

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**  
WASHINGTON, D.C.

In the annulment proceeding between

**IMPREGILO S.P.A.**

and

**ARGENTINE REPUBLIC**  
(Applicant)

**ICSID Case No. ARB/07/17**  
**(Annulment Proceeding)**

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**DECISION OF THE *AD HOC* COMMITTEE ON THE  
APPLICATION FOR ANNULMENT**

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*Members of the Committee*  
Mr. Rodrigo Oreamuno, President  
Mr. Eduardo Zuleta  
Ms. Teresa Cheng

*Secretary of the Committee*  
Ms. Alicia Martín Blanco

*Date of dispatch to the Parties: January 24, 2014*

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## ABBREVIATIONS

<b>AGBA:</b>	Argentine company formed by Impregilo S.p.A. and other partners
<b>Argentina:</b>	Argentine Republic
<b>MFN clause:</b>	Most Favored Nation clause.
<b>ICSID Convention:</b>	Convention on the Settlement of Investment Disputes between States and Nationals of Other States.
<b>Impregilo:</b>	Impregilo S.p.A., incorporated under the laws of Italy.
<b>Award:</b>	Award rendered on June 21, 2011 in the arbitration of Impregilo S.p.A. v. Argentina, ICSID Case No. ARB/07/17.
<b>Arbitration Rules:</b>	Rules of Procedure for Arbitration Proceedings.
<b>Argentina-US BIT:</b>	Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment.
<b>Argentina-Italy BIT or BIT:</b>	Agreement between the Republic of Italy and the Argentine Republic on the Promotion and Protection of Investments ( <i>Fra la Repubblica Italiana e la Repubblica Argentina sulla Promozione e Protezione degli Investimenti</i> )
<b>Tribunal:</b>	Arbitration Tribunal that issued the Award.

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## I. INTRODUCTION

1. Pursuant to Article 52 of the ICSID Convention, on October 19, 2011, Argentina filed an application requesting the annulment and stay of enforcement of the Award. The Award was issued on June 21, 2011 by an Arbitral Tribunal consisting of Judge Hans Danelius (President), Judge Charles N. Brower, and Professor Brigitte Stern, in the arbitration between Impregilo and Argentina.
2. In order to arrive at this decision the Committee reviewed and evaluated all the arguments of the parties and the documents submitted by them in this proceeding. The fact that the Committee does not specifically mention a given argument or reasoning does not mean that it has not considered the same. In their submissions the parties produced and cited numerous awards and decisions dealing with matters that they consider relevant to this decision on annulment. The Committee has considered these documents carefully and may take into account the reasoning and findings of other committees on annulment. However, in coming to a decision on the matter of annulment raised by 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 case.
3. In order to summarize some of the factual circumstances mentioned in the Memorial on Annulment, the Committee quotes the following background history that was included in the Award:

“In the 1990s, water and sewage services in the Province of Buenos Aires were provided by the public utility [company] .... In 1996, the Province decided to privatize these services and adopted for this purpose Law No. 11,820 ... and set up as regulator the Organismo Regulador de Aguas Bonaerense... It also organized a bidding process for the concessions to be issued for the various parts of the Province.

Impregilo formed a consortium with other international companies (Sideco Americana S.A. and Aguas de Bilbao Bizkaia), and, by

Provincial Decree No. 2907/99 of October 18, 1999, was awarded one of the concession areas into which the Province's territory had been divided. Pursuant to the bidding rules, Impregilo and its partners incorporated and funded AGBA, an Argentine company. On December 7, 1999, the Province and AGBA executed the Concession Contract to provide water and sewage services..."<sup>1</sup>

## II. PROCEDURAL HISTORY

4. On October 25, 2011, the Secretary-General of ICSID registered the Application pursuant to ICSID Arbitration Rule 50(2)(b), granted the provisional stay of enforcement of the Award pursuant to ICSID Arbitration Rule 54(2) and notified the Parties accordingly.
5. On January 30, 2012, the ICSID Secretariat informed the Parties of the constitution of the *ad hoc* Committee comprising Mr. Rodrigo Oreamuno (President), a Costa Rican national, Mr. Eduardo Zuleta, a Colombian national, and Ms. Teresa Cheng, a Chinese national, (the "*ad hoc* Committee" or "Committee"). On the same date the ICSID Secretariat transmitted copies of the Committee members' signed declarations in accordance with ICSID Arbitration Rules 53 and 6(2).
6. On March 28, 2012, the first session of the *ad hoc* Committee was held by telephone conference. During such session, various procedural matters were agreed between the Parties and the *ad hoc* Committee. The Parties agreed, *inter alia*, that the present proceedings would be governed by the 2006 ICSID Arbitration Rules, and that they had no objection to the constitution of the *ad hoc* Committee as described above. They also agreed on a provisional timetable.
7. On June 26, 2012, Argentina filed its Memorial on Annulment, followed by a translation into English on July 6, 2012.
8. On October 4, 2012, Impregilo filed its Counter-Memorial on Annulment, followed by a translation into Spanish on October 15, 2012.

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<sup>1</sup> Impregilo S.p.A. v. Argentina. ICSID Case No. ARB/07/17, Award of June 21, 2011, ¶¶ 13 and 14

9. On November 30, 2012, Argentina filed its Reply on Annulment, followed by a translation into English on December 10, 2012.
10. On January 23, 2013, Impregilo filed its Rejoinder on Annulment, followed by a translation into Spanish on February 1, 2013.
11. By email of March 8, 2013, the ICSID Secretariat invited the Parties to inform the *ad hoc* Committee of any proposal they would like to make with regard to the agenda for the hearing and related questions of procedure. On March 13, 2012, Impregilo submitted an agreed draft agenda for the hearing on annulment, which was confirmed by Argentina on March 14, 2013.
12. On March 19 and 20, 2013, a hearing was held at the seat of the Centre in Washington, D.C. The proceeding was closed on December 18, 2013, in accordance with ICSID Arbitration Rules 53 and 38(1).
13. In the following paragraphs the Committee will summarize the position of the parties in relation to each annulment argument, and then examine each of the grounds for annulment under Article 52 of the ICSID Convention and alleged by Argentina.

### **III. ARGUMENTS OF THE PARTIES**

#### **A. ARGENTINA'S ARGUMENTS**

##### **1. The Tribunal manifestly exceeded its powers**

14. This section contains a summary of the arguments submitted by Argentina. All arguments were carefully analyzed and considered by the Committee and the fact that one or more specific allegations are not summarized does not mean that they have not been considered.

15. Argentina's first argument is that the Tribunal manifestly exceeded its powers established in the ICSID Convention and the BIT. Argentina based this argument on the fact that, in its opinion, the Tribunal improperly extended the MFN clause to matters of jurisdiction. In this regard Argentina said: "In the case of the Argentina-Italy BIT, arbitral tribunals can only exercise their jurisdiction if the dispute has been previously submitted 'to a competent administrative or judicial jurisdiction of the Contracting Party in whose territory the investment is located' and continues to exist after a period of 18 months has elapsed 'since notification of the commencement of the proceeding before the national jurisdictions'..."<sup>2</sup> Argentina emphasized that this requirement was recognized by the Tribunal as a general condition that has no exception.<sup>3</sup>
16. For ease of reference and given that it was invoked by Argentina, the Committee sets out below Article 8 of the BIT:
- "1. Any dispute regarding an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.  
2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.  
3. Where, after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be submitted to international arbitration"
17. Argentina noted that the majority of the Tribunal recognized in paragraph 89 of the Award that Article 8(3) of the BIT contains a general condition subject to no exception. Based on that recognition, Argentina concluded that under Article 8(3) of the Argentina-Italy BIT, the Tribunal had no jurisdiction to decide the dispute between the parties.<sup>4</sup> Argentina considered that notwithstanding the recognition

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<sup>2</sup> Memorial on Annulment, ¶ 21

<sup>3</sup> Id., ¶ 22

<sup>4</sup> Id., ¶¶ 22 and 24; Reply, ¶¶ 31 and 36

of that general condition, the majority of the Tribunal was wrong in concluding that Impregilo “... could choose not to meet the requirement demanding prior submission of disputes to domestic courts by invoking the most favored nation (MFN) clause contained in Article 3(1) of the Argentina-Italy BIT,” because it effectively authorized Impregilo to benefit from the provisions in the Argentina-US BIT, which does not require prior submission of the dispute to the administrative or judicial courts of Argentina.<sup>5</sup> According to Argentina, in coming to this decision, the Tribunal manifestly exceeded its powers “... in exercising its jurisdiction without the condition for consent having been satisfied...”<sup>6</sup> It also stated that the Tribunal “... failed to state the reasons on which its decision was based, and also seriously departed from a fundamental rule of procedure.”<sup>7</sup> The reference to the alleged serious departure from the fundamental rule of procedure is also expressed in paragraphs 29 and 54 of its Reply.

18. According to Argentina, the Tribunal’s action, as described in the preceding paragraph, sets out the grounds for annulment contained in Article 52(1)(b),(d), and (e) of the ICSID Convention and “... it even de facto abrogated a provision of the Treaty.”<sup>8</sup>
19. Argentina subdivided its first argument entitled “The Tribunal manifestly exceeded the limits of its competence” into several parts: “failure to state reasons,” “manifest excess of powers,” and “serious departure from a rule of procedure.” The Committee shall deal with these charges in the same order in which they were put forward by Argentina.

**a. Failure to state reasons**

20. In developing the concept of failure to state reasons Argentina referred to Article 3.1 of the Argentina-Italy BIT, which provides:

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<sup>5</sup> Id., ¶ 27

<sup>6</sup> Id., ¶ 28

<sup>7</sup> Id., ¶ 28

<sup>8</sup> Id., ¶ 28

“Each Contracting Party shall, within its own territory, accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.”

21. Argentina stated that “the failure to state the reasons upon which the jurisdiction of the Tribunal is based is, thus, self-evident ...”<sup>9</sup> Argentina argued that articles 8.3 and 8.5(a) of the Argentina-Italy BIT are the rules that confer jurisdiction on an ICSID Tribunal and, according to Argentina, the reference to Article 3.1 by the Tribunal did not cure the failure to state reasons in order to find jurisdiction.
22. Argentina also claimed that the majority of the Tribunal held in paragraph 99 of the Award that the term “treatment” in Article 3.1 of the BIT was in itself wide enough to be applicable to procedural matters. According to Argentina, the term “treatment” could not be a reason for the decision of the Tribunal to assert jurisdiction over the case.<sup>10</sup>
23. According to Argentina, the majority of the Tribunal did not even refer to the first argument that Argentina stated in its Memorial on Jurisdiction, in relation to Article 3.1 of the Argentina-Italy BIT. In its opinion, the Tribunal “... never stated its reasons for claiming that an MFN clause that applies only to the treatment accorded to *investments* is applicable as well to the treatment afforded to *investors*, bearing in mind especially, in this case, that it is *investors* and not *investments* that can set the jurisdictional mechanisms into motion.”<sup>11</sup>
24. Argentina also claimed that the majority of the Tribunal, in paragraph 100 of the Award, accepted that the phrase “within its own territory” used in Article 3(1) of the BIT limits the scope of the MFN clause. Despite that, according to Argentina the majority “ruled that ‘the question as to what legal protection Argentina shall give to foreign investors is in no way an issue over which Argentina has no power

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<sup>9</sup> Id., ¶ 30

<sup>10</sup> Id., ¶¶ 31 and 32

<sup>11</sup> Id., ¶ 33

to decide, *nor is it tied to any particular territory*. The Tribunal therefore considers that the wording ‘within its own territory’ does not exclude the application of the MFN clause to dispute settlement.’ Thus, the majority of the Tribunal failed to state the reasons upon which this conclusion is based or, at best, it stated genuinely contradictory reasons.”<sup>12</sup> Argentina also stated that this interpretation is a manifest excess of powers due to the failure to apply the express provisions of the BIT.<sup>13</sup>

25. Argentina submitted that, moreover, the Award lacks any reasons whatsoever because the Tribunal did not even perform a preliminary analysis of the conclusion expressed in paragraph 101 of the Award in which it affirmed that the requirement to first resort to domestic courts or administrative agencies is a less favorable treatment for investors.<sup>14</sup>
26. In relation to paragraph 102 of the Award, Argentina claims that the Tribunal acknowledged that several BITs signed by that Nation require an 18-month waiting period, is an indication that Argentina did not intend such requirement to be replaced via MFN clauses in those treaties. “However, it reached the conclusion that ‘the argument becomes less persuasive in the present case, because the Italy-Argentina BIT (signed on 22 May 1990) preceded the Argentina-US BIT (signed on 14 November 1991).’ Once again in this case, the majority of the Tribunal failed to state the reasons upon which its decision was based, since the Argentina-US BIT came into force *before* the Argentina-Italy BIT.”<sup>15</sup>
27. Argentina noted that the majority of the Tribunal, after referring to certain decisions concerning the application of the MFN clause to jurisdictional issues, and noting the lack of uniformity on the approach to this matter, held in paragraph 108 of the Award that “in cases where the MFN clause has referred to

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<sup>12</sup> Id., ¶¶ 33 and 34

<sup>13</sup> Id., ¶ 35

<sup>14</sup> Id., ¶ 36

<sup>15</sup> Id., ¶ 38

‘all matters’ or ‘any matter’ regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules”. On this basis, the majority of the Tribunal reached the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT. According to Argentina, the Tribunal’s conclusion regarding the “near-unanimity” of the decisions on these matters is erroneous, because “there is no principle of *stare decisis* in the field of international arbitration. Therefore the alleged majority of the decisions of Tribunals on the matter cannot be considered as a valid basis for this decision.”<sup>16</sup> Moreover, according to Argentina the majority of the Tribunal did not consider whether the reasons for the other tribunals’ decisions it referred to were correct.<sup>17</sup>

28. In its Reply, Argentina stressed that various committees have insisted that annulment for failure to state the reasons for the decision applies where such failure might have affected the Tribunal’s conclusion.<sup>18</sup>

**b. Manifest excess of powers**

29. Argentina claimed that the above facts are also a manifest excess of powers of the Tribunal given that it lacked the power to rely on case law—which is non-binding and is not a source of law— and instead should rely upon its own interpretation of the rules.<sup>19</sup>
30. Argentina also noted that the Tribunal manifestly exceeded its powers by asserting jurisdiction over the dispute without Impregilo having met the mandatory requirements provided in the BIT in order to give consent. According to Argentina, this excess of power is manifest from a plain reading of the Award.<sup>20</sup>

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<sup>16</sup> Id., ¶¶ 38 and 39

<sup>17</sup> Id., ¶ 40

<sup>18</sup> Reply, ¶ 18

<sup>19</sup> Memorial on Annulment, ¶ 43

<sup>20</sup> Id., ¶ 44

31. Argentina emphasized that where a tribunal fails to act within the scope of its jurisdiction, the excess of powers is always manifest.<sup>21</sup>
32. Argentina stated that “[t]he MFN clause in the Argentina-Italy BIT does not allow the tribunal to exercise its jurisdiction over disputes with regard to which consent has not been given by the host State [of the investment], and that is the case here[...].”<sup>22</sup> It also added that the MFN clause cannot be allowed to fundamentally modify the dispute settlement method set forth in the BIT, as the Tribunal did.
33. Argentina further argued that “... the Tribunal manifestly exceeded its powers by failing to apply the relevant law”<sup>23</sup> and stated that “... the majority of the Tribunal began by recognizing that prior submission of disputes to the local courts is a mandatory requirement for the submission of those disputes to an ICSID arbitral tribunal. However, when referring to Impregilo’s failure to meet it, such majority simply dismissed that *mandatory* requirement.”<sup>24</sup>
34. In its Reply Argentina stated that, based on annulment decisions rendered by various Committees, the excess of powers by a Tribunal is always manifest when it concerns matters of jurisdiction. Argentina claimed that “...the manifest excess of powers by the Tribunal is absolutely clear and self-evident, among other things, because the excess of powers by a tribunal is always manifest when it concerns matters of jurisdiction.” Argentina also stated that “... the Committee must determine whether the Tribunal had jurisdiction or not —by applying the Vienna Convention on the Law of Treaties to interpret the applicable instruments— since, if it lacked jurisdiction, then it manifestly exceeded its powers”.<sup>25</sup>

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<sup>21</sup> Id., ¶ 43, 44 and 46

<sup>22</sup> Id., ¶ 47

<sup>23</sup> Id., ¶ 51

<sup>24</sup> Id., ¶ 52

<sup>25</sup> Reply, ¶¶ 10 and 13.

35. Argentina also argued in its Reply that the Tribunal determined that Impregilo failed to meet the requirement of Article 8(3) of the BIT and that Article 3(1) of that treaty cannot remedy the deficiency since it is not a jurisdictional clause and also, it only applies to investments and not to investors.<sup>26</sup> It also stated that Impregilo breached the obligation under the BIT to submit the case to the local courts for a period of 18 months and clarified that this requirement does not mean that in that period the dispute should be resolved by the Argentine courts. What Article 8(3) of the BIT provides is that, if the dispute is not settled within that period, the investor may resort to international arbitration. Additionally, it concluded that the only legitimate interpreters of the BIT are Argentina and Italy.<sup>27</sup>

**c. Serious departure from a rule of procedure**

36. In its Memorial on Annulment Argentina claimed a serious departure from a rule of procedure because the Tribunal "... did not observe the consent of the States Parties to the Treaty"<sup>28</sup> by not applying the condition of prior submission to local courts. It noted that this departure from a rule of procedure is serious since if the Tribunal had followed the principles set forth in the Treaty, then the outcome of this arbitration would have been substantially different.

37. It also argued that the Tribunal "... failed to render a decision on the compliance by Impregilo with the dispute settlement provisions contained in the Argentina-United States BIT or on Argentina's fundamental arguments, such as that referring to the fact that the MFN clause only applies to the 'investments' and not 'investors.' In view of the foregoing, the Tribunal must be deemed to have seriously departed from a rule of procedure..."<sup>29</sup>

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<sup>26</sup> Id., ¶ 32

<sup>27</sup> Id., ¶¶ 42, 47 and 48

<sup>28</sup> Memorial on Annulment, ¶ 53

<sup>29</sup> Id., ¶ 54

## 2. The Tribunal manifestly exceeded the material limits of its competence

38. Argentina also argued that the Tribunal manifestly exceeded the material limits of its competence by admitting the indirect claim of Impregilo. It exercised a “manifest excess of powers,” “failure to state reasons” and “risk of double recovery in indirect claims” by accepting that the shares held by Impregilo in AGBA were investments protected under the Argentina-Italy BIT. It added that “this type of claims is not allowed under Argentine law” and that “under general international law indirect actions such as those of this case are not permitted.” Again the Committee will summarize these arguments in the same order in which they were put forward by Argentina.

### a. Manifest excess of powers

39. Argentina stated that the Tribunal failed to consider the arguments it laid out in its Memorial on Jurisdiction and at the hearing that took place during the arbitration proceedings which “... are therefore fully incorporated herein by reference.”<sup>30</sup> It said the Tribunal, without making any analysis, accepted that the shares held by Impregilo in AGBA are protected investments under the Argentina-Italy BIT and accepted that expropriation of AGBA’s rights affected Impregilo rights; it also stated that the Tribunal rejected, without stating the reason for such rejection, the objection raised by Argentina with regard to its material competence.<sup>31</sup>

40. Argentina also claimed that the Tribunal manifestly exceeded its powers by exercising its jurisdiction over Impregilo’s claims for damages, specifically claims arising from the Concession Contract entered into by the Province of Buenos Aires, to which Impregilo was not a party.<sup>32</sup> Argentina also submitted that the Tribunal mistakenly regarded Impregilo and AGBA as if they were a single entity. For example, in the Award it considered whether or not “AGBA was given fair

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<sup>30</sup> Id., ¶ 55

<sup>31</sup> Id., ¶ 56

<sup>32</sup> Id., ¶ 58

and equitable treatment;”<sup>33</sup> and the Tribunal was inconsistent when it indicated that AGBA is not a protected investor under the ICSID Convention and the Argentina-Italy BIT.<sup>34</sup>

41. Argentina insisted that the Tribunal manifestly exceeded its powers in exercising jurisdiction over the claims for alleged damages caused to Impregilo because that company argued that there was interference with the rights deriving from the Concession Contract to which AGBA, and not Impregilo, was a party.<sup>35</sup>
42. Argentina claimed in its Memorial on Annulment: “... the Tribunal allowed a shareholder to take the place of the company [AGBA], to file claims based on the actual rights of that company, and to obtain compensation for the alleged infringement of those rights.”<sup>36</sup>
43. Argentina claimed that the Tribunal exercised its jurisdiction over the rights that belonged to AGBA (not Impregilo) and so it manifestly exceeded its powers.<sup>37</sup>
44. According to Argentina, the Tribunal’s decision to admit its jurisdiction over Impregilo’s claims based on alleged rights of AGBA is inconsistent with the ICSID Convention and the Argentina-Italy BIT because these bodies of law do not provide for the possibility that a shareholder can claim for alleged rights of a local company.<sup>38</sup>

#### **b. Failure to state reasons**

45. According to Argentina, “the Tribunal failed to specify how Impregilo could assert rights relating to the Concession Contract.”<sup>39</sup> It added: “... the Tribunal had

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<sup>33</sup> Id., ¶ 60

<sup>34</sup> Id., ¶ 62

<sup>35</sup> Id., ¶ 64

<sup>36</sup> Id., ¶ 65

<sup>37</sup> Id., ¶¶ 64 to 71

<sup>38</sup> Id., ¶¶ 70 and 71

<sup>39</sup> Id., ¶ 74

acknowledged that Impregilo could not assert the rights vested in AGBA. The contradiction in the Tribunal's reasoning [in this case] is manifest."<sup>40</sup>

46. Argentina also claimed that the following conclusion of the Tribunal is unfounded "... if AGBA was subjected to expropriation or unfair treatment with respect to its concession ... such action must also be considered to have affected Impregilo's rights as an investor, rights that were protected under the BIT."<sup>41</sup>
47. Argentina concluded its discussion of indirect claims by asserting that the Tribunal referred to the second objection to jurisdiction raised by it in only four paragraphs of the Award. It added that in paragraph 140 the Tribunal based its reasoning on case law which, in Argentina's opinion, "does not constitute valid grounds for the decision."<sup>42</sup> In its Reply, Argentina also indicated that the Tribunal reproduced the arguments of the parties and did not base its decision on the issue of indirect claims.<sup>43</sup>

### **c. Risk of double recovery in filing indirect claims**

48. Argentina noted that the Tribunal recognized the existence of a legal problem by "the risk of double recovery" by AGBA and Impregilo. According to Argentina, with the real possibility that this problem could exist, the Tribunal "... went on to speculate about the possibility of it being resolved, in the future, by someone."<sup>44</sup> Argentina further stated that the possibility of there being double recovery "... must be avoided through legal considerations established for these purposes ... and through the correct interpretation of the applicable instruments. This is not what the Tribunal did."<sup>45</sup>

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<sup>40</sup> Id., ¶ 74

<sup>41</sup> Id., ¶ 75

<sup>42</sup> Id., ¶ 75

<sup>43</sup> Reply, ¶ 69

<sup>44</sup> Memorial on Annulment, ¶ 76

<sup>45</sup> Id., ¶ 77; Reply, ¶¶ 70 to 72

49. Even though, in strict logic, the arguments contained in sections (d) and (e) below should be part of Argentina's disagreement with the acceptance by the Tribunal of the indirect claims described in paragraphs 38-43, the Committee will follow the order in which Argentina presented its arguments.

**d. These type of claims are not allowed under Argentine law**

50. Argentina claims that derivative or indirect actions are "not provided for under Argentine law, which is part of the applicable law in accordance with Article 8(7) of the BIT."<sup>46</sup> It added that, "[u]nder Argentine law, a shareholder may not file any action on its own behalf and for its own benefit for the purpose of receiving compensation for alleged losses in proportion to its shareholding,"<sup>47</sup> and explained that Argentine law provides for a whole series of actions which were not used by Impregilo.<sup>48</sup>

**e. Under international law, indirect actions such as those of this case are not permitted**

51. Argentina argued that "[u]nder international law, in order for derivative claims to be admitted, they must be expressly provided for, since they constitute an exception to the general principle that no one can bring a claim on behalf of another."<sup>49</sup>

52. Following this line of argument, Argentina stated that in order to make the claim, Impregilo should be the owner of the rights invoked. Argentina based its arguments on the words of the International Court of Justice, stating that there are other treaties in which the legality of an indirect claim is expressly provided for. In its Reply, moreover, it stated that Impregilo and the Tribunal made the mistake of not providing reasons and simply referred to decided cases.

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<sup>46</sup> Id., ¶ 78

<sup>47</sup> Id., ¶ 81

<sup>48</sup> Id., ¶ 82; Reply, ¶¶ 73 to 76

<sup>49</sup> Id., ¶ 84; Reply, ¶ 77

**3. The Tribunal abrogated the normative content of the standard requiring the investment to be accorded fair and equitable treatment, by failing to clarify its meaning**

53. Argentina's third argument is that the Tribunal failed to clarify the content of the standard requiring the investment to be accorded fair and equitable treatment, and the notion of that standard in the Argentina-Italy BIT, and therefore implicitly abrogated the normative content of the standard. It further argued that the Tribunal contradicted itself in its reasoning leading to the conclusion that Argentina violated such standard.<sup>50</sup> It also stated the following: "Upon drawing a distinction between two different approaches regarding the scope of the fair and equitable treatment standard and apparently adopting neither of them, the Tribunal deliberately failed to establish the criterion applied in eventually holding Argentina liable for the violation of the alleged legitimate expectations."<sup>51</sup>
54. Argentina argued that the Tribunal linked the fair and equitable treatment and investor expectations, but there is nothing in the BIT referring to expectations or demonstrating that the Contracting States meant to protect them. It concluded that holding a State liable based on "alleged" expectations entails a manifest excess of powers.<sup>52</sup>
55. Argentina also stated that "... the Tribunal makes a number of statements that are not only implausible in light of the established facts ...but are also in conflict with other submissions contained in the Award." (translation of the Committee.)<sup>53</sup>
56. In its Reply it insisted "How is it possible for a tribunal to hold a country liable for the violation of a Treaty standard if the content of such standard is not defined first?"<sup>54</sup>

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<sup>50</sup> Id., ¶¶ 87 and 91

<sup>51</sup> Id., ¶ 90

<sup>52</sup> Id., ¶ 91

<sup>53</sup> Id., ¶ 94

<sup>54</sup> Reply, ¶ 83

57. In its Reply Argentina concluded, on this argument, that because the Tribunal "... held Argentina liable for the alleged violation of the fair and equitable treatment standard both contradicting itself and failing to state the reasons for its decision, the Award should be annulled..."<sup>55</sup>
58. Argentina went on to present three lines of reasoning under this section: a) "The Tribunal acknowledged that since the beginning of the concession period, ABGA had experienced difficulties in complying with its obligations under the Concession Contract"; b) "In arriving at this conclusion, the Tribunal relied on Presidential Decree No. 878/03, which established a New Regulatory Framework, despite the fact that such decree could only be applied with AGBA's consent, and that, in any event, it was basically never applied"; and c) "the Tribunal recognized the Concessionaire's contributory fault."
59. In the first part of this argument Argentina explained that the Tribunal, in paragraph 311 of the Award, recognized that from the beginning AGBA had difficulties in complying with its obligations under the Concession Contract. According to Argentina, this shows that the "economic and financial equation" was already disrupted before they knew the measures challenged by Impregilo. According to Argentina, the alteration of the contractual equilibrium was caused by the actions of the concessionaire, but the Tribunal, contradicting itself, held Argentina liable for the alteration of that equilibrium.<sup>56</sup>
60. As for the second part of its argument, Argentina explained that the aforementioned Presidential Decree 878/03, which established a new regulatory framework, was never applied to AGBA and this was recognized by Impregilo's witness Albarracín. In the opinion of Argentina, the Tribunal contradicted itself when it claimed violation of fair and equitable treatment in the application of that rule and indicated, in paragraph 291 of the Award, that the legitimate expectations cannot be that the State will never modify the legal framework but

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<sup>55</sup> Reply, ¶ 103

<sup>56</sup> Id., ¶¶ 98 to 100.

that investors must be protected if there are unreasonable modifications of that legal framework.<sup>57</sup>

61. In the latter part of its argument Argentina noted that the Tribunal recognized in paragraph 377 of the Award the contributory fault of AGBA and the Province of Buenos Aires, which is inconsistent with condemning Argentina for violation of the fair and equitable treatment standard.<sup>58</sup>
62. Argentina also argued that the Tribunal recognized the contributory fault of AGBA and therefore there are contradictions and inconsistencies in the Award. After quoting paragraph 377 of the Award, which states: “The failure of the concession can therefore be ascribed partly to events for which AGBA stood the risk and partly to acts or failures by the Province,” Argentina stated that “ ... the Tribunal thus made another unfounded statement, which constitutes a ground for annulment...”<sup>59</sup>
63. Argentina said in its Reply that the Tribunal “... based on a series of contradictions and unreasonable statements” concludes that Argentina violated the fair and equitable treatment standard and that this way of proceeding is grounds for annulment.<sup>60</sup>

**4. The Tribunal failed to state the reasons on which the Award was based and exceeded its powers in deciding on the defenses based on the extraordinary situation faced by Argentina**

64. As part of its fourth argument, Argentina stated that the Tribunal recognized in several paragraphs of the Award that the emergency legislation was enacted in reaction to a very serious economic crisis in the country and that drastic measures were required because the crisis was critical and alarming. However, contradicting its own position, the Tribunal held Argentina liable for the

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<sup>57</sup> Id., ¶¶ 103 to 106.

<sup>58</sup> Id., ¶¶ 107 to 110.

<sup>59</sup> Id., ¶ 109

<sup>60</sup> Reply, ¶¶ 86 and 103

emergency measures adopted, holding that Argentina failed to restore a reasonable equilibrium in the concession, and thus aggravated its situation and violated the Argentina-Italy BIT.<sup>61</sup>

65. Argentina concluded that “the Tribunal failed to consider the measures adopted in light of the international (customary and contractual) provisions that apply in emergency situations. Therefore, it failed to rely on the applicable law, thus manifestly exceeding its powers.”<sup>62</sup>

66. In its Reply Argentina stated that the severity of the crisis was recognized by the Tribunal, but that “...upon arriving at this conclusion, the Tribunal—contradicting itself, that is, rendering an unfounded award—held Argentina liable for the emergency measures adopted.”<sup>63</sup>

67. Argentina divided its fourth argument in two parts entitled: “The Tribunal did not apply Article 4 of the BIT” and “Consideration of the state of necessity under customary international law.” The Committee will refer to them in the following paragraphs:

**a. The Tribunal did not apply Article 4 of the BIT**

68. Article 4 of the Argentina-Italy BIT states:

“Investors of one Contracting Party whose investments suffer losses ... owing to ... a state of national emergency, or other similar political economic events shall be accorded, by such other Party in whose territory the investment was made, treatment no less favorable than that accorded to its own nationals or legal entities or to investors of any third country as regards damages.”

69. In connection with the provisions of this Article, Argentina claimed that the Tribunal recognized, in paragraph 339 of the Award, that the crisis that the

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<sup>61</sup> Memorial on Annulment, ¶¶111 and 112

<sup>62</sup> Id., ¶ 114

<sup>63</sup> Reply, ¶ 106

country experienced in 2002 should be interpreted as a political-economic occurrence equivalent to a national state of emergency. Therefore, Article 4 should apply to the case. However, in contradiction with its prior reasoning, the Tribunal concluded that this provision was not applicable.<sup>64</sup> According to Argentina the interpretation of the Tribunal was unfounded depriving the above-mentioned Article 4 of any useful effect.<sup>65</sup> In doing so, states Argentina, the Tribunal manifestly exceeded its powers and failed to apply the applicable law.<sup>66</sup>

**b. Consideration of the state of necessity under customary international law**

70. Argentina cited paragraphs 346, 349, and 350 of the Award in which the Tribunal recognized the gravity of the crisis that hit Argentina and that there was a serious and imminent threat to the public interest. However, according to Argentina, the Tribunal concluded that that nation contributed significantly to the situation of necessity and, for that reason, could not invoke it as a defense. Argentina further noted that the Tribunal relied on the report of Mr. Edwards, Impregilo's expert, without establishing the legal criteria applied in coming to its conclusion.<sup>67</sup>
71. Argentina also stated that "In sum, the position adopted by the Tribunal renders the necessity defense meaningless, as it would be sufficient for an economist to take the opposite view (and there will always be one willing to do so) for the state of necessity to become inadmissible."<sup>68</sup>
72. Argentina argued that the Tribunal failed to take the evidence submitted by it into consideration, including reports prepared by economic and legal experts that demonstrated that the measures adopted were necessary, but also that the report of Impregilo's expert was flawed.<sup>69</sup> Argentina also indicated the reasons

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<sup>64</sup> Memorial on Annulment, ¶¶ 115 and 116

<sup>65</sup> Id., ¶ 118

<sup>66</sup> Id., ¶ 120

<sup>67</sup> Id., ¶¶ 121 to 126

<sup>68</sup> Id., ¶ 129

<sup>69</sup> Id., ¶¶ 134 and 135

for stating that the expert contradicted himself at the hearing and was not an independent expert.

73. Argentina concluded that the Tribunal, by relying solely on a report, and failing to specify the legal criteria on which it was based, failed to state the reasons and seriously departed from a rule of procedure.<sup>70</sup> In its Reply, Argentina insisted that the Tribunal “... seriously departed from the rules of procedure in failing to consider all the significant body of evidence submitted by the Argentine Republic...”.<sup>71</sup>
74. Finally, Argentina stated “Furthermore, in this regard, there is a manifest excess of powers by the Tribunal, as it failed to rely upon the applicable law, which includes the notion of state of necessity.”<sup>72</sup>

## **5. Compensation**

75. In its plea related to the decision on compensation Argentina argued failure to state reasons, manifest excess of powers and a departure from fundamental rules of procedure. The Committee will address these issues in the following paragraphs.

### **a. Failure to state reasons**

76. Argentina cited paragraph 375 of the Award where the Tribunal said it had not been established categorically that the concession granted to AGBA would have been profitable, even in the absence of state actions allegedly contrary to the principle of fair and equitable treatment. In light of this, according to Argentina, the Tribunal had no discretion to determine the amount of damages.<sup>73</sup> Argentina added that even in those cases where the assessment of damages is made on a

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<sup>70</sup> Id., ¶ 140

<sup>71</sup> Reply, ¶ 136

<sup>72</sup> Memorial on Annulment, ¶ 140

<sup>73</sup> Id., ¶ 143

discretionary basis, the Arbitral Tribunal must assess the evidence produced. According to Argentina, in this case the Tribunal failed to address the evidence submitted on damages.<sup>74</sup>

77. Argentina stated “... even in those cases where a tribunal is deemed to have discretion over the assessment of damages, the committees have established that, in making that assessment, the tribunal must refer to the relevance and evaluation of the evidence produced. In this case, even though the Tribunal found that ‘it is incumbent on Impregilo to prove that it suffered the damage for which it asks to be compensated,’ it failed to address the evidence produced in the damages section of the Award, thus disregarding the evidence submitted in relation to the amounts invested.”<sup>75</sup>

**b. Manifest excess of powers**

78. The Tribunal stated that Impregilo should prove damages allegedly suffered but, according to Argentina, the Tribunal “... did not analyze any of the alleged losses invoked by Impregilo.”<sup>76</sup> According to Argentina, the Tribunal awarded Impregilo compensation that had no causal connection with the disputed measures, with the evidence produced, nor with the applicable law; it only cited an award, and, Argentina insisted that case law is not a source of law. The Tribunal held that Impregilo should be placed in the same position as it would have been, had Argentina’s unfair and inequitable treatment not occurred. Actually the profitability of the investment had not been proved and, according to Argentina, awarding compensation to Impregilo for the total amount allegedly invested by the company, placed it in a better position than it would have been, had Argentina not taken any action.<sup>77</sup> According to Argentina the compensation awarded by the Tribunal is contrary to the applicable law and is therefore tantamount to a manifest excess of powers by the Tribunal.

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<sup>74</sup> Id., ¶¶145

<sup>75</sup> Id., ¶ 145

<sup>76</sup> Id., ¶ 146

<sup>77</sup> Id., ¶ 149

### **c. Serious departure from fundamental rules of procedure**

79. Argentina noted that in this case there was a serious departure from a fundamental rule of procedure because the Tribunal awarded the damages claimed by Impregilo, without considering the defenses raised by Argentina. According to Argentina, the Tribunal stated that it had no reason to doubt the figures of Impregilo's experts without even considering the defenses raised by Argentina, which clearly warrants the annulment of the award.
80. According to Argentina, the Tribunal did not consider the defenses it raised as to the amounts that Impregilo invested in AGBA. "There is no doubt that this departure is 'serious' since, had it not taken place, the Tribunal would have reached a substantially different conclusion from that of the decision."<sup>78</sup>
81. At the bottom of page 182 of its Memorial on Annulment and in its Reply, Argentina expanded on this argument and said:

"In the present case, Argentina presented numerous challenges regarding the alleged amounts invested by Impregilo in AGBA. Indeed, valuation experts Dapena and Coloma noted that (i) the funds actually contributed by AGBA should be denominated in Argentine pesos; (ii) only a portion of the capital that was contributed and paid in translated into investments in fixed assets; (iii) the value of those assets decreased substantially in terms of US Dollars in 2002, owing to the devaluation; (iv) the investments made, in 2000, started to be recovered as from 2001, to 2006, through operating revenues, and the amounts recovered should be subtracted from the historical value of AGBA's contributions and; (v) should the historical cost method be applied, the more objective approach would be to consider the Financial Statements submitted by AGBA as of December 2005 and to take the net value of fixed assets. Such net value, restated in US dollars, and taking into account Impregilo's participation in AGBA, adds up to USD 3.6 million."<sup>79</sup>

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<sup>78</sup> Id., ¶ 155

<sup>79</sup> Reply, ¶ 165

82. Argentina concluded in its Reply that the object and purpose of an ICSID annulment proceeding is to control the fundamental integrity of the ICSID arbitral process in all its facets: the integrity of the tribunal, the integrity of the procedure and the integrity of the award.<sup>80</sup> It argued that “Ignoring the defences raised by one party and inverting the burden of proof is a ground for annulment ...” It also said “... this departure is ‘serious’ since, had it not taken place, the Tribunal would have reached a substantially different conclusion from that of the decision.”<sup>81</sup>
83. For the foregoing reasons Argentina requested the annulment of the Award and asked the Committee to order that Impregilo pay the costs of Argentina, as well as the costs incurred in the annulment proceedings by Argentina and ICSID.<sup>82</sup>

#### **B. IMPREGILO’S RESPONSE TO ARGENTINA’S ARGUMENTS**

84. This section contains a summary of the arguments submitted by Impregilo. All arguments were carefully considered by the Committee and the fact that one or more specific allegations are not summarized does not mean that they were not considered by the Committee.
85. Impregilo stated that Article 52(1) of the ICSID Convention should be construed in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties. It further argued that the five grounds for annulment set forth in Article 52 of the ICSID Convention relate to the integrity of the arbitration. It added that nothing in this Article suggests that annulment allows a substantive review of the Award, as the annulment is not an appeal. It emphasized that the *travaux preparatoires* of the ICSID Convention show that the fundamental objective of the system was to ensure the finality of arbitration awards and the first Secretary

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<sup>80</sup> Id., ¶ 28

<sup>81</sup> Id., ¶ 168

<sup>82</sup> Memorial on Annulment, ¶ 156

General of ICSID characterized annulment as a remedy concerning procedural errors.<sup>83</sup>

86. Impregilo also noted that the annulment process is not a mechanism created in order to check if there was any alleged misapplication of the applicable law or a mistake in fact. It stated that the Legal Committee involved in the drafting of the ICSID Convention indicated that even a manifestly incorrect application of the law is not a ground for annulment. It also argued, based on several decisions on annulment, that the annulment system is intended to safeguard the integrity of the proceedings and the legitimacy of the award, not the outcome of the arbitration proceedings, or the correctness of the award.<sup>84</sup>
87. Impregilo stated that according to the ordinary meaning of the terms, Article 52(1)(b) of the ICSID Convention refers to the excess of power that is manifest, that is, obvious and clear, discernible without the need for an elaborate analysis of the award.<sup>85</sup>
88. According to Impregilo, Argentina did not state the reasons for its claim that the Tribunal exceeded its powers, and insisted that the Tribunal should rule on its jurisdiction. It stated that “There is nothing in the Convention’s *travaux preparatoires* that supports a different interpretation. Moreover, under the *kompetenz-kompetenz* principle, ICSID tribunals have the express power to decide their own jurisdiction. It follows that their decision should not be annulled under Article 52(1)(b) unless the exercise of that power is manifestly beyond any reasonable interpretation of that power.”<sup>86</sup> It argued that “Only when a tribunal deliberately and manifestly refuses to apply the applicable law can an award be annulled on the grounds of manifest excess of power.”<sup>87</sup>
89. Impregilo cited Professor Schreuer who stated the following:

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<sup>83</sup> Counter-Memorial on Annulment, ¶¶ 31 to 33

<sup>84</sup> Id., ¶¶ 34 to 37

<sup>85</sup> Id., ¶¶ 38 to 40

<sup>86</sup> Id., ¶¶ 41, 44 and 45

<sup>87</sup> Id. ¶ 46

“... misapplication of the applicable law ...did not constitute an annulable error, even if it is a ‘manifest error of law,’ provided it is not of such a magnitude as to amount to a veritable non-application of the proper law as a whole.”<sup>88</sup>

90. Impregilo argued that the ICSID Convention provides solutions where the Tribunal fails to address a question in the award: a supplementary decision or interpretation of the award. Argentina chose neither of those options. It noted that other Annulment Committees have indicated that whether the reasoning is incorrect or unconvincing is beyond the authority of the Committee and is not grounds for annulment.<sup>89</sup>
91. Based on the criterion reiterated by Professor Schreuer, Impregilo stated that for a procedural violation to constitute a ground for annulment it must be serious and relate to a fundamental rule of procedure. It added, based on several decisions on nullity, that the fundamental rules of procedure are equal treatment of the parties, the right to be heard, the right to an independent and impartial tribunal, the burden of proof and the necessity of deliberations among the members of the Tribunal.<sup>90</sup>
92. According to Impregilo, Argentina’s application for annulment does not meet the threshold for annulment of the Award. It is an attempt to re-argue the merits of the case and replace the vote of the majority with the dissenting opinion.<sup>91</sup>
93. Impregilo, in sum, answered Argentina’s allegations as follows:  
  
**1. The Tribunal did not exceed its powers**
94. Impregilo stated that there is no prohibition against including most favored nation clauses in investment treaties that extend to dispute settlement provisions.

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<sup>88</sup> Id., ¶ 48

<sup>89</sup> Id., ¶ 50 to 52

<sup>90</sup> Id., ¶¶ 53 to 57

<sup>91</sup> Id., ¶ 58

According to Impregilo, the Tribunal gave several ample reasons as the basis of its interpretation and there is no element that constitutes a manifest excess of powers by the Tribunal. It noted that the Tribunal considered and rejected each of the arguments of Argentina and, although the Tribunal did not rely exclusively on existing jurisprudence, if it did, it would have been sufficient grounds on which to base the Award, for relying on jurisprudence means that the Tribunal agrees with the reasoning in the cited cases and that in itself constitutes a statement of reasons.<sup>92</sup>

95. Impregilo also noted that Argentina argued that the interpretation of the most favored nation clause by the Tribunal was incorrect and, therefore, constitutes a manifest excess of powers. Impregilo stressed that, in order to constitute grounds for annulment, the excess must be manifest. It also stated that Article 53 of the ICSID Convention provides that the substance of an ICSID award may not be reviewed and this rule makes no exception for jurisdictional decisions.<sup>93</sup>
96. Impregilo also criticized the fact that Argentina cited legal authorities that were issued after the Tribunal issued its Award and requested that they not be considered by this Committee.<sup>94</sup>
97. In its Rejoinder Impregilo reiterated that based on the drafting history of the ICSID Convention, to be grounds for annulment, the excess of powers must be manifest as various Annulment Committees have confirmed.<sup>95</sup>

## **2. The Tribunal did not depart from any rule of procedure**

98. According to Impregilo, to meet the request of Argentina, the Committee would necessarily have to determine whether the decision of the Tribunal was correct,

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<sup>92</sup> Id., ¶¶ 99 to 102

<sup>93</sup> Id., ¶ 103

<sup>94</sup> Id., ¶ 105 and footnote No. 127

<sup>95</sup> Rejoinder, ¶¶ 10 to 13

which clearly exceeds its mandate. According to Impregilo, the 18-month-domestic court requirement (Article 8(3) of the BIT) is related only to admissibility and “it does not affect the legitimacy of the Tribunal’s jurisdiction over the claim.”<sup>96</sup>

### **3. The Tribunal did not manifestly exceed its powers by asserting jurisdiction over the investment**

99. Impregilo said Argentina’s claim regarding the *jus standi* is a request for review of the merits of the Award and not a decision on any potential violations of the fundamental principles of law.<sup>97</sup>
100. Impregilo insisted that most Committees have interpreted manifest excess of powers of a Tribunal to mean an excess that is so egregious or self-evident that it is discernible without the need for analyzing the award. It added that jurisdictional issues are not subject to “... heightened scrutiny.”<sup>98</sup>

### **4. The Tribunal did not fail to state reasons for its award**

101. Impregilo said the Tribunal devoted more than six pages to explaining the Parties’ arguments and summarizing the authorities supporting their respective arguments. The Tribunal cited several arbitral awards and, based on them, used analogies and laid out syllogisms, which is the most common form of legal reasoning.<sup>99</sup>
102. In relation to the Tribunal’s interpretation of Article 4 of the BIT in respect of recovery of damages, Impregilo said the Tribunal provided reasons for its

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<sup>96</sup> Counter-Memorial on Annulment, ¶¶ 107 and 108

<sup>97</sup> Id., ¶¶ 110 and 111

<sup>98</sup> Id., ¶ 114

<sup>99</sup> Id., ¶¶ 120 to 122

interpretation and therefore did not commit any annulable error regarding this holding.<sup>100</sup>

103. Impregilo also noted that the Tribunal expressed detailed findings to support its ruling on the necessity plea. It added that the Tribunal extensively analyzed Argentina's contribution to the country's crisis.<sup>101</sup>

#### **5. The Tribunal did not fail to apply the applicable law**

104. Impregilo stated that the Tribunal did not apply the report of Professor Edward presented in this case, as the applicable law, as claimed by Argentina. In the opinion of Impregilo, the Tribunal cited the report and its supporting evidence and identified four specific situations which in the opinion of the Tribunal had contributed to Argentina's "situation of necessity."<sup>102</sup>

#### **6. The Tribunal did not fail to state reasons for its damages award**

105. Impregilo stated that "... annulment committees afford significant discretion to tribunals' reasoning. That is not a failure to apply the annulment standard correctly; it is, rather, a reflection of the fact that the requirement to state reasons is inherently more flexible in the damage context due to the discretionary nature of the exercise."<sup>103</sup> It cited several decisions of annulment committees on this subject.
106. Impregilo noted that the Tribunal discussed in the Award the damage models of the experts of both sides and explained why it would not adopt those models.<sup>104</sup>
107. Impregilo criticized Argentina's position that contradictory reasons in an award are sufficient in themselves to annul the award. Impregilo cited the decisions

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<sup>100</sup> Id., ¶ 135

<sup>101</sup> Id., ¶¶ 140 to 156

<sup>102</sup> Id., ¶¶ 157 and 158

<sup>103</sup> Id., ¶ 168

<sup>104</sup> Id., ¶ 172

issued by annulment committees in the Klockner I, Rumeli, and Vivendi I cases, in which those committees referred to contradictions in the awards that were questioned.<sup>105</sup>

108. Impregilo stated in its Rejoinder that the Tribunal did analyze the evidence presented by Argentina and as a basis for its claim it quoted paragraphs 372 and 378 of the Award.<sup>106</sup>

### **7. The Tribunal did not exceed its powers when it awarded damages**

109. According to Impregilo, the Tribunal cited and discussed the fundamental legal principle of international law concerning damages (the Chorzów principle) and held that the measures taken by Argentina contributed to the concession's failure. Regarding Argentina's argument that the Tribunal did not consider the risk of double recovery (for Impregilo and AGBA), Impregilo stated that was obviously not a legitimate annulment argument.
110. Impregilo responded to Argentina's allegation that, supposedly, the Tribunal did not respect the international legal principle that damages must be certain and proven and put Impregilo in a better situation than that in which it would have been but for the measures taken by Argentina. It stated that even if these assertions were true (which they are not), they would not constitute a manifest excess of powers on the part of the Tribunal.<sup>107</sup>

### **8. The Tribunal did not depart from any rules of procedure**

111. Regarding Argentina's allegation that the Tribunal failed to take into account the items of evidence that Argentina offered as a counter to the testimony of Professor Edward (Impregilo's expert), because the Tribunal did not expressly

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<sup>105</sup> Rejoinder, ¶¶ 14 to 16

<sup>106</sup> Id., ¶ 92

<sup>107</sup> Counter-Memorial on Annulment, ¶¶ 174 to 177

mention them, Impregilo stated that Tribunals are not obliged to refer specifically to each piece of evidence introduced into the record.<sup>108</sup>

112. Impregilo also noted that, even if true that the Tribunal failed to consider the evidence disputing the amounts of money that Impregilo invested, this does not constitute an error that would lead to annulment of the Award.<sup>109</sup>
113. Impregilo concluded that the Tribunal committed no error capable of annulling the Award and requested that the Committee deny each of Argentina's grounds for annulment. It also asked the Committee, under Articles 52(4) and 61(2) of the Convention, to order Argentina to bear all costs, fees, and expenses of these proceedings, plus interest.

### **C. ANALYSIS OF THE COMMITTEE**

114. The Committee has carefully considered the annulment claim submitted by Argentina. In its submissions, Argentina raised five "grounds for annulment of the award," which were summarized by the Committee in section III.A of this decision. Following the same order proposed by Argentina as to the "grounds" could result in unnecessary repetitions as each "ground" or argument made by Argentina was then divided into sections that repeat the grounds for annulment governed by Article 52 of the ICSID Convention. For this reason, the Committee, after carefully studying each argument or "ground" for annulment, will follow the order in which Article 52(1) of the ICSID Convention enumerates the grounds for annulment applicable to the case and refer under each section of article 52 (1) to each of the "grounds" raised by Argentina.
115. As stated, to begin the analysis of the merits of the application for annulment, the Committee will quote the rules governing the matter, and express some general comments.

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<sup>108</sup> Id. ¶ 159

<sup>109</sup> Id., ¶ 179

116. Article 52(1) of the ICSID Convention lists the grounds for annulment as follows:

“(1) Either party may request annulment of the award by an application in writing to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.”

117. The first paragraph of Article 53 of this Convention provides:

“(1) The award shall be binding on the parties and shall not be subject to appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.”

118. Article 53 sets out the fundamental features of an arbitration award, reiterating the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties. The only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention. No appeal is allowed by said Article, which indicates clearly that an Annulment Committee should not review the merits. This approach is rightly accepted by both parties here. Given this framework, this Committee concludes that in balancing these principles and interests, annulment is an exceptional recourse that should respect the finality of the award. Thus, the grounds for annulment should be interpreted as being exhaustive and restrictive. This conclusion is consistent with those of various committees which have asserted repeatedly that the role of an Annulment Committee is restricted to assessing the legitimacy of the award, to examining the integrity of the proceedings, and not to correct the

award.<sup>110</sup> The Committee agrees with the following statements of Professor Aron Broches:

“Annulment is an essential but exceptional remedy. It is well understood that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled...After these determinations have been made on the basis of objective legal analysis, the ad hoc committees may be faced with the delicate final task of weighing the conflicting claims of finality of the award, on the one hand and, on the other, of protection of parties against procedural injustice, as defined in the five subparagraphs of Article 52(1). This requires that an ad hoc committee be able to exercise a measure of discretion in ruling on applications for annulment.”<sup>111</sup>

119. As pointed out by various committees, the action for annulment is not and cannot be used as an appeal against the decision in the award.<sup>112</sup> The Committee in *Amco II* expressed this concept clearly when it said, “[i]t is incumbent upon *ad hoc* Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards.”<sup>113</sup>
120. This Committee agrees with the aforementioned approach and therefore disagrees with an approach that would imply reviewing the correctness of the reasoning of the award, because Article 53 states unequivocally that the Award “shall not be subject to appeal”.
121. To properly identify the matters discussed in this proceeding, the Committee will set out below the rules relating to the arguments that will be discussed in the following paragraphs.

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<sup>110</sup> M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador. ICSID Case No. ARB/03/6, Decision on Annulment, October 19, 2009, ¶ 24; Eduardo Vieira S.A. v. Republic of Chile. ICSID Case No. ARB/04/7, Decision on Annulment, December 10, 2010, ¶ 236

<sup>111</sup> ICSID, Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 111

<sup>112</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*. ICSID Case No. 97/3. Decision on Annulment, July 3, 2002, ¶¶ 62 and 64; *Repsol v. Petroecuador*. ICSID Case No. ARB/01/10, Decision on Annulment, January 8, 2007, ¶ 38; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*. ICSID Case No. ARB/01/7, Decision on Annulment, March 21, 2007, ¶ 31; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, September 25, 2007, ¶ 44; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16. Decision on Annulment, June 29, 2010, ¶¶ 73 and 74; *Enron Creditors Recovery Corporation and Ponderosa Assets, LP v. Argentina*. ICSID Case ARB/01/3. Decision on Annulment, July 30, 2010, ¶ 63

<sup>113</sup> *AMCO v. Republic of Indonesia*. ICSID Case No. ARB/81/1. Decision on Annulment, December 3, 1992, ¶ 1.18

122. Article 3 of the BIT states:

“1. Each Contracting Party shall, within its own territory accord to investments made by investors of the other Contracting Party, to the income and activities related to such investments and to all other matters regulated by this Agreement, a treatment that is no less favorable than that accorded to its own investors or investors from third-party countries.

2. The provisions set forth in paragraph 1 of this Article shall not apply to advantages and privileges accorded by either Contracting Party to any third country by virtue of that Party’s binding obligations that derive from its membership in a customs or economic union, common market, or free trade area, or as a result of regional or subregional agreements, multilateral international economic agreements or double taxation agreements, or any other tax-related arrangements or agreements to facilitate cross border trade.”

123. Article 8 of the BIT provides in its relevant part:

“1. Any dispute relating to an investment between an investor of one of the Contracting Parties and the other Party, arising out of or relating to this Agreement, shall, to the extent possible, be settled through friendly consultation between the parties to the dispute.

2. If the dispute cannot be settled amicably, it may be submitted to the competent judicial or administrative courts of the Party in whose territory the investment is made.

3. Where after eighteen months from the date of notice of commencement of proceedings before the courts mentioned in paragraph 2 above, the dispute between an investor and one of the Contracting Parties has not been resolved, it may be referred to international arbitration...”

124. The Committee will now discuss the first ground of annulment alleged in this proceeding: the manifest excess of powers on the part of the Tribunal, pursuant to Article 52(1)(b) of the ICSID Convention.

### **1. Manifest excess of powers of the Tribunal**

125. From the decisions of various *ad hoc* Committees, it is clear and not disputed by the parties in this case, that manifest excess of powers may relate to jurisdictional or substantive issues. Manifest excess of powers may occur when

an arbitral tribunal decides on matters which the parties did not submit to it, when the tribunal failed to apply the proper law, or did not apply the law agreed upon by the parties. In those cases the excess of powers must be considered “manifest”.

126. The Committee considers it important to quote the following about the first form of manifest excess of powers, that is when the tribunal decided on matters not submitted to it:

“... [A]d 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.’ However, one *ad hoc* committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case.”<sup>114</sup>

127. The concept of “manifest excess of powers” has been defined by several Annulment Committees as something that is obvious, clear or self-evident; can be discerned with little effort and without deeper analysis.<sup>115</sup> For other Committees that concept is more complex. For example for the Committee in the *Fraport* case, manifest excess must be demonstrable and substantial and not doubtful. According to the Committee’s decision in the *Fraport* case, “the excess of jurisdiction should be demonstrable and substantial and not doubtful.” “It

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<sup>114</sup> Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 89

<sup>115</sup> *Wena Hotels Limited v. Arab Republic of Egypt*. ICSID Case No. ARB798/4. Decision on Annulment, January 28, 2002, ¶ 25; *Azurix Corp. v. Argentine Republic*. ICSID Case No. ARB/01/12. Decision on Annulment, September 1, 2009, ¶ 68; *MCI Power Group PLC and New Turbine Inc. v. Republic of Ecuador*. ICSID Case ARB/03/6. Decision on Annulment, October 19, 2009, ¶ 49

seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious or substantially serious.”<sup>116</sup>

128. For this Committee, it is clear that not every excess of powers could result in an annulment of an award issued under the ICSID Convention. The standard imposed by Article 52 makes it clear that an award could only be annulled if the excess of powers is “manifest”. In the views of this Committee, the word “manifest” has to be given its plain meaning, in the context of the purpose of Article 52, bearing in mind the features of finality and binding effect of awards set out in Article 53. This means that the excess of power has to be obvious, self-evident, clear, flagrant and substantially serious, as found by other Committees.
129. In relation to the second form of manifest excess of powers, i.e., failure to apply the proper law, “The 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 ... 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.”<sup>117</sup>
130. Some annulment committees have considered that a flagrant misapplication or misinterpretation of the law may lead to annulment of an award, while others think that such an approach relates to an appeal, not an annulment.<sup>118</sup>
131. In the opinion of this Committee it is necessary to differentiate between a failure to apply the proper law and an error in applying the law. The first is a ground for annulment under Article 52, the second is not. Reviewing the substantive reasoning by which the Tribunal arrived at its conclusions would demand reviewing how the Tribunal applied the law or interpreted the same, resulting in

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<sup>116</sup> *Fraport Frankfurt Airport Services Worldwide v. Republic of the Philippines*. ICSID Case No. ARB/03/25. Decision on Annulment, December 23, 2010, ¶ 44; *Hussein Nuaman Soufraki v. The United Arab Emirates*. ICSID Case No. ARB/02/7. Decision on Annulment, June 5, 2007, ¶ 40

<sup>117</sup> Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 91

<sup>118</sup> Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 94

the Committee acting as a court of appeal, thereby exceeding the powers granted to it by Article 52 of the ICSID Convention. In order to decide whether the Tribunal misapplied or misinterpreted the law to the matter decided, the Committee would necessarily have to evaluate the facts and evidence as well as the correctness of the legal principles submitted by the parties, assessed and applied by the Tribunal. Obviously that is the function of an appellate court and not of an Annulment Committee.

132. Failure to apply the law is part of the concept of manifest excess of powers and for the reasons set out above, should be self-evident, clear, obvious, flagrant and substantially serious. As stated above, this Committee agrees with the views of Prof. Schreuer that there is a difference between a failure to apply the proper law and the misapplication of the applicable law, and that the latter does not constitute grounds for annulment, even if it is a “manifest error of law”, unless it is of such a magnitude as to amount to the non-application of the proper law as a whole.
133. In light of the above, the Committee will review below Argentina’s arguments on the alleged manifest excess of powers on the part of the Tribunal.
134. As stated in paragraphs 15,17,30,32, and 37 above, Argentina stated that the Tribunal had no jurisdiction to resolve the dispute between the parties and that it manifestly exceeded its powers when it assumed jurisdiction based on the MFN clause contained in the Argentina-Italy BIT which the majority of the Tribunal found allowed recourse to the Argentina-US BIT, which does not require prior submission to the administrative or judicial courts of Argentina.
135. The Tribunals in cases that have ruled on the most favored nation clause in relation to jurisdictional issues have expressed divergent positions. In *Mafezzini* (Argentine investor) v. Spain, the Arbitration Tribunal applied this clause contained in the Argentina-Spain BIT and, based on it, referred to the provisions of the Treaty between the Kingdom of Spain and the Republic of Chile and

assumed jurisdiction.<sup>119</sup> In *Siemens* (German investor) v. Argentina, the Tribunal, based on the most favored nation clause of the Argentina-Germany BIT had recourse to the current treaty between the Republics of Argentina and Chile and declared that it had jurisdiction to hear the case.<sup>120</sup> In *Gas Natural* (Spanish company) v. Argentina the Tribunal, based on the MFN clause of the Argentina-Spain BIT referred to the Treaty between the United States and Argentina and also decided that it had jurisdiction.<sup>121</sup> In the opposite direction, Argentina cited the case of ICS (UK investor) against that nation, in which the Tribunal applied the provisions of the Argentina-United Kingdom BIT, denied that the MFN clause was applicable to jurisdictional issues and stated that it had no jurisdiction.<sup>122</sup> In *Salini* (Italian investor) v. Jordan the Tribunal analyzed the MFN clause in the Italy-Jordan BIT and considered the treaties signed between Jordan and the United States and Great Britain. It held that it could not extend the procedural rights of the dispute resolution clause under those treaties to circumvent the requirement to have recourse to the mechanisms established under the investment contract.<sup>123</sup> In the *Plama* case (Cypriot company) v. Bulgaria, the Tribunal analyzed the most favored nation clause and the treaty between Bulgaria and Finland and concluded that the claimant could not rely on other treaties signed by Bulgaria to access ICSID.<sup>124</sup>

136. The above cited decisions suggest that there are two extreme positions on this issue: one supports the application of the MFN clause to dispute resolution mechanisms as a means of access to ICSID jurisdiction, the other considers that the MFN clause cannot be given effect for jurisdictional purposes. In each

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<sup>119</sup> Emilio Agustín Mafezzini v. the Kingdom of Spain. ICSID Case ARB/97/7. Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000.

<sup>120</sup> Siemens A. G. v. Argentina. ICSID Case ARB/02/8. Decision on Jurisdiction, August 3, 2004

<sup>121</sup> Gas Natural SDG SA v. Argentina. ICSID Case ARB/03/10. Decision of the Tribunal on Preliminary Questions on Jurisdiction, June 17, 2005

<sup>122</sup> ICS Inspection and Control Services Limited v. Argentine Republic. CPA Case No. 2010-9. Award on Jurisdiction, February 10, 2012, cited in paragraph 33 of the Memorial on Annulment.

<sup>123</sup> Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Jordan. ARBA/02/13 ICSID Case. Decision on Jurisdiction, November 29, 2004

<sup>124</sup> Plama Consortium Limited v. Republic of Bulgaria. ICSID Case ARB/03/24. Decision on Jurisdiction, February 8, 2005.

particular case the wording of the Treaty, the circumstances of the dispute and the evidence and arguments submitted have had a substantial role in the decision of Tribunals as to whether or not to apply the MFN clause to jurisdictional issues. Thus, this matter should be analyzed on a case-by-case basis and it is not possible to establish, for the purposes of the annulment of an award, a general rule that an MFN clause applies or does not apply to jurisdictional issues. If the Treaty – as some do – expressly prohibits the application of the MFN clause to jurisdictional issues and the tribunal disregards such prohibition and applies the MFN clause to assume competence; or if the Treaty expressly extends the MFN clause to jurisdictional issues and the Tribunal does not assume jurisdiction, regardless of the clear wording of the clause, one could say that there is a manifest excess of powers. In such events, the mere comparison between the text of the Treaty and the decision of the tribunal could lead to the conclusion that there is an excess of powers, and that such excess would be evident.

137. The issue is different, however, when there is no express prohibition or authorization and the applicability or non-applicability of the MFN clause to jurisdictional matters requires, inter alia, an interpretation of the provisions of the given Treaty, a review of the intent of the parties and the evidence and arguments submitted in the case at hand. Such are the cases that give rise to controversy and to a division in the reasoning of the tribunals. In an article published in 2011, Professor Zachary Douglas of the University of Cambridge stated:

“In this article the author revisits the vexed question of whether the jurisdiction of an international tribunal, established in accordance with the terms of the basic treaty, can be expanded by reference to the terms of a third treaty through the investor’s reliance upon the MFN clause in the basic treaty.”<sup>125</sup>

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<sup>125</sup> Douglas, Zachary. The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails. In: Journal of International Dispute Settlement, Vol. 2, No. 1 (2011), page 97.

138. Professor Douglas concludes that the MFN clause does not extend to jurisdictional matters and adds that:

“It is notorious that this question has proved to be among the most divisive in the jurisprudence.”<sup>126</sup>

139. The controversial nature of this matter is evidenced also by the fact that two respected jurists members of the Tribunal opted for the argument that, in this particular case, the MFN clause contained in the Argentina-Italy BIT permitted Impregilo to have recourse to the Argentina-US BIT that did not require submission to the administrative or judicial courts of Argentina before filing a request for arbitration. Another jurist, equally distinguished, also a member of the Tribunal, held the opposite view in a long and detailed dissenting opinion containing a thorough analysis of the MFN clause.

140. From the discussion in the preceding paragraphs, it is clear to this Committee that the issue of whether the MFN clause in the Argentina-Italy BIT has jurisdictional effects in the circumstances of this case that allowed Impregilo to have recourse to the Argentina-US BIT, which does not require recourse to local courts before resorting to the ICSID jurisdiction, is a complex issue, subject to debate, with opposite views that were discussed by the majority and the dissenting arbitrator. Neither applying an MFN clause to jurisdictional issues nor refusing to apply it to assume jurisdiction may be considered, *per se*, as a manifest excess of powers. The Committee is being asked to review in detail and *de novo* the complex issues involved in the jurisdictional debate in this case, to support the analysis of the dissenting arbitrator and to consider that such analysis is the one to prevail, and to conclude that the majority manifestly exceeded its powers. This is not the task of the Committee. The analysis required to reach a conclusion other than the majority’s would imply a new and complex analysis of the issues at stake, a review that is far from the responsibility of this Committee according to Article 52.

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<sup>126</sup> Id., page 98

141. For these reasons, it is clear that this Committee has no authority to determine whether or not the Tribunal should apply Article 3.1 of the BIT in order to establish its jurisdiction to review the merits of the dispute. The interpretation made by an Arbitration Tribunal in one way or another on the possible extension of the MFN clause to jurisdictional issues can never by itself constitute a clear, obvious, and self-evident excess of powers.
142. Argentina also claimed manifest excess of powers because the Tribunal, in its opinion, did not apply the applicable law (paragraph 33 above). In making this claim, Argentina referred to paragraphs 94 and 108 of the Award.
143. Paragraph 94 of the Award states:

“In sum, Article 8(3) contains a jurisdictional requirement that has to be fulfilled before an ICSID tribunal can assert jurisdiction. This decision is in accordance with the decision in *Wintershall*, where it was found for a very similar clause in the Argentina-Germany BIT, that “ Article 10(2) contains a time-bound prior-recourse-to-local-courts-clause, which mandates (not only permits) litigation by the investor (for a definite period) in the domestic forum,” before the right to ICSID can even materialize. Impregilo not having fulfilled this requirement, the Tribunal cannot find jurisdiction on the basis of Article 8(3) of the Argentina-Italy BIT.”

144. Paragraph 108 of the Award states:

“Nevertheless, the Arbitral Tribunal finds it unfortunate if the assessment of these issues would in each case be dependent on the personal opinions of individual arbitrators. The best way to avoid such a result is to make the determination on the basis of case law whenever a clear case law can be discerned. It is true that, as stated above, the jurisprudence regarding the application of MFN clauses to settlement of dispute provisions is not fully consistent. Nevertheless, in cases where the MFN clause has referred to “all matters” or “any matter” regulated in the BIT, there has been near-unanimity in finding that the clause covered the dispute settlement rules. On this basis, the majority of the Tribunal reaches the conclusion that Impregilo is entitled to rely, in this respect, on the dispute settlement rules in the Argentina-US BIT and that the case cannot be dismissed for non-observance of the requirements in Articles 8(2) and (3) of the Argentina-Italy BIT.”

145. Argentina's complaint is, then, that the Tribunal exceeded its powers by not complying with the provisions of Article 8(3) of the BIT.
146. For the reasons explained in paragraph 131 above, the ground for annulment under Article 52 of the ICSID Convention would be the lack of application of Article 8(3). In this case the Tribunal did not fail to apply Article 8(3). On the contrary, it examined said article in paragraphs 79 to 93 of the Award and concluded in paragraph 94 that it lacked jurisdiction based on that specific article. However, the Tribunal proceeded further with the analysis of other provisions of the treaty and, after analyzing and discussing the MFN clause contained in Article 3(1) of the Argentina-Italy BIT, in paragraphs 95 to 108 of the Award, the majority of the Tribunal concluded that it could rely on the Argentina-US BIT to not require Impregilo to have recourse to Argentine courts before filing a request for arbitration.
147. Argentina's plea actually does not refer to the lack of application of Article 8(3) of the BIT; it is rather an expression of disagreement with the Tribunal's interpretation and specifically with the conclusion reached by the Tribunal concerning the scope of Article 3(1) of the BIT. It is not the task of this Committee to review whether the interpretation of article 8(3) by the Tribunal is correct or not. Even if the standard of article 52 were to allow a Committee to consider that a gross error in the application of the law equals a lack of application of the proper law, the Committee finds no self-evident, clear, obvious or substantially serious failure to apply the proper law, nor an error in the application of the law that would allow annulment within the ambit of Article 52, as requested by Argentina.
148. Argentina also claimed the failure to apply Article 4 of the BIT (paragraphs 67, 68, and 69 above).
149. According to Argentina, the Tribunal did not apply Article 4 of the BIT which refers to losses in case of war, states of emergency or other events, and the type

of treatment that should be given to compensation as may be warranted under the circumstances. It stated that in the Award the Tribunal deprived Article 4 of any useful effect.<sup>127</sup>

150. The Tribunal stated, in paragraphs 340-343 of the Award, the reasons for its conclusions in relation to Article 4 of the BIT and cited in support of these conclusions, the analysis made by two Arbitral Tribunals that heard other cases against Argentina (*CMS* and *Suez*), of a rule that the Tribunal considered similar to Article 4 of the BIT.<sup>128</sup> The interpretation of article 4 by the Tribunal and the scope of its application in the Award are grounded by reference to other awards. Moreover, the Tribunal explained why it considered that this rule should not apply to the case at hand. Argentina does not agree with the analysis nor the conclusion reached by the Tribunal. This is different from a failure to apply the law. It is incorrect, therefore, to say that the Tribunal did not apply the applicable law simply because one does not agree with the Tribunal's interpretation. Obviously, the determination of whether the interpretation of Article 4 of the BIT by the Tribunal is correct or not is a matter unrelated to this Committee and to any annulment proceeding.
151. Argentina also claimed that there was a manifest excess of powers by the Tribunal which occurred in other ways: by exercising jurisdiction over Impregilo's claims for compensation based on a contract that said company did not sign (paragraphs 40, 41, and 43 above) and basing its decision on case law, which is not mandatory nor a source for the creation of law (paragraph 28).
152. The Tribunal stated in the Award that Impregilo formed a consortium with other companies, which were awarded one of the concession areas for the provision of drinking water services in the Province of Buenos Aires. In accordance with the bidding requirements, that consortium formed an Argentine company, AGBA.<sup>129</sup> The Tribunal added that Argentina itself admitted the existence of a substantial

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<sup>127</sup> Memorial on Annulment, ¶ 120

<sup>128</sup> Award, ¶¶ 341 and 342

<sup>129</sup> Award, ¶¶ 14 and 137

case-law showing that claims such as those presented by Impregilo enjoy protection by ICSID under the applicable BITs, and found no reason to depart from that case-law.<sup>130</sup> The Tribunal also said that Impregilo owns 42.58 percent of the shares of AGBA and made an equity investment of US\$21.3 million in the company.

153. The Tribunal concluded in the Award, after mentioning another similar case, that “... AGBA does not qualify as a protected investor under the ICSID Convention and the BIT, and its contractual rights cannot be considered protected investments. On the other hand, Impregilo’s shares in AGBA were an investment protected under the BIT.”<sup>131</sup> Argentina argued in its Memorial on Annulment, and was quoted in paragraph 42 above, that the Tribunal was wrong to allow Impregilo to take the place of AGBA in order to obtain compensation.
154. Even though Argentina claims that Impregilo was authorized by the Tribunal to “take the place” of AGBA, to claim compensation, the issue that was decided by the Tribunal was whether Impregilo, as one of AGBA’s shareholders, could file an independent claim for acts that affect AGBA, the local company. This is a topic that was debated extensively by Argentina and is a matter of interpretation of the BIT and its standards. This Committee may not analyze such interpretation and decide otherwise because it cannot review the merits of the Award. The characterization of the debate related to independent claims of shareholders as a situation where one company has “taken the place” of another would not change the aforesaid conclusion.
155. Moreover, Argentina did not identify specifically what facts or matters the Tribunal failed to take into account in its analysis. If the Award needed to be supplemented or rectified, Argentina could have requested so, pursuant to Article 49 (2) of the Convention but, certainly, this is not a ground for annulment. Furthermore, the Tribunal considered that the shareholder had an independent

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<sup>130</sup> Award, ¶ 140

<sup>131</sup> Award, ¶ 245

claim for acts that affect the local company, which is a matter of interpretation of the TBI and of its standards that the Committee may not review as it would be imply a decision on the merits.

156. Regarding the Tribunal's use of case law as the basis of the Award, the Committee is of the opinion that it is not possible to annul an award alleging manifest excess of powers because the Arbitral Tribunal based the award on other arbitration decisions. A tribunal is entitled to and often quotes from other decisions in deriving or in support of its own reasoning and quoting from rulings of other arbitral tribunals certainly constitutes a valid form of reasoning.
157. Another claim of Argentina founded on the alleged manifest excess of powers by the Tribunal is set forth in paragraph 53 above in which it is stated that Argentina accused the Tribunal that it deliberately "failed to establish the criterion applied [in relation to fair and equitable treatment] in eventually holding Argentina liable for the violation of the alleged legitimate expectations." Before making such a claim Argentina had stated the following:

"The Tribunal itself acknowledged that '[t]he term 'fair and equitable treatment' appears in many BITs. It cannot be easily defined, and it is generally believed to require at least respect for the international minimum standard of protection which, according to international customary law, any State is obliged to afford to foreign property in its territory. The Tribunal considers that the term 'fair and equitable treatment,' as it appears in the present BIT and in other similar BITs, is intended to give adequate protection to the investor's legitimate expectations,' yet it only referred to general terms—without providing any supporting argument—and did not specifically state on which grounds Argentina was found to be liable."<sup>132</sup>

158. In this Committee's opinion, the failure to fully conceptualize the content of a standard is not a ground for annulment of an award. In this case, the Tribunal gave reasons for its interpretation of the scope of the standard but even the failure to give reasons for its reasoning would not be a ground for annulment.

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<sup>132</sup> Memorial on Annulment, ¶ 89

Importantly, Argentina contradicted itself because it stated that the Tribunal did not explain the content of the fair and equitable treatment standard and later affirmed what was quoted in the previous paragraph, from which it may easily be deduced that the Tribunal did analyze the standard in question. In any case, it is obvious that the annulment mechanism is not devised to address the alleged omissions.

159. Finally, Argentina alleged manifest excess of powers of the Tribunal when it fixed the compensation granted to Impregilo in the Award, which in its opinion is contrary to applicable law and, therefore, it stated that the Tribunal became liable for that ground of annulment (paragraph 78 above). As explained in that paragraph, Argentina argued that the Tribunal placed Impregilo in a better position than it would have been in if Argentina had not taken any action.
160. The Committee cannot review *de novo* the facts, evidence and criteria used by the Tribunal in assessing the damages nor the amount of compensation awarded to Impregilo. It is clear that Argentina disagrees with the causal connection found by the Tribunal between the damages and the disputed measures; that it considers that there was a gap in the analysis of causation and that the evidence produced should have resulted in a different compensation; and that it disagrees with the interpretation by the Tribunal of the applicable law in the assessment of the damages. However, a disagreement with the analysis of the Tribunal as to causation, or with respect to the assessment of the evidence or the interpretation of the law does not constitute ground for annulment under Article 52. None of the criticism that Argentina raises in connection with the Tribunal's analysis on compensation resulted in an excess of powers for the Tribunal not having applied the proper law. Of course, the assessment of damages cannot be arbitrary, but a Tribunal's determination of the amount of compensation allows for a high level of discretion and a disagreement with the criteria used by the Tribunal cannot be a ground for annulment of an award.

161. In conclusion, as discussed in the preceding paragraphs, the Committee considers that none of the five “grounds” for requesting annulment submitted by Argentina in relation to the Tribunal’s alleged manifest excess of powers constitutes grounds for annulment. For that reason, Argentina’s application for annulment of the Award, based on Article 52(1) (b) of the ICSID Convention will be rejected.
162. The Committee then discussed the second ground for annulment alleged by Argentina in this proceeding: serious departure from a fundamental rule of procedure pursuant to Article 52(1) (d) of the ICSID Convention.

## **2. Serious departure from a fundamental rule of procedure**

163. The ground cited in Article 52 (1) (d) has an important connotation: the word “serious” means 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”. Further the violation has to be akin to a “fundamental” rule of procedure.
164. This Committee agrees with the determinations made by other committees as regards the requirement that the departure has to have a material impact on the outcome of the award for the annulment to succeed.<sup>133</sup> In the opinion of the Committee, the word “serious” expresses that impact.
165. With a view to defining the scope of this ground for annulment, other Committees have identified the following “fundamental rules of procedure”: the equal treatment of the parties, the right to be heard, an independent and impartial tribunal, the treatment of evidence and burden of proof, and deliberations among members of the Tribunal.<sup>134</sup> This Committee agrees with such formulations of the fundamental rules of procedure.

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<sup>133</sup> Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 101

<sup>134</sup> *Id.*, ¶ 100

166. The arguments put forward by Argentina with regard to this alleged breach committed by the Tribunal in the Award will be analyzed in the following paragraphs.
167. In paragraph 17 above the Committee noted that Argentina alleged a serious departure from a rule of procedure because the Tribunal assumed jurisdiction without the condition for consent having been met (Article 8(3) of the BIT). In this argument on grounds for annulment, which is being analyzed in this section, Argentina failed to indicate which fundamental rules of procedure the Tribunal had allegedly departed from or the manner in which said departure was made, when the Tribunal interpreted Article 8(3) of the BIT. The Committee is therefore unable to address this claim. Furthermore, in paragraphs 29 and 54 of its Reply, Argentina reiterated this argument with the same omissions.
168. The second argument supporting this ground for annulment relating to the issue of consent is set forth in paragraphs 35 and 36 above. Argentina claimed that the Tribunal failed to observe the consent of the parties to the BIT by not applying the condition of prior submission to local courts (Article 8(3) of that Treaty).
169. The Committee understands that, according to Argentina, the fundamental rule of procedure from which the Tribunal allegedly departed from was consent. The Committee carefully reviewed the part of the Award that makes reference to this issue and determined that there had been no such departure, as the Tribunal analyzed Articles 8(3) and 3(1) of the BIT and deduced that in this specific case Impregilo could benefit from the provisions of the Argentina-USA Treaty, where referral to local courts prior to submission to ICSID arbitration is not required.
170. In the Award, the Tribunal reviewed Article 8(3) of the BIT, which requires the investor to first refer disputes to Argentine courts. It did indeed analyze that Article and examined the arguments put forward by the parties relating to this Article and Article 3(1) of the BIT. Argentina's claim is in fact a disagreement with the Tribunal's interpretation of Articles 3(1) and 8(3) of the BIT.

171. As has repeatedly been stated in the previous paragraphs, the fact that a Tribunal interprets the jurisdictional consequences of the MFN clause in one sense or another (*i.e.*, as applying or not to jurisdictional matters) cannot be a ground for annulment on the basis that the given interpretation constitutes a serious departure from a fundamental rule of procedure.
172. The third argument put forward by Argentina as a ground for serious departure from a rule of procedure was summarized in paragraphs 79, 80, 81, and 82 above. In these paragraphs, Argentina argues that the Tribunal awarded the compensatory damages claimed by Impregilo without considering the defenses raised by Argentina.
173. The Tribunal reviewed the matter of the compensation awarded to Impregilo in paragraphs 361 through 381 of the Award. In these paragraphs, the Tribunal mentioned the difficulties obtaining financing that AGBA experienced, noted that the Argentine authorities had adopted an ambiguous position on this situation, and examined the effects of the measures adopted by Argentina in 2002. In paragraph 371 the Tribunal also stated that it could not be established with certainty in what situation Impregilo would have been had Argentina not breached the fair and equitable treatment standard. Based on that analysis, the Tribunal determined that reasonable probabilities and estimates were a sufficient basis for Impregilo's claims for compensation.
174. In paragraph 372 of the Award the Tribunal referred to the expert reports submitted by both parties. With regard to those submitted by Argentina it noted that "in the latter reports, MM. Dapena and Coloma [who were questioned by the Parties and by the Tribunal] argue that the concession had no economic value and that no compensation can therefore be justified." The Tribunal then summarized the testimony of the experts presented by Impregilo. This Committee believes that it would have been appropriate that the Tribunal had provided a more thorough explanation of the reasons why it determined that the opinions of the experts for Argentina were not credible. However, that omission

cannot, in any way, be a ground for annulment of the Award. In order to reinforce that conclusion, the Committee herein reiterates what it stated in paragraph 158 above.

175. If the Tribunal had not considered the defenses raised by Argentina in relation to this matter in the Award, no reference to the reports from the experts presented by Argentina would have been made. It is clear that the Tribunal searched for a way to determine the amount in damages, for which, in accordance with the discretionary authority of Arbitral Tribunals, it used reasonable probabilities and estimates.
176. The Committee concludes that the Tribunal evaluated the evidence submitted by both parties on the amount of compensation, and reviewed the conclusions presented therein. There is, therefore, no serious departure from fundamental rules of procedure as Argentina has had the opportunity to present its defenses and evidence on this matter and the Tribunal established the amount of compensation in a reasonable manner. There is no requirement whatsoever for arbitral tribunals to indicate in an award the reasons why some types of evidence are more credible than others. Discretionary authority that is reasonable and reasoned is the rule in this regard, and it is clearly not within the purview of Annulment Committees, which do not have direct and immediate access to the evidence submitted by both parties, to determine whether the determinations made in an award were correct. Attempting to do so would involve a subsequent assessment of the conclusions of arbitral tribunals, which would destroy the basic principles of the institution of arbitration and outside the power of *ad hoc* Committees.
177. Argentina also pointed out in this part of its claim that a ground for annulment exists where there is a reversal of the burden of proof. It is not evident in the Award that there was such reversal that materially affected the outcome of the case. The Committee further points out that neither the Memorial on Annulment nor the Reply submitted by Argentina provided adequate substantiation or

analysis for its position. With respect to this issue, Argentina expressed a purely theoretical opinion, making no reference to the specific case.

178. For the reasons outlined in the previous paragraphs, the Committee rejects Argentina's arguments for annulment, which were based on the alleged serious departure from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention).

179. The Committee will now address the third ground for annulment put forward by Argentina in this proceeding: the failure to state the reasons on which the Award is based, pursuant to Article 52 (1)(e) of the ICSID Convention.

### **3. Failure to state the reasons on which the Award is based**

180. For this requirement to be established, an *ad hoc* Committee should not be concerned with the correctness of the Tribunal's reasoning but is confined to ascertaining whether the reasoning would allow an informed reader to understand how the Tribunal reached its conclusions. The Committee fully agrees with the following paragraph in the Background Paper on Annulment for the Administrative Council of ICSID:

“*Ad hoc* Committees [Klöcher, MINE, Vivendi I, Wena, CDC, MCI, Fraport, Vierira, and Transgabonais] have 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.”<sup>135</sup>

181. 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.<sup>136</sup> As indicated by the Committee in MINE “... The requirement that an award has to be motivated implies that it must enable the reader to follow the

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<sup>135</sup> Background Paper on Annulment for the Administrative Council of ICSID, August 10, 2012, ¶ 106

<sup>136</sup> See Schreuer, C et al *The ICSID Convention, A Commentary* (Cambridge University Press, 2009), 1011.

reasoning of the Tribunal on points of fact and law. It implies that, and only that...” “... the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or of law”. If the reasoning of the Arbitral Tribunal with respect to an award cannot be understood by the parties and an informed reader, the reasons and basis for the award cannot be considered to have been stated; the issue of whether or not the conclusions of the Arbitral Tribunal are satisfactory to the parties can never be used as a valid ground for annulment of an award.

182. Argentina stated that the Tribunal declared itself competent to hear the dispute between the parties, without the condition for consent established in the BIT having been satisfied and added that the Tribunal did not state the reasons on which the decision regarding its jurisdiction was reached (paragraph 17 above). This was again stated in the section entitled “Failure to state reasons,” where reference was made to Article 3(1) of the BIT (paragraphs 20 through 24).
183. In paragraphs 79 and 80 of the Award the Tribunal analyzed the content of Article 8 of the BIT and the connection between clauses (2) and (3) of said Article. The Committee will summarize the Tribunal’s findings in this regard as follows: in paragraph 82 it noted the possible interpretations of those clauses and in paragraphs 86 through 90 it analyzed the context in order to reach the conclusion outlined in paragraphs 90 and 91 that Impregilo did not comply with the conditions set forth in that rule. It also made reference in paragraphs 92 and 93 to what other Arbitral Tribunals (such as *Maffezini* and *Wintershall*) had decided with respect to jurisdictional requirements and in paragraph 94 of the Award it established a parallel between that latter case and this current one.
184. In subsequent paragraphs of the Award (95 through 109), the Tribunal analyzed the MFN clause. Paragraph 97 mentions the four arguments invoked by Argentina to oppose the application of the most favored nation clause in this case. In paragraph 99 the Tribunal explained its interpretation of the term

“treatment” and of the phrase “all other matters regulated by this Agreement,” both of which appear in Article 3(1) of the BIT, and explained why it did not consider the allegations made by Argentina in its first argument in which it rejected the application of the MFN clause to jurisdictional issues.

185. The Tribunal was of the opinion that in this case the Argentina-US BIT could be applied, pursuant to Article 3(1) of the Argentina-Italy BIT, and determined that, on the basis of that application, the failure to meet the requirement established in Article 8(3) of the Argentina–Italy BIT had no bearing on Impregilo’s claim. Argentina did not agree with that reasoning and has expressed its disagreement repeatedly. In the opinion of the Committee, it is evident that disagreement of the reasoning cannot constitute a valid ground for its application for an annulment for lack of reasons.
186. As indicated in paragraph 25 above, Argentina stated that the conclusion expressed in paragraph 101 of the Award fails to set out the reasons therefor. This paragraph relates to the third argument presented by Argentina during the arbitral proceedings, against ascribing jurisdictional effects to the most favored nation clause. The Tribunal explained its conclusion noting that a system that provides the option of having recourse to domestic courts and to arbitration is more favorable than a system that does not offer this choice. Argentina does not agree with that conclusion. In the opinion of the Committee the Tribunal’s conclusion and Argentina’s opposing view on this issue is a matter that has no bearing whatsoever on this Application for Annulment.
187. Argentina also argued that paragraph 102 of the Award did not state the reasons on which it was based (paragraph 26 above). Argentina (in paragraph 38 of its Memorial on Annulment) and Impregilo (in paragraphs 86 and 95 of its Counter-Memorial) discussed the dates on which the Argentina-Italy BIT and the Argentina-US BIT were signed and came into effect. Obviously, this discussion relates to the Tribunal’s reasoning and not to the absence of reasoning or grounds, and as such is of no relevance to this annulment proceeding.

188. Argentina also indicated that the Tribunal's conclusion in paragraph 108 of the Award cannot be considered to be a valid ground, as the Tribunal did not even indicate whether it agreed with the reasoning of other decisions rendered by Arbitral Tribunals that it cited (paragraph 27 above).

189. For purposes of continuing the analysis of Argentina's line of argument, the Committee once again quoted a part of said argument in relation to paragraph 108 of the Award:

“Notwithstanding the fact that the conclusion arrived at by the Tribunal with regard to the “near-unanimity” of the decisions on this matter is erroneous, the principle of *stare decisis* does not apply in the context of international arbitration. Therefore, the fact that this position was adopted by an alleged majority of the tribunals cannot be considered a valid reason for this decision.”<sup>137</sup>

190. The Committee points out that, contrary to the assertion made by Argentina, the Tribunal did not assume that it was bound by decisions rendered by other Arbitral Tribunals nor the preponderance of decisions in a particular way. The Committee considers that the Tribunal believed that the decided cases and the “near unanimity” that it cited allowed it to reinforce its reasoning and findings, arrive at a conclusion and settle the dispute in the manner in which it did. This line of argument of Argentina is not a ground for annulment. While decisions rendered by Arbitral Tribunals are not binding, the reasoning contained therein can indeed be used by a Tribunal as a basis for its decision.

191. It should be made clear as well that no annulment committee can determine whether or not an arbitral tribunal used a “valid reason” to arrive at a specific conclusion. While the reasons for awards must be stated, the reasoning used by the arbitrators as grounds for the awards cannot and should not be subject to substantive and critical analysis by annulment committees.

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<sup>137</sup> Memorial on Annulment, ¶¶ 38 and 39

192. As indicated in paragraph 39 above, Argentina also stated that the Tribunal failed to consider the arguments Argentina laid out with respect to the “material competence” of the Tribunal in its Memorial on Jurisdiction and at the hearing held from May 4-6, 2009. “The Tribunal failed to consider fundamental arguments which were presented on those occasions and which are therefore fully incorporated herein [Memorial on Annulment] by reference.”<sup>138</sup> Moreover, it stated that the Tribunal, without conducting any analysis, accepted that the shares held by Impregilo in AGBA are protected investments under the BIT and that the violation of AGBA’s rights must be considered to be a violation of Impregilo’s rights; it therefore rejected, without stating the reasons, the objection raised by Argentina with regard to the material competence of the Tribunal.
193. Argentina specifically argued that, with regard to the issue of material competence, the Tribunal failed to consider the fundamental arguments that it presented in its Memorial on Jurisdiction; hence, it requested that these arguments be reproduced in its Application for Annulment. The Committee notes that Argentina did not indicate which of its arguments on jurisdiction it deemed to be fundamental and that, in its view, had not been analyzed by the Tribunal. On the issue of “reproduction” of the arguments presented by Argentina, the Committee reiterates the fact that it is not an appeal court and that its role is not to review Argentina’s arguments on jurisdiction, but instead to render a decision on the alleged invalidity of the Award.
194. With regard to the determination of the Tribunal that the shares held by Impregilo in AGBA are protected investments under the BIT, the Committee points out that the Tribunal based its decision on Article 1(1)(b) of the BIT quoted below.

“ARTICLE 1

Definitions

For the purposes of this Agreement:

1. “Investment” means, in accordance with the host country laws and irrespective of the selected legal form or any other related laws, any kind of asset invested or reinvested by an individual or a

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<sup>138</sup> Id., ¶155

legal entity of a Contracting Party in the territory of the other Party, in conformity with the laws and regulations of the latter.

Within this general framework, it included, in particular though not exclusively:

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b) shares of stock, interests or any other form of participation, including minority or indirect interest, in a company established in the territory of each Contracting Party;...”

195. The Tribunal based its decision on its interpretation of the BIT and its understanding of what the BIT defines as an investment. The Committee cannot review the accuracy of such interpretation and therefore finds no grounds here to support the application for the annulment of the Award.
196. Another claim included by Argentina in the section entitled “failure to state reasons” was described in paragraphs 45 through 47 above, in which Argentina stated that the Tribunal failed to specify how Impregilo could assert rights relating to the Concession Contract; in the Memorial on Annulment, it cited paragraphs 138, 245, 325, and 331 of the Award that address this claim.
197. Although Argentina named this specific claim as a “failure to state reasons,” it is actually contending that the Tribunal’s reasoning is contradictory (“[t]he contradiction in the Tribunal’s reasoning is manifest”)<sup>139</sup> and that such alleged contradiction is so evident that it could be assimilated to lack of reasoning. The Committee disagrees. The fact that Argentina does not agree with the Tribunal’s reasoning, which is the case here, is no failure to state reasons and this ground should therefore be dismissed.
198. As indicated in paragraph 47 above, Argentina criticized the fact that the Tribunal made reference to an award handed down by another arbitral tribunal and insisted that this other award could not serve as a basis for the Award. Argentina claims that the foregoing constitutes a “manifest failure to state reasons under Article 52(1)(e) of the ICSID Convention.”

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<sup>139</sup> Id., ¶ 74

199. The Committee noted that in paragraphs 137 through 140 of the Award, the Tribunal stated its opinion on the second objection to jurisdiction raised by Argentina. Furthermore, in paragraph 140, it stated, as Argentina itself noted, that there is substantial case law showing that claims such as those filed by Impregilo enjoy protection under the BITs.
200. As noted by Argentina, arbitration case law is not binding on any Arbitral Tribunal. However, that fact does not mean that a tribunal cannot base its opinion on decisions rendered by other tribunals or uphold the decisions of other tribunals on a specific matter. The Tribunal summarized Argentina's position on the second objection that it raised, referring in that summary to *CMS v. Argentina*. It noted that the same approach had been adopted for other awards "allowing shareholders to bring indirect claims in respect of the reduction in the value of their shares."<sup>140</sup>
201. If the Tribunal concluded that other Tribunals have accepted indirect claims and that it found no reason to depart from that case law, this is, in the Committee's opinion, a valid reason on which to base its decision. Argentina agreed with this opinion but argued that the reference to decided cases is not a valid way to state reasons for an award. Yet, it did not explain why this is the case; why an Arbitral Tribunal cannot state the reason for its decision, indicating that other cases have been decided in a particular manner and that with respect to the case that it is considering it can find no reason to depart from that decision. Stating that it has no ground to disagree with decisions in another case means that the Tribunal accepted the reasoning in those decisions and applied that to the specific case submitted to it. Based on the foregoing, the Committee finds that Argentina's assertion of a failure to state reasons is without merit.
202. Argentina put forward another argument on the alleged failure to state reasons in paragraph 114 of its Reply (referred to in paragraph 66 above). The issue in question is the Tribunal's analysis of Article 4 of the BIT and the emergency

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<sup>140</sup> Award, ¶¶ 114 and 127

measures adopted by Argentina during the economic crisis in which it was mired. In sum, Argentina stated that the Tribunal handed down an award for which it failed to state the reasons and held it liable for the emergency measures that it had adopted.

203. In paragraphs 336 through 360 of the Award, the Tribunal examined Argentina's state of necessity plea. In these paragraphs, the Tribunal analyzed Article 4 of the BIT in light of customary international law and considered the provisions of Article 25 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission of the United Nations. It also examined the conclusions of the *CMS* and *Suez* Arbitral Tribunals; it made reference to facts on the Argentine crisis which are of public knowledge; it reviewed reports on Argentina's economic situation (paragraph 350 of the Award), and considered Argentina's contribution to the crisis. In short, the Tribunal based its decision on several solid sources; it is therefore not correct that it failed to state the reasons for its conclusions on this matter.
204. Argentina argued in paragraph 70 above that the majority of the Tribunal relied mainly on the report from Impregilo's expert without establishing the legal criteria in arriving at its conclusions, and, consequently, failed to state the reasons (paragraph 73 above).
205. As mentioned in paragraphs 71 and 72 above, Argentina disagrees with the conclusions of the Tribunal on this matter, because it does not agree with the testimony of Impregilo's expert at the arbitration proceedings. A disagreement with the decision of the Tribunal clearly falls outside the competence of this Committee.
206. On this same point Argentina asserted the following:

"The Tribunal also failed to consider Edwards' contradictions during his examination at the merits phase, which is an additional ground for annulment of the Award, as it seriously departed from a rule of procedure. Indeed, at the hearing, the expert contradicted himself

and his prior submissions or statements regarding the Argentine crisis and the measures under analysis. Furthermore, Edwards' *lack of reliability* became evident, as he attached to his report the documents or instruments on which he relied in preparing his opinion, excluding such pages or parts as supported Argentina's position. This is clear evidence of the fact that Edwards was far from being an independent expert. Therefore, the Tribunal should not have relied on his report to hold Argentina liable."<sup>141</sup>

207. It is evident that, based on the argument of an alleged failure to state the reasons for this part of the Award, Argentina is expecting the Committee to assess the credibility that the testimony of Mr. Edwards, Impregilo's expert, should have had for the Tribunal, which was the responsibility of the Tribunal, and which is clearly impossible under the standards of Article 52. The credibility of an expert is not a matter for review in an annulment proceeding.
208. Finally, in the section entitled "Compensation" (paragraphs 75 and 76 above) Argentina argued that there was a failure to state reasons.
209. The Tribunal analyzed the issue of compensation in paragraphs 361 through 384 of the Award. At the arbitral proceedings, Impregilo requested payment for all losses suffered plus compound interest. The Tribunal noted that Impregilo had the burden of proof, but that the circumstances of the case made it difficult to assess damages. As a result, the Tribunal pointed out that "...probabilities and estimates have to suffice..."<sup>142</sup> The Tribunal also noted that it had serious doubts about the forecasts made by AGBA in its Business Plan<sup>143</sup> and added that AGBA only made a minor part of the envisaged investments and that it could not establish that the concession would have been profitable.<sup>144</sup> The Tribunal explained further down that the compensation amount would be based solely on

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<sup>141</sup> Memorial on Annulment, ¶ 139

<sup>142</sup> Award, ¶ 371

<sup>143</sup> Id., ¶ 373

<sup>144</sup> Award, ¶ 375

the capital contribution made by AGBA shareholders and indicated the evidence used to determine that amount (MM. Walck's and Giacchino's reports).<sup>145</sup>

210. In light of the foregoing paragraph, the Committee concludes that the Tribunal provided detailed information and analysis on the evidence that it considered and clearly outlined how it arrived at its ruling against Argentina. Evidently, this Committee does not have authority nor is it empowered (among other reasons, because it did not have direct access to the evidence submitted by the parties) to ascertain whether or not the Tribunal's conclusions were correct.
211. Based on the reasons set forth in the foregoing paragraphs, the Committee will reject the arguments for annulment put forward by Argentina which are based on the alleged failure to state the reasons for the Award.
212. In the following section the Committee will refer to other arguments raised by Argentina in its Memorial on Annulment and its Reply to request annulment of the Award.

#### **4. Other arguments for annulment**

213. Argentina presented other arguments to request annulment of the Award:
  - a. "Contradictions," "inconsistencies," and "unreasonable statements," in the Award (paragraphs 45, 55, 61, 62, 63, 64, 69 of this Decision).
  - b. Risk of "double recovery" (paragraphs 48 y 49 above).
  - c. Derivative or indirect actions are not provided for under Argentine law (paragraph 50).
  - d. Indirect actions are not provided for under international law (paragraphs 51 and 52 above).
  - e. "The Tribunal abrogated the normative content of the standard requiring the investment be accorded fair and equitable treatment, by failing to clarify its meaning" (paragraphs 53 through 63).

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<sup>145</sup> Id., ¶ 381

214. With respect to the alleged “contradictions,” “inconsistencies,” and “unreasonable statements” in the Award the Committee points out once again that Articles 49 and 50 of the ICSID Convention provide parties with the opportunity to request that the Tribunal address omissions, rectify material errors, and clarify the interpretation of an award. Argentina could make use of those mechanisms if, in fact, there were grounds to do so. Obviously, they cannot be heard by this Committee because pursuant to Article 52 of the ICSID Convention they are not grounds for annulment.
215. The Committee is also unable to make reference to the remaining arguments supporting the application for annulment set forth in paragraph 211(b) through (e) above, as none of them constitutes grounds for annulment, pursuant to Article 52 of the ICSID Convention.
216. For the above reasons the Committee will dismiss completely Argentina’s application for annulment of the Award.
217. The Committee will decide on the payment of costs of this annulment proceeding and render its final decision in the following section.

#### **D. COSTS**

218. Pursuant to Article 52(4) of the ICSID Convention, Chapter VI of the Convention (Articles 59 through 61) shall apply *mutatis mutandis* to the proceedings before this Committee.
219. Article 61(2) of the ICSID Convention states:

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

220. As reflected in paragraph 4 of the April 23, 2012 minutes of the First Session, the Parties did not agree on a method for apportionment of costs different from that envisaged in Article 61(2) of the ICSID Convention.
221. Although the Argentine Republic's Application is being rejected in its entirety, the Committee does not consider the Application frivolous. Accordingly, exercising its discretion under Article 61(2) of the ICSID Convention, the Committee decides the following: (a) the Applicant shall bear the costs of the proceeding, comprising all of the fees and expenses of the Committee Members, and the costs of using the ICSID facilities; and (b) each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.

#### **E. DECISION**

222. For the reasons set forth above, the Committee unanimously decides:
- i. To dismiss in its entirety the Application for Annulment of the Award submitted by the Argentine Republic.
  - ii. To declare the stay of enforcement automatically terminated, in accordance with ICSID Arbitration Rule 54(3).
  - iii. That each party shall bear its own legal costs and expenses incurred with respect to this annulment proceeding.
  - iv. That the Applicant 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.

[Signed]  
Teresa Cheng  
Member of the *ad hoc* Committee  
[January 10, 2014]

[Signed]  
Eduardo Zuleta  
Member of the *ad hoc* Committee  
[January 14, 2014]

[Signed]  
Rodrigo Oreamuno  
President of the *ad hoc* Committee  
[January 16, 2014]