however, the Tribunal should have taken into account the termination in both the actual and the "*without measures*" scenario and thereby should have assessed the damages until 2006 rather than until 2023.[306] Respondent emphasizes that the Tribunal even recognized that the risk of termination was always present in the concession and claims that this makes the contradiction in the Tribunal's reasoning "*even more evident*."[307]

315. Respondent refers to the example given by the Tribunal in this context, *i.e.*, that one would value a house lost in a fire based on the market value just before the fire's occurrence rather

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[303] Argentina's Memorial, ¶¶ 139-140; Argentina's Reply, ¶ 172.
[304] Argentina's Application, ¶¶ 49-51 referring to Decision on Liability, ¶ 246 and Award, ¶ 97; Argentina's Memorial, ¶ 142; Argentina's Reply, ¶¶ 168-169 quoting from Decision on Liability, ¶ 246.
[305] Argentina's Application, ¶ 52 referring to Award, ¶ 26; Argentina's Memorial, ¶ 149; Argentina's Reply, ¶¶ 170-171.
[306] Argentina's Memorial, ¶¶ 144-146 quoting from Award, ¶ 28; Argentina's Reply, ¶ 176.
[307] Argentina's Reply, ¶ 171.

than after the fire, and its conclusion that, likewise, the Tribunal had to start its valuation of Claimants' losses at a point before Respondent's Treaty breaches took place. According to Respondent, this demonstrates the Tribunal's excess of power because, in the example, there was a link between the measure giving rise to liability, *i.e.*, the fire, and the injury sustained, *i.e.*, the loss of value of the house; in the present case, however, the termination was not found to be a measure giving rise to liability under the BIT but the Tribunal nevertheless placed the burden of bearing the consequences of the termination on Respondent.[308]

316. Respondent emphasizes that it does not disagree with the valuation date or the valuation methodology as Claimants allege but rather with the fact that Respondent is requested to pay compensation for a period during which there was no longer a contract in force – without the termination having been found to violate the BIT.[309]

317. In Respondent's view, by awarding damages for the time period after the termination, the Tribunal exceeded the framework of its Decisions on Jurisdiction and on Liability, under which it was to assess the damages, and awarded damages for a lawful act. Respondent claims that this constitutes a manifest excess of powers and a failure to state reasons – in the form of stating contradictory reasons.[310]

318. In addition, Respondent takes the view that all cash flows, both prior to and after the termination, belong to AASA rather than its shareholders and should therefore be subject to discussion in the Argentine courts, in accordance with the forum selection clause agreed upon in the Concession Contract, given the Tribunal's finding that the termination took place in accordance with the Concession Contract; that it did not have jurisdiction over that matter; and that there was no evidence that the termination amounted to a violation of the BIT.[311] In this regard, Respondent emphasizes that Claimants have also brought an action in the Argentine courts for "*the same items that they claim in this dispute*."[312]

b. Methodology and Calculation of Damages

319. As to the construction of the valuation exercise, Respondent claims that the Tribunal: (i) based its calculation of damages on Resolution ETOSS No. 602/99 dated 8 July 1999 ("**Resolution 602/99**") – a rule it had earlier deemed not to be part of the applicable

[308] Argentina's Reply, ¶¶ 173-175 quoting from Award, ¶ 36.
[309] Argentina's Reply, ¶¶ 178-179.
[310] Argentina's Application, ¶ 54; Argentina's Memorial, ¶¶ 151-154; Argentina's Reply, ¶¶ 181-182.
[311] Argentina's Application, ¶¶ 52-53; Argentina's Reply, ¶¶ 169, 176.
[312] Argentina's Memorial, ¶ 148.

regulatory framework; and (ii) applied a series of regulatory/legal presumptions, which are not even based on Resolution 602/99 nor on the applicable legal framework – without providing any reasons and in contradiction to other statements it had made.[313]

320. Respondent refers in particular to the Tribunal's assumption of a liquidity relief, *i.e.*, an interest-free loan of Argentina to AASA in the amount of ARS 132 million, which Respondent considers to be incompatible with the applicable legal framework and which was not considered or suggested by the Parties. Respondent argues that it was under no obligation to grant such a loan to AASA and considers this assumption contradictory, in particular taking into account that Argentina was experiencing one of the most severe crises in its history.[314]

321. Respondent further considers it contradictory that the Tribunal assumed in its Award that: (i) profits were guaranteed allowing for a continuous repayment of debt; and (ii) AASA had a guarantee ensuring the achievement of financial equilibrium, even though the Tribunal had held in its Decision on Liability that the expression "*equilibrium principle*" was nowhere to be found in the Water Decree and that "[t]*he Concession is based on the principle of business risk,*" expressly including financial risk.[315]

322. According to Respondent, by assuming as a premise that AASA should be a viable company, the Tribunal ignored the law that it deemed applicable, *i.e.*, the Concession Contract, and applied legislation that it did not mention as part of the applicable legal framework in its Decision on Liability, *i.e.*, Resolution 602/99, and thereby manifestly exceeded its powers and failed to state the reasons for its decision.[316] As regards the Tribunal's statement referred to by Claimants that Resolution 602/99 best reflected Argentina's obligation in a but-for scenario, Respondent argues that even the discretion of the Tribunal "*could never entitle* [it] *to calculate damages based on a rule that it expressly excluded from the applicable law*."[317]

323. Respondent argues that the difference between the legal framework identified by the Tribunal in its Decision on Liability and Resolution 602/99 applied in its Award "*is essential, since it is directly linked to the risk and responsibilities assumed by the Concessionaire*"; while the former is based on the principle of business risk, the latter is based on the

[313] Argentina's Reply, ¶ 183; Argentina's Application, ¶ 55.
[314] Argentina's Application, ¶¶ 55-56; Argentina's Memorial, ¶ 170.
[315] Argentina's Application, ¶ 56 quoting from Decision on Liability, ¶¶ 125 and 106.
[316] Argentina's Application, ¶ 57; Argentina's Memorial, ¶¶ 136, 155-157.
[317] Argentina's Reply, ¶ 186.

"*Equilibrium Principle*" invoked by Claimants, which guarantees a certain rate of return over the unamortized investments. Despite finding in its Decision on Liability that "*the term* 'Equilibrium Principle' *appears nowhere in the text of the Water Decree,*" which rather adopted a more flexible standard, Respondent claims that the Tribunal implemented the above mentioned "*Equilibrium Principle*" in its Award as part of the "*without measures*" scenario and thereby contradicted its earlier finding.[318]

324. Respondent submits that, as a result of the assumptions it applied, the Tribunal assumed a "*guarantee over the projected flows repaying the total amount of the substantial debt sponsored by AASA's main shareholders*," which would not have been in place if the applicable legal framework had been applied. In this context, Respondent notes that, only in its Award did the Tribunal determine that the secured debt was a protected investment under the Treaty – simply by concluding that there was no evidence to the contrary. As a result, Respondent claims that the risks assumed by Claimants through their "*policy of high indebtedness*" were allocated in their entirety to Argentina, contrary to the Tribunal's finding that the risks should be apportioned between the private investors and the State based on the principle of "*mutual sacrifice*."[319] In Respondent's view, this amounts to an "*abusive exercise of the Tribunal's powers*" as well as a failure to state reasons in the form of contradictory reasons.[320]

325. Respondent claims that, contrary to its expressed intention, the Tribunal did not conceive a scenario based on "*mutual sacrifice*" and ignored its earlier finding that the Concessionaire had to assume the Concession at its own economic and financial risk, given that the assumptions applied by the Independent Expert and adopted by the Tribunal resulted in a "*guarantee, from a mathematical perspective,* [of] *the company's viability*" and the entire amount of the guaranteed debt being paid by the Argentine State.[321]

326. Respondent further argues that by building a scenario where the guaranteed debt was a protected investment under the BIT and thus intangible, the Tribunal ignored the Parties' discussions and the Independent Expert's projections on whether a potential tariff review would have made it possible to repay the total amount of guaranteed debt and rather built a scenario in which such debt was always fully covered.[322]According to Respondent, the

[318] Argentina's Memorial, ¶¶ 158-163 quoting from Decision on Liability, ¶ 125; Argentina's Reply, ¶¶ 187-191.
[319] Argentina's Memorial, ¶¶ 164-168, 171; Argentina's Reply, ¶¶ 192-194, 197.
[320] Argentina's Memorial, ¶ 174.
[321] Argentina's Reply, ¶¶ 196, 198.
[322] Argentina's Reply, ¶¶ 199-200.

assumption that the sponsored debt would be repaid entirely contradicts not only the applicable legal framework but even Resolution 602/99 because this resolution provides for a temporary tariff increase but makes no mention to an interest-free loan to cover the liquidity deficit – removing the risk of delinquency and uncollectability arising from a tariff increase – as assumed by the Tribunal.[323] Respondent emphasizes that this total coverage was not even requested by Claimants and therefore manifestly exceeds the Tribunal's powers.[324]

327. In addition, Respondent considers it contradictory that the Tribunal awarded compensation to AASA's shareholders as sponsors of the guaranteed debt but did not consider according the same treatment to the Argentine State, in relation to the payments it made in its capacity as guarantor of a debt incurred by AASA to the Inter-American Development Bank ("**IDB**"). Respondent emphasizes that the Tribunal did not distinguish between the shareholder-sponsors and the National State-guarantor; thus, the situations were identical but the Tribunal nevertheless "*applied opposing principles and conclusions*" by placing the burden of repayment and enforcement on Respondent but not on Claimants.[325]

328. Finally, Respondent claims that pursuant to a proposal made by the Independent Expert, Dr.Akash Deep, the Tribunal adopted an interest rate that was "*slightly*" higher than the rate proposed by Claimants' experts. Respondent rejects Claimants' submission that the choice of interest rate is subject to the Tribunal's discretion and emphasizes that the Tribunal did not even refer to the rate that the Parties had agreed upon to apply as from the termination of the Concession Contract, *i.e*., the 6-month US Treasury bill rate. Respondent claims that the Tribunal therefore acted *ultra petita* and, thus, exceeded its powers; it also seriously departed from a fundamental rule of procedure because it did not submit the rate to the Parties for comments.[326]

c. Management Contract

329. As to the management fees, Respondent claims that the Tribunal awarded to Suez alleged losses incurred in relation to the Management Contract, even though it had not previously determined that this Contract was a protected investment in relation to which Respondent had violated the BIT. According to Respondent, the Tribunal would have had to state in its Decision on Jurisdiction what the protected investment is, given that this definition would

[323] Argentina's Memorial, ¶¶ 169-171; Argentina's Reply, ¶ 201.
[324] Argentina's Reply, ¶ 201.
[325] Argentina's Memorial, ¶ 172; Argentina's Reply, ¶ 203.
[326] Argentina's Memorial, ¶ 173; Argentina's Reply, ¶¶ 204-207.

then form the basis for the discussion on the merits and damages. Respondent further emphasizes that the Tribunal recognized Claimants' standing based on their shareholdings rather than on the basis of a contract for the provision of services, which was unrelated to Claimants' shareholdings.[327]

330. In addition, Respondent claims that the Tribunal's decision to award compensation for unpaid management fees not only between 2002 and 2006, *i.e.*, until the termination of the Concession Contract, but rather until 2023 – for services that were never provided – amounts to an abuse of the Tribunal's powers and a failure to state reasons for such conclusion, which warrants the annulment of the Award.[328] Respondent argues that the Tribunal had no powers to award damages in the absence of injury, given that the management fees were found to be consideration to be given in exchange for the transfer of "*essential, intangible assets*," – a transfer that no longer took place after the termination in 2006.[329]

331. In addition, Respondent notes that the Tribunal acknowledged in its Award that "*Dr. Deep was unsure of the legal status of the claim for Management fees*" and argues that, nevertheless, the Tribunal did not specify such legal status and thus acted outside its jurisdiction when awarding compensation for a claim of uncertain legal status.[330] In Respondent's view, Dr. Deep's report demonstrates that it would have been essential to classify the claim for management fees either as an "*expected return*" or as a "*compensation for management services*" because a classification as the former would have required amending the parameters applied in his valuation.[331] Even though Dr. Deep's valuation was thus valid only for a classification as compensation for services, Respondent contends that the Tribunal, while not clearly stating its position, addressed the management fees as an expected return, given that it considered them as "*an integral part of* [Claimants'] *principal claim*." According to Respondent, the Tribunal did not explain why it nevertheless applied Dr. Deep's parameters and contradicted its own statement that the management fees were paid "*in consideration for the* [management-related] *obligations*" of Suez under the Concession Contract.[332]

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[327] Argentina's Application, ¶ 58; Argentina's Memorial, ¶¶ 136, 185; Argentina's Reply, ¶¶ 209-211.
[328] Argentina's Memorial, ¶¶ 136, 175, 186.
[329] Argentina's Reply, ¶¶ 212-213 quoting from Award, ¶ 71
[330] Argentina's Memorial, ¶ 176 quoting from Award, ¶ 74; Argentina's Reply, ¶ 216.
[331] Argentina's Memorial, ¶¶ 177-178; Argentina's Reply, ¶ 215 quoting from **Exhibits A/C-34 and A RA 55**, ¶ 429.
[332] Argentina's Memorial, ¶¶ 179-184 quoting from Award, ¶¶ 72, 75; Argentina's Reply, ¶¶ 209, 217-218.

2. Summary of Claimants' Position

332. Claimants submit that Respondent's arguments are "*nothing more than quarrels with the way the Tribunal assessed the evidence and applied the law*" and a "*disagreement with the Tribunal's findings*"; they do not amount to an excess of powers nor to a failure to state reasons for the Award.[333]

a. Calculation of Damages to Provide Full Reparation at the Date of Respondent's Breach

333. In Claimants' view, Respondent's claim that the Tribunal awarded damages for a measure that it did not find to be a Treaty breach is a mischaracterization of how the Tribunal assessed Claimants' losses and, "*in reality, an effort to appeal the Tribunal's decision with respect to the period over which damages should be assessed*."[334] Claimants argue that Respondent does not claim that the Tribunal failed to apply the proper law, but rather that it applied such law incorrectly, which is not a basis for annulment.[335]

334. Claimants argue that the Tribunal did not contradictorily award damages for termination of the Concession Contract but rather for Respondent's two Treaty breaches on the dates they occurred, which preceded the termination and resulted in full reparation from that date onwards. According to Claimants, Respondent disagrees with the fact that the Tribunal's calculation did not account for events that post-dated the Treaty breaches and were thus unknown at the valuation date, such as the termination of the Concession Contract that occurred in 2006. Claimants emphasize that this point was discussed by the Parties and dealt with by the Tribunal "*after comprehensive analysis*."[336] In Claimants' view, the reasons supporting the Tribunal's findings are equally "*clear and comprehensive*" and do not contain any contradictions that would result in the reasons "*cancel*[ing] *each other out so as to amount to no reasons at all*."[337]

335. Claimants refer to the Tribunal's finding that it "*must begin its valuation of what the Claimants have lost as a result of Argentina's illegal actions* at a point in time before those actions took place," which meant that the Tribunal valued the investment in January 2002, *i.e.*, the date immediately before the first Treaty valuation. Claimants note that, as of that

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[333] Claimants' Counter-Memorial, ¶¶ 115, 170.
[334] Claimants' Counter-Memorial, ¶ 117.
[335] Claimants' Rejoinder, ¶ 57.
[336] Claimants' Counter-Memorial, ¶¶ 118-119, 172; Claimants' Rejoinder, ¶¶ 59, 121.
[337] Claimants' Counter-Memorial, ¶¶ 170-171 quoting from **A/CLA-43**, ¶ 77; Claimants' Rejoinder, ¶ 123.

date, the Concession Contract had another 21 years to run, and again refer to the Tribunal's finding that "[t]*o limit the valuation period to five instead of twenty-one years would, of course, seriously undervalue the investments lost as a consequence of Argentina's treaty violations. … The termination of the Concession Contract, even if not illegal under the BITs, cannot exonerate it from its obligation to repair the consequences of its wrongful act in denying fair and equitable treatment to the Claimants' investments.*"[338]

336. In response to Respondent's additional argument that the Tribunal recognized that the risk of termination always existed but refused to take such risk into account, Claimants emphasize that the Tribunal in fact did refer to this risk and stated that it "*would be accounted for in the rate applied to discount to present value the remaining twenty-one years of projected cash flows*." According to Claimants, it is irrelevant whether the Tribunal did so correctly, as long as the reasoning is clearly set out in its Award.[339]

337. In Claimants' view, Respondent disagrees with the Tribunal's findings on the valuation date and the valuation methodology; however, these fall solely within the Tribunal's powers to determine the compensation due for Respondent's breaches and cannot properly be at issue in an annulment proceeding.[340]

b. Construction of the "*But For*" Scenario

338. Claimants submit that Respondent's arguments on the *but-for* scenario again amount to a disagreement with the Tribunal's findings on the factual and legal arguments presented by the Parties. Claimants note that Respondent argued in the arbitration that Resolution 602/99 should not be applied in the "*but for*" scenario – an argument that was rejected by the Tribunal, which found instead that the application of Resolution 602/99 as assumed by Dr. Deep best reflected what fair and equitable treatment from the regulator would have looked like.[341] Claimants quote the Tribunal's statement that "*while Resolution 602/99 may or may not have been legally binding, it was nonetheless, as the product of an agency of the Argentine government, strong evidence of how a reasonable regulator would act in the situation that AASA and the regulators faced at the time of the Argentine crisis.*"[342]

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[338] Claimants' Counter-Memorial, ¶ 120 quoting from Award, ¶ 36 (emphasis added by Claimants).
[339] Claimants' Rejoinder, ¶ 122 quoting from Award, ¶ 36.
[340] Claimants' Counter-Memorial, ¶ 121.
[341] Claimants' Counter-Memorial, ¶ 123 referring to Award, ¶¶ 51-56; Claimants' Rejoinder, ¶¶ 61-64.
[342] Claimants' Rejoinder, ¶ 64 quoting from Award, ¶ 55.

339. Claimants refer to the Tribunal's statement that the construction of a "*but for*" scenario "*necessarily requires the Tribunal to enter into the realm of the hypothetical*," *i.e.*, a scenario in which "*both Argentina and the AASA's investors would share the burden of assisting AASA through its liquidity crisis*"; while Respondent would provide some liquidity relief through a partial and temporary increase in tariffs, the shareholders would contribute additional capital, thus amounting to "*mutual sacrifice*."[343] Claimants argue that in the "*but for*" scenario, the Tribunal was not bound to apply the conditions prevailing in Argentina at the time but had to determine the conditions that would reasonably have prevailed if there had been a "*productive and cooperative working relationship between the parties*."[344]

340. According to Claimants, the Tribunal's approach to resort to the principles underlying Resolution 602/99 was "*fully justified*" and supported by "*extensive reasoning*" that was "*explicit, straightforward, and discernable on the face of the Award*" but, in any event, Respondent is not entitled to a *de novo* review of the assessment of the evidence and the interpretation of the law performed by the Tribunal; its disagreement with the Tribunal's findings does not amount to an excess of powers nor to a failure to state reasons on the part of the Tribunal.[345]

341. Claimants further submit that Respondent's arguments relating to the secured debt were also argued before and decided by the Tribunal; however, Respondent never argued that the Tribunal did not have power to award damages in this regard but rather that any potential damages resulted from the riskiness of Claimants' investment and not from Respondent's Treaty breaches – an argument that the Tribunal rejected. Claimants emphasize that they always contended that the secured debt constituted protected investments and specifically identified their debt participation as an investment in their Counter-Memorial on Jurisdiction – a characterization Respondent never objected to.[346]

342. In response to Respondent's argument that the Tribunal contradicted itself by awarding Claimants compensation for extinguishing AASA's secured debt but not providing Respondent with similar relief for various sums it claims to have paid, Claimants consider

[343] Claimants' Counter-Memorial, ¶¶ 124-125; Claimants' Rejoinder, ¶ 65 quoting from Award, ¶¶ 52-53, 55.
[344] Claimants' Rejoinder, ¶ 66 quoting from Award, ¶ 43.
[345] Claimants' Counter-Memorial, ¶¶ 126, 173; Claimants' Rejoinder, ¶¶ 67-68.
[346] Claimants' Counter-Memorial, ¶¶ 127-128 referring to **Exhibit A/C-33**, ¶ 8(b)(iii); Claimants' Rejoinder, ¶ 70.

this again to be disagreement with the Tribunal's decision to reject Respondent's claim, the reasons for which the Tribunal gave in its Award.[347]

343. Finally, as to Respondent's *ultra petita* claim, Claimants contend that the interest rate proposed by the Independent Expert, *i.e.*, the 6-month Eurodollar rate, in fact yielded an interest amount lower than that sought by Claimants. In addition, Claimants submit that both Parties presented arguments on the appropriate interest rate and commented on the Independent Expert's proposal, which the Tribunal ultimately determined to more accurately place Claimants "*in the position they would have been if no such loss had occurred.*"[348] In any event, Claimants submit that while the Parties initially agreed on the US Treasury bill rate, Claimants later accepted Dr. Deep's proposal to apply the Eurodollar rate so that there was no longer any agreement on the risk-free rate when the Tribunal rendered its Award.[349]

344. Claimants further argue that the choice of the applicable interest rate "*falls squarely within the discretion of the Tribunal,*" just as the choice of applicable discount rate or any other "*damages input or even final damages figures*," and does not amount to an excess of powers.[350]

c. Compensation for Management Fees

345. Claimants submit that Respondent again disagrees with the Tribunal's finding on the valuation date, which resulted in a valuation of Claimants' investment, including the management fees, as of 2002, on what Claimants consider to be a "*reasonable assumption that, had Argentina provided fair and equitable treatment to the Claimants' investment, the Concession would have continued through 2023*." Claimants argue that on this but-for assumption, Suez would also have continued to receive management fees through 2023 and was thus entitled to damages in that amount.[351]

346. As to Respondent's argument that the Tribunal determined only in its Award that the claim for management fees was a protected investment, Claimants note that the Parties exchanged arguments on this issue, leading to the Tribunal accepting Claimants' argument that the Management Contract was "*an integral part of the Claimants' investment*." Claimants argue that Respondent's suggestion that a failure to define the management fees as part of

[347] Claimants' Counter-Memorial, ¶ 174 referring to Award, ¶¶ 69-70.
[348] Claimants' Counter-Memorial, ¶ 129 quoting from Award, ¶ 64; Claimants' Rejoinder, ¶ 74.
[349] Claimants' Rejoinder, ¶ 72.
[350] Claimants' Counter-Memorial, ¶ 129; Claimants' Rejoinder, ¶ 73.
[351] Claimants' Counter-Memorial, ¶ 131; Claimants' Rejoinder, ¶ 79.

Claimants' investment in the Decision on Jurisdiction would have deprived the Parties of an opportunity to fully brief the damages owed in this regard is disproven by the fact that both Parties did in fact "*extensively*" brief such damages in the quantum phase of the arbitration. Therefore, Claimants argue that it is irrelevant whether the Tribunal made the decision on a characterization of the management fees only in the damages phase.[352]

347. Finally, Claimants reject Respondent' argument that the Tribunal did not assign a "*legal status*" to the management fees, referring to the Tribunal's finding that the fees were earned though a Management Contract, which was part of Claimants' protected investment. Claimants further deny that the Tribunal misapplied Dr. Deep's alleged conclusion and note that in the paragraphs following the one quoted by Respondent, Dr. Deep in fact assumed that the management fees were a payment for services rather than a return on investment, which was "*the precise conclusion that the Tribunal adopted when it follows Dr. Deep's approach to this issue*."[353]

348. Specifically, Claimants reject Respondent's submission that the Tribunal classified the management fees as an "*expected return*" and contend that it rather considered them to be compensation for services rendered and gave "*detailed reasons*" for its decision to: (i) grant Claimants' request for future management fees, albeit without interest; and (ii) reject their request for accrued but unpaid management fees.[354] In addition, Claimants submit that the Tribunal followed Dr. Deep's "*middle ground*" approach because it agreed with the order in which creditors were being paid under this assumption.[355]

349. In any event, Claimants contend that these arguments are irrelevant because the Committee is not tasked with reviewing whether the Tribunal awarded compensation for the management fees in a correct manner but rather whether it manifestly exceeded its powers in doing so – for which Respondent's arguments provide no basis.[356]

3. Committee's Analysis

350. In the context of the Tribunal's evaluation of Claimants' alleged damages, Respondent advances two annulment grounds: (i) that the Tribunal manifestly exceeded its powers

[352] Claimants' Counter-Memorial, ¶ 133; Claimants' Rejoinder, ¶¶ 77-78.
[353] Claimants' Counter-Memorial, ¶¶ 134-136.
[354] Claimants' Counter-Memorial, ¶¶ 176-177 referring to Award, ¶¶ 71-83 and ¶¶ 84-86; Claimants' Rejoinder, ¶ 128.
[355] Claimants' Rejoinder, ¶ 129.
[356] Claimants' Counter-Memorial, ¶ 137; Claimants' Rejoinder, ¶ 129.

(Article 52(1)(b) of the ICSID Convention); and (ii) that the Tribunal failed to state the reasons for its decision (Article 52(1)(e) of the ICSID Convention).

351. The Committee makes reference to the general considerations above on the scope of its review under these two annulment grounds and agrees with the committee's finding in *Impregilo v. Argentina*, made specifically in relation to the assessment of damages:

> "*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* [the claimant]. … *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.*"[357]

352. Bearing this in mind, the Committee will assess the three elements of the Tribunal's evaluation that Respondent claims to be tainted with annullable errors: (i) the valuation period; (ii) the construction of the valuation exercise; and (iii) the management fees.

a. Compensation for the Effects of a Measure that Did Not Violate the BITs

353. First, Respondent alleges that the Tribunal's decision in its Award to adopt a valuation period up to the regular end of the concession period in 2023, and thus to award damages for alleged losses incurred after the termination of the Concession Contract by Argentina in 2006, contradicts its earlier finding in the Decision on Liability that such termination did not violate the BITs and that it did not have jurisdiction to judge whether it violated the Concession Contract.[358] Respondent takes the position that any losses incurred after the termination are to be assessed by the Argentine courts, which is the competent forum to assess whether the termination amounts to a breach of the Concession Contract.

354. The Committee notes that Respondent has raised the same objection before the Tribunal, which thoroughly dealt with it in its Award. Specifically, it held:

> "*The Tribunal does not agree with Argentina on this point. Under international law, as noted above, the Claimants'* [sic] *are entitled to full compensation for what they have lost as a consequence of Argentina's treaty violations. Just as one would not value the loss of a house in a fire based on the market value of the burned structure after the fire, but rather would value the house just before the fire's occurrence, this Tribunal must*

[357] **A/CLA-42 / AL A RA 34**, ¶ 160.
[358] Decision on Liability, ¶ 246.

> *begin its valuation of what the Claimants have lost as a result of Argentina's illegal actions at a point in time just before those actions took place. In its Decision on Liability, the Tribunal determined that the first breach of the treaties took place on January 6, 2002. Just before that point in time, AASA, and therefore the Claimants, had the right to a revenue stream which would continue for another 21 years until the year 2023, not just for another five years until the year 2006 when, unknown to them in 2002, Argentina would terminate the Concession. To limit the valuation period to five instead of twenty-one years would, of course, seriously undervalue the investments lost as a consequence of Argentina's treaty violations. It is true that the risk of termination was always present in the Concession; however, that risk, along with other risks, would be accounted for in the rate applied to discount to present value the remaining twenty-one years of projected cash flows. The termination of the Concession Contract by Argentina, even if not illegal under the BITs, cannot exonerate it from its obligation to repair the consequences of its wrongful act in denying fair and equitable treatment to the Claimants' investments.*"[359]

355. In the above quoted paragraph, the Tribunal explained its approach to value the investment from the perspective of a potential buyer in January 2002, *i.e.*, the date of the first Treaty breach. At that time, a potential buyer would not have known that the Concession Contract would be terminated five years later by Argentina but would have accounted for such risk only as part of the discount rate it would have applied to the projected future cash flows. In light of this explanation, the Committee does not agree with Respondent that the Tribunal exceeded its jurisdiction by awarding damages for a measure it had not found to be in violation of the BIT. Likewise, the Tribunal did not fail to state reasons for its decision to adopt a valuation period up to the regular end of the concession period.

356. During the hearing, Respondent appeared to modify its initial argument by placing more emphasis on the question of whether the risk of termination, which the Tribunal acknowledged was always present in the Concession Contract, was actually taken into account in the discount rate applied by the Tribunal-appointed expert Dr. Deep. The Tribunal stated in its Award that "*that risk, along with other risks, would be accounted for in the rate applied to discount to present value the remaining twenty-one years of projected cash flows.*" It did not, however, explicitly state whether the risk was actually and specifically incorporated into Dr. Deep's calculation.

[359] Award, ¶ 36.

357. From the Parties' responses to an explicit question from the Committee in this regard, it appears that the risk of early termination was not considered as an individual factor but rather as part of the systematic risk coefficient, the *beta*, that Dr. Deep included to account for "*the riskiness of a regulated water and sewerage utility such as AASA.*"[360] Claimants argued that in the present case, "*the contractual termination risk is inherent in industry risk … reflected in the beta*" because "[t]*his is an industry in which investors sign contracts with the State*."[361]

358. Respondent, however, took issue with the sources used by Dr. Deep to compile such *beta*, *i.e.*, (i) *beta* values used by the UK water regulator to set water tariffs in the UK for 2000-2005; and (ii) the (general) unlevered *beta* for developing countries surveyed by Prof. Damodaran.[362] Specifically, Respondent argued that the average *beta* of UK water companies (0.5) and emerging markets in general (0.44) did not adequately reflect the risk of water companies operating in emerging markets, including any specific termination risk.[363]

359. Based on the arguments presented by the Parties, it is indeed not entirely clear to the Committee whether the discount rate applied by Dr. Deep, and specifically the systematic risk coefficient *beta*, adequately reflected the risk that Argentina might at some point in the future terminate the Concession Contract. However, the Committee recalls its agreement with the finding of the *Impregilo* committee above that the Tribunal has "*a high level of discretion*" as to the criteria it applies in its assessment of damages and that "*a disagreement with the criteria used by the Tribunal cannot be a ground for annulment of an award.*"[364] In line with this consideration, it is not for this Committee to re-consider the view taken by the Tribunal that the criteria applied by Dr. Deep to compile the *beta* sufficiently accounted for the termination risk that later materialized in 2006.

360. In the same context, Respondent also criticized that the "*without-measures*" scenario applied by Dr. Deep, *i.e.*, the *but-for* scenario by which the Tribunal intended to determine how the value of Claimants' investment would have evolved in the absence of Respondent's Treaty violations, excluded not only the two measures that the Tribunal had found to be in violation

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[360] **Exhibit A/C-34**, ¶ 221.
[361] Transcript (Day 2), p. 342 lines 8-11.
[362] *Cf*. **Exhibit A/C-34**, ¶ 375 and Table 25.
[363] Respondent argued that "[t]*he beta considered by Deep for the water sector in the UK, where termination risk is supposed to be lower than in emerging markets, is higher. This proves that the beta considered in the discount rate applied to AASA does not include the termination risk*." Argentina's Rebuttal Statement dated 9 November 2016, slide 56. *See* also Transcript (Day 2), p. 276 line 18 - p. 277 line 2.
[364] **A/CLA-42 / AL A RA 34**, ¶ 160.

of the BITs but also the termination of the Concession Contract. During the hearing, Respondent further pointed out that the "*with-measures*" scenario, *i.e.*, the scenario to which the Tribunal compared the hypothetical *but-for* scenario, likewise excluded the termination event and thus did not reflect the actual or real scenario examined by the Parties' experts but rather a second hypothetical scenario.

361. According to Dr. Deep's explanation, this "*with-measures*" scenario was intended to capture how AASA *would* have evolved after 2002, this time in the presence of the unlawful measures and, correspondingly, the absence of the measures re-establishing the financial equilibrium; contrary to the actual or real scenario, however this "*with-measures*" scenario again excluded measures "*that were not necessarily found to be in breach of the BITs, including the termination of the Concession Contract in 2006.*"[365] Dr. Deep clarified:

> "[O]*ur objective in defining the* with-Measures *scenario is to be able to estimate the damages suffered by the Claimants due to the Measures* relative *to the* but-for *scenario. The simplest way to do this is to maintain all of the assumptions of the* but-for *scenario except for the tariff-related regulatory interventions whose absence is what constitutes the Measures that have been considered a breach of the Bilateral Investment Treaties by the Tribunal.*"[366]

362. The Committee notes that while the Tribunal referred to the "*with-measures*" scenario in its Award,[367] it did not discuss the fact that it did not simply reflect the "*as-is*" situation but rather a second hypothetical scenario, nor did it discuss why both scenarios excluded measures that were not found to be in violation of the BITs and, most importantly, the termination of the Concession Contract. However, in light of the Tribunal's finding that "[t]*he starting point of the Valuation Period is connected with the date of first breach of fair and equitable treatment by Argentina, in January 2002*,"[368] it can reasonably be inferred that the Tribunal intended to compare two scenarios, both from the perspective of January 2002, of how Claimants' investment would have evolved in the presence and in the absence of the two Treaty breaches. While the Tribunal did not provide explicit reasons why *both* scenarios excluded the termination of the Concession Contract, this naturally follows from adopting the perspective of January 2002. At that time, it was not known that the termination would

[365] **Exhibit A/C-34**, ¶ 94.
[366] **Exhibit A/C-34**, ¶ 95. *See* also ¶¶ 3-4 and ¶ 61.
[367] *Cf.* Award, ¶ 28.
[368] Award, ¶ 37.

occur in 2006 and the risk of such termination was reflected in both scenarios in the same way, *i.e.*, in the industry-specific *beta*.

363. It is therefore consistent with the Tribunal's approach to disregard the termination event itself from both scenarios in order to account exclusively for the difference resulting from the two Treaty breaches. While Respondent may disagree with the approach adopted by the Tribunal, this does not constitute either a manifest excess of powers, given that the Tribunal did not award damages for a measure it did not find to be in violation of the BITs, nor a failure to state reasons, given that an informed reader can reasonably follow the Tribunal's reasoning to its conclusion.

364. Finally, Respondent argued during the hearing that there was a contradiction between the Tribunal's finding in its Decision on Liability that there was no expropriation of Claimants' investment and its evaluation of damages in the Award where Dr. Deep allegedly valued the investment as if an expropriation had taken place. The Committee notes that Respondent raised the same objection already before the Tribunal, which clarified in its Award:

> "… [C]*ontrary to Argentina's objection, Dr. Deep was not engaged in making an expropriation valuation. The construction of a without measures scenario was only the first step in his proposed methodology. He then had to value the Claimants' investments in a* 'with measures' *scenario and finally to subtract the value of the latter from the value of the former in order to arrive at a value of the loss sustained. Dr. Deep correctly determined that the* 'with measures' *scenario resulted in a complete loss of the Claimants' investments. Their value was therefore zero. That amount would then be subtracted from the value to be attributed to the various elements of the Claimants' investment had Argentina accorded them fair and equitable treatment. Thus the conceptual framework for the valuation process in a case of denial of equitable treatment is quite different from that of an expropriation case."*[369]

365. Following a detailed discussion of Dr. Deep's calculation of the value of Claimants' investments in both scenarios, the Tribunal ultimately agreed that in the "*with-measures*" scenario, "*the measures Argentina did take during the crisis would have resulted in a negative cash flow to AASA's equity holders in 2002 and it would have remained negative throughout the life of the Concession. In short, the Claimants' equity would have been worthless.*"[370]

[369] Award, ¶ 56.
[370] Award, ¶ 102.

366. Consequently, the Committee cannot agree with Respondent's argument that Dr. Deep valued Claimants' investment as if an expropriation had taken place; rather, the Tribunal agreed with Dr. Deep that the value to be subtracted from the hypothetical value of Claimants' investment in the *but-for* scenario was zero. Therefore, the Committee finds that there is no contradiction in this regard between the findings made in the Tribunal's Decision on Liability and in its Award.

b. Methodology and Calculation of Damages

367. As to the methodology and calculation of damages, Respondent advances two arguments: (i) the Tribunal did not base the *but-for* scenario on the applicable legal framework and contradicted its earlier findings because it modeled the *but-for* scenario on the basis of achieving financial equilibrium pursuant to Resolution 602/99 dated 8 July 1999 despite the fact that this Resolution was never adopted, and it even went beyond the measures prescribed in Resolution 602/99 by assuming a liquidity relief in the form of a one-year interest-free loan and the total repayment of sponsored debt; and (ii) the Tribunal applied pre-award interest at a rate higher than that agreed upon by the Parties' experts.

i. Modeling of the *But-For* Scenario

(a) Aim to Achieve Financial Equilibrium

368. Respondent alleges that the Tribunal did not correctly take into account the legal framework it had deemed applicable in its Decision on Liability when modeling the *but-for* scenario in its Award. Specifically, Respondent claims that the Tribunal's assumption in its Award that the *but-for* scenario would involve a tariff adjustment to ensure the Concession Contract was in financial equilibrium contradicted its earlier finding that the term "*Equilibrium Principle*" did not appear in the Water Decree and that Article 44(d) of the Water Decree adopted a more flexible standard that sought to apportion the risks between the private investors and the Argentine State.

369. In its Decision on Liability, the Tribunal found that "*the legal framework of the Concession sought to achieve and balance two basic objectives*." The first objective was to attract private and foreign capital and know-how, as a result of which the framework needed to ensure that potential investors would earn "*a reasonable profit*" through the tariff system and that changes affecting the profitability of their enterprise would be dealt with by virtue of the

mechanism for revising the tariff.[371] The second objective was to ensure that water and sewage services could be provided efficiently and at low cost, which is why the framework provided the Argentine authorities with "*a certain degree of regulatory discretion in setting tariffs and in determining other important matters relating to AASA's activities.*" Specifically with regard to the disputed term "*Equilibrium Principle*," the Tribunal found:

> "*Although the Claimants assert that the tariff regime of the Water Decree was based on the* 'Equilibrium Principle' *guaranteeing the Concessionaire a recovery of all costs plus a return on invested capital, it is important to note three features of the legal framework at this point: 1) the term* 'Equilibrium Principle' *appears nowhere in the text of the Water Decree; 2) the Water Decree conditions tariffs on the attainment of service efficiency by the Concessionaire; and 3) the Concessionaire was to assume the business risks of the operation.*
>
> … [I]*nstead of specifically mandating that the tariff was to provide for all costs and a reasonable return to the investor, Article 44 (d) of the Water Decree adopted a more flexible standard in stating, as noted above:*
>
> > 'The prices and tariffs shall *tend (tenderán)* to reflect the economic cost of the water and wastewater services, including a margin of profit for the Concessionaire and include all costs arising from the approved expansion plans.' *(emphasis added).*"[372]

370. On the other hand, the Tribunal found that the legal framework did seek to protect the Concessionaire from certain of the risks involved with the operation of a water and sewage system of Buenos Aires and held that "[t]*he Concession's legal framework sought to apportion those risks between the private investors and the Argentine State*."[373]

371. There is a dispute between the Parties as to whether there is a contradiction between the findings of the Tribunal in its Decision on Liability and its adoption in the Award of the *but-for* scenario modeled by Dr. Deep, which included, *inter alia*, "*a full review of the economics of the Concession Contract … in 2003*." Respondent points in particular to the Tribunal's statement that "[t]*he aim of such a review was to ensure that the Concession achieved financial equilibrium as prescribed by the Water Decree*."[374]

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[371] Decision on Liability, ¶ 124.
[372] Decision on Liability, ¶¶ 125-126.
[373] Decision on Liability, ¶ 126.
[374] Award, ¶¶ 45, 46.

372. The Committee notes that Dr. Deep explicitly quoted the Tribunal's finding regarding the absence of the term "*Equilibrium Principle*" from the text of the Water Decree in his Final Report and then stated that "[t]*hus the regulator had significant discretion in implementing the mechanism that would establish the financial equilibrium of the Concession Contract in accordance with the principles of the Water Decree*."[375] This statement demonstrates that Dr. Deep did not consider there to be a contradiction between stating on the one hand that the term "*Equilibrium Principle*" was absent from the Water Decree, and finding on the other hand that the Water Decree nevertheless aimed to achieve financial equilibrium of the Concession. To the contrary, Dr. Deep opined that "[t]*he determination of financial equilibrium would reflect the principles outlined in Article 44(d) of the Water Decree.*"[376]

373. Dr. Deep further considered that the so-called "*EFNQ mechanism*," which ETOSS (*Ente Tripartito de Obras y Servicios Sanitarios*, the regulatory authority in Argentina) used in 1998 to determine the then-required tariff adjustment and which was described in Resolution 602/99 of July 1999, "*was intended to serve as a guide toward establishing the long-run financial equilibrium of the Concession*."[377] In response to Respondent's objection to his reliance on Resolution 602/99, which was undisputedly never adopted, Dr. Deep acknowledged that it was not for him to determine its applicability in the *but-for* scenario but noted that "*Resolution 602/99 is the only document at our disposal that describes an example of the implementation of the equilibrium principle. We* [have relied on this document] *because we feel that this is better than devising a hypothetical scenario from scratch.*"[378]

374. In its Award, the Tribunal noted, *inter alia*, that neither Party had provided it with "*another equally detailed and convincing scenario of how a reasonable regulator intent on according fair and equitable treatment to AASA would have behaved*." In the absence of any competing scenario, it further considered that "*it need only find that Dr. Deep's scenarios* [sic] *is a reasonable hypothesis of what a reasonable regulator, intent on fair and equitable treatment of AASA, would do in a comparable situation*." It then explained why it considered Dr. Deep's hypothetical *but-for* scenario, including the application of Resolution 602/99, indeed reasonable. In particular, it stated that "*while Resolution 602/99 may or may not be legally binding, it was nonetheless, as the product of an agency of the Argentine*

[375] **Exhibit A/C-34**, ¶ 185.
[376] **Exhibit A/C-34**, ¶ 74.
[377] **Exhibit A/C-34**, ¶¶ 185, 121. *See* also ¶¶ 67-68 and ¶¶ 176-177.
[378] **Exhibit A/C-34**, ¶ 453.

Government, strong evidence of how a reasonable regulator would act in the situation that AASA and the regulators faced at the time of the Argentine crisis." In addition, the Tribunal considered it "*significant that ETOSS applied Resolution 602/99 in its dealings with AASA before 2002*" and therefore found that it was justified for Dr. Deep to use this resolution to build his *but-for* scenario.[379]

375. In light of the above, the Committee finds that there is no contradiction between the Tribunal's findings regarding the applicable legal framework in its Decision on Liability on the one hand, and regarding the reasonableness of the *but-for* scenario modeled by Dr. Deep in its Award on the other. In particular, the Committee cannot agree with Respondent's argument that the absence of the term "*Equilibrium Principle*" from the Water Decree excluded a finding that this Decree nevertheless aimed to achieve financial equilibrium for the Concession. To the contrary, the Tribunal made it reasonably clear that there was no strict equilibrium in terms of a guarantee implemented by an automatic adjustment of the tariffs in fixed intervals and/or according to fixed indices but that the regulator rather possessed a certain degree of discretion in how it sought to achieve the aims of the legal framework – one of which was to ensure that private investors enjoyed a reasonable profit.

376. The Committee further considers that the application of Resolution 602/99 in the *but-for* scenario does not amount to an excess of powers nor to a failure to state reasons. The Tribunal explicitly addressed Respondent's objection that it was not part of the applicable framework and gave convincing reasons why it nevertheless considered it to be a reasonable indication of how a reasonable regulator would have behaved in the *but-for* scenario built by Dr. Deep. Any disagreement with these reasons cannot give rise to a ground for annulment under Article 52 of the ICSID Convention.

(b) Liquidity Relief in the Form of a One-Year Interest-Free Loan

377. Respondent further claims that the *but-for* scenario also included measures that were not even provided for in Resolution 602/99 and, specifically, that there is no basis for the one-year interest-free loan that Dr. Deep assumed Argentina would have granted to AASA in 2002. While Claimants do not dispute that this concrete measure cannot be found in the applicable legal framework nor in Resolution 602/99, they point out that this assumption has to be viewed together with Dr. Deep's further assumption, *i.e.*, an additional capital infusion by the investors, described by the Tribunal as "*mutual sacrifice*."

[379] Award, ¶¶ 53-55.

378. The Committee notes that, initially, both Parties objected to Dr. Deep's assumptions before the Tribunal. While Claimants sought to assume an "*outright subsidy or other type of permanent capital infusion by Argentina*" and objected to an additional capital infusion to be made by the investors, Respondent protested against the assumption that it would have provided an interest-free loan while "*facing the worst crisis in the country's history.*"[380]

379. The Tribunal noted these objections and thoroughly addressed them in its Award. It acknowledged that these concrete measures were imposed neither by the applicable framework nor by Resolution 602/99, but noted that the Parties would have had to work together to solve the liquidity crisis faced by AASA in 2002. It further considered that both Parties would have had "*strong reasons*" to adopt the measures suggested by Dr. Deep or similar measures in order to ensure AASA's continued existence.[381] In the Tribunal's view, these measures were in line with the three principles it identified "*that would guide a reasonable regulator intent on according fair and equitable treatment to AASA*": (i) the short-term and long-term continuation of the important public service provided by AASA; (ii) the preservation of the entity providing such service; and (iii) the principles of cooperation and of shared sacrifice as embodied in the Concession Contract.[382]

380. In particular with regard to the third principle, the Tribunal noted in its Decision on Liability that Article 5.1 of the Concession Contract required the parties to "*use all means at their disposal to establish and maintain a fluid relationship that facilitates the performance of this Concession Contract*" and found that contrary to this obligation, "*the Argentine authorities demonstrated extreme rigidity in their dealings with AASA and the Claimants*."[383] In its Award, the Tribunal then found that the *but-for* scenario modeled by Dr. Deep was in accordance with these principles and in particular "*reflect*[ed] *a partnership relationship between AASA and the Argentine government in that the ultimate solution requires mutual sacrifice by both sides.*"[384]

381. Consequently, it is apparent to the Committee that the Tribunal adopted the *but-for* scenario modeled by Dr. Deep, including the one-year interest-free loan to AASA, in order to achieve a balanced solution and a middle-ground position between the positions of the Parties. While this may not have been the only possible solution the Tribunal could have adopted, it does

[380] *Cf.* Award, ¶¶ 49-50.
[381] Award, ¶¶ 51-53.
[382] Award, ¶ 54.
[383] Decision on Liability, ¶ 233.
[384] Award, ¶ 55. *See* also ¶¶ 42-44.

constitute a reasonable and balanced hypothesis based on the submissions and evidence presented by the Parties as well as the considerations of Dr. Deep, applying the concept of "*shared sacrifice*."[385] The Tribunal further gave detailed reasons for its decision, consistent with its earlier findings on the necessary cooperation between the Parties, in accordance with the Concession Contract and the general principle of good faith that would, in the *but-for* scenario, "*in all probability*," have led to a set of agreements ensuring the viability of the Concession.[386]

382. In addition, the Committee does not agree with Respondent that a one-year interest-free loan contradicted the Tribunal's findings in its Decision on Liability that, under the applicable legal framework the business risk of the Concession had to be assumed by the Concessionaire, because this assumption would allegedly have shifted the financing risk of the Concession to the State. In this regard, the Committee notes that Dr. Deep set out the features of immediate liquidity relief as envisaged in Resolution 602/99, which include the following: "[T]*he intention of liquidity relief is the provision of short-term relief to help the Concessionaire surmount the adverse short-term impact of the change in the Convertibility law. The long-term impact of the change in parity is a financing risk that would remain with the Concessionaire*."[387] Dr. Deep then explained why he considered a one-year interest-free loan to be in line with this feature. Specifically with regard to the financing risk; he stated: "*Financing risk is a business risk that should remain with the Concessionaire in the longer term. Therefore we have postulated that the amount of liquidity relief provided to AASA in 2002 in the but-for scenario would be paid back by AASA in 2003*."[388]

383. In its Award, the Tribunal found that Dr. Deep's proposal of a one-year interest-free loan appeared to be "*a reasonable and constructive device within the spirit and intent to the Resolution 602/99 to enable AASA to avoid defaulting on its debt obligations at least cost to Argentina.*" It then gave detailed reasons for its finding, including the ones summarized at paragraph 379 above, and concluded that "*the fulfillment by Argentina of its obligation of fair and equitable treatment would* in all probability *have fostered cooperation between the parties to achieve a solution of the kind suggested by Dr. Deep's Model*."[389]

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[385] *Cf.* Award, ¶ 54.
[386] Award, ¶ 31.
[387] **Exhibit A/C-34**, ¶ 79 lit. b.
[388] **Exhibit A/C-34**, ¶ 82.
[389] Award, ¶¶ 47-53.

384. The Committee again finds that, while the concrete form of immediate liquidity relief assumed by Dr. Deep may not have been the only possible solution the Tribunal could have adopted in its *but-for* scenario, it does appear to be a reasonable and balanced scenario for all the reasons given by the Tribunal in its Award. Consequently, the Committee finds that by adopting these concrete assumptions, the Tribunal did not manifestly exceed its powers nor make contradictory findings.

(c) Total Repayment of Sponsored Debt

385. Respondent further alleges that the Tribunal exceeded its powers and contradicted its earlier findings when it decided in its Award that AASA's guaranteed debt: (i) was a protected investment under the BITs; and (ii) would have been repaid (entirely) in the *but-for* scenario.

(i) Sponsored Debt as Protected Investment under the BITs

386. First, there is a dispute as to whether the Tribunal would have had to (expressly) determine in its Decision on Jurisdiction that the sponsored debt was an investment protected by the BIT, which it did not, or whether it was sufficient to make such a finding in its Award.[390] Claimants point out that in the underlying proceedings Respondent never objected to the Tribunal's jurisdiction in this regard, even though Claimants argued as early as in their Counter-Memorial on Jurisdiction that "*shares and other forms of participation in the Concession*" formed part of their investments under the BITs. They specifically argued that, *inter alia*, their "*other forms of participation in AASA, i.e. as lenders, guarantors in support of AASA's financial obligations (***Debt Supporter***), and Suez's participation also as operator, are all* 'investments' *under the terms of the French Treaty"* or in the case of AGBAR, "'investments' *under the terms of the Spanish Treaty.*"[391] Claimants further note that they consistently sought damages in respect of this investment and that Respondent never argued that the Tribunal did not have power to award such damages but rather that Argentina did not owe anything because these losses resulted from the alleged riskiness of Claimants' investment.

387. Respondent does not dispute that it never raised an objection to the Tribunal's jurisdiction on Claimants' claims for damages regarding AASA's secured debt. However, it claims that if the Tribunal considered that the sponsored debt formed part of Claimants' investment, it would have had to take an affirmative decision on its own motion on this aspect of its

[390] *Cf.* Award, ¶ 67.
[391] **Exhibit A/C-33**, ¶¶ 6(b), 8(b)(ii) and (iii) (emphasis in original).

jurisdiction in order to enable the Parties to align their arguments in the subsequent phases of the proceedings with the scope of Claimants' investment as found by the Tribunal.

388. The Committee notes that, while it generally agrees with the statement of the tribunal in *Wintershall v. Argentina* quoting the ICJ that a court or tribunal "*must always examine* proprio motu *the question of its own jurisdiction,*"[392] there is no requirement in the ICSID Convention that such decision be taken in a preliminary decision on jurisdiction. It is clear from both the structure and the contents of the Tribunal's Decision on Jurisdiction that its findings therein were limited to the six objections to jurisdiction that Respondent had raised before the Tribunal. It did not, however, state that it thereby explicitly confine the scope of its jurisdiction to the items discussed in this Decision.

389. In addition, Rule 41(1) of the ICSID Arbitration Rules provides that an objection to jurisdiction shall be made "*as early as possible*" but in any event "*no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder*." As pointed out by Claimants, they argued already in their Counter-Memorial on Jurisdiction that AASA's sponsored debt formed part of their investment. Therefore, it would have been for Respondent to raise any objection it may have had on this point in its subsequent submission. As it undisputedly failed to do so, Respondent cannot now be heard with its belated argument that the Tribunal did not have power to award damages for AASA's sponsored debt.

390. In any event, Respondent does not dispute that the merits of Claimants' claim for losses incurred in connection with the sponsored debt were extensively argued before the Tribunal, again without Respondent raising the argument that the Tribunal did not have power to do so. Thus, Respondent's suggestion that the lack of an express affirmation in the Decision on Jurisdiction prevented it from making submissions on this matter has no merit.

(ii) (Full) Repayment of Sponsored Debt

391. There is a further dispute between the Parties as to whether the Tribunal's finding in its Award that Respondent had to pay damages for the costs Claimants incurred to extinguish their debt guarantee obligations contradicted its earlier findings that: (i) pursuant to the

[392] **AL A RA 95**, ¶¶ 67-68 (emphasis in original).

Concession Contract, the financial risk was assumed by the Concessionaire;[393] and (ii) loans payable in US dollars presented a financial risk to AASA.[394]

392. The Committee notes that Respondent advanced the argument that the risk of dollar-denominated loans was for AASA and Claimants to bear before the Tribunal, which dealt with this argument in its Award. First, the Tribunal found that the alleged high riskiness of financing AASA's operations with US-dollar denominated loans despite the fact that its revenues were entirely in Argentine pesos did not exclude sponsored debt from the protection of the BITs. While acknowledging that it is "*totally appropriate and is standard practice in finance and in law*" to take into account risk in valuing the loss of an investment, the Tribunal emphasized:

> "[W]*ith respect to the payments on guaranteed debts, the Tribunal is not seeking to value an investment in AASA made by the Claimants in the past but rather it is seeking to actualize to the present time the amount of known, liquidated, actual losses sustained by each Claimant in the past*."

The Tribunal thus concluded that, as Claimants would not have been required to make any guarantee payments if Respondent had accorded fair and equitable treatment to Claimants' investments, their losses were "*a direct consequence of Argentina's treaty violations*."[395]

393. In light of this explanation, the Committee finds that there is no contradiction between the Tribunal's finding on the allocation of financial risk to AASA and its investors on the one hand, and its decision to award damages for the costs incurred by Claimants in connection with sponsored debt on the other. By doing the latter, the Tribunal did not shift the financial risk to the Argentine State, as alleged by Respondent, but it rather compensated Claimants for losses they would not have incurred if Respondent had observed its Treaty obligations. In other words, Respondent's Treaty violations do not represent a materialization of any financial risk to be borne by the Concessionaire but rather a breach of international law whose consequences were to be compensated by the award of damages rendered by the Tribunal.

394. The Committee is aware of the additional argument raised by Respondent that the assumption of a total repayment of the sponsored debt in the *but-for* scenario ignored the Parties' submissions and Dr. Deep's projections on whether a potential tariff review would have made such repayment possible. As the assumption that AASA would have been able to

[393] Decision on Liability, ¶¶ 106, 113.
[394] Award, ¶ 60.
[395] Award, ¶¶ 66-67.

fully repay its sponsored debt is based on the further assumption discussed above that it would have been granted liquidity relief in the form of a one-year interest-free loan by Respondent, the Committee refers to its conclusion above that this concrete form of liquidity relief as assumed by the Tribunal appears to be a reasonable and balanced scenario under the circumstances. The same must then apply to the consequential assumption that this relief would have enabled AASA to fully repay its sponsored debt and, thus, that Claimants would not have incurred any costs in having to make repayments in their capacity as guarantors of such debt in the *but-for* scenario.

395. Finally, the Committee notes Respondent's argument that it was contradictory for the Tribunal to award compensation to Claimants for the losses they incurred but not to afford the same treatment to Argentina in relation to payments it made, allegedly in an identical capacity, as a guarantor of a debt incurred by AASA, to the IDB. The Committee notes, however, that Respondent raised the argument that the payments it made should be deducted from Claimants' damages before the Tribunal, which dealt with this argument in its Award. Specifically, the Tribunal noted that the loan in question had been made to Argentina in 1989 and while AASA, as part of the privatization process of the Buenos Aires water and sewage systems, had agreed to reimburse such payments to Argentina, the State remained liable on that loan obligation to the IDB. As Respondent had not advanced any principle of international law supporting its contention, the Tribunal "*reject*[ed] *Argentina's claim that the amounts that it paid on a pre-existing IDB loan for which it was primarily liable should be deducted from any compensation that the Tribunal might award to the Claimants*." It further added that if Respondent had observed its Treaty obligations, AASA would also have been able to service the IDB loan repayments; thus, "*to reduce the amount of the compensation awarded to the Claimants for their losses on sponsored debt would amount to denying the Claimants full compensation, as required by international law, and amount to allowing Argentina to benefit from the violation of its treaty obligations*."[396]

396. In the Committee's view, it is apparent that, contrary to what Respondent suggests, Argentina did not make the payments to the IDB in a capacity identical to that of the shareholders in AASA on the sponsored debt because, in that case, the State was rather the primary debtor that remained liable to the IDB even after the privatization process. Therefore, the Committee sees no contradiction in making a distinction between the two situations. In addition, the Tribunal held that AASA's non-ability to service the reimbursements to Respondent was a direct consequence of Respondent's Treaty

[396] Award, ¶¶ 69-70.

obligations, which was a further reason for not awarding Respondent any compensation for the payments it had incurred without being reimbursed by AASA.

397. Consequently, the Committee finds that the Tribunal did not manifestly exceed its powers and did not fail to state reasons for its decision to award damages for the losses Claimants incurred by having to repay AASA's sponsored debt.

(d) Conclusion on the Modeling of the But-For Scenario

398. In conclusion, the Committee finds that the Tribunal did not formulate the *but-for* scenario in an obvious contradiction to the applicable legal framework or Resolution 602/99 and therefore did not manifestly exceed its powers nor did it fail to state reasons for its decision.

ii. Interest Rate Applied by the Tribunal

399. Respondent claims that the Tribunal acted *ultra petita* and thus exceeded its powers because it applied interest at a rate that was, allegedly, higher than the interest rate agreed by the Parties' experts during the proceedings.[397]

400. Claimants do not dispute that the Parties agreed "*at an earlier stage of the proceedings*" on the use of the US Treasury Bill rate but note that they later accepted Dr. Deep's proposal to use the Eurodollar rate that was ultimately applied by the Tribunal.[398] Specifically, Claimants point to their Comments on the Preliminary Report of the Financial Expert to the Tribunal where they stated that "[a]*lthough Dr. Deep's interest rates are, on average, lower, the Claimants do not object to their application.*"[399] Claimants further emphasize that Respondent also commented on the Eurodollar rate in its Comments on the Final Report of Dr. Deep and requested that the Tribunal redirect him to use the US Treasury Bill rate.[400] In addition, Claimants argue that the determination of the interest rate was in any event within the scope of the Tribunal's "*large margin of discretion*" on this point.[401]

401. In any event, Claimants dispute that the Eurodollar rate applied by the Tribunal results, on average, in a higher interest amount than the US Treasury Bill rate requested by Respondent. During the hearing, Respondent presented a calculation pursuant to which the interest rate proposed by Dr. Deep yielded an average of 2.47% between 2006 and 2012, while the

[397] *Cf.* Transcript (Day 2), p. 280 lines 17-22.
[398] Claimants' Rejoinder, ¶ 72.
[399] **Exhibit A/C-32**, ¶ 8.
[400] **Exhibit A/C-31**, ¶ 83.
[401] *Cf.* **A/CLA-30**, ¶ 96.

interest rate proposed by the Parties' experts yielded an average of 1.77% during the same time period.[402] Claimants claimed, however, that Respondent's calculation is "*inaccurate, and it misrepresents what Dr. Deep actually did, and it misrepresents what the U.S. T-bill rate actually is*."[403] They further presented a calculation pursuant to which Claimants' losses as of November 2014 were in fact lower when updated using the Eurodollar rate (USD 404.5 million) than when updated using the US Treasury Bill rate (USD 419.1 million).[404]

402. In light of the above, the Committee cannot agree with Respondent's argument that the Tribunal acted *ultra petita*. First, the Committee considers that Respondent has not sufficiently established that the amount of interest awarded by the Tribunal was indeed higher than that sought by Claimants. Second, the Committee considers that in light of Claimants' acceptance of the Eurodollar rate in their comments on Dr. Deep's Preliminary Report, they included a request for interest calculated by using the Eurodollar rate in their request for relief, which in any event excluded an act of *ultra petita* on the part of the Tribunal in this regard.

403. Therefore, the Committee does not have to express an opinion on the more general question whether a tribunal could be considered to have acted *ultra petita*, and thus have manifestly exceeded its powers, by awarding interest at a rate that ultimately yielded an amount higher than that sought by the claimant.

c. Management Contract

404. Finally, Respondent alleges that the Tribunal exceeded its powers and failed to state reasons for its decision to award to Suez damages for unpaid management fees from 2002 up to the regular end of the concession period in 2023. Respondent argues that: (i) the Tribunal failed to determine in its Decision on Jurisdiction that such fees were a protected investment under the BITs; (ii) the Tribunal awarded damages for services that were never rendered, given that Respondent terminated the Concession Contract in 2006; and (iii) the Tribunal failed to assess the legal nature of Suez's claim, even though a classification would have been essential for the calculation of such claim.

[402] Argentina's Rebuttal Statement dated 9 November 2016, slide 68.
[403] Transcript (Day 2), p. 348 line 22 - p. 349 line 2.
[404] Claimants' Responses to the Committee's Questions, slide 33.

i. Management Contract as Protected Investment under the BIT

405. As to Respondent's first argument, it is undisputed that the Tribunal did not determine in its Decision on Jurisdiction that the Management Contract or Suez's services rendered under this Contract formed part of Suez's investment protected by the BIT. The Committee further notes that Respondent raised the argument that the Management Contract was not an investment protected by the BIT and that the damages phase was in any event not the appropriate stage to make such determination already before the Tribunal, which dealt with this argument in its Award. It held that Suez's claim for unpaid management fees was justified because "*the management Contract … was an integral part of Suez's investment in AASA as covered by the BIT and the ICSID Convention.*" The Tribunal noted that the applicable legal framework required that at least one substantial shareholder be designated as the Concession's Operator and, thus, "[a] *management contract was a* sine qua non *for any group seeking to invest in AASA.*"[405] Based on this finding, the Tribunal held:

> "*The Management Contract being an integral part of the Claimants' investment, there is no need to review whether the Management Contract in and of itself constitutes an investment for the purposes of the ICSID Convention and the France-Argentina BIT. For the sake of completeness, the Tribunal nevertheless notes that the Management Contract falls within the definitions given to that word by the applicable BIT in this case and by tribunals interpreting the ICSID Convention …*"[406]

406. In light of this explanation given by the Tribunal, the Committee finds that the Tribunal did not exceed its powers by finding in the Award that the Management Contract formed part of Suez's investment. While it appears that Claimants did not present the Management Contract as part of Suez's investment in the jurisdictional phase, Suez did raise its claim for unpaid fees in Claimants' first Memorial and Respondent apparently did not raise a jurisdictional objection in this regard. Consequently, the Tribunal did not deal with this issue in its Decision on Jurisdiction nor in its Decision on Liability but only later in the damages phase, when the Parties also debated the merits of Suez's claim.

ii. Damages for Services That Were Never Rendered

407. As to Respondent's second argument that the Tribunal awarded damages for services that were never rendered, *i.e.*, fees that Suez would have received after 2006, the Committee notes that this argument again relates to the construction of the *but-for* scenario and in

[405] Award, ¶ 75.
[406] Award, ¶ 76.

particular the Tribunal's decision to exclude the termination of the Concession Contract from both valuation scenarios. In this regard, the Committee refers to its considerations above as to why the Tribunal did not commit an annullable error in constructing the valuation scenarios in this manner.

408. For the same reasons and also taking into account that the legal framework of the Concession required that the services be provided by a substantial shareholder of the Concessionaire, it was reasonable to assume from a perspective of 2002 that Suez would have continued to render its services to AASA and to be remunerated by AASA for these services up to the regular end of the concession period in 2023. Consequently, it was consistent for the Tribunal to award damages for Suez's lost profits over the entire remaining concession period.

iii. Failure to Assess the Legal Nature of Suez's Claim

409. With regard to Respondent's third argument that the Tribunal failed to determine the legal nature of Suez's claim even though this would have been essential for its calculation, the Committee notes that Dr. Deep in his Final Report indeed posed the question whether the management fees should be considered a return on investment or a payment for services under a management contract.[407] He further noted that "[i]*f Management Fees are indeed viewed as a component of the expected return on the investors' equity investment, that would distort the benchmarks related to risk and return (such as leverage, beta, cost of debt) that are used to arrive at an estimate of a fair rate of return for AASA.*"[408]

410. Dr. Deep then stated that if the management fees were considered compensation for services provided by Suez, they "*ought to be considered similar to fees payable to any other service provider*" and "*could represent (perhaps performance-linked) compensation for the intangible assets that Suez's expertise is bringing to AASA.*" Dr. Deep concluded:

> "[U]*nder this perspective, we find the claim for lost Management Fees to be distinct from those related to the equity and debt sponsorship stakes of the Claimants in AASA. We find the claim to be more akin to the claims of any other service providers for lost revenues from the provision of services that it expected to provide in the future*."[409]

411. In its Award, the Tribunal acknowledged that "*Dr. Deep was unsure of the legal status of the claim for management fees and therefore computed them on a contingent basis in his*

[407] **Exhibit A/C-34**, ¶ 427 lit. b and lit. c.
[408] **Exhibit A/C-34**, ¶ 429.
[409] **Exhibit A/C-34**, ¶ 430.

Final Report."[410] The Tribunal then held that "*the management Contract was not a separate transaction … but was an integral part of Suez's investment in AASA as covered by the BIT and the ICSID Convention*" given that the legal framework required that a substantial investor serve as Technical Operator of the Concession. As noted by the Tribunal, this requirement was intended to ensure Argentina that the Concessionaire "*would not only invest the necessary financial resources, but would also provide* [the] *essential, intangible assets*" associated with the management of the water and sewage systems.[411] Having noted this particular nature of the Management Contract, the Tribunal further found:

> "… [G]*iven the nature of* [the] *responsibilities* [of the Operator] *and the importance of the Concession and to the future of the water and sewage systems of Buenos Arise of the transfer of modern management and technology, things that the system clearly lacked in the past, it was natural and appropriate that Suez be compensated for what it was to provide and that such compensation be additional to the profits it would make as an AASA shareholder. The Tribunal therefore concludes that the loss on management fees is an appropriate item to be considered in awarding compensation to Suez on account of Argentina's failure to accord it the promised treatment under the France-Argentina BIT. …*"[412]

The Tribunal then considered the quantum of Suez's loss, in particular in terms of priority in AASA's income stream, applicability of the contractual penalty interest rate, and timing of the conversion of the payments in Argentine pesos into US dollars. Except for one assumption in the context of actualizing Suez's claim, the Tribunal followed the calculation presented by Dr. Deep in his Final Report.[413]

412. In the Committee's view, the Tribunal's finding that the Management Contract constituted "*an integral part of Suez's investment*" does not necessarily indicate that the Tribunal considered the fees a return on investment, as claimed by Respondent. More specifically, the Committee considers that this finding did not relate to the classification of the management fees as questioned by Dr. Deep but rather to Respondent's jurisdictional argument discussed above, *i.e.*, that the Management Contract was not a protected investment under the BIT and that the Tribunal would have had to make such determination at an earlier stage.

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[410] Award, ¶ 74.
[411] Award, ¶¶ 75, 71.
[412] Award, ¶ 78.
[413] Award, ¶¶ 79-83.

413. It is also important to recall that the determination of the legal nature of the fees was not an end in itself and that this issue gained relevance only by virtue of Dr. Deep's statement that a classification as a return on investment would "*compromise the logic of using benchmarks*" to arrive at a fair rate of return of AASA and thus the calculation he had provided on Claimants' equity stakes.[414] Consequently, the Committee does not consider it decisive that the Tribunal did not explicitly answer the questions raised by Dr. Deep in his Final Report and, in particular, failed to make an express determination on the fees' legal nature. The Tribunal explicitly recognized that Dr. Deep had been "*unsure of the legal status*" of Suez's claim and had therefore computed it "*on a contingent basis*."[415] As the Tribunal then expressly adopted Dr. Deep's calculation made on this basis (except for one assumption in the context of actualizing the claim with which it disagreed), it can reasonably be inferred that the Tribunal (implicitly) also followed Dr. Deep's "*contingent*" classification as a payment for services.

414. Consequently, the Committee finds that the Tribunal did not manifestly exceed its powers nor did it fail to state reasons for its decision to award to Suez separate damages for unpaid management fees as of 2002 up to the end of the concession period in 2023.

4. Conclusion

415. In conclusion, the Committee finds that Respondent did not establish that the Tribunal committed an annullable error in its assessment of damages, more specifically, that it manifestly exceeded its powers or failed to state reasons for its decision. Consequently, Respondent's fourth annulment ground is dismissed.

E. Overall Conclusion

416. The Committee has found that Respondent has failed to establish either of the four annulment grounds it advanced in its Application for Annulment. Consequently, Respondent's request for annulment of the Award as well as the Decision on Jurisdiction and the Decision on Liability, which are an integral part thereof, is denied.

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[414] *Cf.* **Exhibit A/C-34**, ¶ 429.
[415] Award, ¶ 74.

VII. COST DECISION

A. Argentina's Statement of Costs

417. Pursuant to its Statement of Costs dated 2 December 2016, Respondent has incurred the following costs in connection with this annulment proceeding:

DESCRIPTION	DOLLARS (USD)
ICSID Costs	525,000.00
Treasury Attorney-General's Office personnel costs	552,322.51
Airline tickets, hotel and travel expenses	60,661.00
Experts	12,015.34
Translations	6,626.10
Courier	2,742.00
Stationery	2,100.00
Communication expenses	150.00
TOTAL	**USD 1,161,616.95**

B. Claimants' Statement of Costs

418. Pursuant to Annex A of their Statement of Costs dated 3 December 2016, Claimants have incurred the following total costs in connection with this annulment proceeding:

Legal Fees and Disbursements	**Totals**
Freshfields Bruckhaus Deringer	USD 1,769,602.96
Claimants In-House	USD 816.00 EUR 2,614.84
Total	**USD 1,770,418.96** **EUR 2,614.84**

419. Pursuant to Annex B of Claimants' Statement of Costs, the total amount of USD 1,769,602.96 representing the fees and disbursements of Freshfields Bruckhaus Deringer LLP includes the following disbursements:

Expenses	**Totals**
Travel	USD 12,116.34
Legal Research	USD 413.83
Courier	USD 6,730.16
Translations	USD 16,582.99
Printing	USD 18,776.56
Total	**USD 54,619.88**

C. Committee's Decision

420. Pursuant to Article 52(4) of the ICSID Convention, Chapter VI of the Convention, including its Article 61(2), shall apply *mutatis mutandis* to the proceedings before this Committee. Article 61(2) of the ICSID Convention provides:

> "*In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. …*"

421. Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations further provides that in annulment proceedings:

> "*… the applicant shall be solely responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, and without prejudice to the right of the Committee in accordance with Article 52(4) of the Convention to decide how and by whom expenses incurred in connection with the annulment proceeding shall be paid.*"

422. In accordance with these provisions, Respondent, as the Party seeking annulment of the Award, has up to date been responsible for making all the advance payments to cover the costs of the Committee and the Centre. However, the Committee has discretion to decide on

the final allocation of these costs of the proceeding, as well as of the costs incurred by the Parties in respect of their legal representation in this annulment proceeding.

423. Claimants request that the Committee order Respondent to bear the costs of the proceeding as well as Claimants' legal costs and expenses in full based on the following arguments: (i) costs should presumptively follow the event in annulment proceedings – a presumption that has frequently been applied by annulment committees in the past; and (ii) Respondent should be discouraged from filing future "*abusive*" requests for annulment.[416]

424. Respondent, on the other hand, requests that each Party should bear the costs incurred by them in relation to the proceeding and that the costs of the proceeding, including the fees payable to the members of the Committee, should be borne by both sides equally. Respondent presents the following arguments: (i) the present case "*involves issues of undeniable complexity*," and in such cases, ICSID tribunals and committees that have heard disputes involving Argentina "*have generally concluded*" as requested by Respondent; and (ii) in filing its Application for Annulment, Respondent has exercised its legitimate right granted by the ICSID Convention, which is "*far from constituting an act carried out in bad faith or an abusive conduct*."[417]

425. In respect of the allocation of costs, the Committee notes that the ICSID Background Paper on Annulment records the following development in recent ICSID jurisprudence:

> "… *While* ad hoc *Committees in the past usually divided the Costs of Proceeding equally between the parties and ruled that each party bear its own legal fees and expenses, in recent years, a majority of Committees have decided that the Applicant should bear all or a majority of the Costs of Proceeding when the application for annulment was unsuccessful. Some* ad hoc *Committees have also ruled that the losing party should bear the legal fees and expenses of the successful party, in most instances the defending party*."[418]

426. The Committee further notes that both Parties refer in their submissions to the annulment decision in *CDC Group v. Seychelles*, where the committee held that it was appropriate to order the respondent as the unsuccessful applicant to bear the costs of the proceeding as well as the legal fees and expenses incurred by the claimant in connection with the annulment proceeding based on the following reasons:

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[416] Claimants' Counter-Memorial, ¶¶ 178-184; Claimants' Rejoinder, ¶¶130-134.
[417] Argentina's Reply, ¶¶ 221-226.
[418] **A/CLA-91**, ¶ 65.

> "…[W]*e must be mindful of our determination, founded upon careful consideration of all arguments advanced by the parties in this proceeding, that the Republic's case before this Committee was fundamentally lacking in merit. While we refrain from going so far as to say that it was frivolous, we can state unequivocally that, taking into account the presumption of finality in ICSID arbitration and the restrictive grounds of challenge available in annulment process, the Republic's case was, to any reasonable and impartial observer, most unlikely to succeed*."[419]

427. The *CDC* committee's finding and the corresponding threshold for a cost order, *i.e.*, a case that is "*fundamentally lacking in merit*" and is, "*to any reasonable and impartial observer, most unlikely to succeed,*" was also referred to, *e.g.*, by the committees in *EDF v. Argentina* and *Daimler v. Argentina*.[420] At the same time, however, it has to be noted that both the *EDF* committee and the *Daimler* committee concluded, respectively, that, while this threshold was not met in the case they had to decide and each side thus was to bear the legal costs it incurred, Argentina was to bear the entire costs of the proceeding it had advanced because each of its annulment grounds was rejected.[421]

428. The same conclusion, distinguishing between costs of the proceeding and legal costs incurred by the parties, was reached by the committees in *Impregilo v. Argentina* and *El Paso v. Argentina* based on the consideration that, on the one hand, Argentina's application was rejected in its entirety but, on the other hand, its application could not be considered "*frivolous*" and in *El Paso*, the committee even considered that it was "*entirely legitimate for Argentina to raise some of the issues in which it based its request for annulment of the Award*."[422]

429. The Committee is aware that Respondent referred to four annulment decisions involving Argentina that ordered each side to bear its own legal costs and half of the costs of the proceeding, as requested by Respondent. In two of those cases, however, *i.e.*, *Enron* and *CMS Gas*, the committees decided to partially annul the award, respectively.[423] In a third case, *i.e.*, *Continental Casualty*, the committee had to decide on applications for annulment from both sides and rejected both of them.[424] Finally, the committee in *Vivendi II* indeed

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[419] **AL A RA 53**, ¶ 89.
[420] **AL A RA 70 / A/CLA-61**, ¶¶ 389-390; **A/CLA-43**, ¶ 309.
[421] **AL A RA 70 / A/CLA-61**, ¶ 391; **A/CLA-43**, ¶¶ 306-307.
[422] **A/CLA-42 / AL A RA 34**, ¶ 221; **AL A RA 35**, ¶ 290.
[423] **AL A RA 33**; **AL A RA 31**.
[424] **AL A RA 82**, ¶ 285.

rejected Argentina's application and decided as requested by Respondent, albeit without giving any reasons for its decision on costs.[425]

430. Having reviewed additional cases involving Argentina, the Committee notes that two other committees that heard annulment applications filed by Argentina and fully rejected them ordered Argentina to bear the entire costs of the proceeding, with each side bearing their own legal costs. Specifically, this was the case in *Total* and *Azurix*.[426] In addition, as noted in the ICSID Background Paper of Annulment, this approach has been applied more frequently in recent ICSID jurisprudence, including several cases that were discussed in this annulment proceeding, such as: *Tulip v. Turkey*, *Caratube v. Kazakhstan*, *SGS v. Paraguay*, *Libananco v. Turkey* and *Duke Energy v. Peru*.[427] At the same time, there are also cases in which the committees decided as requested by Respondent in the present case, in particular: *Occidental v. Ecuador*, *Rumeli v. Karakhstan* and *Soufraki v. United Arab Emirates*.[428]

431. Taking into account the not yet settled ICSID jurisprudence on this issue, the Committee will now exercise its discretion under Article 61(2) of the ICSID Convention to decide on an appropriate allocation of costs in the present proceedings. In this regard, the Committee cannot agree with Claimants that Respondent's Application for Annulment "*lacks even the slightest merits*" and has to be considered "*tactical*" and "*abusive*."[429] In the Committee's view, such a conclusion cannot be drawn simply because Argentina has also filed annulment applications in other ICSID cases in which it has been involved. Considering that the ICSID Convention explicitly provides for the right to seek annulment and also taking into account that some of Argentina's applications have been (partially) successful, the Committee is not convinced that there is any illegitimacy in Respondent's motives to seek annulment in the present case and, specifically, that Respondent has advanced its Application for Annulment in bad faith or based on tactical, abusive considerations.

432. In particular as regards the annulment ground advanced by Respondent in connection with the appointment of Prof. Kaufmann Kohler to the UBS Board of Directors, the Committee agrees with the cost consideration of the *EDF* committee, which had to decide on the same ground and based on very similar arguments, that Argentina's application was "*advanced in good faith and … based on arguments that were generally plausible*." Likewise, the

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[425] **AL A RA 67**, ¶¶ 268-269.
[426] **A/CLA-68**, ¶ 324; **AL A RA 84 / A/CLA-69**, ¶¶ 379-380.
[427] **A/CLA-90**, ¶¶ 230-231; **AL A RA 30**, ¶ 307; **A/CLA-46**, ¶ 153; **A/CLA-95**, ¶¶ 225-226; **A/CLA-31**, ¶¶ 265, 268.
[428] **AL A RA 90**, ¶ 589; **A/CLA-32**, ¶ 184; **AL A RA 61**, ¶ 138.
[429] Claimants' Counter-Memorial, ¶¶ 178, 182; Claimants' Rejoinder, ¶ 130.

Committee considers that the following consideration of the *EDF* committee is also justified in the present case: "[T]*he 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*."[430] The Committee also considers it noteworthy that the committee in *Vivendi II v. Argentina* expressed very specific concerns regarding the conduct of Prof. Kaufmann-Kohler that formed the basis of an annulment ground on which it had to decide.

433. As indicated above, this Committee shares some of the concerns voiced by the *Vivendi II* committee and therefore concludes that Argentina's Application for Annulment cannot be considered to be "*fundamentally lacking in merit*" or, "*to any reasonable and impartial observer, most unlikely to succeed.*" Exercising its discretion, the Committee thus sees no justification for ordering Respondent to bear the legal costs and expenses Claimants have incurred in connection with this annulment proceeding.

434. As regards the costs of the proceeding, the Committee agrees with the recent trend in ICSID jurisprudence that it is generally reasonable for a party whose application has been rejected in its entirety to bear the costs of the proceeding in full. In the Committee's view, there are no special circumstances that would warrant a different conclusion in the present case. Therefore, the Committee decides that Respondent shall bear all costs of the proceeding, consisting of the fees and expenses of the members of the Committee and the charges for the use of the facilities of the Centre. As Respondent has advanced the entire amount of the costs of the proceeding pursuant to Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations, no reimbursement order is required.[431]

[430] **AL A RA 70 / A/CLA-61**, ¶ 390.

[431] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account once all invoices are received and the account is final.

VIII. DECISION

435. For the reasons referred to above, the Committee issues the following decision:

1. Respondent's request for annulment of the Award rendered on 9 April 2015, in ICSID Case No. ARB/03/19, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* is denied.

2. Each Party shall bear its own legal costs and expenses incurred in connection with this annulment proceeding.

3. Respondent shall bear the total costs of the proceeding, consisting of the fees and expenses of the members of the Committee and the charges for the use of the ICSID facilities.

4. All other requests by the Parties are dismissed.

[*Signed*]

Sir Trevor A. Carmichael
Member of the *ad hoc* Committee
April 18, 2017

[*Signed*]

Mr. Rodrigo Oreamuno B.
Member of the *ad hoc* Committee
April 24, 2017

[*Signed*]

Prof. Dr. Klaus Sachs
President of the *ad hoc* Committee
May 2, 2017