International Centre for Settlement of Investment Disputes

Washington D.C.

In the annulment proceeding between:

Total S.A.

(Claimant)

v.

Argentine Republic

(Respondent)

ICSID CASE N º ARB/04/01

DECISION ON ANNULMENT

Members of the a*d hoc* Committee:

Mr. Eduardo Zuleta, Chairman
Ms. Teresa Cheng, Member
Mr. Álvaro Castellanos, Member

Secretary of the *ad hoc* Committee:

Ms. Giuliana Canè

Date of dispatch to the Parties: February 1, 2016

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LIST OF DEFINED TERMS

Argentina or Respondent	The Argentine Republic
Argentina-France BIT or the BIT or the Treaty	Agreement between the Republic of France and Argentina on the Promotion and Reciprocal Protection of Investments, entered into on June 28, 1990
Argentina's Application	Application for annulment of the award filed by the Argentine Republic on March 27, 2014
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Articles on State Responsibility	International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts of 2001.
Award	*Award on the case Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, dated November 27, 2013
C-Mem.	Total S.A.'s counter-memorial on annulment of March 9, 2015
Committee	*Ad hoc* Committee appointed for the annulment proceeding
Decision on Jurisdiction	Decision on Objections to Jurisdiction rendered on August 25, 2006 in ICSID Case No. ARB/04/01, *Total S.A. v. Argentine Republic*
Decision on Liability	Decision on Liability rendered on December 27, 2010 in ICSID Case No. ARB/04/01, *Total S.A. v. Argentine Republic*
Decisions	The Decision on Jurisdiction and the Decision on Liability
ICSID	International Centre for Settlement of Investment Disputes
ICSID Background Paper on Annulment	Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012.
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
Mem.	Argentine Republic's memorial on annulment of December 22, 2014
Parties	The Argentine Republic and Total S.A.
Rej.	Total S.A.'s rejoinder on annulment of July 10, 2015
Reply	Argentine Republic's reply on annulment of May 4, 2015
Total or Claimant	Total S.A.
VCLT	Vienna Convention on the Law of Treaties
¶	Paragraph

I. THE PARTIES

1. The Claimant is Total S.A. In this proceeding Total S.A. is represented by:

Mr. Nigel Blackaby
Freshfields Bruckhaus Deringer US LLP
Washington, DC, USA

Mr. Noah Rubins
Mr. Ben Love
Freshfields Bruckhaus Deringer LLP
Paris, France

Mr. Sam Hunter Jones
Freshfields Bruckhaus Deringer LLP
London, United Kingdom

Mr. Luis Erize
Mr. Sergio Porteiro
Abeledo Gottheil Abogados SC
Buenos Aires, Argentina

2. Respondent is the Argentine Republic. In this proceeding, the Argentine Republic was represented until December 22, 2015 by:

Dra. Angelina María Esther Abbona
Procuradora del Tesoro de la Nación de la República Argentina
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

As of December 23, 2015 the Argentine Republic is represented by:

Dr. Carlos Francisco Balbín
Procurador del Tesoro de la Nación de la República Argentina
Procuración del Tesoro de la Nación
Buenos Aires, Argentina

3. Argentina seeks the annulment of the Award rendered on November 27, 2013 and of the Decisions on Jurisdiction and Liability which form integral part of the Award.

4. Through the Decision on Jurisdiction, the Tribunal declared that the dispute between Total and Argentina was within the jurisdiction of ICSID and the competence of the Tribunal, since jurisdictional requirements set out in the Argentina-France BIT and in the ICSID Convention were met. Pursuant to the Decision on Liability the Tribunal upheld Total's submission concerning Argentina's obligation to grant Fair and Equitable Treatment to Total S.A. under the Argentina-France BIT. In the Award, the Tribunal ordered Argentina to compensate Total for the damages caused to its investments in Argentina for the violations of the Argentina-France BIT.

II. PROCEDURAL BACKGROUND

5. On March 27, 2014, Argentina filed an application requesting the Annulment of the Decisions and the Award. The Application for Annulment was submitted within the time period provided for by Article 52(2) of the ICSID Convention.

6. In its Application, Argentina requested the Stay of Enforcement of the Award provided for in Article 52(5) of the ICSID Convention.

7. On April 2, 2014, the Secretary-General of ICSID registered the Application for Annulment pursuant to ICSID Arbitration Rules 50(2)(a) and (b). In accordance with Arbitration Rule 54(2) the Secretary-General informed the Parties of the provisional stay of enforcement of the Award.

8. On May 6, 2014, the Secretary-General of ICSID informed the Parties the proposed names for the appointment of the *ad hoc* Committee. ICSID proposed the appointment of Ms. Teresa Cheng, a national of China, Mr. Alvaro Castellanos, a national of Guatemala and Mr. Eduardo Zuleta, a national of Colombia. Ms. Cheng, Mr. Castellanos and Mr. Zuleta were all members of the ICSID Panel of Arbitrators, designated by the Chairman of ICSID's Administrative Council (Ms. Cheng and Mr. Zuleta) and by Guatemala (Mr. Castellanos).

9. On May 27, 2014, the Secretary-General informed the Parties that the *ad hoc* Committee had been constituted. The Committee was composed of Ms. Teresa Cheng, Mr. Alvaro Castellanos and Mr. Eduardo Zuleta, as Chairman of the Committee. The Parties were also informed that Ms. Natali Sequeira, ICSID Legal Counsel, would serve as the Secretary of the Committee.

10. On June 9, 2014, the Committee requested the Parties to confer on the date of the First Session and the timetable for the exchange of written submissions on Argentina's request for the continuation of the stay of enforcement of the Award. On June 16, 2014, Total submitted a letter to the Committee on behalf of both Parties requesting for additional time to confer on these matters. On June 18, 2014, the Committee granted additional time until June 26, 2014.

11. On June 26, 2014, the Parties agreed to hold the First Session in Washington D.C. on August 15, 2014. In addition, the Parties agreed to file their First Submissions on the Stay of Enforcement of the Award on July 11, 2014, with translations due July 18, 2014 and their Second Submissions on the Stay of Enforcement of the Award on July 25, 2014, with translations due August 1, 2014. Argentina confirmed that this was the agreement reached by the Parties by letter dated June 30, 2014.

12. On July 11, 2014, the Parties filed their First Submissions on the Stay of Enforcement of the Award.

13. On July 11, 2014, after conferring with the Parties, the *ad hoc* Committee changed the date of the First Session to October 6, 2014.

14. By letter dated July 24, 2014, Argentina requested the Committee to extend time limits for the discussion of the Parties on procedural matters to be discussed at the First Session until July 28, 2014 and to extend the deadline of the Second Submission on the Request for Stay of Enforcement of the Award until August 12, 2014. The Claimant confirmed its agreement to extend these two deadlines by email dated July 25, 2014. On the same date, the Committee granted the two time extensions. The Parties submitted their comments and points of difference to the Procedural Order No. 1, on July 29, 2014.

15. On August 12, 2014, the Parties presented their Second Submissions on the Stay of Enforcement of the Award.

16. On October 6, 2014 the *ad hoc* Committee held with the Parties the First Session at the seat of the Centre in Washington, D.C. During this session, the Parties made oral submissions on Argentina's request for the continuation of the stay of enforcement of the Award and on the items of the Procedural Order No. 1 on which the Parties had not reached agreement.

17. On October 21, 2014, the *ad hoc* Committee issued Procedural Order No. 1 whereby the Parties agreed on the number of written pleadings that each of them would submit, the corresponding deadlines for their submission and reserved dates for the hearing on annulment. The Parties confirmed that the Committee had been properly constituted in accordance with the ICSID Convention and the Arbitration Rules. It was agreed that the proceeding would be conducted in accordance with the ICSID Arbitration Rules in effect as of January 1, 2003. The Parties agreed on several other procedural matters, *inter alia*, that the procedural languages would be English and Spanish, and that the place of the proceedings would be the seat of ICSID in Washington, D.C.

18. On December 4, 2014, the Committee issued a decision concerning the termination of the stay of enforcement of the Award, whereby it: (i) rejected the request from Argentina to continue the stay of enforcement of the Award rendered on November 27, 2013; and (ii) ordered the lifting of the stay of enforcement of the Award effective as of the date thereof.

19. On December 22, 2014 and on March 9, 2015, Argentina and Total filed a Memorial and a Counter-Memorial on annulment, respectively. On Footnote 52 of its Memorial on Annulment, Argentina requested leave to submit documents related to (i) an administrative claim lodged by Transportadora de Gas del Norte S.A (TGN) and (ii) a judicial proceeding initiated by TGN against the Ministry of Federal Planning, Public Investment and Services in 2012.

20. On April 29, 2015 Argentina filed a request for the Committee to decide on the admissibility of new evidence, holding that these documents were relevant to the discussion on double recovery and the Tribunal's failure to apply the applicable law. On May 1, 2015, Total filed observations on Argentina's request. On May 4, 2015, Argentina filed a Reply on annulment.

21. On May 12, 2015 the *ad hoc* Committee issued Procedural Order No. 2, whereby it rejected Argentina's request for leave to submit the new evidence. The Committee based its decision on the fact that it did not find any exceptional circumstances that demand the admission of the documents requested by Argentina into the record, considering the nature and purpose of ICSID annulment proceedings.

22. Total filed a Rejoinder on Annulment on July 10, 2015.

23. On July 27, 2015, the ICSID Secretariat sent the Parties a letter from Ms. Teresa Cheng advising them that on April 2015 she had been contacted by lawyers from Freshfields Bruckhaus Deringer LLP (Hong Kong office) in a matter that had already concluded. Ms. Cheng said the matter involved oral advice on an issue that was not related to investment law or disputes between States and investors and that it mainly concerned disputes between shareholders under Hong Kong law that had nothing to do with Total S.A. or with the Argentine Republic. The lawyers of Freshfields Bruckhaus Deringer LLP (Hong Kong office) involved in that matter were not the lawyers of Freshfields Bruckhaus Deringer LLP that are before the Committee in this proceeding. Ms. Cheng stated that she understood that this situation did not pose a conflict of interest, but out of an abundance of caution, she considered it appropriate to communicate this circumstance to the Parties.

24. On July 29, 2015, the Argentine Republic sent a letter to the Committee requesting Ms. Cheng to clarify certain questions referred to in her letter of July 27, 2015.

25. On August 4, 2015, the ICSID Secretariat sent to the Parties the response furnished by Ms. Cheng to questions raised by the Argentine Republic on July 29, 2015.

26. On August 3, 2015, the Argentine Republic requested Ms. Cheng to disclose all her present or past relationships with Freshfields Bruckhaus Deringer LLP. On August 5, 2015, the ICSID Secretariat sent to the Parties Ms. Teresa Cheng's response

27. On August 6, 2015, the Argentine Republic filed a Proposal for the Disqualification of Ms. Teresa Cheng, under Article 57 of the ICSID Convention and Arbitration Rule 9. On the same day ICSID informed the Parties of the suspension of proceedings in accordance with ICSID Arbitration Rules 53 and 9(6), until the majority of the *ad hoc* Committee, comprising Mr. Zuleta and Mr. Castellanos, decided on the Disqualification Proposal.

28. On August 7, 2015, Mr. Zuleta and Mr. Castellanos established a procedural timetable for the submissions of the Parties in respect of the Disqualification Proposal. An expedited timetable was set in response to the state of the proceedings at the time Ms. Cheng's declaration and Argentina's Disqualification Proposal were filed.

29. Accordingly, on August 12 and August 17, 2015 Argentina and Total filed observations on the Proposal for Disqualification, respectively. On August 18, 2015 Ms. Cheng furnished

explanations regarding the Proposal for Disqualification in accordance with ICSID Arbitration Rules 53 and 9(3). Both Parties simultaneously filed further observations on August 24, 2015.

30. The Argentine Republic sent a letter to Ms. Cheng, dated August 19, 2015, requesting additional information. Ms. Cheng sent a reply to Argentina's request on August 20, 2015.

31. On August 26, 2015, the majority of the Committee composed of Mr. Zuleta and Mr. Castellanos rejected the Argentine Republic's proposal for the disqualification of Ms. Teresa Cheng. The proceedings resumed pursuant to ICSID Arbitration Rule 9(6).

32. On September 1 and 2, 2015, the *ad hoc* Committee held a Hearing on Annulment at the seat of ICSID in Washington D.C, as established by Procedural Order No.1.

33. On September 9, 2015, Argentina requested the Committee to grant leave to the Parties to submit post-hearing briefs. On September 14, 2015, Total asked the Committee to reject Argentina's request for post-hearing briefs.

34. On September 17, 2015, Argentina addressed the members of the *ad hoc* Committee requesting them to inform any past or present links with the Claimant or its related persons and/or their counsels in investment international arbitrations against the Argentine Republic. As to Ms. Cheng, Argentina expressly stated that there was no need to mention her links with Freshfields Bruckhaus Deringer LLP. By letter dated November 10, 2015 the members of the Committee responded this request indicating that under the ICSID Convention and Arbitration Rules they had nothing further to declare regarding their previously submitted declarations under Arbitration Rule 6(2).

35. On September 23, 2015, the *ad hoc* Committee issued Procedural Order No. 3, whereby it rejected Argentina's request for leave to submit post-hearing briefs.

36. On November 10, 2015, the Parties submitted their statements of costs regarding the Annulment Proceeding.

37. On December 23, 2015, Argentina informed the Centre of the resignation of Mrs. Abbona and the appointment of Mr. Balbín as the new *Procurador del Tesoro de la Nación de la República Argentina*.

38. On December 24, 2015, the *ad hoc* Committee declared the proceeding closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

III. POSITION OF THE PARTIES

39. Argentina requests the annulment of the Decisions and the Award on the basis that (i) the Tribunal manifestly exceeded its powers (ICSID Convention, Article 52(1)(b)); (ii) there have been serious departures from fundamental rules of procedure (ICSID Convention, Article 52 (1)(d)); and (iii) the Award failed to state the reasons on which it is based (ICSID Convention, Article 52 (1)(e)).[1]

40. Total rejects Argentina's request for annulment because in its view Respondent seeks for a review of substance of the Decisions and the Award in order to overturn the Tribunal's decisions on such basis.[2]

41. This section addresses the submissions of the Parties on the three grounds of annulment invoked by Argentina and provides a summary of the claims and reliefs sought by each Party. This section does not reproduce the entire position of each Party, but a summary of their main submissions. The Committee has carefully reviewed all claims, reasoning, documents and legal authorities submitted by the Parties, and the fact that a reasoning, document or legal authority is not cited or referred to in the following section does not mean that it has not been considered and analyzed by the Committee.

A. Position of the Argentine Republic

42. Argentina submits that the three grounds for annulment that are the basis for its Application touch upon five different issues referred to in the Decisions and the Award. Thus, Argentina first provided an overview of the standards for annulment that it considered applicable and then explained how each issue gave rise to one or several grounds for annulment. In this section, the Committee will follow Argentina's submissions in the manner in which they were presented to provide a complete overview of its submissions.

a. The Standards for Annulment

1. General Standard

43. Argentina submits that the incorporation of an annulment mechanism was the *quid pro quo* of the acceptance of ICSID jurisdiction by States as a means to protect the integrity of such jurisdiction.[3] The object and purpose of these proceeding is the "control of the fundamental integrity of the ICSID arbitral process in all of its facets"[4]. Argentina holds that annulment proceedings aim at procuring integrity of the tribunal, integrity of the procedure and integrity of the award.[5]

[1] Argentina's Application, ¶¶1-3.
[2] C-Mem, ¶¶1-3.
[3] Mem., ¶12.
[4] Mem., ¶ 13, footnotes omitted.
[5] Mem., ¶13; Reply, ¶4.

44. The standards for annulment must be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT"), with a view to giving full effect to them. A restrictive interpretation is contrary to the rules of interpretation of treaties, to the ICSID Convention and to the Arbitration Rules[6] and would result in depriving ICSID awards of a legitimate review.[7]

45. Argentina contests Total's assertions that it is seeking a revision of the Decisions and the Award by the *ad hoc* Committee as if it had filed a request for appeal in regards to the decisions of the Tribunal on jurisdiction or on its interpretation of the law.[8] Argentina's Application is based on three of the grounds provided in Article 52 (1) of the ICSID Convention, according to the legal standard described below.

2. Manifest Excess of Powers

46. In Argentina's view, the power of arbitral tribunals exclusively arises from the agreement between the Parties, and consequently, a tribunal exceeds its powers when it acts in contravention of the Parties' consent.[9] Such excess of powers relates to three main categories: (i) the scope of the tribunal's jurisdiction; (ii) the applicable law and (iii) the issues raised by the parties.[10]

47. The first category refers to instances in which the tribunal incorrectly finds or rejects jurisdiction, or exceeds the scope of such jurisdiction.[11] Manifest excess of powers can also refer to a tribunal's failure to apply the applicable law, which determines the framework within which the parties have authorized the tribunal to make a decision.[12] Lastly, a tribunal can manifestly exceed its powers when it fails to decide over matters subject to its jurisdiction or decides matters that were not subject to it.[13]

48. In its Reply, Argentina clarifies that it is not seeking a revision by the Committee of the Tribunal's interpretation of the law, as Total wrongly contends.[14] Argentina did not invoke an error in the application of the law, but a failure to apply the applicable law.[15] Neither did it submit that a mere error of law is a ground for annulment.[16]

[6] Mem., ¶14.
[7] Mem., ¶16.
[8] Reply, ¶ 5-6; Tr.:24:19-25:4.
[9] Mem., ¶ 19.
[10] Mem., ¶ 20; Reply, ¶ 6.
[11] Mem., ¶¶ 21-22.
[12] Mem., ¶¶ 23-24.
[13] Mem., ¶ 25.
[14] Reply, ¶¶ 5-10.
[15] Reply, ¶ 8.
[16] Tr.:201:17-20.

49. As to jurisdiction, Respondent does not request the Committee for a *de novo* review of the Tribunal's jurisdiction but for an analysis on the existence of manifest excess of jurisdictional powers by the Tribunal, as prior annulment committees have done so.[17]

3. Serious Departure of Fundamental Rules of Procedure

50. Argentina considers that the provision in Article 52(1)(d) of the ICSID Convention concerning a serious departure from a fundamental rule of procedure was designed to safeguard the basic fairness and integrity of the arbitration process, including the so-called principles of natural justice.[18]

51. The obligation to preserve the fundamental rules of procedure is not limited to the Arbitration Rules. It refers to the minimum standards of procedure that must be respected as a matter of international law, including, *inter alia*, the right of both parties to be heard, the right of defense, equality between the parties, etc.[19] Annulment committees, and not tribunals, have the task of evaluating whether a fundamental rule of procedure has been breached.[20]

4. Failure to State Reasons

52. An essential aspect of ICSID arbitration is the tribunal's duty to provide reasons in awards.[21] Argentina submits that failure to state reasons may appear in different forms:

> "Failure to state the reasons for an award may appear in different forms, including: (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) the statement of genuinely contradictory reasons; and (iv) the statement of reasons which are insufficient to bring about the solution or inadequate to explain the result arrived at by the tribunal."[22]

53. Failure to state reasons for the award prevents the parties from understanding the reasoning of the tribunal to reach a decision. In consequence, the tribunal must provide reasons in an express manner, and neither the parties nor annulment committees are entitled to speculate about the potential reasons that might justify the conclusion reached by the tribunal. The factors that led to the tribunal's conclusion must be specified with some measure of coherence and consistency.[23]

54. Finally, unlike other grounds for annulment, failure to state reasons is not qualified as "manifestly" or "serious."[24]

55. Argentina opines that Total's proposition, based on Professor Reisman's opinion, that annulment committees should reconstruct the tribunal's implicit reasons, is incompatible with the ICSID Convention. This position entails the dangers of speculating on what is implicit in a tribunal's

[17] Reply, ¶¶ 11-12.
[18] Mem., ¶ 26.
[19] Mem., ¶¶ 26-28.
[20] Tr.:239: 3-17; 241:1-16.
[21] Mem., ¶¶ 29-30.
[22] Mem., ¶ 31, footnotes omitted.
[23] Mem, ¶¶ 29-33.
[24] Mem., ¶ 33.

finding and is contrary to the requirement under the ICSID Convention regarding that reasons be stated.[25]

b. Reasons for Annulment

1. Reasons for Annulment Relating to the Applicable Law and Claimant's Derivative Claim

56. Argentina claims that annulment is warranted on reasons related to the applicable law and Claimant's derivative claim on the grounds of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) and failure to state reasons (Article 52(1)(d) of the ICSID Convention).

57. Respondent states that, in accordance with Article 8(4) of the Argentina-France BIT, the Tribunal had a duty to apply the provisions of the BIT; Argentine law, including the rules on the conflict of laws; special agreements concluded in relation to the investment; and the relevant principles of international law.[26] The Tribunal failed to apply the applicable law because it did not apply the domestic law, along with the BIT and international law in its analysis of Total's *ius standi*.[27] This constitutes a ground for annulment, especially since the Tribunal did not provide reasons for its failure to apply Argentine law, which it considered immaterial for the determination of whether the rights in question belonged to Total.[28] If the Tribunal had applied Argentine law it would, for instance, have concluded that Total was not entitled to part of the compensation or that TGN had to recover part of the compensation because the interests of creditors were involved.[29]

58. In fact, the Tribunal expressly recognized that the rights and assets did not belong to Total but to the domestic companies.[30] However, it exercised jurisdiction over the case arguing that claims with respect to Total's indirect and minority shareholding in the domestic companies are disputes relating to an investment, under Article 25(1) of the ICSID Convention and under Article 8(1) of the BIT.[31]

59. Argentina contests the Tribunal's exercise of jurisdiction over rights vested in Argentine companies that were not parties to this arbitration.[32] Relying on decisions from the International Court of Justice, Argentina holds that general international law does not permit indirect or derivative actions, unless the possibility of submitting such actions has been expressly provided for in an appropriate instrument.[33] In its Reply, Argentina refers to the decision in *CMS Gas*

[25] Reply, ¶¶ 16-17.
[26] Mem., ¶¶ 34-36.
[27] Tr.: 199:19-22; 200:9-15; Mem., ¶ 34.
[28] Mem., ¶¶ 34-37.
[29] Tr.:210:7-13.
[30] Mem., ¶ 38.
[31] Mem., ¶ 39.
[32] Mem., ¶ 40.
[33] Mem., ¶¶ 40-41, ¶¶ 55-56.

Transmission Company v. Argentine Republic,[34] to dismiss Total's claim that previous annulment committees have consistently rejected its allegations on shareholder claims.[35]

60. Argentina also explained that under its domestic law, the corporation is the only person entitled to assert its own rights. A shareholder may not submit a claim alleging the breach of the rights of the company, such as Total did.[36] An investment treaty does not create a new kind of shareholding, for the provisions of the BIT could not introduce regulatory changes in the laws of the host State. Shareholding cannot be interpreted in a vacuum for "…*when a shareholder brings a claim coming out of an investment, the issues related to the rights that arise from that kind of investment must arise from the domestic legal order*."[37]

61. Respondent claims that Total recognizes this failure to apply Argentine law and finds it justified, in spite of contradictions to its own statements according to which Argentine law determines the extent of property rights constituting the investment under domestic law.[38] This contradiction is evident in other sections of the Decision on Liability where the Tribunal established that Argentine law determines the content and scope of Total's economic rights and that it is crucial to identify the content of said rights, but it still deems it immaterial regarding standing and ownership.[39]

62. Further, Argentina rejects Total's proposition that tribunals have discretion to assess the interaction between national and international law, since it does not consider that tribunals have such discretion nor that they are able to consider "immaterial" one of the established sources of law.[40]

63. The Tribunal also manifestly exceeded its powers by exercising jurisdiction on Total's claims for damages, which referred to contracts and companies that are not involved in the arbitration.[41] The Tribunal allowed Total to raise a claim over its interests in Argentine companies, who are in turn allowed to file local proceedings based on the same facts, therefore the Tribunal made possible a double recovery.[42] In fact, while the arbitration and these proceedings are conducted, the renegotiation process with the local companies is still ongoing. The damage to Claimant and the domestic companies is the same, and thus, as stated by the committee in *CMS v. Argentina*, these would be parallel proceedings in different fora.[43]

64. Argentina asserts that the Tribunal did not explain in any of its Decisions in what way the rights of different persons over the same assets were reconciled, which provisions allowed investors to bring claims for assets belonging to others, or which provision in the BIT led the Tribunal to the

[34] *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Annulment Proceeding. [*CMS v. Argentina*].
[35] Reply, ¶¶ 31-32.
[36] Mem., ¶¶ 50-54.
[37] Tr.:15:5-19.
[38] Reply, ¶¶ 22-23.
[39] Reply, ¶¶ 26-28.
[40] Reply, ¶ 21.
[41] Mem., ¶ 42.
[42] Mem., ¶ 43.
[43] Tr.:202:14-22; 203:1-10.

conclusion that Argentine law was immaterial to this question.[44] Expanding the Tribunal's jurisdiction to allow a shareholder to benefit from the ICSID system to bring claims based on rights that do not belong to him, amounts to a manifest excess of powers.[45]

65. The Tribunal held that the investment protected under the BIT consists of minority shareholding. This reason confuses the legal standing that a shareholder might have with the substantial rights arising from his or her shares. [46]

66. Since the Tribunal manifestly exceeded its powers in acting beyond the scope of its jurisdiction and failed to state the reasons upon which its subject-matter jurisdiction was based, "the three Decisions of the Tribunal must be annulled."[47]

2. Reasons for Annulment Relating to the Renegotiation Process and the Fair and Equitable Treatment Standard

67. Argentina claims that annulment is warranted on reasons related to the renegotiation process and the Fair and Equitable Treatment Standard on the grounds of manifest excess of powers (Article 52(1)(b) of the ICSID Convention); failure to state reasons (Article 52(1)(e) of the ICSID Convention); and serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).[48]

68. At the jurisdictional phase of the arbitration proceeding, the Tribunal dismissed Argentina's objection to jurisdiction that the dispute was contractual in nature because it considered that Total had not asked the Tribunal to evaluate the renegotiation process under Argentina's regulations nor to enter into the merits of this process.[49] In contradiction with this conclusion, the Tribunal found Argentina liable for violating the Fair and Equitable Treatment Standard because of the inconclusive results of the renegotiation process of tariffs in the gas transportation sector.[50]

69. By holding Argentina liable because of an issue excluded from its competence, the Tribunal adversely affected the principles of due process.[51] In fact, Argentina could not know until it read the Decision on Liability that the Tribunal would use the results of the renegotiation process to issue a finding of liability given that the Tribunal had actually stated that Claimant had not requested an evaluation of that process and that said issue was outside its competence. By unexpectedly contradicting these conclusions, the Tribunal departed from the guarantee of due process, violated the right of defense of Argentina and substantially deprived it from the right to

[44] Mem., ¶ 44.
[45] Mem., ¶ 45.
[46] Mem., ¶ 47.
[47] Mem., ¶ 48.
[48] Mem., ¶ 70; Reply, ¶¶ 54 and 58.
[49] Mem., ¶¶ 57-59.
[50] Reply, ¶ 35.
[51] Mem., ¶ 62.

be heard, all of which warrant annulment on the ground of serious departure of fundamental rules of procedure.[52]

70. Moreover, Argentina clarifies that it only referred to the renegotiation process during the hearing, in order to respond to a question from the Tribunal and this statement cannot be taken as an appropriate defense on the merits of the renegotiation process.[53]

71. The contradiction on the renegotiation process also merits annulment since contradictory reasons cancel each other out and amount to a failure to state reasons within the meaning of Article 52 (1)(e) of the ICSID Convention.[54] The Tribunal did not explain why it could consider the renegotiation process that it had previously excluded from its own competence.[55] In turn, this excess of the Tribunal's competence implies an *ultra petita* ruling and is thus a manifest excess of powers in accordance with Article 52(1)(b) of the ICSID Convention.[56]

72. In its Reply, Argentina rejected Total's assertions that it had taken isolated statements of the Award or analyzed them regardless of the context in which they were made. A simple reading of the Decisions evidences the manifest contradiction in which the Tribunal incurred and confirms that the Tribunal indeed analyzed the renegotiation process.[57]

73. In addition, contrary to Total's submission, Argentina argues that under Article 52(1)(d) of the ICSID Convention the notification of a breach to the tribunal is not necessary for it to have an opportunity to cure the situation. The Committee must not go back to Arbitration Rule 27, as suggested by Claimant, for it shall decide on the serious violation of a rule of procedure.[58]

3. Reasons for Annulment Relating to Argentine Emergency Law Provisions

74. Argentina claims that annulment is warranted on reasons related to the Argentine Emergency Law provisions on the grounds of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) and failure to state reasons (Article 52(1)(e) of the ICSID Convention).

75. Argentina argues that the Tribunal failed to apply the emergency doctrine under Argentine Law in respect to Total's claims, which was one of the defenses raised by it during the arbitration.[59] The Tribunal failed to apply domestic law *in totum* as a source of law indicated in Article 8(4) of the BIT.[60] The analysis of the measures adopted by Argentina under the BIT did not release the Tribunal from examining such measures under Argentine laws on emergency.[61] The Tribunal

[52] Mem., ¶ 69.
[53] Reply, ¶¶ 55-58; Tr.:27:4-14.
[54] Mem., ¶ 63.
[55] Mem., ¶ 64.
[56] Mem., ¶¶ 65-66.
[57] Reply, ¶¶ 40-44; ¶¶ 45-50.
[58] Tr.:235:13-22; 236: 4-16; 240:7-241:16.
[59] Mem., ¶ 72.
[60] Mem., ¶ 72; Reply, ¶¶ 13-15.
[61] Mem., ¶ 76.

should have considered the application of the emergency doctrine in order to determine the extent of the property rights that pertain to Claimant's investment.[62] Referring to *M.I.N.E. v. Republic of Guinea*, Argentina recalls that a tribunal's disregard of the parties' agreement on the applicable law would imply a derogation from the terms of reference with which it was authorized to function.[63]

76. In light of this failure to apply the applicable law, the Tribunal manifestly exceeded its powers and failed to state the reasons on which the Award was based, because it did not specify the alleged conflict with the BIT that purportedly prevented the application of the emergency doctrine or the circumstances that relieved the Tribunal from applying this doctrine as part of the applicable law.[64]

77. Further, Argentina disagrees with Total in that tribunals are not required to apply the proper provision or a particular rule of that law. Argentina opines that even if failure to apply a particular provision of domestic law may not amount to failure to apply the applicable law, the complete failure to consider the whole of a doctrine of domestic law, prominently invoked by one of the parties as a defense, does in fact constitute a failure to apply the law and merits annulment of the award.[65]

78. In its Reply, Argentina submits that the Tribunal's failure to apply the emergency law is not justified under Article 8(4) of the BIT nor under Article 27 of the VCLT or Article 3 of the ILC Articles on State Responsibility. In fact, the ILC recognizes that compliance with domestic law is relevant in the question of international responsibility and that Article 27 of the VCLT may be qualified in light of domestic law.[66]

79. Likewise, Argentina argues that the application of the emergency doctrine could have led the Tribunal to decide that there was not a breach of the Fair and Equitable Treatment Standard in the BIT.[67]

4. Reasons for Annulment relating to Article 5(3) of the BIT and the Necessity Defense

80. Argentina claims that annulment is warranted on reasons related to Article 5(3) of the BIT and the necessity defense on the grounds of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) and failure to state reasons (Article 52(1)(e) of the ICSID Convention).

[62] Reply, ¶¶ 64-65.
[63] Reply, ¶ 14; ¶ 59.
[64] Mem., ¶ 77; Tr.:212:14-17.
[65] Reply, ¶¶ 61-63.
[66] Reply, ¶¶ 67-69.
[67] Tr.:214:16-22; 215: 1-20.

81. Argentina's fourth reason for annulment refers to the Tribunal's approach to two of the fundamental defenses it raised in the arbitration: the application of Article 5(3) of the BIT and the necessity defense under customary international law.

82. First, Argentina argued that since the measures challenged by Claimant were aimed at responding to a state of national emergency the only applicable provision of the BIT was Article 5(3). This article provides for no less favorable treatment to foreign investors than that afforded to domestic investors or to investors of the most-favored nation, whose investments have suffered losses because of war, armed conflict or a state of national emergency.[68]

83. Accordingly, Argentina states that in order for this provision to have effect, the only obligation of the State during a state of national emergency was to grant French investors no less favorable treatment than that accorded to its own investors or to investors from a third state.[69] Citing *L.E.S.I. S.p.A. and Astaldi S.p.A. v. Algeria*,[70] Argentina holds that the provision in Article 5(3) of the BIT abrogates other provisions in the BIT in situations of emergency.[71]

84. Nevertheless, defying all logic, the Tribunal found that Article 5(3) of the BIT was not applicable to an economic emergency, unless it lead to a national emergency where losses that have occurred are a result of war or civil disturbance. The Tribunal did not provide reasons for its conclusion, which rendered this provision ineffective and meaningless, in spite of the fact that it acknowledged Article 5(3) as a "war and civil disturbance" provision that operates only when compensation has been granted to its own investors or to a third party's investors. For these reasons, the Tribunal exceeded its powers and failed to state the reasons for its conclusions. [72]

85. Argentina clarifies that its claim is that the Tribunal failed to apply the law and not that it applied it erroneously.[73] In addition, Respondent holds that the Tribunal created a condition that was not incorporated in the text of the BIT - that the provision only operates when a party to the Treaty has granted compensation for losses to its own investors or those of a third country.[74]

86. As a second reason, Argentina argued that the Tribunal failed to apply the necessity defense under customary international law, as a circumstance precluding wrongfulness. The Tribunal recognized that it had to assess this defense in light of the criteria of Article 25 of the ILC Articles on State Responsibility, nonetheless it concluded that Argentina failed to show that those measures were the only way for the State to safeguard essential interests against a grave and imminent peril. This conclusion applies to the Tribunal's findings in regards to Total's investments in the power generation, hydrocarbon exploration and production sectors and in regards to measures concerning TGN.[75]

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[68] Mem., ¶¶ 79-80.
[69] Mem., ¶¶ 79-80.
[70] *Lesi S.p.A. and Astaldi, S.p.A. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/05/3).
[71] Mem., ¶ 81.
[72] Mem., ¶¶ 82-84.
[73] Reply, ¶ 72.
[74] Reply, ¶ 76.
[75] Mem., ¶¶ 85-88.

87. Yet, the Tribunal did not specify the legal standard for "essential interests" and "only way", which is precisely why the *Enron Creditors Recovery Corp and Ponderosa Assets L.P. v Argentine Republic*[76] award was annulled.[77] Therefore, the Tribunal failed to state the reasons for its decision and manifestly exceeded its powers in failing to apply the law.[78]

88. Argentina replies to Total's assertions that the legal standards concerning "essential interests" and "only way" were explained in paragraphs 221-223 and footnotes 266-267 of the Decision on Liability. These sections of the decision only contain a discussion of the facts of the case in connection with the necessity defense and do not include any legal standards.[79]

89. Respondent also submits that Total's posture that under Article 27 of the ILC Articles on State Responsibility a finding of state of necessity would have been without prejudice to Argentina's obligation to compensate it for its loss is not true. Article 27 of the ILC Articles on State Responsibility provides that the invocation of grounds for precluding the wrongfulness of an act is *without prejudice* to the question of compensation and does not attempt to specify in which circumstances compensation could be due. This reasoning was adopted by the annulment committee in *Enron Creditors Recovery Corp and Ponderosa Assets L.P. v Argentine Republic*, which stated that if the necessity defense had been applied the tribunal might have found Argentina not liable for a breach of the bilateral investment treaty in question. In any case, even if Total's reading of Article 27 were adopted, the Tribunal's statement admitting the necessity defense would inevitably have an impact on the operative part of the Award and in an assessment of an eventual compensation.[80]

5. Reasons for Annulment Relating to the Assessment of Damages

90. Argentina claims that annulment is warranted on reasons related to the Tribunal's assessment of damages on the ground of failure to state reasons (Article 52(1)(e) of the ICSID Convention).

91. Argentina submits that the Tribunal made three contradictory statements in its assessment of damages that do not enable the reader to understand its motives. This results in a failure to state reasons under Article 52(1)(e) of the ICSID Convention, since two genuinely contradictory reasons cancel each other out.[81] Moreover, these contradictions pertain to an outcome-determinative point of the decision, which is the payment of compensation by the Argentine Republic.[82]

92. Respondent identifies a first contradiction in the adjustments made on price variation in the first semester of 2002. In the Decision on Liability, the Tribunal held that the failure to readjust the tariffs, following the enactment of the Emergency Law and in the height of the crisis could be

[76] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3).
[77] Mem., ¶ 87; Reply, ¶ 80.
[78] Mem., ¶ 88.
[79] Reply, ¶ 82.
[80] Reply, ¶¶ 83-86.
[81] Mem., ¶ 89.
[82] Mem., ¶ 96.

justified provided that Argentina subsequently pursued renegotiations to re-establish the equilibrium of the tariffs as established by law. However, in rendering the Award the Tribunal held that it could not accept the different approach suggested by Argentina that adjustments should not take into account the price variations of the first semester of 2002.[83]

93. Second, in the calculation of the evolution of the local prices of TGN's tariffs, the Award concluded that with a view to adjust TGN's tariffs in the *but-for* scenario, it would apply the index of costs calculated by the valuation experts presented by Argentina in accordance with its evolution since the beginning of 2002. Yet the Tribunal contradicted the findings of the Decision on Liability since it was not able to apply the index of costs since the beginning of 2002.[84] The Tribunal conducted a tariff review taking into account the evolution in the index of costs according to developments as from 2002, which was in practice similar to the extraordinary tariff review, and transferred the impact of the devaluation on consumers.[85]

94. The third contradiction relates to the tariff adjustments and the debt incurred by TGN. In the Decision on Liability, the Tribunal noted that Total had been unable to repay or renegotiate the debt incurred in US Dollars as a consequence of the devaluation of TGN's assets and revenues because of the monetary crisis in Argentina. The Tribunal stated that it could not share Total's views that the pesification was a breach of its treaty rights, yet in addressing the *but-for* scenario, the Tribunal held that Total had demonstrated that periodically adjusted tariffs would have allowed TGN to service its foreign denominated debt.[86]

95. Claimant justifies the latter contradiction based on the fact that the Tribunal had more evidence at its disposal when rendering the Award. However, *"…the Tribunal did not add new evidence to perform this analysis but accepted Claimant's arguments that TGN used cash flows of revenues from its export business to repay its debt."*[87] Finally, Argentina submits that Total is speculating when it affirms that if the Tribunal had not assumed the full service of TGN's debt but a restructuring, the resulting damages would be higher.[88]

c. Argentina's Submissions on Costs

96. Argentina dismisses Total's assertions that it raised a wholly unmeritorious application. Applying for annulment of an award is a specific right granted under the ICSID Convention to protect the integrity of the ICSID arbitration system, thus recourse to annulment cannot be interpreted against the party that uses it. Therefore, to impose costs on Argentina for exercising its right would be detrimental to the confidence of States parties in these proceedings.[89]

[83] Mem., ¶¶ 90-91, Reply, ¶¶ 89-91.
[84] Mem., ¶¶ 92-93.
[85] Reply, ¶ 92.
[86] Mem., ¶¶ 94-95.
[87] Reply, ¶ 94.
[88] Reply, ¶¶ 95-96.
[89] Reply, ¶¶ 98-102.

97. Even if the Committee rejects Argentina's arguments, it would not be appropriate to order Respondent to pay for costs because its application has not been frivolous and because it has not acted in bad faith.[90]

B. Position of Total

98. According to Total, annulment under the ICSID Convention is an exceptional remedy available only where the procedural integrity of the proceedings would be jeopardized, based on five narrow grounds concerning fundamental procedural errors. The ICSID Convention excludes any review of the substance of the award.[91] Argentina views annulment as a process available as a matter of course and has sought annulment of every adverse award against it, regardless of the merits of its position.[92]

99. Argentina has asked the Committee to conduct a *de novo* review and to overturn the decision of the Tribunal on that basis. Respondent applied for annulment based on three grounds of Article 52 of the ICSID Convention, but it abandoned arguments that it had presented in its Request for Annulment[93] and was not able to produce arguments for several of the claimed deficiencies.[94]

100. The overall weakness of Argentina's position is evident in the near universal rejection of its prior applications for annulment, which were construed upon rehashed arguments that it has consistently raised.[95]

101. Total responded to Argentina's pleadings following each of the reasons that according to Respondent justified annulment. Total first established the applicable standard for each of the grounds for annulment and then presented its rebuttal to each of Argentina's reasons for annulment.

a. The Tribunal Did Not Manifestly Exceed its Powers

1. Standard for Annulment under Article 52 (1) (b)

102. Total acknowledges that the adjudicative power of ICSID tribunals stems from the parties' agreement. In certain situations, an excess of jurisdiction or a failure to apply the law may give rise to annulment.[96] However, both for jurisdictional decisions and for failure to apply the law, any excess of powers must be *manifest*.[97]

[90] Reply, ¶¶ 98-102.
[91] C-Mem., ¶¶ 1-2.
[92] Rej., ¶¶ 2-5.
[93] Rej., ¶ 4.
[94] C-Mem., ¶¶ 4.
[95] C-Mem., ¶ 5.
[96] C-Mem., ¶ 7.
[97] C-Mem., ¶ 7.

103. Argentina advances a lesser degree of legal error to trigger annulment because in its view failure to apply the law, regardless of its generality or specificity, constitutes a manifest excess of powers. It relies on *Wena v. Egypt*, which actually discerns between a failure to apply the applicable law and an error in the application of the law.[98]

104. Total outlines three conditions concerning annulment under Article 52(1)(b) of the ICSID Convention: (i) the excess of powers must be manifest; (ii) a *de novo* review of the Tribunal's jurisdiction is not permitted; and (iii) an erroneous application of the law does not entail a manifest excess of powers.[99]

105. First, Article 52(1)(b) requires that an excess of powers be manifest before annulment can be justified. An annulment committee may not review the tribunal's interpretation of the law and thus the excess of powers shall be self-evident on a simple reading and does not require elaborate interpretations of the tribunal's reasoning. The committee must verify the excess of powers without consulting the evidence before the tribunal. In addition, a manifest excess of powers will only be annullable if it would result determinative.[100]

106. In addition, Total submits that Argentina's interpretation of excess of jurisdictional powers discards the fact that under Article 52(1)(b) the excess of powers must be manifest and thus that an *ad hoc* committee cannot conduct a *de novo* review of any decision of the tribunal.[101] A reasonable new review of the findings of jurisdiction of the tribunal, without demonstrating the *manifest* standard, will neglect the principle of *competence-competence,* under which the tribunal shall settle any question pertaining to its competence.[102]

107. As a third point, Total recalls that a failure to apply the chosen law may amount to a manifest excess of powers, but the erroneous application of the law or partial application of it does not. This principle has been consistently applied in annulment proceedings. Argentina attempts to relitigate issues as it incorporates within its complaints the misapplication of the law.[103]

108. Respondent criticizes the misapplication of specific provisions or rules of law, disregarding that to find an excess of powers for failure to apply the law there must have been a failure to apply the law *in toto.*[104] This interpretation is also contrary to prior decisions on annulment.[105] Tribunals have the power to determine the relevance of the legal provisions of the law and they are not obliged to apply every particular provision invoked by a party.[106]

[98] Rej. ¶ 8.
[99] C-Mem., ¶¶ 8-24.
[100] C-Mem., ¶¶ 8-13.
[101] C-Mem., ¶¶ 14-16.
[102] C-Mem., ¶ 17.
[103] C-Mem., ¶¶ 19- 20.
[104] C-Mem., ¶22.
[105] C-Mem., ¶ 23.
[106] C-Mem., ¶ 24.

2. Argentina has not established that the Tribunal manifestly exceeded its powers

i. *The Tribunal did not exceed its powers in finding jurisdiction over Total's claims*

109. Total criticizes Argentina's allegation concerning a manifest excess of powers by the Tribunal in regards to its finding on competence over Total's investment in local companies, in contravention with particular provisions of domestic law and international law. In Total's view, Argentina requests the Committee to undertake a *de novo* review of the Tribunal's finding on jurisdiction.[107]

110. Total concedes that jurisdictional decisions are annullable on the ground of manifest excess of powers only when the decision to exercise jurisdiction is self-evident. A difference of opinion in respect to the Tribunal's decision on jurisdiction is insufficient.[108]

111. Contrary to Argentina's beliefs, the Tribunal did apply the applicable law –the BIT and the ICSID Convention- and concluded that the BIT afforded protection to Total's investments because it specifically included minority shareholding within the definition of investment.[109] Therefore, the Tribunal rejected Argentina's characterization of Total's claims as derivative claims in the Decision on Jurisdiction.[110] Total raises two additional points: (1) investment treaties grant independent and often superior protections than those existing in domestic law[111]; and (2) annulment committees have consistently rejected annulment requests premised on Argentina's position on shareholder claims.[112]

112. Total states that the discretion tribunals have to assess the interaction between national and international law is generally recognized and that previous annulment committees have consistently rejected similar arguments advanced by Argentina.[113] Particularly, Total refers to the decision in *Azurix Corp. v. Argentine Republic*,[114] where the annulment committee confirmed the tribunal's conclusion on the standing of the investor. This committee stated that the BIT determines the types of interests protected under its scope and that it did not have a mandate to reach independent conclusions on the proper interpretation of the treaty.[115]

113. Further, Total responds to Argentina's allegations on erroneous application of international law by recalling that the Tribunal expressly applied the terms of the BIT as *lex specialis* rules of international law. The annulment committee in *Sempra Energy International v. Argentine Republic*[116] rejected a similar argument, affirming that whether an investor may claim for

[107] C-Mem., ¶¶ 25-26.
[108] Rej., ¶ 10.
[109] C-Mem., ¶¶ 27-29.
[110] C-Mem., ¶ 28.
[111] Tr.: 107: 8-108:4.
[112] Rej., ¶ 15.
[113] C-Mem., ¶¶ 29-30, ¶32.
[114] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Annulment Proceeding. ["*Azurix v. Argentina"*]
[115] C-Mem., ¶¶ 30-31.
[116] *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Annulment Proceeding.

measures that affected its investment in a locally incorporated company is a matter of interpretation of the BIT and cannot be analyzed by an *ad hoc* committee.[117]

114. Finally, Total argues that Argentina failed to explain how its complaint on double recovery, routinely rejected by annulment committees, constitutes a manifest excess of powers. Particularly, the committee in *El Paso Energy International v. Argentine Republic*[118] characterized these arguments as complaints typical of an appeal and stated that the possibility of double recovery is an issue to be assessed by the tribunal and not the *ad hoc* committee.[119]

115. In its Rejoinder, Total points out that the BIT circumscribes the Tribunal's jurisdiction.[120] This was the position taken by the *CMS v. Argentina* annulment committee.[121]

116. Argentina misinterprets the decision of *Poštová Banka, AS e Istrokapital Se v. Hellenic Republic*,[122] for this tribunal considered that the default proposition was that a shareholder's investment under a bilateral investment treaty are its shares in a local company and not the assets of the company itself. The Tribunal's finding that Total's shareholding constitutes a protected investment under the BIT is consistent with the approach of the *Poštová Banka* tribunal.[123]

117. During the hearings on annulment, Total argued that if the Tribunal had applied Argentine law, it would have reached the same conclusion on shareholder claims because there is no provision in Argentine law that refers to questions of international law.[124] Furthermore, Argentine law recognizes the supremacy of international law, and where there is a conflict between a domestic and an international law, there is *renvoi* to international law.[125]

ii. *The Tribunal did not exceed its powers in finding a breach of Article 3 of the BIT*

118. Total asserts that the determination on whether there has been a manifest excess of powers in the Tribunal's ruling on the renegotiation process depends on a reading of the whole text in its proper context. Argentina misinterprets the Tribunal's decisions.[126]

119. In the Decision on Jurisdiction, the Tribunal did not restrict its ability to take the conduct of the renegotiation process into account for potential treaty breaches. The Tribunal stated that it was not competent to rule on the renegotiation process as a matter of Argentine Law but specified that the fair and equitable treatment claim was factually premised on the renegotiation process.[127] The Tribunal's ruling held that Argentina had breached Article 3 of the BIT by failing to restore

[117] C-Mem., ¶ 34.
[118] *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Annulment Proceeding.
[119] C-Mem., ¶¶ 35-36.
[120] Rej., ¶ 12.
[121] Rej., ¶ 15.
[122] *Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic* (ICSID Case No. ARB/13/8), Annulment Proceeding.
[123] Rej., ¶¶ 13-14.
[124] Tr.:264:12-265:12.
[125] Tr.: 266:20-268:13.
[126] C-Mem., ¶ 39.
[127] C-Mem., ¶40.

the economic equilibrium of TGN's tariffs;[128] the Tribunal assessed this failure under international law standards.[129]

120. Total contests Argentina's allegations that the Tribunal made an *ultra petita* ruling because Total had not asked it to consider Argentina's conduct with respect to the renegotiation process. Claimant recalls paragraphs 31 and 68 of the Decision on Jurisdiction, where it is clearly stated that Total had actually requested the Tribunal to consider breaches of the BIT by Argentina arising out of the ongoing renegotiation process. This was exactly what the Tribunal did in its Decision on Liability.[130]

121. Total submits that the Tribunal was very careful to avoid a possibility of double recovery, however if eventually, after fourteen years, the renegotiation process comes to an end, compensation to one entity and compensation to another does not amount to double recovery.[131]

iii. *The Tribunal did not exceed its powers in its application of the Argentine emergency doctrine*

122. In regards to Argentina's criticism on the application of the Argentine emergency doctrine by the Tribunal, Total considers this another instance in which Respondent seeks for a review of the Tribunal's application of the law.[132]

123. In the Decision on Liability, the Tribunal applied both international and domestic law in a reasoned manner. It first considered which law to apply to each question and concluded that the provisions of the emergency doctrine in Argentine law were not relevant to determine the extent of obligations arising under the BIT. In Total's view, this type of characterization is a necessary part of applying the applicable law, as Argentine law and international law apply to different aspects of the dispute. Thus, Argentina is unable to meet the standard under Article 52 (1) (b) that the Tribunal failed to apply the law *in toto.*[133]

124. At the hearing, Total explained that domestic law does not offer defenses for breaches of international law.[134] In addition, even by applying Argentine emergency doctrine, the result would not have been outcome-determinative: the Tribunal would have reached the same decision, because as it was acknowledged by Argentina, the doctrine under international law was applicable too, and would have trumped the Argentine defense.[135]

[128] C-Mem., ¶ 41.
[129] Rej., ¶ 19.
[130] C-Mem., ¶ 42; Rej., ¶ 20.
[131] Tr.: 285:6-286:18.
[132] C-Mem., ¶ 43.
[133] C-Mem., ¶¶ 43-47.
[134] Tr.:74:13-75: 8.
[135] Tr.:75: 14-22; 76: 1-10.

iv. *The Tribunal did not exceed its powers in interpreting Article 5(3) of the BIT*

125. Similarly, Total deems Argentina's arguments based on the interpretation of Article 5(3) of the BIT a disagreement with the Tribunal's application of this provision rather than an allegation that the Tribunal manifestly failed to apply the applicable law.[136] The Tribunal concluded that Article 5(3) of the BIT did not correspond to a "non-precluded measures" clause, as Argentina requested. Thus, the Tribunal concluded that Article 5(3) of the BIT does not cover the measures adopted by Argentina.[137]

126. The Tribunal, as it is empowered to do so, distinguished national emergencies (for which the provision could be potentially applicable) and economic emergencies such as the one that Argentina experienced in the early 2000s, and concluded that this provision did not cover economic emergencies. Argentina's argument is based on an erroneous application of the law and therefore falls outside the scope of annulment under the ICSID Convention.[138]

v. *The Tribunal did not exceed its powers in interpreting the customary international law defense of necessity*

127. Total posits that Argentina's arguments on the failure to apply the law based on the way in which the Tribunal applied the necessity defense under customary international law also concerns the application of the legal rule, instead of a failure to apply the law at all.[139]

128. According to Total, the Tribunal addressed the necessity defense and applied the standards reflected in Article 25 of the ILC Articles on Responsibility of States. Argentina's argument that the Tribunal failed to elaborate upon the requirements of the "only way" to safeguard the "essential interests" of the State disregards several pages of the Decision on Liability. Total refers to the reasoning of the Tribunal in paragraphs 221-224 and footnotes 266-267 of the Decision on Liability, and distinguishes this case from the annulment decision in *Enron Creditors Recovery Corp, Ponderosa Assets LP v. Argentine Republic*, which in turn has been widely criticized for going beyond the scope of ICSID annulment.[140]

129. Total argues that the doctrine of necessity requires the party invoking it to show that the measures in question were the only way to safeguard essential interests of the State. Since no further definition was required, the Tribunal turned to the factual analysis. It concluded that Argentina was unable to prove that freezing the tariffs was the "only way" to protect its interest.[141]

130. In any event, Total states that under Article 27 of the ILC Articles on State Responsibility, a finding of a state of necessity would have been without prejudice to Argentina's obligation to

[136] Rej., ¶ 23.
[137] Tr.:146:21-147:14.
[138] C-Mem., ¶¶ 48-52.
[139] C-Mem., ¶ 53.
[140] C-Mem., ¶¶ 54-58.
[141] Reply, ¶¶26-27.

compensate Total for its loss, and therefore Argentina's criticism of the Tribunal's reasoning would not have had any dispositive effect on the outcome of the case.[142]

b. The Tribunal did not fail to state reasons

1. Standard for Annulment under Article 52 (1) (e)

131. Total submits that a violation of the duty to provide a reasoned award (Article 48(3) of the ICSID Convention) may yield grounds for annulment as Failure to State Reasons (Article 52(1)(e) of the ICSID Convention), in limited circumstances.[143]

132. An *ad hoc* committee cannot annul an award on the basis that it disagrees with the reasons provided by a tribunal. An actionable failure to state reasons arises from a total absence of reasons, contradictory reasons or incoherent reasons that do not allow the reader to follow the logic of the arguments. However, Argentina is questioning the *quality* of the Tribunal's reasoning, rather than alleging that the reasoning is unintelligible.[144]

133. Neither Article 48(3) nor Article 52(1)(e) of the ICSID Convention provide the manner in which tribunals must give reasons. As such, reasons may be implicit and annulment committees can reconstruct the tribunal's reasoning.[145]

134. In addition, the failure to state reasons must relate to a point essential to the tribunal's decision, in order for it to be annullable.[146]

135. Contradictory reasons may exceptionally constitute a failure to state reasons where they prevent the reader from understanding the tribunal's motives. Prior annulment committees have set a high threshold, whereby the reasons must be genuinely contradictory in that they cancel each other out and that they refer to a point that is necessary to the tribunal's decision. Also, committees must distinguish contradictory reasons from conflicting considerations, as they may risk acting as an appellate body.[147]

[142] C-Mem., ¶ 59.
[143] C-Mem., ¶ 60.
[144] C-Mem., ¶¶ 60-64.
[145] C-Mem., ¶¶ 65.
[146] C-Mem., ¶ 66.
[147] C-Mem., ¶¶ 67-70.

2. Argentina has not established that the Tribunal failed to state reasons in its Award

i. *The Tribunal did not fail to state reasons in finding jurisdiction over Total's claims*

136. Total responds to Respondent's allegations that the Tribunal failed to state reasons in finding competence over Total's claims, recalling that the Tribunal dedicated an entire section of its Decision on Jurisdiction to address the issues that form the basis of Argentina's concerns. However, Argentina proposes an alternative reasoning contending that the Tribunal failed to state reasons by neglecting to explain how the treaty allows claims relating to assets and rights that belong to non-covered investors. The Tribunal expressly stated that its competence was based on the rights of Total under the BIT and not the rights of Total's subsidiaries under Argentine law.[148]

ii. *The Tribunal did not fail to state reasons in finding a breach of Article 3 of the BIT*

137. Total submits that Argentina misrepresents the Tribunal's approach in its dealing with the renegotiation process in the Decision on Jurisdiction and in the Decision on Liability, in an attempt to create a contradiction. [149] The Tribunal did not take *"…a decision on the merits of the renegotiation process under Argentine law, but rather a consideration that the failure of the renegotiation process (which was by no means the only measure available for Argentina to re-establish equilibrium in the gas transportation tariffs) contributed to the unfair treatment that Argentina meted out to Total's investment."*[150]

138. Additionally, Total signals that, similarly to the situation in *Azurix v. Argentina*, there is no contradiction in the Tribunal excluding the compliance with the renegotiation process with domestic law from its jurisdiction and then considering it as a part of a factual basis for treaty breaches. The Tribunal simply dealt with questions of national and international law separately when exercising jurisdiction.[151]

iii. *The Tribunal did not fail to state reasons in its application of the Argentine emergency doctrine*

139. Once again, Total points out that Argentina attempts to create the semblance of a missing reason by mischaracterizing the Tribunal's decision. However, the Tribunal presented its reasoning concerning the application of Argentine law and, in the same paragraph cited by Respondent, it concluded that the fact that a domestic measure challenged by Total might be legitimate in Argentina's legal system would not relieve the Tribunal from examining whether Argentina has nevertheless breached the BIT.[152]

[148] C-Mem., ¶¶ 71-73.
[149] C-Mem., ¶ 75.
[150] C-Mem., ¶ 75.
[151] C-Mem., ¶ 77.
[152] C-Mem., ¶¶ 79-80.

iv. *The Tribunal did not fail to state reasons in interpreting Article 5(3) of the BIT*

140. Total submits that the Tribunal found that Article 5(3) of the BIT does not excuse the parties from their obligations, but provides an additional guarantee to investors. The Tribunal concluded that this clause did not apply in Total's case because Argentina's measures were taken in the context of an economic emergency that did not rise to the level of a national emergency.[153] Total posits that this conclusion is evident from the wording of the provision and that the Tribunal's interpretation merely reflected this fact.[154]

141. In fact, paragraph 229 of the Decision on Liability contains the reasons for this conclusion: Article 5(3) of the BIT must carry its meaning according to its text and function and therefore it is not applicable to an economic emergency unless such emergency leads to a national emergency.[155]

142. In any event, even if the Tribunal incorrectly applied Article 5(3) of the BIT, it would have not had an impact on the outcome of the arbitration, as this clause is an *additional guaranty* to the investor.[156] In addition, Total argues that the Tribunal fully addressed and justified its decision.[157]

v. *The Tribunal did not fail to state reasons in interpreting the customary international law defense of necessity*

143. Total recalls that the Tribunal expressly addressed Argentina's necessity defense at length on the Decision on Liability. The Tribunal defined the legal standards and explained its conclusions, thus Argentina has not established that it is impossible to follow the reasoning of the Tribunal.[158]

144. In its Rejoinder, Total further argues that Argentina does not distinguish between the grounds that give rise to annulment for the Tribunal's dealing of the defense of necessity that relate to failure to state reasons and manifest excess of powers.[159]

vi. *The Tribunal did not fail to state reasons in its assessment of damages*

145. Total argues that a consideration of the whole decision in light of the record before the Tribunal dispels any doubts as to the alleged existence of contradictory statements in the Tribunal's assessment of damages.[160]

146. First, Total states that there is no contradiction. The Tribunal found that the pesification and subsequent failure to readjust tariffs might be understandable, as it was limited to the period of

[153] C-Mem., ¶¶ 81-82.
[154] C-Mem., ¶ 83.
[155] Rej., ¶¶ 37-38.
[156] Rej., ¶ 39.
[157] Tr.:148:14-149:11.
[158] C-Mem., ¶ 84.
[159] Rej., ¶ 40.
[160] Mem., ¶85.

economic difficulties (first semester of 2002). The Tribunal chose a valuation date as of 1 July 2002 because the measures adopted by Argentina after that date were unfair and inequitable. Total clarifies that "*[t]ariff adjustments in the second half of 2002 therefore would have taken into account price variations in the first half of 2002 because that is the way in which tariffs were calculated in Argentina, not because of an assumption that measures taken during the first half of 2002 were wrongful.*"[161] There is no contradiction in the Tribunal's approach to the timing of Argentina's wrongful measures.[162]

147. Second, Total deems incomprehensible Argentina's argument on the alleged contradiction regarding the indexing of TGN tariffs in the *but-for* scenario and the finding in the Decision on Liability that Argentina could have been expected to exclude gas tariffs from pesification. In this decision, the Tribunal did not find Argentina at fault under the BIT for the devaluation of its currency and the pesification of gas tariffs, but considered unfair and unequitable the blocking of mechanisms that were at Argentina's disposal to respect the fundamental expectations of investors. The blocking of the periodic adjustment of tariffs according to inflation was eliminated from the *but-for* scenario in the Award.[163]

148. In Total's words: "A finding that no extraordinary tariff review was required is entirely consistent with an assumption that tariffs would have adjusted naturally according to the indexation of the *but-for* scenario."[164] Argentina criticizes the Tribunal's findings on the quantification of damages but does not identify a failure to state reasons.[165]

149. Finally, Total does not see a contradiction between the Tribunal's conclusion in the Award that TGN would have remained solvent in the *but-for* scenario and its decision that the pesification did not violate the BIT. The Tribunal concluded that had TGN's tariffs been adjusted for inflation the resulting cash-flow would have allowed it to service its foreign debt. The Tribunal included the full impact on pesification in both the actual and the *but-for* scenarios because it decided to adjust costs and tariffs.[166]

150. In addition, the Tribunal's conclusion in the Award that TGN would have been able to service its foreign debt in the *but-for* scenario only was delivered after the Tribunal examined additional evidence submitted by the Parties after the Decision on Liability was rendered.[167] Argentina chose to ignore this evidence which refers to the expert analysis submitted in accordance with Procedural Order No. 7.[168] In any case, Total argues that even if a contradiction existed, it would not have been outcome determinative since the resulting damages would actually be higher.[169]

[161] C-Mem., ¶¶ 86-88.
[162] Rej., ¶ 41.
[163] C-Mem., ¶¶ 89-90.
[164] Rej., ¶ 42.
[165] Rej., ¶ 43.
[166] C-Mem., ¶¶ 90-91.
[167] C-Mem., ¶ 92.
[168] Rej., ¶ 46.
[169] C-Mem., ¶ 93.

c. The Tribunal did not depart from a fundamental rule of procedure

1. Standard for Annulment under Article 52 (1) (d)

151. Article 52 (1)(d) establishes the possibility of annulling a decision where there is a serious departure from a fundamental rule of procedure. This ground requires the rule to be fundamental, to relate to an element of due process, and to be serious, insofar as it causes the tribunal to reach a substantially different result.[170] Also, as per Arbitration Rule 27, a party cannot rely on a departure from a fundamental rule of procedure that it did not raise during the arbitration, or else it would have waived its right to request annulment on that basis.[171]

152. Total contests Argentina's allegations that it could not have known that the Tribunal would rule on the renegotiation process until the Decision on Liability, by recalling that such a claim was not raised during the arbitral proceedings. Total states that the Parties had been able to address the issue of the renegotiation process in their pleadings, thus both Parties were aware that this issue was potentially relevant to the Tribunal's consideration on liability. There was nothing improper at the hearing and Argentina's due process rights were fully respected.[172] Argentina's response shows dissatisfaction with its own oral responses to these questions. Respondent's complaint is difficult to understand because it was able to furnish arguments in its Rejoinder on the Merits and in post-hearing submissions.[173]

153. Even if the Committee accepts Argentina was in fact deprived of the right to be heard, it should be noted that Argentina waived the right to complain about such deprivation in accordance with ICSID Arbitration Rule 27 by not raising the matter during three years between the Decision on Jurisdiction and the Decision on Liability. [174]

d. Total's Submissions on Costs

154. Total requests the Committee to order that Argentina bear all costs and expenses of Total in connection with these annulment proceedings. Argentina's application for annulment is unmeritorious. For the past decade, Argentina has sought to annul every award rendered against it as a matter of reflex, in order to exert pressure on its judgment creditors to accept a reduced or delayed payment. This behavior must not go uncounted when considering the allocation of costs.[175]

155. Article 52(4) of the ICSID Convention on costs is expressly incorporated in annulment proceedings and therefore the shifting of costs is equally appropriate in these proceedings. *Ad hoc* committees have ordered unsuccessful applicants to pay costs in cases in which the request was completely rejected, the application fundamentally lacked merit and when the applicant was

[170] C-Mem., ¶¶ 94-95.
[171] Tr.:166:10-168:2.
[172] C-Mem., ¶¶ 97-99.
[173] Rej., ¶ 49.
[174] Tr.:276: 3-8.
[175] C-Mem., ¶ 100.

routinely late in paying ICSID advances. Should Argentina's application be dismissed in its entirety, all those elements would exist.[176]

IV. ANALYSIS OF THE *AD HOC* COMMITTEE

156. In order to arrive to the conclusions contained in this Decision on Annulment, the Committee reviewed and considered 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 it. 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 also considered these documents carefully and may have taken into account the reasoning and findings of the committees referred to during the proceeding as well as other committees on annulment.

157. However, in coming to a decision on the matter of annulment raised by Argentina, the Committee must perform, and in fact has performed, an independent analysis of the ICSID Convention, the Arbitration Rules, and the particular facts of this annulment case.

A. Scope of the Annulment Proceedings

158. The Parties do not dispute that ICSID awards are binding on the disputing parties, may not be appealed, and are not subject to any remedies except those provided for in the ICSID Convention.[177]

159. As explained in the ICSID Background Paper on Annulment, during the deliberations of the Convention from which the grounds for annulment derive, *"(…) the ILC decided that no appeal against an arbitral award should be allowed, but that the validity of an award might be challenged 'within rigidly fixed limits.'"*[178] The Committee notes that the usage of qualifiers such as "manifest," "serious," and "fundamental" suggest that the powers of an *ad hoc* committee to annul an ICSID award were intended to be limited within the grounds for annulment under Article 52(1) of the Convention. As one commentator indicated, annulment is an exceptional remedy.[179]

160. In addition, "[t]he limited and exceptional nature of the annulment remedy expressed in the drafting history of the Convention has been repeatedly confirmed by ICSID Secretary-Generals in Reports to the Administrative Council of ICSID, papers and lectures."[180]

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[176] C-Mem., ¶¶ 101-102.

[177] Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012; ¶12 ["ICSID Background Paper on Annulment"]; Mem., ¶15; C-Mem., ¶¶1-2

[178] ICSID Background Paper on Annulment;¶12, referring to the Documents of the Fifth Session Including the Report of the Commission to the General Assembly of 1953. Footnotes omitted.

[179] Aron Broches, Observations on the Finality of ICSID Awards, 6 ICSID Rev. – FILJ 321 (1991), p.329

[180] *See ibid.,* fn. 136 , "Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twentieth Annual Meeting 3 (October 2, 1986): "The history of the Convention makes it clear that the draftsmen intended to: (i) assure the finality of ICSID awards; (ii) distinguish carefully an annulment proceeding from an appeal; and

161. The Committee agrees with Argentina in that the grounds listed in Article 52(1) of the ICSID Convention must be interpreted in accordance with the treaty interpretation principles contained in Articles 31 and 32 of the VCLT.

162. This means that Article 52(1) should be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the ICSID Convention in their context and in the light of its object and purpose. If necessary to confirm the meaning of the interpretation according to Article 31, or if the interpretation under Article 31 leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, then, according to Article 32 of the VCLT recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

163. It is not disputed that the grounds for annulment provided by Article 52(1) of the ICSID Convention are exhaustive and are the only grounds under which an award may be annulled.

164. Article 53 of the ICSID Convention provides for the fundamental features of an arbitration award and confirms the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties.[181] The said article confirms also that the only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention and that no appeal is allowed.

165. Therefore, it is also undisputed that an annulment committee should not review the merits. It is not the duty of an *ad hoc* committee under the ICSID Convention to revisit the merits of the case, or to comment on what it would have decided on the merits had it acted as an arbitral tribunal. Annulment is an exceptional recourse that should consider the finality of the award.

166. Thus, the grounds for annulment should be interpreted as being exhaustive, considering their object and purpose, as an exceptional remedy, against an award that is otherwise considered final and binding. Nothing in the text of the ICSID Convention or in the preparatory works suggests that the interpretation of the grounds for annulment should consider that "*ICSID awards are not subject to the remedies typically available against awards under other arbitration rules, which may generally be resorted to before domestic courts during award enforcement proceedings.*"[182]

167. ICSID *ad hoc* committees have affirmed in their decisions, and this Committee agrees, that (a) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (b) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc*

(iii) construe narrowly the ground for annulment, so that this procedure remained exceptional;" Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twenty-Second Annual Meeting (September 27-29, 1988): "It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the shortcomings against which it is meant to be a safeguard. It is also wrong to confuse the annulment proceeding with an appeals process which is not possible in respect of awards issued by ICSID's tribunals; Broches, supra note 15, at 354 & 355; Annex 4, para. 28." ICSID Background Paper on Annulment, ¶ 74 and Footnote, 136.

[181] ICSID Convention, Article 53.

[182] Mem., ¶ 16.

committee is limited; (c) *ad hoc* committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the tribunal's determination on the merits for its own; (d) *ad hoc* committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (e) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly: and (f) an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full.[183]

168. It is under the above general standard and scope that this Committee will review each of the grounds for annulment submitted by Respondent. The Committee will refer to each ground for annulment, define the standard that applies to each such ground and then analyze the claims of Argentina with respect to each ground to determine whether or not the Decisions and the Award should be annulled.

B. Manifest Excess of Powers

169. Argentina submits that the Tribunal manifestly exceeded its powers because:

(a) The Tribunal had a duty to apply both international law and the domestic law of Argentina, as established in Article 8(4) of the Argentina-France BIT. In analyzing Total's *ius standi*, the Tribunal failed to apply Argentine law, along with the BIT and international law, which amounts to a failure to apply the applicable law. The Tribunal did not provide the reasons for such failure.

(b) The Tribunal exercised jurisdiction over Total's claims as a shareholder and awarded damages, despite the fact that neither general international law nor Argentine law permit indirect actions such as those brought by Total and admitted by the Tribunal.

(c) The Tribunal first stated—in its Decision on Jurisdiction—that it did not have jurisdiction to decide on the merits of the renegotiation process and then contradicted itself—in its Decision on Liability—in holding the Argentine Republic liable on the basis of the inconclusive result of the renegotiation process.

(d) The Tribunal failed to apply the applicable law by not applying the emergency doctrine under Argentine law. The Tribunal was supposed to carry the examination of the emergency doctrine and the BIT, since Argentina had invoked that defense and Argentine law was part of the applicable law.

(e) The Tribunal (i) failed to apply Article 5(3) of the BIT by rejecting the defense of necessity with regard to the measures adopted in relation to TGN; and (ii) did not state

[183] ICSID Background Paper on Annulment, ¶75. Footnotes omitted.

the reasons for its decision not to apply such Article to losses deriving from measures adopted by the government in a situation of national emergency.

170. The Committee will first define the standard for annulment under Article 52(1)(b) of the ICSID Convention and then analyze the application of such standard with respect to each of the reasons for annulment submitted by Argentina.

a. Manifest Excess of Powers - The Standard

171. The Committee is of the view, and the Parties do not seem to dispute, that Article 52(1)(b) of the ICSID Convention requires that there is an "excess" in the performance of the powers of the Tribunal and that such excess must be "manifest."

172. As stated in the ICSID Background Paper on Annulment: "Article 52(1)(b) of the ICSID Convention provides that only instances of "manifest" excess of the Tribunal's powers may lead to an annulment, indicating a dual requirement of an "excess" that is "manifest."[184]

173. An excess of powers is manifest when it is "(…) obvious, clear or self-evident, and which is discernable without the need for an elaborate analysis of the award."[185] In the words of the *Wena v. Egypt* annulment committee: "The 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."[186]

174. The limited scope of Article 52(1)(b) was emphasized in the following passage from the annulment committee's decision in *CDC v. Seychelles:*

> "As interpreted by various ad hoc Committees, the term 'manifest' means clear or "self-evident". Thus, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal's conduct, if susceptible of argument 'one way or the other', is not manifest. As one commentator has put it, 'If the issue is debatable or requires examination of the materials on which the tribunal's decision is based, the tribunal's determination is conclusive.'"[187]

175. In accordance with the foregoing, an *ad hoc* committee under the ICSID Convention cannot annul an award on the ground that it's understanding of the facts, or interpretation of the law, or appreciation of evidence is different from that of the tribunal. If it so does, it will cross the line that separates annulment from appeal.[188]

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[184] ICSID Background Paper on Annulment, ¶ 83.
[185] ICSID Background Paper on Annulment, ¶ 84.
[186] *Wena Hotels Limited v. Arab Republic of Egypt*, (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award (February 5, 2002), ¶ 25 ["*Wena v. Egypt*"].
[187] *CDC Group PLC v. Republic of Seychelles*, (ICSID Case No. ARB/02/14), Decision of the Ad-Hoc Committee on the Application for Annulment of the Republic of Seychelles (June 29, 2005), ¶ 41 ["*CDC v. Seychelles*"].
[188] *Daimler Financial Services A.G. v. Argentine Republic*, (ICSID Case No. ARB/05/1), Decision on Annulment (January 7, 2015), ¶ 186 ["*Daimler v. Argentina*"].

176. This Committee agrees with others that have stated that nothing in the ICSID Convention indicates that a different standard shall be applied to issues of jurisdiction. Therefore an award can only be annulled if the lack or excess of jurisdiction was manifest.[189] This Committee considers that there is no difference in the standard of review applicable to a claim of manifest excess of powers on the basis of jurisdiction or on the merits.

177. The same conclusion is reflected in the ICSID Background Paper on Annulment:

> "At the same time, ad hoc Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence. This means that the Tribunal has the power to decide whether it has jurisdiction to hear the parties' dispute based on the parties' arbitration agreement and the jurisdictional requirements in the ICSID Convention. In light of this principle, 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'."[190]

178. The ICSID's Secretariat Background Paper on Annulment recalls that "[t]he drafters of the ICSID Convention anticipated an excess of powers when a Tribunal went beyond the scope of the parties' arbitration agreement, decided points which had not been submitted to it, or failed to apply the law agreed to by the parties."[191]

b. Manifest Excess of Powers Relating to the Applicable Law – The Standard

179. As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed.[192] Annulment under the ICSID Convention is a limited remedy.[193]

180. Consequently, when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention.

181. As stated by the *CDC v. Seychelles* annulment committee:

> "(…) Regardless of our opinion of the correctness of the Tribunal's legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal

[189] *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*. (ICSID Case No. ARB/07/29), Decision on Annulment (May 19, 2014), ¶¶114-115 ["*SGS v. Paraguay*"].
[190] ICSID Background Paper on Annulment, ¶ 89.
[191] ICSID Background Paper on Annulment, ¶ 82.
[192] *Hussein Nuaman Soufraki v. The United Arab Emirates*, (ICSID Case No. ARB/02/7), Decision of the Ad Hoc Committee on the Application for Annulment of Mr. Soufraki (June 5, 2007), ¶ 24
[193] *CDC v. Seychelles*, ¶¶ 34.

endeavored to apply English law. That it did so is made plain by its explicit statement in the Award that it did as well as by its repeated citation to relevant English authorities."[194]

182. The *Daimler v. Argentina* committee portrayed the issue of applicable law in the same sense: "What the Committee can do is to determine whether the Tribunal correctly identified the applicable law and endeavored to apply it. As to the latter, there is a distinction between endeavoring to apply the correct law and correctly applying the law. While the former may provide a ground for annulment the latter is outside the scope of authority of an ad hoc annulment committee."[195]

183. This conclusion is also supported in the findings of the ICSID Background Paper on Annulment: "[t]he drafting history of the ICSID Convention shows that a Tribunal's failure to apply the proper law could constitute a manifest excess of powers, but that erroneous application of the law could not amount to an annullable error, even if it is manifest. As stated above, there is no basis for an annulment due to an incorrect decision by a Tribunal, a principle that has been expressly recognized by many ad hoc Committees."[196]

184. The Committee also considers that when more than one interpretation or approach in concluding what the applicable law 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.

185. In sum, even if a Tribunal exceeds its powers, the excess must be plain on its face for annulment to be an available remedy. If the issue is susceptible of an argument "one way or the other," is not manifest or if the issue is debatable or requires examination of the materials on which the tribunal's decision is based, then the tribunal's determination is conclusive.[197]

C. Committee's decisions on applicable law

a. Failure to apply Argentine law to determine the *ius standi* of Total

186. Argentina claims that, pursuant to Article 8(4) of the Argentina-France BIT, the Tribunal had a duty to apply the provisions of the BIT; Argentine law, including the rules on the conflict of laws; special agreements concluded in relation to the investment; and the relevant principles of international law.[198]

187. According to Argentina, the Tribunal failed to apply the applicable law because in its analysis of Total's *ius standi* it did not apply the domestic law of Argentina and international law, along with the BIT.[199] In addition, the Tribunal did not provide reasons for its failure to apply the

[194] *Ibid.* ¶ 45.
[195] *Daimler v. Argentina*, ¶ 191.
[196] ICSID Background Paper on Annulment, ¶ 91.
[197] *CDC v. Seychelles*, ¶ 41.
[198] Mem., ¶¶ 35-36.
[199] Tr. 199:19-22; 200:9-15.

applicable law – Argentine law- but simply considered that such law was "immaterial" for the determination of whether the rights in question belonged to Total.[200]

188. The scope of the manifest excess of powers as a ground for annulment has been discussed above both as regards the general standard and the standard that applies in the cases of alleged failure to apply the applicable law.

189. As stated by the *ad hoc* committee in *MTD v. Chile*, in order to decide on the matter the Committee has to consider three questions: (1) what law was in truth applicable to a given issue, in accordance with Article 42 of the ICSID Convention; (2) what law did the Tribunal purport to apply to that issue; (3) whether there is any basis for concluding that the Tribunal's decision involved a manifest failure to apply the applicable law, in the limited sense explained in paragraphs 179-185 *supra*.[201]

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

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

191. Article 8(4) of the Argentina-France BIT provides that:

> "The ruling of the arbitral body shall be based on the provisions of this Agreement, the legislation of the Contracting Party which is a party to the dispute, including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law."

192. Respondent considers that Argentine law should have been applied to the determination of Total's *ius standi* and that if Argentine law had been applied the Tribunal would have concluded that a shareholder could not submit a claim alleging the breach of the rights of the company, such as Total did.[202] It also considers that general international law does not permit indirect or derivative actions, unless the possibility of submitting such actions has been expressly provided for in an appropriate instrument[203].

193. The first question[204] that this Committee has to address is what law was in truth applicable to the given issue that the Tribunal had to decide, in accordance with Article 42 of the ICSID Convention.

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[200] Mem., ¶¶ 34-37.
[201] *MTD Equity S.d.n. Bhd and MTD Chile S.A. v. Republic of Chile*, (ICSID Case No. ARB/01/7), Decision on Annulment (March 1, 2007), ¶59 ["*MTD v. Chile*"].
[202] Mem., ¶¶ 50-54.
[203] Mem., ¶¶ 40-41, ¶¶ 55-56.
[204] See ¶ 189 *supra.*

194. There is no doubt that in Article 8(4) the parties to the Argentina-France BIT agreed on the applicable law: the provisions of the Argentina-France BIT, the legislation of Argentina (as the Contracting Party which is a party to the particular dispute), including rules governing conflict of laws, the terms of any private agreements concluded on the subject of the investment, and the relevant principles of international law.

195. The Parties do not seem to dispute, and the Committee agrees, that there would be a manifest excess of powers if the parties to the given treaty have agreed on the applicable law and the Arbitral Tribunal fails to apply the agreed applicable law. In other words, failing to apply such agreed laws to the issue in dispute would meet the requisite standard for annulment.

196. However, if the text of the treaty provides for several applicable laws, without providing a hierarchy or a rule as to which law should apply to a particular issue, and there is a dispute between the parties as to the law that should apply to decide a particular issue in dispute, it is for the arbitral tribunal to conclude what the applicable law is, based on the text of the treaty and the submissions of the parties before it. It is not for the *ad hoc* Committee to review the correctness of the approach taken by the Arbitral Tribunal, let alone the correctness of the conclusion on which is the applicable law for a particular issue.

197. If the parties, as in the case at hand, dispute the applicable law based on a different interpretation of the language of the treaty, it is for the arbitral tribunal to characterize the nature of the issue in dispute and decide which is the law that applies to the given issue. The Committee notes that there may be many different approaches or conclusions that tribunals have adopted or made in the past, and that there are differing views on how the law should be ascertained. Suffice it to note that the task for this Committee is not to review the findings of the Tribunal and substitute the applicable laws it finds or prefers in the annulment proceedings.

198. Hence in addressing the first question of what law was in truth applicable to a given issue in accordance with Article 42 of the ICSID Convention, this Committee stresses that it cannot review *de novo* the arguments of the Parties and come to a conclusion as to what is the applicable law under Article 42. This Committee takes the view that short of acting *ex aequo et bono* or where the error in applying the law is so grave that it is tantamount to a veritable case of non-application, a finding of the tribunal on what the applicable law is cannot be reviewed and challenged by an *ad hoc* committee.

199. It is clear for this Committee that an arbitral tribunal has the authority to interpret the text of the given treaty and to determine, based on the interpretation of the treaty, the approach that it will follow to identify the applicable law and to establish how such law applies to the issue in question. An *ad hoc* committee could not review the correctness of such interpretation.

200. Nothing in the Argentina-France BIT requires the Tribunal to apply all the laws listed in Article 8(4) to all issues in dispute, or to grant the treaty, or domestic law or international law a special hierarchy or preference to define an issue in dispute. It is thus for the Tribunal to interpret

Article 8(4) the Argentina-France BIT and decide on the interplay between the different sources of law listed therein.

201. In the Decision on Jurisdiction, the Arbitral Tribunal first defined the issue that it had to decide, *i.e*., whether the measures of Argentina that allegedly adversely affected the local companies, in which Total holds minority shareholdings are capable of constituting a breach of the protection afforded by the BIT and therefore, whether the case at hand was one of a "dispute arising directly out of an investment". [205]

202. Thereafter, the Tribunal considered that Total was invoking treaty rights, and proceeded to analyze the definition of "investment" under the Argentina-France BIT, referring to its object and purpose and citing international case law, to conclude that:

> "There is no reason to hold otherwise when minority shareholding in a local company incorporate are at issue in a situation such as the present one. The BIT specifically included minority shareholding within the definition of investment".[206] […] The Tribunal finds therefore that claims with respect to Total's indirect and minority shareholdings in TGN, HPDA and Central Puerto are disputes relating to an investment, as defined in the BIT. Thus, the Tribunal finds that it has jurisdiction under Article 25(1) of the ICSID Convention and Article 8.1 of the BIT with respect to these legal disputes arising directly out of an investment. The issue of whether Argentina's measures actually breached any of Total's treaty rights is one for the merits stage of the proceedings and has not been considered by the Tribunal at this stage.[207]

203. When addressing the objection on jurisdiction based on the alleged lack of *ius standi*, the Tribunal reiterates that Total's claims fall within the ambit of the BIT and that the Tribunal has jurisdiction,[208] explains the reasons why the Barcelona Traction case[209] and Argentine law do not apply[210] and indicates that Total is invoking treaty rights as an investor under the Argentina-France BIT, and therefore Total's claims cannot "*be defined as indirect claims (or "derivative claims"), as if Total was claiming on behalf or* in lieu *of its subsidiaries in respect to rights granted to the latter by the laws of Argentina. It is therefore irrelevant that such claims would be inadmissible under those laws and that they would not be amenable in any case to the jurisdiction of and ICSID arbitral tribunal*."[211]

204. In sum, in the case at hand, the arbitral tribunal first identified the issue in dispute, i.e., whether Total had an investment and thus, whether there was a "*dispute arising directly out of an*

[205] "The question at issue here is whether the measures of Argentina that allegedly adversely affected the local companies, in which Total holds minority shareholdings and whose value was in turn affected, are capable of constituting a breach of the protection afforded by the BIT to Total's investments as therein defined. If the answer is affirmative on the basis of a prima facie examination, then the present case is one of a "dispute arising directly out of an investment" on which this Tribunal has jurisdiction." Decision on Jurisdiction, ¶ 73.
[206] Decision on Jurisdiction, ¶ 75.
[207] Decision on Jurisdiction, ¶ 76.
[208] Decision on Jurisdiction, ¶ 77.
[209] Decision on Jurisdiction, ¶ 78.
[210] Decision on Jurisdiction, ¶¶ 79-81.
[211] Decision on Jurisdiction, ¶ 81.

investment."[212] Then it decided that the applicable law for that particular issue was the Argentina-France BIT and applied the definition of "investment" in the Argentina-France BIT to conclude that the definition included minority shareholders and therefore "*claims with respect to Total's indirect and minority shareholdings in TGN, HPDA and Central Puerto are disputes relating to an investment, as defined in the BIT."*[213] Considering that the disputes related to an investment, the Tribunal concluded that it had "*jurisdiction under Article 25(1) of the ICSID Convention and Article 8.1 of the BIT with respect to these legal disputes arising directly out of an investment."*[214]

205. As regards Argentine law, the Tribunal indicated that since there was an investment in accordance with the Argentina-France BIT and Total was invoking treaty rights under the Argentina-France BIT, the claims could not be considered indirect or derivative as if Total was claiming rights of its subsidiaries under Argentine law and therefore, "*it is therefore irrelevant that such claims would be inadmissible under those laws and that they would not be amenable in any case to the jurisdiction of and ICSID arbitral tribunal."*[215]

206. The foregoing does not mean, as Argentina suggests, that the Tribunal has considered the Argentine legal system or Argentine law irrelevant. The Decisions and the Award must be read in context and not in an isolated manner. The Tribunal considered, as it results from the above paragraphs, that the issue in dispute was whether or not Total had an investment for purposes of the Argentina-France BIT, and thus whether the dispute related to an investment. The Tribunal decided that the issue in dispute had to be defined under the provisions of the Argentina-France BIT and not under Argentine law and explained the reasons for that decision.

207. The Parties differed as to which of the laws mentioned in the Argentina-France BIT applied to determine the *ius standi* of Total as an investor. The Arbitral Tribunal determined that, amongst the laws mentioned in the said treaty, the proper law to define the *ius standi* of Total as an investor was the Argentina-France BIT, and concluded that Argentine law was not applicable and thus that it was not relevant whether or not the claims were admissible under Argentine law. The Arbitral Tribunal characterized the issue in dispute and decided, based on the text of the Argentina-France BIT and the submissions of the Parties, which of the laws agreed upon by the parties to the treaty applied to the issue in dispute.

208. Moreover, the Tribunal followed a similar approach throughout the Decisions and the Award, *i.e.*, identifying the specific issue in dispute and then determining whether such particular issue is a matter that had to be defined under the Argentina-France BIT, the laws of Argentina, or principles of international law.[216]

209. Neither the approach applied by the Tribunal to determine the applicable law nor the decision to apply the provisions of the Argentina-France BIT to the issue in dispute - *ius standi* of Total - amount to a disregard of the applicable law, much less a failure to apply Argentine law.

[212] Decision on Jurisdiction, ¶ 73.
[213] Decision on Jurisdiction, ¶ 76.
[214] Decision on Jurisdiction, ¶ 76.
[215] Decision on Jurisdiction, ¶ 81.
[216] *e.g.* Decision on Objections to Jurisdiction, ¶¶ 73-76.

Argentina considers that the Tribunal should have followed a different approach to determine the applicable law, and that such approach should have resulted in the application of Argentine law to define whether Total, being a minority shareholder, had the right to claim as an investor.

210. As already mentioned by this Committee,[217] nothing in the Argentina-France BIT requires the Tribunal to apply all the laws listed in Article 8(4) to all issues in dispute or to grant a given law a special hierarchy to define an issue in dispute. What Argentina is asking this Committee is to review *de novo* not only the interpretation of the Arbitral Tribunal that led it to conclude that the applicable law is the Argentina-France BIT, but also to reconsider the arguments before the Tribunal on what the applicable law is and to conclude that the Arbitral Tribunal should have applied Argentine law to determine whether Total had an investment protected under the Argentina-France BIT. This would amount to an appeal of the Decisions of the Arbitral Tribunal, which is precluded upon a proper interpretation of the provisions of the ICSID Convention.

211. The reasoned decision of the Arbitral Tribunal to apply the Argentina-France BIT as the proper law to the issue in question, and not to apply Argentine law or the Barcelona Traction case, as claimed by Argentina, does not involve a manifest disregard of the applicable law in the limited sense explained above. This ground for annulment is therefore rejected.

b. Failure to apply the applicable law as regards the emergency doctrine under Argentine law

212. Argentina questions the decision of the Arbitral Tribunal under paragraph 40 of the Decision on Liability. According to Argentina, the Tribunal never applied the emergency doctrine under Argentine law, which was one of the defenses raised by the Argentine Republic. However, in paragraph 39 of the Decision on Liability the Tribunal held that it had to determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT had occurred.

213. Argentina criticizes that the Arbitral Tribunal reasoned that Argentine law would play a role in determining the scope of Total's economic rights under Argentina's legal system, while the provisions of the emergency doctrine in Argentine law would not be relevant to the extent of obligations under the Argentina-France BIT.[218] According to Argentina, the Tribunal should have considered the application of Argentine law, *i.e.*, the emergency doctrine, for purposes of determining in the light of this doctrine the extent of the property rights that constitute Claimant's investment.

214. According to Argentina, regardless of the position adopted by the Arbitral Tribunal with regard to the resolution of potential conflicts between international and domestic law, so long as such conflict does not arise, the Tribunal should have applied both sources of law, as provided for in Article 8(4) of the Argentina-France BIT. The failure to apply the domestic law, together with

[217] See ¶ 200 *supra*.
[218] Reply, ¶¶ 64-65.

the BIT and international law, amounted to yet another case of failure to apply the applicable law.

215. In paragraph 39 of its Decision on Liability, the Tribunal affirmed that:

> "39. *The first question concerns the role of Argentina's domestic law in determining the content and the extent of Total's economic rights as they exist in Argentina's legal system.* In this regard the Tribunal believes that Argentine law has a broader role than that of just determining factual matters. The content and the scope of Total's economic rights (in Total's words, "Argentina's commitments to Total") must be determined by the Tribunal in light of Argentina's legal principles and provisions. Moreover, the extensive reliance by the Claimant on Argentina's acts of a legislative and administrative nature governing the gas, electricity and hydrocarbons sectors, as well as the extensive discussion between the parties regarding the content and extent of Total's rights in respect of the operation of its investments, is a recognition that Argentina's domestic law plays a prominent role. Thus, the Tribunal shall determine the precise content and extent of Total's economic rights under Argentina's legal system in respect of Total's claims under the BIT, wherever necessary in order to ascertain whether a breach of the BIT has occurred." (Emphasis added).

216. In paragraph 40, in turn, the Tribunal reasoned as follows:

> "40. *The second question regards the relevance that Argentina claims the emergency doctrine under Argentine law to have in determining whether a breach of the BIT has taken place.* In this regard the Tribunal makes the following observations. First, since Total complains of breaches of the BIT, the Tribunal must apply principally the BIT, as interpreted under international law, to resolve any matter raised. This means that the Tribunal must assess Argentina's responsibility under the BIT by applying the treaty itself and the relevant rules of customary international law. The Tribunal cannot accept Argentina's position that, by invoking the emergency principle as it exists under Argentine law, Argentina can avoid international responsibility for violation of the treaty. This would contradict the fundamental principle of international law according to which —a party may not invoke its internal law as a justification for its failure to perform a treaty (Article 27 of the Vienna Convention on the Law of the Treaties). Secondly, the Tribunal notes that any complaint by Total that Argentina's measures are in breach of domestic law is not raised per se but is used by Total to support Total's claims under the BIT. Therefore the fact that any domestic measure challenged by Total might be legitimate in Argentina's legal system thanks to the emergency doctrine would not relieve the Tribunal from examining whether Argentina has nevertheless thereby breached the BIT." (Emphasis added).

217. An arbitral tribunal has the authority to characterize the issue in dispute, interpret the provisions of the treaty as to applicable law and determine the law that applies to the given issue.[219] An *ad hoc* committee could not review such interpretation on grounds of manifest excess of powers,

[219] See ¶ 197 *supra.*

unless it is manifest, evident, that the arbitral tribunal failed to apply a law pursuant to the terms of Article 42 of the ICSID Convention.

218. The Committee has already established[220] that the Argentina-France BIT does not require the Arbitral Tribunal to apply all the laws listed in Article 8(4) to all issues in dispute, or to grant a given law a special hierarchy to define an issue in dispute. In the case at hand, the Tribunal identified two different questions, characterized the issue in dispute, and then decided which law should apply to each specific question.

219. First, the Tribunal considered the question related to "the role of Argentina's domestic law in determining the content and the extent of Total's economic rights as they exist in Argentina's legal system"[221] and concluded that in order to determine such content and extent the laws of Argentina had a broader rule than just determining factual matters.

220. Second, the Arbitral Tribunal considered whether the emergency doctrine under Argentine law was, as claimed by Argentina, relevant to determine whether a breach of the BIT has taken place.

221. In this regard, the Arbitral Tribunal reasoned that (a) the responsibility of Argentina under the Argentina-France BIT must be assessed by applying the treaty itself and the relevant rules of customary international law; (b) Argentina cannot avoid international responsibility for violation of the Argentina-France BIT by invoking the emergency principle under Argentine law (Article 27 of the VCLT); and (c) the fact that any domestic measure might be legitimate in Argentina's legal system thanks to the emergency doctrine would not relieve the Tribunal from examining whether Argentina has nevertheless thereby breached the BIT.

222. The Committee considers that in paragraphs 39 and 40 of the Decision on Liability the Tribunal characterized each issue that it had to decide, determined which law should apply to each such issue, and explained the reasons therefor. There is no failure to apply the law, as Argentina suggests, but a reasoned decision as to which law should apply to each specific issue. What Argentina is asking this Committee is either to apply all the laws listed in Article 8(4) of the Argentina-France BIT, to conclude that the Argentine emergency doctrine should have prevailed, or to consider that Argentine law, not the Argentina-France BIT, should have applied to the question of the emergency doctrine. This would amount to an appeal of the decisions of the Arbitral Tribunal, which is precluded upon a proper interpretation of the ICSID Convention. This ground for annulment is therefore rejected.

c. Failure to apply Article 5(3) of the BIT

223. Argentina claims that throughout the arbitration proceedings it held that since the measures challenged by Claimant were aimed at responding to a state of national emergency, the only applicable provision was Article 5(3) of the Argentina-France BIT.

[220] See ¶¶ 195-197 *supra*.
[221] Decision on Liability, ¶39.

224. Argentina holds that in order for such provision to have a useful effect, the only obligation to be fulfilled by the State in a state of national emergency—or in any of the abovementioned cases—was to grant the French investors treatment no less favorable than that accorded to its own investors or to investors from third States. However, the Arbitral Tribunal considered that Article 5(3) is not applicable to an economic emergency, unless the economic emergency, which hits one of the parties to the BIT, has led to a national emergency where losses have occurred such as those that are a result of war, uprising or any other kind of civil disturbance.

225. According to Argentina, the Tribunal never stated the reasons for its decision and rendered Article 5(3) ineffective in stating that such provision does not apply to losses deriving from measures adopted by the government in a situation of national emergency, when the State is normally liable only for its measures (and therefore, in accordance with the Tribunal's interpretation, Article 5(3) would have no useful effect). The Tribunal's suggestion that Article 5(3) of the BIT only applies when compensation of losses has been granted by a Party to its own investors or to investors of a third Party creates a condition that has not been established in the text of the provision.

226. The Committee does not agree with Argentina and considers that there is no failure to apply Article 5(3) of the Argentina-France BIT, but rather a disagreement of Argentina with the interpretation of the said article by the Arbitral Tribunal and with the conclusion of the Arbitral Tribunal arising from such interpretation.

227. In paragraph 229 of the Decision on Liability the Tribunal indicated that Article 5(3) is not applicable to an economic emergency unless it has led to a national emergency where losses have occurred such as those that are a result of war, uprising or any other kind of civil disturbance. The Tribunal interpreted the aforesaid article and concluded that in the case at hand a national economic emergency was not covered by the article in question and explained the reasons therefor. The provision was considered and the Tribunal expressed the reasoning for its interpretation of the article. There is no failure to apply the applicable law.

228. Argentina considers that the interpretation of the Arbitral Tribunal would render Article 5(3) ineffective and proposes its own interpretation. It is not for the Committee to review the interpretation of the Tribunal or to review whether such interpretation is correct. This ground for annulment is therefore rejected.

d. Failure to Apply the Necessity Defense under Customary International law.

229. Argentina invoked the defense of necessity under customary international law as a circumstance that precludes the wrongfulness of an act contrary to the obligation allegedly violated.

230. According to Argentina, in the Decision on Liability, the Tribunal rejected the defense of necessity with regard to the measures adopted in relation to TGN, because the Argentine Republic had allegedly failed to show that those measures were the only way for the State to safeguard essential interests against a grave and imminent peril. However, the Tribunal never

specified the legal standards to be met in relation to the "necessity" of protection of essential interest and the "only way" requirement.

231. Argentina holds that similar conclusions may be drawn as regards the finding of the Tribunal in connection with the power generation and the hydrocarbon exploration and production sectors.

232. Consequently, according to Argentina, the Tribunal manifestly exceeded its powers in failing to apply the law it was supposed to apply.

233. In the Decision on Liability, the Arbitral Tribunal specifically analyzed the defense of necessity under customary international law.[222]

234. The Arbitral Tribunal initially explained (a) that it was for Argentina, as the party raising the defense, to prove that the elements required under Article 25 of the Articles on State Responsibility were met,[223] (b) the reasons for considering that the Arbitral Tribunal should only have to evaluate the defense of necessity in respect of the failure of Argentina to readjust the gas tariffs;[224] and (c) what such evaluation of the defense of necessity entails, *i.e*, the "essential interests" and "only way" requirements.[225]

235. The Decision on Liability, together with the footnotes thereto, discuss the "essential interests" and "only way" requirements as characterized and claimed by Argentina,[226] and after such discussion the Tribunal concludes that:

> "Argentina has failed to prove the defense of necessity under customary international law as concerns the measures adopted in relation to Total's investments in TGN found to be in breach of the BIT. It is therefore unnecessary for the Tribunal to examine whether the further conditions required under customary international law for Argentina to avail itself of the defense of necessity have been fulfilled. Nor does the Tribunal have to analyze Total's counter-arguments in respect of those conditions. The Tribunal concludes that Argentina's defense based on the state of necessity under customary international law is groundless."[227]

236. Finally, in connection with Total's claims as to its investments in exploration and production of hydrocarbons, in paragraph 482 of the Decision on Liability the Arbitral Tribunal indicated that:

> "Argentina has raised the defense of necessity under customary international law also in respect of Total's claims as to its investments in exploration and production of

[222] Decision on Liability ¶¶ 220-224.
[223] Decision on Liability ¶ 221.
[224] Decision on Liability ¶ 221.
[225] In this regard, in ¶ 221 of the Decision on Liability the Arbitral Tribunal stresses that "More specifically, this entails, first, ascertaining whether the protracted freezing of the gas distribution tariff as of 2002 in breach of the BIT was necessary to safeguard Argentina's essential interests in preserving its people and their security in face of the economic and social emergency of 2001. Second, the Tribunal must determine whether such freezing, if necessary, was the only way to safeguard such alleged essential interest." Footnotes omitted.
[226] Decision on Liability ¶¶ 220-224.
[227] Decision on Liability ¶ 224.

> hydrocarbons. As in the case of Total's other investments, the Tribunal must therefore examine this defense in the light of the criteria stated in Article 25 ILC Articles on State Responsibility as it relates to measures adopted by Argentina in breach of the BIT."[228]

237. In footnotes 674 and 675 of paragraph 482 of the Decision on Liability, the Arbitral Tribunal refers to the analysis of the state of necessity under paragraph 220 and following, to conclude that Argentina had not met its burden of proof of the defense of necessity and therefore such defense is groundless.[229]

238. The reading of the above mentioned paragraphs of the Decision on Liability leads the Committee to conclude that Argentina is not correct in claiming that the Tribunal never specified the legal standards to be met in relation to the necessity of protection of essential interest and the "only way" requirement. On the contrary, what the said paragraphs indicate is that Argentina defined what it considered to be the standards of the "necessity" of protection of "essential interest" and the "only way" requirement and failed to prove the standards it had defined.

239. In sum, the Decision on Liability does not reject the legal standards claimed by Argentina to apply standards that the Tribunal did not define, as suggested by Argentina. The Decision on Liability takes the standards claimed by Argentina, the facts that Argentina presents in support of such standards, and concludes that Argentina failed to prove its own standards. This does not amount to a failure to apply the applicable law. It is simply a disagreement of Argentina with the legal analysis and conclusions of the Arbitral Tribunal. This ground for annulment is therefore rejected.

D. Manifest excess of powers relating to jurisdiction

a. The Standard

240. The ICSID Background Paper on Annulment summarizes the standard for annulment for excess of powers related to jurisdiction, as identified by tribunals and *ad hoc* committees, by indicating that "*there may be an excess of powers if a Tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking or when the Tribunal exceeds the scope of its jurisdiction. It has been recognized, in the inverse case, that a Tribunal's rejection of jurisdiction when jurisdiction exists also amounts to an excess of powers.*" [230]

241. Arbitral tribunals are the judges of their own competence and therefore, they are empowered to decide whether they have jurisdiction to hear the parties' dispute, considering the arbitration agreement and the Convention's jurisdictional requirements.[231]

242. The requirement of Article 52(1)(b) of the Convention that the excess of powers must be manifest applies equally to jurisdictional decisions and to a failure to apply the proper governing law. This means that an *ad hoc* committee cannot generally review *de novo* the decision of the

[228] Decision on Liability ¶ 482.
[229] Decision on Liability, ¶ 482, fn. 674 and 675.
[230] ICSID Background Paper on Annulment, ¶ 88.
[231] ICSID Background Paper on Annulment, ¶ 89.

tribunal on jurisdiction. An *ad hoc* Committee could only annul an award for manifest excess powers related to jurisdiction if it is obvious, clear or self-evident, without the need for an elaborate analysis of the decision, that the tribunal exercised jurisdiction that it does not have or failed to exercise jurisdiction that it has.

243. In the words of the *Azurix v. Argentina* committee:

> "If … reasonable minds might differ as to whether or not the tribunal has jurisdiction, that issue falls to be resolved definitively by the tribunal in exercise of its power under Article 41 before the award is given, rather than by an ad hoc committee under Article 52(1)(b) after the award has been given.
>
> In these circumstances, 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. As the tribunal's decision under Article 41 must be treated as conclusive, is such a case there is also no occasion for an ad hoc committee to express its own view on whether or not the tribunal had jurisdiction."[232]

244. The Committee will review, under the aforementioned standard, the claims by Argentina related to manifest excess of powers for excess jurisdiction

b. Excess jurisdiction because neither general international law nor Argentine law permit indirect actions such as those brought by Total and admitted by the Tribunal

245. According to Argentina, the Tribunal exercised jurisdiction over rights vested in Argentine companies that were not parties to this arbitration.[233] In the view of Argentina, general international law does not permit indirect or derivative actions, unless the possibility of submitting such actions has been expressly provided for in an appropriate instrument.[234]

246. Argentina considers that under Argentine law, only the corporation would be entitled to assert its own rights. A shareholder may not submit a claim alleging the breach of the rights of the company.[235] An investment treaty does not create a new kind of shareholding for the provisions of the BIT could not introduce changes in the laws of the host State.

247. In sum, Argentina claims that the Tribunal manifestly exceeded its powers because it impermissibly assumed jurisdiction despite the fact that neither international law nor Argentine law, which are applicable laws to the dispute pursuant to the Argentina-France BIT, allow indirect or derivative claims.

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[232] *Azurix Corp. v Argentina*, Decision on the Application for Annulment (1 September 2009), ¶ 68-69.
[233] Mem., ¶ 40.
[234] Mem., ¶¶ 40-41, ¶¶ 55-56.
[235] Mem., ¶¶ 50-54.

248. As mentioned before in this Decision on Annulment,[236] the Tribunal considered "whether the measures of Argentina that allegedly adversely affected the local companies, in which Total holds minority shareholdings and whose value was in turn affected, are capable of constituting a breach of the protection afforded by the BIT to Total's investments as therein defined"[237] and concluded that the "BIT specifically includes minority shareholdings within the definition of investment"[238] and that the "claims with respect to Total's indirect and minority shareholdings in TGN, HPDA and Central Puerto are disputes relating to an investment, as defined in the BIT."[239]

249. In its finding in favor of jurisdiction the Tribunal considered that the terms of the BIT and the ICSID Convention were the law relevant to determine standing to bring claims under the BIT and specifically rejected Argentina's characterization of Total's claims as derivative claims and its contention that Argentine law must be applied to disallow these claims. It also analyzed and rejected Argentina's contention that international law should be applied and that under the ICJ jurisprudence the claims were derivative or indirect claims.[240]

250. Argentina was not able to substantiate in these annulment proceedings that the Arbitral Tribunal was manifestly in excess of its powers in concluding that it had jurisdiction. There is nothing in the provisions of the Argentina-France BIT related to applicable law that imposes on a Tribunal a particular hierarchy, or a particular method of interpretation or application of the laws that it lists as applicable. Argentina simply disagrees with the decision of the Tribunal as to the interpretation and application of the interaction between the particular legal provisions mentioned in Article 8(4) the Argentina-France BIT and asks the Committee to revisit the issue and to conclude that it was Argentine law, not international law nor the Argentina-France BIT, that should be applicable, and that under such laws the claims were derivative or indirect. This would entail a *de novo* review by this Committee, which is not permitted under the ICSID Convention. This ground for annulment is therefore rejected.

c. Excess jurisdiction related to the renegotiation process.

251. Argentina holds that at the jurisdictional phase of the arbitration proceedings it objected to the jurisdiction of the Tribunal because the dispute was contractual in nature. Total challenged such objection to jurisdiction. In its Decision on Jurisdiction, the Tribunal rejected the objection in question and indicated that Total had not asked the Tribunal to evaluate the renegotiation process under Argentina's regulations nor to enter into the merit of the renegotiation process on which the Tribunal would have no competence.

252. However, according to Argentina, in its Decision on Liability, the Tribunal contradicted itself and held Argentina liable for violating the fair and equitable treatment standard due to the inconclusive results of the renegotiation process. By holding Argentina liable in its Decision on Liability on the basis of that which the Tribunal had excluded from its competence in the

[236] See ¶ 204-205 *supra*.
[237] Decision on Jurisdiction, ¶ 73.
[238] Decision on Jurisdiction, ¶ 75.
[239] Decision on Jurisdiction, ¶ 76.
[240] Decision on Jurisdiction, ¶¶ 67-81, ¶ 90.

Decision on Jurisdiction, the Tribunal exceeded its competence, which amounts to a manifest excess of powers in accordance with Article 52(1)(b) of the ICSID Convention.

253. In paragraphs 68 and 69 of the Decision on Jurisdiction, when addressing the objection filed by Argentina, the Tribunal expressed:

> "For the purpose of ascertaining jurisdiction, the Tribunal considers the above claims to fall within its competence since, prima facie, they present conduct by Argentina that may constitute a violation of the BIT obligations and standards of protection to which Total as a French investor is entitled. Total has clearly not asked this Tribunal to evaluate the renegotiation process under Argentina's regulations nor to enter into the merit of this process, on which – as Argentina points out – this Tribunal would have no competence. On the contrary Total claims that the renegotiation process is itself in breach of the BIT and that, by invoking such process under its domestic law, Argentina attempts to evade its international obligations, including that of arbitrating the dispute in accordance with Article 8 of the BIT.
>
> "In the light of the above, the Tribunal cannot accept Argentina's arguments that the present dispute is not a legal dispute involving the application of the BIT under international law. Nor can the Tribunal accept that it is a contractual dispute involving the renegotiation process."[241]

254. In its Decision on Liability, the Tribunal analyzes the freezing of tariffs since 2002 and the process of review of the tariffs undertaken by Argentina, including the proposed renegotiation thereof.[242] The Tribunal considered that "*the failure of the renegotiation process in 2002 to lead to re-adjustments, notwithstanding the legal provisions enacted for that purpose, might be understandable in view of the political and economic emergency of that period*."[243]

255. The Tribunal further reasoned that this was not true after President Kirchner's election and the creation through UNIREN of a general mechanism to carry out tariff re-adjustments and that it had been recognized that Argentina's economy quickly recovered from the crisis—by the end of 2003 and the beginning of 2004. UNIREN was required to conclude the renegotiation process by 31 December 2004 and as late as April 2007 UNIREN proposed a final *Acta Acuerdo* that would not have remedied the lack of readjustment of the past. After analyzing the conditions in the proposed *Acta Acuerdo* the Tribunal stated: "*Total submits that these conditions represent an additional breach of the fair and equitable treatment required under Article 3 of the BIT*."[244]

256. The Tribunal concluded as follows:

> "In sum, from the passage of Emergency Law onwards, Argentina's public authorities repeatedly established new deadlines, causing protracted delays in the renegotiation of concessions and licenses (the tariff regime included) in the public utility sector for almost six years. At the same time, any automatic semi-annual

[241] Decision on Jurisdiction, ¶¶ 68-69.
[242] Decision on Liability, ¶¶ 166 -175.
[243] Decision on Liability, ¶ 171.
[244] Decision on Liability, ¶ 173.

adjustment (such as the one originally provided linked to the US PPI) had been discontinued.

As mentioned above, the failure to promptly readjust the tariffs when the Emergency Law was enacted and during the height of the crisis could have been justified, provided that Argentina subsequently had pursued successful renegotiations to re-establish the equilibrium of the tariffs as provided by law. This, however, has not happened due to the inconclusive results of the renegotiation process entrusted by Argentina to UNIREN. Therefore, the Tribunal cannot but conclude that, in this respect, Argentina is in breach of its BIT obligation to grant fair and equitable treatment to Total under Article 3 in respect of Total's investment in TGN."[245]

257. The Committee sees no contradiction, much less an excess jurisdiction, in the Decision on Jurisdiction when compared to the relevant paragraphs of the Decision of Liability as regards the renegotiation process.

258. Total claimed that the renegotiating process was in itself a breach of the Argentina-France BIT and that by invoking such process under its domestic law, Argentina was attempting to evade its international obligations, including that of arbitrating the dispute. In the Decision on Jurisdiction the Tribunal considered that it had no jurisdiction to *"evaluate the renegotiation process under Argentina's regulations nor to enter into the merit of this process."*[246]

259. The Decision on Liability did not, as suggested by Argentina, undertake a review of the renegotiation process under Argentine law or regulations or the legal merits of such renegotiation process. There is nothing in the said Decision on Liability that suggests that the Tribunal undertook such a review. Neither the text of the above quoted paragraphs, on which Argentina bases its claim of excess of powers, nor other sections of the Decision on Liability contain an evaluation of the renegotiation process based on Argentina´s regulations, *e.g.*, a review of the validity or effects of such process under Argentine law or regulations.

260. In the Decision on Liability the Tribunal considered the renegotiation process as a fact, as part of the conduct of Argentina, to determine whether the conduct of Argentina in connection with the freezing of tariffs, including the conduct of Argentina in connection with the renegotiating process, constituted a violation of the Argentina-France BIT.

261. Such review of the conduct during the renegotiation process does not entail, as suggested by Argentina, a review of the merits of the renegotiation itself, which review is a matter of Argentine law. By considering that the renegotiation process was delayed, that it was not concluded, that it was incapable of re-establishing the equilibrium of the tariffs and therefore, that Argentina violated "*its BIT obligation to grant fair and equitable treatment to Total under Article 3 in respect of Total's investment in TGN,*"[247] the Tribunal is not making any assessment

[245] Decision on Liability, ¶¶ 174-175.
[246] Decision on Jurisdiction, ¶ 68.
[247] Decision on Liability, ¶175.

of the merits or legality of the renegotiation itself, but an assessment whether the conduct of Argentina as regards the renegotiation constitutes a violation of the Argentina-France BIT.

262. Consequently, there is no contradiction between the Decision on Jurisdiction and the Decision on Liability and it is clear for the Committee that the Tribunal did not review the renegotiation process under Argentine law nor its legal merits and therefore there is no cause for annulment for the alleged manifest excess of powers in connection with the renegotiation process. This ground for annulment is therefore rejected.

E. Failure to State Reasons

263. Argentina considers that the Arbitral Tribunal failed to state reasons:

a. In finding jurisdiction over Total's claims;
b. In finding a breach of Article 3 of the Argentina-France BIT;
c. In its application of the Argentine emergency doctrine;
d. In interpreting Article 5(3) of the Argentina-France BIT;
e. In interpreting the customary international law defense of necessity; and
f. In its assessment of damages.

a. The Standard

264. Article 52(1)(e) of the ICSID Convention provides that an award may be annulled if it has "failed to state the reasons on which it is based". ICSID *Ad hoc* committees have considered that annulment under this ground requires a failure by the arbitral tribunal to comply with its obligation of rendering an award that allows readers to comprehend and follow its reasoning.[248]

265. As indicated by the *Impregilo v. Argentina ad hoc* committee, for this requirement to be established, an *ad hoc* Committee should not be concerned with the correctness of the tribunal's reasoning but its analysis should be confined to ascertaining whether the reasoning would allow an informed reader to understand how the tribunal reached its conclusions.[249]

266. The ICSID Background Paper on Annulment, quoting decisions of other *ad hoc* committees, explained that "the requirement to state reasons is intended to ensure that parties can understand the reasoning of the Tribunal, meaning the reader can understand the facts and law applied by the Tribunal in coming to its conclusion. The correctness of the reasoning or whether it is convincing is not relevant."[250]

[248] *Daimler v. Argentina*, ¶ 74; *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), Decision on the Application by Guinea for Partial Annulment of the Arbitral Award (December 22, 1989), ["*M.I.N.E. v. Guinea*"] ¶ 5.09 ("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")
[249] *Impregilo v. Argentina*, ¶ 180.
[250] ICSID Background Paper on Annulment, ¶ 106.

267. As stated by the *ad hoc* committee in *M.I.N.E. v. Guinea*, "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."[251] The *ad hoc* Committee considers that this ground for annulment refers to a 'minimum requirement' only, which is based on the duty of the arbitral tribunal to identify and let the parties know the factual and legal premises that led the tribunal to its decision. If the tribunal gives such sequence of reasons, there would not be basis for annulment under Article 52(1)(e).[252]

268. The Parties in these annulment proceedings do not seem to dispute the two tests provided for by the *ad hoc* committee in *Daimler v Argentina* as tests that 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.[253]

269. In sum, as already stated by the *Daimler v. Argentina ad hoc* committee, the standard for annulment under Article 52(1)(e) of the ICSID Convention is, therefore, high. It does not permit an *ad hoc* committee to second guess the reasoning of the tribunal and imposes on the applicant the burden of proving that the reasoning of the tribunal on a point that is essential for the outcome of the case was either absent, unintelligible, contradictory or frivolous. In order to succeed, the applicant must discharge this burden.[254]

270. Prior annulment committees have recalled that the standard under Article 52(1)(e) is a minimum standard that allows a reasonable reader to understand the award.[255] As stated by the *MTD v. Chile* annulment committee:

> "In the end the question is whether an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them."[256] This ground for annulment only concerns the absence of reasons and not their quality or correctness."[257]

271. Article 52 (1) (e) does not allow a committee to assess the correctness or persuasiveness of the reasoning in the award or to inquire into the quality of the reasons.[258]

b. Failure to state reasons in finding jurisdiction over Total's claims

272. Argentina claims that the Tribunal failed to apply Argentine law and international law as the applicable laws to determine that it had jurisdiction over Total's claims[259] and that it in so doing

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[251] *MINE v. Guinea*, ¶¶ 5.08 - 5.09.
[252] *Wena v. Egypt*, ¶¶ 79 and 81.
[253] *Daimler v. Argentina*, ¶ 77.
[254] *Daimler v. Argentina*, ¶79.
[255] *Wena v. Egypt*, ¶ 79; *SGS v. Paraguay*, ¶¶ 139-140.
[256] *MTD v. Chile*, ¶ 92.
[257] *Compañía Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic*, (ICSID Case No. ARB/97/3), Decision on Annulment, (July 3, 2002), ¶¶ 64-65; *CDC v. Seychelles*, ¶¶ 70 and 75.
[258] *Impregilo v. Argentina*, ¶ 181.
[259] See ¶¶ *56-66 supra*.

it incurred in a failure to state reasons that merits annulment of the Decision on Jurisdiction, the Decision on Liability and the Award.

273. As already mentioned in this Decision on Annulment,[260] the Tribunal characterized the issue to be decided, determined the law applicable to such issue (the Argentina-France BIT), established the consequences of such application and then analyzed and rejected Argentina's reasoning that Total's claims were derivative claims, explaining the reasons for such rejection.[261]

274. In its submissions in this annulment proceedings Argentina disagrees with such reasoning and presents an alternative approach – application of Argentine law - which it considers the appropriate one, and then claims that not having adopted that approach constitutes both a manifest excess of powers and a failure to state reasons.

275. Here, again, Argentina is asking this Committee to review *de novo* the finding of the applicability of the Argentina-France BIT by the Arbitral Tribunal to conclude that the Tribunal should have applied Argentine law to define whether Total had an investment protected under the Argentina-France BIT. This would amount to an appeal of the decisions of the arbitral tribunal, which appeal is expressly banned by the provisions of the ICSID Convention. This ground for annulment is therefore rejected.

c. Failure to state reasons in finding a breach of Article 3 of the Argentina-France BIT.

276. Argentina claims that there is a contradiction between the Decision on Jurisdiction and the Decision on Liability as the former denies jurisdiction to review the renegotiation process under Argentine law or the merits of such process and the latter takes into consideration the renegotiation process in determining liability. The failure to state reasons results from not having explained the reasons for such alleged contradiction.

277. The Committee has already found that no such contradiction exists[262] and therefore the allegation on failure to sate reasons in finding a breach of Article 3 of the Argentina-France BIT is groundless and must be rejected. This ground for annulment is therefore rejected.

d. Failure to state reasons in its application of the Argentine emergency doctrine

278. Argentina holds that the Arbitral Tribunal failed to state reasons in connection with the emergency doctrine because it did not specify the alleged conflict with the BIT that purportedly prevented the application of the emergency doctrine, or the circumstances that relieved the Tribunal from applying the emergency doctrine as part of the applicable law.[263]

[260] See ¶ 207 *supra.*
[261] See Decision on Jurisdiction, ¶¶ 77-81.
[262] See ¶ 251-261 *supra*.
[263] See Memorial on Annulment ¶ 77.

279. The Committee has already referred to the alleged failure to apply the Argentine law as regards the emergency doctrine and referred, *inter alia*, to paragraph 40 of the Decision on Liability, where the Tribunal expressed the reasons for its decision and concluded that "*the fact that any domestic measure challenged by Total might be legitimate in Argentina's legal system thanks to the emergency doctrine would not relieve the Tribunal from examining whether Argentina has nevertheless thereby breached the BIT.*" [264]

280. The Committee has also indicated that the decision on the emergency doctrine is a reasoned decision[265] and that the Tribunal adopted an interpretation of the Argentina-France BIT as to the determination of the applicable law to each issue under dispute.[266]

281. Argentina asks this Committee to review such interpretation, and to consider that the proper method is to apply all applicable laws referred to in Article 8.4 of the Argentina-France BIT to the issue in dispute and then to explain how the potential conflict between the applicable laws can be solved.

282. Again, this is a request for second -guessing the reasoning of the Tribunal, that is not permitted under the limited grounds for annulment of the ICSID Convention.

283. This ground for annulment is thus rejected.

e. Failure to state reasons in interpreting Article 5(3) of the Argentina-France BIT

284. As already mentioned and analyzed by the Committee,[267] under paragraph 229 of the Decision on Liability the Tribunal discussed the reasons for considering that Article 5(3) of the Argentina-France BIT is not applicable to an economic emergency unless it has led to a national emergency where losses have occurred such as those that are a result of war, uprising or any other kind of civil disturbance. The Tribunal advanced its interpretation of the aforesaid article to conclude that a national economic emergency was not covered by the article in question and explained the reasons therefore. The Arbitral Tribunal expressed the reasoning for its interpretation of the article. There is no failure to apply the applicable law, much less a lack of reasoning.

285. Argentina is asking this Committee to second-guess the interpretation of Article 5(3) of the BIT. This ground for annulment is therefore rejected.

f. Failure to state reasons in interpreting the customary international law defense of necessity

286. The Committee refers to the analysis made under *d. Failure to Apply the Necessity Defense under Customary International law (*¶ 229 *et seq. supra)* as regards paragraphs 220-224 of the

[264] Decision on Liability, ¶ 40.
[265] See ¶ 212-222 *supra*.
[266] See ¶ 222 *supra*.
[267] See ¶¶ 223-228 *supra*.

Decision on Liability and the footnotes thereto. The Arbitral Tribunal reasoned its decision and concluded that Argentina did not prove the standards that it had claimed.

287. Argentina disagrees with the interpretation and the conclusion but has not been able to prove to this Committee that there was no reasoning on the part of the Arbitral Tribunal or that the reasons invoked by the Arbitral Tribunal are contradictory and cancel each other so as to amount to no reasoning at all.

288. This ground for annulment is thus rejected.

g. Failure to state reasons in its assessment of damages

289. Argentina considers that there are three different contradictions in the decisions of the Arbitral Tribunal related to the assessment of damages, which contradictions result in a failure to state reasons under Article 52(1)(e) of the ICSID Convention.[268] Such contradictions pertain to an outcome-determinative point of the decision, which is the payment of compensation by the Argentine Republic.[269]

290. Such contradictions, according to Argentina, refer to:

1) The adjustments made on price variation in the first semester of 2002.
2) The calculation of the evolution of the local prices of TGN's tariffs.
3) The tariff adjustments and the debt incurred by TGN.

291. The Committee will refer to each alleged contradiction separately.

1. The adjustments made on price variation in the first semester of 2002.

292. The Committee finds no contradiction.

293. In its Decision on Liability the Arbitral Tribunal found that the measures predating July 1, 2002 "might be understandable" but that the ones taken thereafter were unfair and inequitable.[270] In the Award, the Arbitral Tribunal, making express reference to the pertinent paragraphs of the Decision on Liability, rejects the position of Argentina to the effect that the calculation of readjustment of the domestic tariffs should not take into account the price variations of the first semester of 2002.[271]

[268] Mem., ¶ 89.
[269] Mem., ¶ 96.
[270] Decision on Liability, ¶¶ 171-175.
[271] Award, ¶¶ 61-63.

294. According to the Arbitral Tribunal, the tariffs should be readjusted every six months based on the evolution of local prices of the previous six months[272] and therefore, the price variations of the first semester of 2002 should be considered.

295. In sum, for purposes of the calculation of the readjustment, and considering that such calculation should consider the index of local prices of the previous month, because that was the way in which tariffs were calculated in Argentina, the Arbitral Tribunal applied a price index corresponding to the first semester of 2002.

296. Argentina fails to explain how applying a price variation index corresponding to the first semester of 2002, changes or contradicts the conclusion that the measures taken before July 1, 2002 were not wrongful. Argentina fails to show there is a lack of reasoning. The Committee finds that the Arbitral Tribunal reasoned its decision on a logical manner. This ground for annulment is therefore rejected.

2. The calculation of the evolution of the local prices of TGN's tariffs.

297. The reasoning presented by Argentina as regards this alleged contradiction is unconvincing.

298. First, if the alleged contradiction is that a finding that no extraordinary review was required is inconsistent with an assumption that tariffs would have adjusted naturally according to indexation under the *but-for* scenario, the Committee sees no contradiction as both conclusions are perfectly compatible. Second, if the alleged contradiction is that the Arbitral Tribunal applied a cost basis for the projection of the tariffs with which Argentina does not agree, this would be a review of the decision on the merits that this Committee is not allowed to undertake.

299. This ground for annulment is therefore rejected.

3. The tariff adjustments and the debt incurred by TGN.

300. Argentina finds a contradiction between the conclusion of the Arbitral Tribunal in the Award that Total would have been able to service its debt if tariffs had been adjusted where, at the same time, it had found that Total had been unable to repay its debt as a consequence of the devaluation—a circumstance for which Argentina was not held liable—and that the effects of the pesification were not to be included in the calculation of damages.[273]

301. The Committee considers that there is no such contradiction and that even assuming that the alleged contradiction exists, Argentina has failed to prove that the same would be outcome determinative. The Arbitral Tribunal found pesification itself to be in compliance with the Argentina-France BIT and therefore that pesification should be incorporated into both the actual

[272] Decision on Liability, ¶ 183; Award, ¶ 62.
[273] Mem., ¶ 94.

and *but-for* scenarios. However, this would not mean that tariffs could not rise in the *but-for* scenario. The Tribunal found that the fair and equitable treatment standard required a reasonable indexation of tariffs after pesification and such increase in tariffs in the *but-for* scenario seem to have led the Tribunal to conclude that TGN would have remained solvent had there not been a wrongful conduct of Argentina.

302. The Committee agrees with Claimant in that, based on the above, the Award was consistent, incorporating pesification into both scenarios, and assuming reasonable tariff increases in the counterfactual, in contrast to the frozen tariffs of the actual scenario.

303. In its submissions to this Committee Total convincingly explained that even if there were a contradiction, as alleged by Argentina, had TGN been unable to pay its debt, it would have restructured, resulting in more value for equity-holders like TGN and a greater damages figure. This would mean that the alleged contradiction would not be outcome determinative.

304. This ground for annulment is thus rejected.

F. Serious violation of a fundamental rule of procedure

305. As already mentioned in this Annulment Decision,[274] Argentina considers that there is a contradiction between the Decision on Jurisdiction, where the Arbitral Tribunal considered that it had no jurisdiction to evaluate the renegotiation process under Argentina's regulations nor to enter into the merit of this process, and the Decision on Liability, where the Arbitral Tribunal held Argentina liable for violating the fair and equitable treatment standard due to the inconclusive results of the renegotiation process.

306. Argentina claims that as a result of the aforesaid contradiction, it was prevented from exercising its right of defense and to be heard in regards to the renegotiation and therefore, that there was a serious departure from a rule of procedure in that Argentina was not allowed to properly prepare its defense.

307. Only when Argentina received the Decision on Liability did it find that the Arbitral Tribunal, which had excluded the renegotiation process in the Decision on Jurisdiction, had considered such process in finding liability.

a. The standard

308. The Parties seem to agree that Article 52(1)(d) provides the possibility for annulment where there is a serious departure from a fundamental rule of procedure and that the procedural irregularity must have been serious, meaning that it caused the tribunal to reach a result substantially different from what it would have awarded had that rule been observed.[275]

[274] See ¶¶ 262 and 277 *supra*.
[275] C-Mem, ¶ 95.

309. They also agree that the rule that has been violated must be fundamental and relate to an element of due process, such as suitable opportunity for rebuttal, the right of defense, equality between the parties, deliberation among the members of the tribunal, the independence and impartiality of the members of the tribunal, and the proper handling of evidence and allocation of the burden of proof.[276]

310. The *Daimler v. Argentina ad hoc* committee, invoked by both parties in this case, held that according to Article 52(1)(d) of the ICSID Convention a departure from a procedural rule justifies annulment of the award provided that (i) the given departure is serious; and (ii) the rule in question is fundamental.[277] A departure is serious if it deprives a party of the protection afforded by the said rule.

311. As stated in the ICSID Background Paper on Annulment, from the drafting history of the ICSID Convention it may be concluded that *"(…) the ground of a 'serious departure from a fundamental rule of procedure' has a wide connotation including principles of natural justice, but that it excludes the Tribunal's failure to observe ordinary arbitration rules. The phrase 'fundamental rules of procedure' was explained by the drafters as a reference to principles."*[278]

312. The Parties do not seem to dispute the determinations of other committees as regard the word "serious", meaning that not any departure from a rule of procedure can lead to the annulment of an award; it must be "a serious departure from a fundamental rule of procedure."[279]

313. In the words of the *ad hoc* committee in *CDC v. Seychelles*:

> "A departure is serious where it is 'substantial and [is] such as to deprive the party of the benefit or protection which the rule was intended to provide.' In other words, 'the violation of such rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had the rule been observed.' As for what rules of procedure are fundamental, the drafters of the Convention refrained from attempting to enumerate them, but the consensus seems to be that only rules of natural justice – rules concerned with the essential fairness of the proceeding – are fundamental." [280]

314. With respect to the rules of procedure that are to be considered fundamental, the Committee considers that they are the rules of natural justice i.e., rules concerned with the essential fairness of the proceeding.[281] Both parties agree that the fundamental rules of procedure include: (i) the equal treatment of the parties; (ii) the right to be heard; (iii) an independent and impartial Tribunal; (iv) the treatment of evidence and burden of proof; and (v) deliberations among members of the Tribunal.

[276] Mem., ¶ 28.
[277] *Daimler v. Argentina*, ¶ 262.
[278] ICSID Background Paper on Annulment, ¶ 99.
[279] *Impregilo v. Argentina*, ¶ 163.
[280] *CDC v. Seychelles*,¶ 49.
[281] *Daimler v. Argentina*, ¶ 265.

b. Serious violation of a fundamental rule of procedure in connection with the renegotiation

315. The Committee has already found that there is no contradiction between the Decision on Jurisdiction and the Decision on Liability as regards the renegotiation and that the claim by Argentina that the alleged contradiction is a ground for annulment under Article 52(1)(b) is unfounded.[282]

316. In the Decision on Liability the Arbitral Tribunal did not, as Argentina contends, analyze the renegotiation process under Argentine law or the merits of such process. It referred to such renegotiation as a factual matter, as part of the conduct of Argentina that led the Arbitral Tribunal to conclude that there was a violation of the Argentina-France BIT.

317. For Argentina to succeed in the claim for annulment under Article 52(1)(d), it should have demonstrated that the Arbitral Tribunal in its Decision on Liability decided on issues that it had excluded from jurisdiction, *i.e.*, on the legal merits of such renegotiation. But Argentina failed in such demonstration. In the Decision on Liability the Tribunal analyzed the renegotiation process as a fact, as part of the conduct of Argentina; to determine whether the conduct of Argentina in connection with the freezing of tariffs and the conduct of Argentina in connection with the renegotiating process constituted a violation of the Argentina-France BIT.

318. In sum, in the Decision on Liability the Tribunal did not assess the merits or legality of the renegotiation itself, which matters it excluded in the Decision on Jurisdiction, and therefore there was no departure from a fundamental rule of procedure.

319. This ground for annulment is therefore rejected.

[282] See ¶¶ 276-277 *supra*.

V. COSTS

320. The Committee must now turn to the question of the costs of these annulment proceedings, pursuant to Articles 52(4) and 61(2) of the ICSID Convention.

321. Total considers that Argentina should bear all of the costs and expenses of these annulment proceedings, for its application is unmeritorious and it responds to Argentina's practice of seeking annulment of every unfavorable award rendered against it, repeating most arguments that other committees have previously rejected.[283]

322. Argentina holds that even if the Committee rejects its application, it would not be appropriate to make an order on costs since it has exercised its rights under the ICSID Convention and in doing so, it has not acted in bad faith nor lodged a frivolous claim.[284] On November 10, 2015 the Parties submitted their Statements for Costs in these annulment proceedings.

323. Prior *ad hoc* committees have followed a practice to order parties to bear legal costs equally, even when the application for annulment has not succeeded.[285] This Committee has carefully considered whether such practice should be followed and whether or not the result of such practice may be anomalous. In particular, the Committee reviewed whether Claimant should bear costs at all, given that every ground for annulment presented by Argentina has been rejected.

324. Finally, the Committee decided that Argentina should bear the costs of the annulment proceedings (which it has already paid) and with respect to legal costs, this Committee decided to follow the aforesaid practice and order that each Party should bear its own legal costs.

VI. DECISION OF THE *AD HOC* COMMITTEE

325. For the reasons stated, the *ad hoc* Committee unanimously decides:

i. To dismiss in its entirety the Application for Annulment of the Award submitted by the Argentine Republic.

ii. That each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.

iii. That the Respondent, the Argentine Republic, shall bear the costs of the proceeding, comprising the fees and expenses of the Committee Members, and the costs of using the ICSID facilities.

[283] Rej., ¶¶ 50-52.
[284] Reply, ¶¶ 95-102.
[285] *Daimler v. Argentina*, ¶¶ 305-306; *SGS v. Paraguay*, ¶153.

[*Signed*]

Mr. Álvaro Castellanos Howell
Member of the Committee
January 11, 2016

[*Signed*]

Ms. Teresa Cheng
Member of the Committee
January 15, 2016

[*Signed*]

Mr. Eduardo Zuleta Jaramillo
President of the Committee
January 21, 2016