

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

**SUEZ, SOCIEDAD GENERAL DE AGUAS DE BARCELONA S.A.
AND INTERAGUA SERVICIOS INTEGRALES DE AGUA S.A.**

Claimants

and

ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/03/17

DECISION ON ARGENTINA'S APPLICATION FOR ANNULMENT

Members of the Committee

Professor Donald M. McRae, President

Professor Doug Jones, Member of the Committee

Tan Sri Dato' Cecil W.M. Abraham, Member of the Committee

Secretary of the Committee

Mr. Francisco Grob, ICSID

Date of dispatch to the Parties: December 14, 2018

REPRESENTATION OF THE PARTIES

Representing the Argentine Republic:

Dr. Bernardo Saravia Frías
Dr. Ernesto Lucchelli
Procurador del Tesoro de la Nación
Subprocurador del Tesoro de la Nación
Procuración del Tesoro de la Nación
Posadas 1641, CP 1112
Buenos Aires,
Argentine Republic

Representing Suez, Sociedad General de Aguas de Barcelona S.A., and Interagua Servicios Integrales de Agua S.A.:

Mr. Nigel Blackaby
Freshfields Bruckhaus Deringer LLP
700 13th St NW,
Washington, DC 20005
USA

Mr. Elliot Friedman
Ms. Noiana Marigo
Mr. Ben Love
Ms. Amanda Lee
Ms. Katherine Ibarra
Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue, 31st floor
New York, NY 10022-4664
USA

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TABLE OF ABBREVIATIONS

APSA	Aguas Provinciales de Santa Fe S.A.
AGBAR	Sociedad General de Aguas de Barcelona, S.A.
Argentina-France BIT	Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments, signed on July 3, 1991, and in force since March 3, 1993
Argentina-Spain BIT	Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments, signed on October 3, 1991, and in force since September 28, 1992
Argentina’s Application	Argentina’s Application on Annulment dated September 16, 2016
Argentina’s Memorial	Argentina’s Memorial on Annulment dated May 8, 2017
Argentina’s Reply	Argentina’s Reply on Annulment dated October 5, 2017
Argentina’s Statement of Costs	Argentina’s Statement of Costs dated March 2, 2018
Award	Award dated December 4, 2015, rendered in the case of <i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic</i> (ICSID Case No. ARB/03/17)
BITs	Argentina-France BIT and Argentina-Spain BIT
Claimants	Suez, a company incorporated under the laws of France, Sociedad General de Aguas de Barcelona, S.A. (“AGBAR”), and Interagua Servicios Integrales de Agua S.A. (“Interagua”), companies incorporated under the laws of Spain
Claimants’ Counter-Memorial	Claimants’ Counter-Memorial on Annulment dated August 7, 2017
Claimants’ Rejoinder	Claimants’ Rejoinder on Annulment dated December 4, 2017
Claimants’ Statement of Costs	Claimants’ Statement of Costs dated April 11, 2018
Committee	<i>Ad hoc</i> Committee in the case of <i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic</i> (ICSID Case No. ARB/03/17)

Decision on Jurisdiction	Decision on Jurisdiction dated May 16, 2006 issued in the case of <i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic</i> (ICSID Case No. ARB/03/17)
Decision on Liability	Decision on Liability dated July 30, 2010 issued in the case of <i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic</i> (ICSID Case No. ARB/03/17)
Decision on Rectification	Decision on Rectification dated May 20, 2016 issued in the case of <i>Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic</i> (ICSID Case No. ARB/03/17)
ETOSS	<i>Ente Tripartito de Obras y Servicios Sanitarios</i> , the regulatory authority in Argentina
FET	Fair and Equitable Treatment
IBA Guidelines	IBA Guidelines on Conflicts of Interest in International Arbitration adopted by resolution of the IBA Council on May 22, 2004
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings in force as of April 10, 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States
IDB	Inter-American Development Bank
IFC	International Finance Corporation
ILC Draft Articles	Draft Articles of Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001
Interagua	Interagua Servicios Integrales del Agua S.A.
MFN	Most Favored Nation
PO1	Procedural Order No. 1 dated February 7, 2017, concerning procedural matters
Resolution 602/99	Resolution ETOSS No. 602/99 dated July 8, 1999
Second Challenge Decision	Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal, May 12, 2008, issued in the case of <i>Suez, Sociedad General de Aguas de Barcelona</i>

S.A. and Interagua Servicios Integrales de Agua S.A. v. the Argentine Republic (ICSID Case No. ARB/03/17)

Tribunal

Arbitral Tribunal in the case of *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua S.A. v. the Argentine Republic* (ICSID Case No. ARB/03/17)

Vienna Convention

Vienna Convention on the Law of Treaties signed on May 23, 1969, and entered into force on January 27, 1980

I. INTRODUCTION

1. This proceeding concerns an application by the Argentine Republic for annulment (“**Argentina’s Application**” or the “**Application**”) of the Award rendered in the underlying arbitration proceedings on December 4, 2015 (the “**Award**”), including the Decision on Jurisdiction dated May 16, 2006 (the “**Decision on Jurisdiction**”), the Decision on Liability dated July 30, 2010 (the “**Decision on Liability**”), and the Decision on Rectification dated May 20, 2016 (the “**Decision on Rectification**”).
2. The Award related to a dispute submitted to the International Center for Settlement of Investment Disputes (“**ICSID**”) on the basis of the *Agreement between the Government of the Argentine Republic and the Government of the French Republic on the Reciprocal Promotion and Protection of Investments*, signed on July 3, 1991, and in force since March 3, 1993 (the “**Argentina-France BIT**”), and the *Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments*, signed on October 3, 1991 and in force since September 28, 1992 (the “**Argentina-Spain BIT**”), as well as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the “**ICSID Convention**”).

II. PARTIES

3. The Parties are Suez, a company incorporated under the laws of France, Sociedad General de Aguas de Barcelona, S.A. (“**AGBAR**”), and Interagua Servicios Integrales de Agua S.A. (“**Interagua**”), both companies incorporated under the laws of Spain (together the “**Claimants**”), and the Argentine Republic (“**Argentina**”) (each a “**Party**”, and together, the “**Parties**”). The Parties’ representatives and their addresses are listed above on page (i).

III. PROCEDURAL HISTORY

A. REGISTRATION AND CONSTITUTION

4. Argentina submitted its Application on September 16, 2016. It also requested that enforcement of the Award be stayed until the Application was decided.

5. On September 21, 2016, the Secretary-General registered Argentina's Application. The Parties were also notified that the enforcement of the Award was provisionally stayed pursuant to Rule 54(2) of the ICSID Arbitration Rules.
6. By letter dated December 15, 2016, the Parties were notified that, in accordance with Rule 52(2) of the ICSID Arbitration Rules, an *ad hoc* Committee composed of Professor Donald M. McRae (a national of Canada and New Zealand), Tan Sri Dato' Cecil W.M. Abraham (a national of Malaysia), and Professor Doug Jones (a national of Australia and Ireland) (the "**Committee**") had been constituted. The Parties were also informed that Professor McRae would be the President of the Committee and Mr. Francisco Grob, Legal Counsel at ICSID, would serve as Secretary.

B. FIRST SESSION

7. As agreed by the Parties, the first session of the Committee was held on February 1, 2017, by telephone conference (the "**First Session**").
8. Following the First Session, the Committee issued on February 7, 2017, Procedural Order No. 1 concerning various procedural matters. The Parties confirmed, among others, that the 2006 ICSID Arbitration Rules would apply to the annulment proceedings.

C. STAY OF THE ENFORCEMENT

9. Before the First Session, the Parties agreed on a schedule for written pleadings concerning the stay of enforcement of the Award. This agreement was set out in the Claimants' and Argentina's letters of December 22 and 23, 2016, respectively.
10. In accordance with the agreed schedule and further revisions, the Parties made three simultaneous rounds of submissions on the stay of enforcement. No hearing was convened.
11. On June 21, 2017, the Committee issued its Decision on the Stay of Enforcement of the Award. The Committee lifted the stay without conditions and deferred the decision on costs to a later stage of the proceeding.

D. SUBMISSIONS ON ARGENTINA’S APPLICATION FOR ANNULMENT

- 12. On May 8, 2017, Argentina submitted its Memorial on Annulment (“**Argentina’s Memorial**”), accompanied by Exhibits A RA-104 to A RA-177, and Legal Authorities AL A RA-52 to AL A RA-107.
- 13. On August 7, 2017, the Claimants submitted their Counter-Memorial on Annulment (“**Claimants’ Counter-Memorial**”), accompanied by Exhibits AC-12 to AC-31, and Legal Authorities ACLA-52 to ACLA-88.
- 14. On October 5, 2017, Argentina submitted its Reply on Annulment (“**Argentina’s Reply**”), accompanied by Exhibits A RA-178 to A RA-250, and Legal Authorities AL A RA-108 to AL A RA-132.
- 15. On December 4, 2017, the Claimants submitted their Rejoinder on Annulment (“**Claimants’ Rejoinder**”), accompanied by Exhibits AC-32 to AC-48, and Legal Authorities ACLA-89 to ACLA-95.

E. HEARING ON ANNULMENT

- 16. On January 17 and 18, 2018, the Committee held a Hearing on Annulment at the World Bank’s headquarters in Washington D.C.
- 17. The following persons were present at the Hearing:

Committee	
Prof. Donald M. McRae	President of the <i>ad hoc</i> Committee
Tan Sri Dato’ Cecil W.M. Abraham	Member of the <i>ad hoc</i> Committee
Prof. Doug Jones	Member of the <i>ad hoc</i> Committee
ICSID Secretariat	
Mr. Francisco Grob	Secretary of the <i>ad hoc</i> Committee
Argentine Republic	
Counsel	
Dr. Bernardo Saravia Frías	Procurador del Tesoro de la Nación
Dr. Ernesto Lucchelli	Subprocurador del Tesoro de la Nación
Ms. María Teresa Gianelli	Procuración del Tesoro de la Nación

Ms. María Alejandra Etchegorry	Procuración del Tesoro de la Nación
Ms. Gisela Ingrid Makowski	Procuración del Tesoro de la Nación
Ms. Belén María Ibañez	Procuración del Tesoro de la Nación
Ms. Inda Valeria Etchechoury	Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde	Procuración del Tesoro de la Nación
Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A.	
Counsel	
Mr. Nigel Blackaby	Freshfields Bruckhaus Deringer
Mr. Elliot Friedman	Freshfields Bruckhaus Deringer
Mr. Ben Love	Freshfields Bruckhaus Deringer
Ms. Amanda Lee	Freshfields Bruckhaus Deringer
Ms. Katherine Ibarra	Freshfields Bruckhaus Deringer
Ms. Yesica Crespo	Freshfields Bruckhaus Deringer
Interpreters	
Ms. Silvia Colla	English-Spanish interpreter
Mr. Daniel Giglio	English-Spanish interpreter
Mr. Charles Roberts	English-Spanish interpreter
Court Reporters	
Mr. David Kasdan	Worldwide Reporting, LLP, English Court Reporter
Mr. Rodolfo Rinaldi	DR-Esteno, Spanish Court Reporter
Ms. Elizabeth Cicoria	DR-Esteno, Spanish Court Reporter

F. POST-HEARING PROCEDURES

18. On March 2, 2018, Argentina submitted a Statement of Costs (“**Argentina’s Statement of Costs**”), and on April 11, 2018, the Claimants submitted a Statement of Costs (“**Claimants’ Statement of Costs**”), accompanied by its Annex A.
19. The Committee declared the proceeding closed on December 7, 2018, in accordance with Rules 53 and 38(1) of the ICSID Arbitration Rules.

IV. THE ARBITRATION PROCEEDINGS, THE AWARD AND PRE-AWARD DECISIONS, AND THE RECTIFICATION DECISION

20. Argentina requests the annulment of the Award including the Decision on Jurisdiction, the Decision on Liability, and the Decision on Rectification, which it describes as an integral part of the Award.¹ It also contends that the Tribunal was improperly constituted as a result of Professor Kaufmann-Kohler's ties with UBS, a company that held shares and other interests in Suez during the arbitration proceedings, and of the two unchallenged arbitrators' decision to dismiss Argentina's proposal to disqualify her.

A. THE ARBITRATION PROCEEDING

21. The arbitration proceeding was heard by a tribunal composed of Professor Jeswald W. Salacuse (President), a national of the United States of America, Professor Gabrielle Kaufmann-Kohler, a national of Switzerland, and Professor Pedro Nikken, a national of Venezuela (the "**Tribunal**"). It concerned a series of measures adopted by Argentina in respect of the water and waste management concession held (indirectly) by the Claimants. An identically composed tribunal was constituted by agreement of the respective parties to hear the claims brought by two other Suez-led consortia in respect of water and waste management concessions for the cities of Buenos Aires and Cordoba. These other cases are *Suez et al v. Argentina*, ICSID Case No. 03/18, *Suez et al v. Argentina*, ICSID Case No. 3/19 and *AWG v. Argentina*, an UNCITRAL (1976) proceeding (*Suez 3/18*, *Suez 3/19* and *AWG*, respectively). *Suez 3/18* was discontinued by agreement of the parties on January 24, 2007.² *Suez 3/19* and *AWG* were handled together by agreement of the parties and produced two awards. Argentina sought vacatur of the *AWG* award before US courts, an application that was denied by a decision issued on September 30, 2016.³ Meanwhile, Argentina requested

¹ Argentina's Application, para. 1.

² See *Aguas Cordobesas S.A., Suez and Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic* (ICSID Case No. ARB/03/18), Order of the Tribunal Taking Note of the Discontinuance of the Proceeding, January 24, 2007.

³ *The Republic of Argentina v. AWG Group Ltd.*, No. 1:15-cv-01057-BAH (D.D.C. September 30, 2016) Memorandum Opinion, A/CLA-57, pp. 24, 26-27.

the annulment of the *Suez 3/19*'s award. This application was also rejected by an ICSID committee in a decision rendered on May 5, 2017.⁴

B. DECISION ON JURISDICTION

22. In its Decision on Jurisdiction of May 16, 2006, the Tribunal rejected all the objections raised by Argentina, except for one, which had become moot because of the discontinuance of the proceedings in respect of the claimant against which it was addressed. The Tribunal found the dispute to be of legal nature and to arise directly out of Claimants' investments in the water distribution and waste water services of the Province of Santa Fe in Argentina. It considered that the existence of a dispute settlement clause in the concession contract concluded by Aguas Provinciales de Santa Fe S.A. ("**APSA**"), an Argentinian corporation in which the Claimants had shares and other interests, and the Province of Santa Fe for the operation of the water services in that Province did not preclude the Claimants from bringing this arbitration based on breaches of the Argentina-France and the Argentina-Spain BITs. It also found that the Claimants Interagua and AGBAR were entitled, by operation of the most-favored-nation ("**MFN**") clause of the Argentina-Spain BIT, to avail themselves of the more favorable treatment of the Argentina-France BIT and did not, therefore, need to resort to the local courts of Argentina before initiating this arbitration.

C. DECISION ON THE DISQUALIFICATION PROPOSAL

23. By a decision dated May 12, 2008, Professors Salacuse and Nikken, the two unchallenged members of the Tribunal, rejected Argentina's (second) proposal to disqualify Professor Kaufmann-Kohler. They found no conflict that could result in Professor Kaufmann-Kohler manifestly lacking independence and impartiality to hear this case. In their view, considering the size and scope of UBS's operations, the outcome of the arbitration would at best have a negligible financial effect on Suez and, consequently, an insignificant effect on UBS. Professor Kaufmann-Kohler's financial position would not thus be altered by the result of

⁴ *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/3/19), Decision on Argentina's Application for Annulment, May 5, 2017.

this arbitration in any material form. Nor did they believe that Professor Kaufmann-Kohler's nondisclosure of her UBS directorship demonstrated lack of independence or impartiality. They concluded that she was unaware of UBS's shareholdings in Suez and did not participate "in the day-to-day management of the corporation."⁵ Moreover, she had reason to rely on the UBS's conflict review after having submitted a list of her arbitrations to the company for that purpose. They therefore rejected the disqualification proposal.

D. DECISION ON LIABILITY

24. The Tribunal determined in its Decision on Liability that Argentina did not expropriate Claimants' investment and did not deny them full protection and security under the applicable investment treaties. It did, however, conclude that Argentina denied the Claimants fair and equitable treatment ("**FET**") in that its "...actions in refusing to revise the tariff according to the legal framework of the Concession and in pursuing the forced renegotiation of the Concession Contract contrary to that legal framework violated its obligations under the applicable BITs...".⁶ Although the Claimants had argued that Argentina's unilateral termination of the Concession also violated their rights under the investment treaties, the Tribunal rejected that claim, stating that it had no jurisdiction to judge whether Argentina's actions breached the Concession Contract since "[w]hether [Argentina] breached the Concession Contract by terminating it is a matter for the dispute resolution procedures provided in the Concession Contract itself."⁷ The Tribunal rejected Argentina's necessity defense, including its allegation that Article 5(3) of the Argentina-France BIT, as well as international law, exempted it from its BIT obligations during times of emergency.

E. AWARD

25. The Tribunal awarded damages for USD 211,661,453 to the Claimants, plus interest. This included damages to Suez for losses on guaranteed (sponsored) debt including contingency

⁵ Decision on a Second Proposal for the Disqualification of a Member of the Arbitral Tribunal ("**Second Challenge Decision**"), May 12, 2008, para. 39.

⁶ Decision on Liability, July 30, 2010, para. 227.

⁷ *Ibid.*, para. 226.

debt losses, equity, management fees, and loans to APSF; to AGBAR for losses on guaranteed debt including contingency debt losses, and equity; and to Interagua for losses on guaranteed debt including contingency debt losses, and equity. On the issue of costs, the Tribunal determined that each party should bear its own costs and that the cost of the proceedings shall be divided equally.

F. DECISION ON RECTIFICATION

26. Upon Claimants' request, the Tribunal corrected two errors in its calculation of losses with respect to one of the items, the so-called contingency debt. As a result, the total amount of the Award came to USD 225,696,464, plus interest.

V. THE PARTIES' POSITIONS ON THE INTERPRETATION OF ANNULMENT GROUNDS

A. THE SCOPE OF ANNULMENT

a. Summary of Argentina's Position

27. For Argentina, the annulment mechanism is an essential part of the ICSID regime without which States would have been unlikely to join the ICSID Convention. Its essential purpose is to safeguard the integrity of the arbitral process in all its facets, including the integrity of the tribunal, the process and the award.
28. Although annulment is not an appeal, as it does not authorize substituting the annulled decision with another, this does not mean that annulment grounds should be construed strictly. As with any other provision of the ICSID Convention, they must be interpreted in accordance with their ordinary meaning, in good faith, with due regard to context, and in the light of the object and purpose of the Convention.
29. In this case, the flaws of the underlying proceeding and Award could not have been addressed during the arbitration through the remedies of rectification, interpretation or supplementation. Rectification only allows a tribunal to "rectify any clerical, arithmetical or

similar error”⁸; interpretation only enables a tribunal to clarify the “meaning or scope of an award.”⁹; and a supplemental decision is available “only in the case of inadvertent omissions of a technical character but not in the case of a considered omission affecting a fundamental aspect of the tribunal’s reasoning.”¹⁰ None of the issues raised in this annulment proceeding fall within the limited scope of application of these remedies.

30. Argentina’s request is not frivolous or dilatory. Argentina has not sought annulment of all the ICSID awards rendered against it as the Claimants suggest. Also, where it has done so, its applications have been based on well-grounded reasons. That is why it has succeeded in annulling several awards.¹¹ Even where the requests for annulment have been unsuccessful, committees have stopped short of finding Argentina’s applications frivolous or dilatory.

b. Summary of Claimants’ Position

31. The Claimants consider that Argentina misapprehends the proper scope and role of ICSID annulment proceedings. All its claims seek an impermissible *de novo* review of points on which it lost.
32. Annulment, however, is not an appeal. It is an extraordinary remedy reserved for “egregious violations of certain basic principles”¹², which threaten the very legitimacy of the decision-making process. Article 52’s annulment grounds provide a narrow exception to the principle that an ICSID tribunal’s decision is final. These grounds are exhaustive and must be

⁸ ICSID Convention, Article 49(2).

⁹ *Ibid.*, Article 50.

¹⁰ Argentina’s Reply, para. 10, citing to Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2009, AL A RA 56, p. 860.

¹¹ Argentina’s Reply, para. 3. Argentina cites to the following decisions: *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007, AL A RA 39; *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Annulment, June 29, 2010, AL A RA 40; *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment, July 30, 2010, AL A RA 41.

¹² Claimants’ Counter-Memorial, para. 71, citing *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment, December 30, 2015, AL A RA 78, para. 39.

interpreted strictly, permitting no form of substantive review. Any complaint falling short of this exceptionally high standard cannot form the basis of an annulment.

33. Annulment is premised on deference to a tribunal's decision. Therefore, even when a tribunal has committed errors of fact or law (which is not the case here), annulment committees cannot substitute their own views for those of the tribunal. Annulment is not a remedy against an incorrect decision.
34. Moreover, not all annulable errors justify annulment. Article 52(3) of the Convention provides that "[t]he Committee shall have the authority to annul the award" if a ground under Article 52(1) is found to have been met.¹³ Article 52(3) does not require a committee to do so. Among other considerations, committees must assess whether an otherwise annulable error had a material impact on the outcome of an award before deciding whether to exercise its annulment powers.

B. IMPROPER CONSTITUTION OF THE TRIBUNAL (ARTICLE 52(1)(A) OF THE ICSID CONVENTION)

a. Summary of Argentina's Position

35. Article 52(1)(a) of the ICSID Convention provides that either party may request annulment of an award on the basis "that the Tribunal was not properly constituted." To determine this, regard must be had to Chapter IV, Section 2 of the ICSID Convention, which regulates the "Constitution of the Tribunal" (Articles 37 to 40). In accordance with Article 40, arbitrators must "possess the qualities stated in paragraph (1) of Article 14." Such qualities are: (a) "be persons of high moral character," (b) "with recognized competence in the fields of law, commerce, industry or finance," and (c) "who may be relied upon to exercise independent judgment."¹⁴ Article 57 of the ICSID Convention provides that a party may propose the disqualification of an arbitrator on account of any fact indicating "the lack of the qualities

¹³ Claimants' Counter-Memorial, para. 73.

¹⁴ Argentina's Reply, para. 19.

required by of Article 14(1) of the ICSID Convention” or “on the ground that he was ineligible for appointment to the tribunal under Section 2 of Chapter IV.”¹⁵

36. The text and context of Article 52(1)(a) make it clear that the manifest lack of the qualities required by Article 14(1) of the ICSID Convention authorizes a party to propose the disqualification of an arbitrator and, once the award is rendered, to request its annulment as a result of the improper constitution of the tribunal. So too does the object and purpose of the ICSID annulment procedure, which is to ensure the integrity of ICSID tribunals, and the principle of *effet utile* interpretation. If a party could not question the constitution of a tribunal under Article 52(1)(a), despite having timely submitted a disqualification proposal, then Article 52(1)(a) would be meaningless.
37. Supplementary means of interpretation confirmed this conclusion. As Professor Schreuer has explained based on the preparatory works of the ICSID Convention, if a party requesting disqualification in the original arbitral proceeding is unsuccessful, its right to challenge the constitution of the tribunal as a ground for annulment under Article 52(1)(a) of the ICSID Convention “remains unaffected.”¹⁶
38. This interpretation is also supported by case law. Unlike the incorrect approach followed by the *Azurix* decision, the *EDF* committee accepted that annulment is available where an arbitrator does not meet the qualifications required under Article 14(1) (it erred, however, in that it unduly limited the scope of review in deference to the unchallenged arbitrator’s decision on the disqualification proposal, a restriction that is nowhere to be found in the ICSID Convention). The same can be said about the *Suez 3/19* committee’s decision.
39. Although the existence of a decision on disqualification in the original arbitration proceeding may be an element of judgment for the annulment committee when verifying the proper constitution of the tribunal, it is not binding on the committee nor should it limit its

¹⁵ Argentina’s Memorial, paras. 28-34.

¹⁶ Argentina’s Reply, para. 23, citing Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2009, AL A RA 56, Art. 52, para. 129.

jurisdiction to determine the proper constitution of the tribunal. Article 52 of the ICSID Convention does not provide for any such limitation.

40. In addition, there is an “essential difference” between a request for annulment under Article 52(1)(a) and the other annulment grounds.¹⁷ Whether a tribunal is properly constituted is expressly subject to the decision of an annulment committee under Article 52(1)(a). The limitations imposed on an *ad hoc* committee in connection with the merits of the dispute are inapplicable to its analysis on this ground. While “‘an *ad hoc* committee does not have the jurisdiction to review the merits of the original award,’ insofar as ‘[t]he annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings,’ as the guardian of ‘the fundamental integrity of the ICSID arbitral process in all its facets,’ ‘[a]n *ad hoc* committee is empowered to verify [...] the integrity of the tribunal – its proper constitution (Article 52(1)(a)) [...]’.”¹⁸

b. Summary of Claimants’ Position

41. Claimants contend that Argentina’s Memorial proceeds on the wrong assumption that an annulment committee is empowered to determine, afresh, whether the requirements of Article 14(1) have been met, and, if not, the committee must annul the award under Article 52(1)(a). This approach ignores, however, that where an annulment committee is called to consider an arbitrator challenge that was decided during the underlying arbitration, the committee does not “write on a blank sheet.”¹⁹ Previous annulment committees have consistently held that, in such circumstances, a committee’s scope of review is very limited. Two lines of authority have emerged from these decisions.
42. The first approach is that followed by the annulment committee in *Azurix v. Argentina*. The *Azurix* committee held that the inquiry under Article 52(1)(a) is a purely procedural one, restricted to verifying whether the procedure for constituting a tribunal and for resolving a

¹⁷ Argentina’s Reply, para. 27.

¹⁸ *Ibid.*, para. 29, citing *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of June 5, 2007, AL A RA 51, paras. 20-23.

¹⁹ Claimants’ Counter-Memorial, para. 81, citing *EDF International SA and others v. Argentine Republic* (ICSID Case No ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para. 145.

challenge to an arbitrator have been complied with. If they have, an annulment application cannot succeed. The second approach was articulated by the committee in *EDF v. Argentina*, later followed by the *Suez 3/19* committee. Under this approach, a committee may inquire into the substance of a disqualification decision. However, annulment under Article 52(1)(a) or (d) is not possible “unless the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision.”²⁰

43. Contrary to Argentina’s position, Article 14(1) does not empower an *ad hoc* committee to scrutinize a tribunal’s handling of an arbitrator challenge, as if it were a matter of first impression. Article 14(1) says nothing about the standard of review to be applied by an annulment committee. This is to be found in the architecture of the ICSID system and in its object and purpose. As noted above, the annulment mechanism acts as a safeguard against “egregious violations of certain basic principles”.²¹ The ICSID Convention charges the unchallenged members of the tribunal (or, in extraordinary circumstances, the Chairman of the Administrative Council) with responsibility for ensuring that only impartial, independent, and expert tribunals are constituted to hear claims. The purpose of this is that any challenge is resolved as early and efficiently as possible during the proceedings, rather than many years later, once an award is rendered. Neither Article 58 nor Article 52 contains any indication that an ICSID tribunal’s power to resolve pre-award arbitrator challenges should be shared with (much less displaced by) an *ad hoc* committee. Raising an arbitrator challenge during the arbitration is not simply a procedural formality designed to preserve a party’s ability to raise the argument once again during an annulment. A pre-award challenge is *the* opportunity for a party to present an arbitrator challenge and to have that challenge resolved on a full evidentiary record. That is why the *EDF* committee did not contradict itself by, on the one hand, acknowledging that it is possible for an award to be annulled under

²⁰ Claimants’ Counter-Memorial, para. 89, citing *EDF International SA and others v. Argentine Republic* (ICSID Case No ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para 145.

²¹ Claimants’ Rejoinder, para. 16; Claimants’ Counter-Memorial para. 71, citing *Tulip Real Estate and Development Netherlands BV v. Republic of Turkey* (ICSID Case No ARB/11/28), Decision on Annulment, December 30, 2015, AL A RA 78, para. 39.

Article 52(1)(a) on the basis of an arbitrator’s lack of the requisite qualities under Article 14(1), while on the other hand, holding that where a tribunal has previously decided an arbitrator challenge, an *ad hoc* committee cannot annul unless the tribunal’s decision is “plainly unreasonable”.²² Moreover, it is Argentina’s interpretation of Article 52(1)(a) that runs contrary to the object and purpose of annulment in the ICSID system.

44. This being clear, there is no need to resort to supplementary means of interpretation. The treaty text is neither ambiguous nor does it lead to absurd or unreasonable results. In any event, the supplementary sources that Argentina cites fail to support its view of Article 52(1)(a). The drafting history of Article 52 confirms that the Convention’s framers did not intend for an annulment application under Article 52(1)(a) (or under any ground) to trigger *de novo* review so much so that the drafters of the Convention considered and rejected a proposal to permit annulment “on the grounds that a member of the Tribunal lacked the qualities listed under Article 14(1)” by 16 votes to 4.²³
45. Argentina’s distinction between Article 52(1)(a) and all other grounds for annulment is flawed. There is no “essential difference” between them. Every issue addressed by Article 52 is “expressly subject to the decision of the annulment committee” and is likewise subject to a deferential standard of review.²⁴

C. MANIFEST EXCESS OF POWERS (ARTICLE 52(1)(B) OF THE ICSID CONVENTION)

a. Summary of Argentina’s Position

46. According to Argentina, a manifest excess of powers may relate to: (a) the scope of the tribunal’s jurisdiction, (b) the applicable law, and (c) the issues raised by the parties.
47. In respect of the first category, Argentina contends that it does not propose a *de novo* review of the Tribunal’s jurisdictional findings as the Claimants suggest. What it seeks is that the

²² Claimants’ Rejoinder, para. 25, citing *EDF International SA and others v. Argentine Republic* (ICSID Case No ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para. 145.

²³ *Ibid.*, para. 22, citing *History of the ICSID Convention*, Volume II, Part 2, Documents 44-146 (1968), A RA 111, p. 852.

²⁴ Claimants’ Rejoinder, para. 29.

Committee examines whether the Tribunal manifestly exceeded its powers when it exercised jurisdiction in this case. Although this may require a degree of argumentation and analysis, it does not prevent a finding of manifest excess of powers.

48. On the second category, Argentina claims that it has not invoked an erroneous application of the law in the present case. Its application on this point is based on the Tribunal's failure to apply the law. Even so, annulment committees have accepted that an error of law may in some circumstances constitute a manifest excess of power under Article 52(1)(b) of the ICSID Convention where it is tantamount to a failure to apply the law, regardless of its general or specific nature. Examples can be found in the decisions of the *Enron* and *Sempra* committees. The former annulled the award because the tribunal failed to specify the legal standards applicable to the necessity defense, thus omitting to apply the applicable law, whereas the latter set aside the award "on the basis of manifest excess of powers (Article 52(1)(b) of the ICSID Convention) in respect of failure to apply Article XI of the BIT" invoked in this case.²⁵
49. With respect to the third category, Argentina argues that both parties agree that a tribunal manifestly exceeds its powers where it decides questions not submitted to it or refuses to decide questions properly before it.

b. Summary of Claimants' Position

50. For the Claimants, annulment on any Article 52(1) ground requires a committee to conclude that an annulable error had a material impact on the outcome of a case, Article 52(1)(b) being no exception.
51. Contrary to Argentina's suggestions, an excess of powers cannot be "manifest" if it is discernible only through elaborate interpretation or requires a committee to decide between competing positions on a debatable legal issue. It must be obvious, self-evident, clear,

²⁵ Argentina's Reply, para. 42, citing *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Application for Annulment of the Award, June 29, 2010, AL A RA 40, para. 159.

flagrant and discernable without great effort or extensive analysis to satisfy this standard. An error of law, even a serious error of law, is not an excess of powers under Article 52(1)(b) let alone a manifest one.

52. The weight of authority agrees also that the manifest requirement applies equally to both jurisdictional and merits decisions. Thus, any suggestion that a jurisdictional error is by its very nature manifest must be rejected.
53. To find an excess of power for failure to apply the applicable law, there must have been a failure to apply the law *in toto*. ICSID annulment committees have consistently held that only a complete failure to apply the correct law may amount to a manifest excess of powers. The reason is very straightforward. As Professor Schreuer has put it, “[p]artial non-application and erroneous application are indistinguishable’ – and neither is a ground for annulment”.²⁶ The decisions Argentina cites in support of this claim are no more than outliers in an otherwise constant jurisprudence.

D. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE (ARTICLE 52(1)(D) OF THE ICSID CONVENTION)

a. Summary of Argentina’s Position

54. Argentina contends that Article 52(1)(d) means that a set of minimal standards of procedure must be observed in ICSID proceedings, which includes the right to an independent and impartial tribunal. These standards, however, are not confined to the rules of procedure provided for in the arbitration rules, but they also embrace principles of natural justice such as due process, the right to be heard, proper treatment of evidence, among others.
55. Contrary to Claimants’ position, an application for annulment must simply demonstrate the impact that the situation could have had on the award, that is to say, that observance of the rule departed from had the potential of causing the tribunal to render a substantially different

²⁶ Claimants’ Reply, para. 67, citing Christoph Schreuer *et al*, *The ICSID Convention: A Commentary*, 2009 (2nd Edition), A/CLA-61, p. 964.

award from the one it actually rendered. It need not prove that the tribunal would have effectively reached a different decision.

56. Where applied to the resolution of a disqualification proposal, this standard is not confined to verifying that the applicable procedures have been followed. It also includes reviewing whether an arbitrator possesses the requisite qualifications to serve as such. The *EDF* committee accepted this, though it unduly limited the scope of review in deference to the two unchallenged members' initial decision on the disqualification proposal.

b. Summary of Claimants' Position

57. The Claimants agree that Article 52(1)(d) is intended to ensure that minimal standards of procedure are observed in the arbitral proceedings. They stress, however, that the applicant bears the burden of proving both that the tribunal committed a serious departure from a procedural rule, and that the rule was fundamental.²⁷
58. In order to be serious, the violation of the rule must have caused the tribunal to reach a result substantially different from what it would have decided had such a rule been observed.²⁸
59. In respect of a disqualification proposal, arbitrators are subject to a duty to investigate and disclose true conflicts, but that duty is not in and of itself a fundamental rule of procedure; it is at most a reflection of the requirement that arbitrators must remain independent and impartial. As recognized by Professors Salacuse and Nikken, as well as the *EDF* tribunal and *ad hoc* committee, nondisclosure in itself cannot be a ground for disqualification where, as here, the facts not disclosed do not evidence a conflict of interest.²⁹

²⁷ Claimants' Counter-Memorial, para. 201.

²⁸ *Ibid.*, para. 202.

²⁹ Claimants' Rejoinder, para. 60.

E. FAILURE TO STATE REASONS IN THE AWARD (ARTICLE 52(1)(E) OF THE ICSID CONVENTION)

a. Summary of Argentina’s Position

60. The requirement that tribunals state reasons for their decisions is an essential aspect of the ICSID system.³⁰
61. As several committees have pointed out, a failure to state reasons may lead to annulment where there has been a total absence of reasons, which encompasses cases in which merely frivolous reasons have been stated; where a tribunal’s reasoning is contradictory; or where the reasoning is lacking in coherence that a reader cannot follow it (i.e. incomplete or inadequate reasons). Moreover, as the *TECO* committee recently noted, the omission to address certain evidence relevant to the assessment of damages may also amount to a failure to state reasons under Article 52(1)(e) of the ICSID Convention.³¹
62. It is not for a committee to substitute its determination on the merits for that of the tribunal, nor should give the reasons that were not stated by the tribunal; “[a]ll it can do is annul the decision of the tribunal.”³² The ICSID Convention requires that the reasons be stated.

b. Summary of Claimants’ Position

63. The Claimants argue that the purpose of Article 52(1)(e) is to ensure that ICSID awards are the result of reasoned decision-making. It is not for an *ad hoc* committee to assess the quality, persuasiveness, or correctness of a tribunal’s reasoning.³³ Only the complete absence of reasoning on an outcome determinative point, or the statement of reasons that are so genuinely contradictory so as to cancel each other out may lead to annulment under Article 52(1)(e).³⁴

³⁰ Argentina’s Memorial, para. 52.

³¹ *Ibid.*, paras. 55-59.

³² Argentina’s Reply, para. 59.

³³ Claimants’ Counter-Memorial, para. 219.

³⁴ Claimants’ Rejoinder, para. 147.

64. Although a tribunal is required to decide every question put before it, there is no duty to comment on every argument raised, or piece of evidence submitted, by the parties. As the *TECO* committee, whose decision Argentina cites to on this point, made clear a tribunal cannot be required to address within its award each and every piece of evidence in the record.³⁵
65. Neither Article 48(3) nor Article 52(1)(e) specifies the manner in which tribunals must state their reasons. A tribunal's reasons may also be implicit as long as they are understandable.³⁶ Where a tribunal fails to address a question raised by one of the parties or the parties desire a further clarification of a tribunal's decision, they can request that the tribunal supplements its award or interprets its ruling. Annulment is not the proper avenue to address these issues.³⁷

VI. THE PARTIES ARGUMENTS FOR AND AGAINST ANNULMENT

A. REPRODUCTION BY THE TRIBUNAL OF THE FINDINGS MADE IN OTHER ARBITRATIONS

a. Summary of Argentina's Position

66. Argentina contends that the Tribunal reproduced in this case the findings of the *Suez 3/19* and *AWG* decisions, disregarding the factual differences between these cases, the distinct legal frameworks, the behavior of the parties and the specific geographic and socioeconomic circumstances pertaining to each of the concession areas.³⁸ In some parts of the Decision on Liability, the Tribunal did not even substitute the correct name of the participating agencies, or the number of parties and BITs involved, let alone the specific terms of the concession agreements. This had a clear and decisive impact on the outcome of the present case and particularly on the fate of the FET claim, the necessity defence and the valuation of

³⁵ *Ibid.*, para. 149.

³⁶ Claimants' Counter-Memorial, para. 225.

³⁷ Claimants' Rejoinder, para. 151.

³⁸ Argentina's Memorial, para. 64.

damages.³⁹ It also constitutes a manifest excess of powers, a serious departure of fundamental rules of procedure and a failure to state reasons.⁴⁰

67. In relation to the FET claim, the Decision on Liability suggests that the Tribunal's conclusions would have been different had the Province "relieved [the Concessionaire], at least temporarily, of investment commitments" to "avoid an increase in tariffs during a time of crisis", or if the Province had been willing to renegotiate the concession terms in good faith instead of forcing the concessionaire to accept "imposed" terms. The problem is that this is exactly what the Province of Santa Fe did.⁴¹ Unlike the Federal Government in the *Suez 3/19* and *AWG* cases, the Province authorized the Concessionaire (APSF) to suspend and reduce investments significantly below what was required under the Contract without imposing any fines in an effort to keep the Concession afloat.⁴² Moreover, there was nothing "forced" or compulsory about this process as the decision wrongly suggests.⁴³ Nor did the Province "abruptly" terminate the Concession relying on "serious fault" by APSF; rather, the contract was terminated due to dissolution of APSF. All of these are misplaced findings belonging to a different case.⁴⁴
68. With respect to Argentina's necessity defence, the Tribunal limited its discussion to 15 paragraphs out of which only 9 are really devoted to analysis, and it yet copied almost word by word from the decision on liability in the *Suez 3/19* and *AWG* cases. This led the Tribunal to ignore the critical situation of the Province of Santa Fe, which was even more serious than that experienced at a national level and was subsequently aggravated by floods in 2003. The Tribunal only mentions the floods in passing in its general account of the facts, but does not really take them into account in its analyses of Argentina's necessity defence. This is

³⁹ For instance, Argentina claims that "[o]ut of the 248 paragraphs that make up the Decision on Liability in the present case *Suez 3/17*, a total of 217 correlate to the paragraphs in the decision on liability issued in the *Suez 3/19* and *AWG* cases, which represents 87.5% of them."

⁴⁰ Argentina's Reply, para. 126.

⁴¹ *Ibid.*, para. 91.

⁴² Agreement between APSF and the Province of Santa Fe on transitory measures to enable the conduct of the renegotiation process, October 29, 2002, R-98, C-106, Exhibit A RA 141, Art. 1.

⁴³ Argentina's Reply, para. 98.

⁴⁴ Argentina's Memorial, paras. 72-74.

particularly evident when the Tribunal states that the Province “could have attempted to apply more flexible means”, another statement copied from the *Suez 3/19* decision, which does not apply to this case. As noted above, the Province allowed the Concessionaire to hold and reduce investments substantially below the contractual targets.⁴⁵

69. On damages, the Tribunal used *Acta III*, a proposal for amending the existing regulatory framework prepared in 2000 by the provincial Government and never formally adopted, to build its valuation model considering it “strong evidence of how a reasonable regulator would act.” The Tribunal reproduced this statement *verbatim* from the *Suez 3/19* case where the tribunal used Resolution 602/99 as a basis for its counter-factual scenario. But unlike Resolution 602/99, which the regulator in the *Suez 3/19* case did in fact follow at some point (although it was never formally adopted), *Acta III* was explicitly rejected by the regulator in this case and never used for any purpose. Moreover, Argentina presented an alternative scenario, but it was ignored by the Tribunal which simply substituted *Acta III* for Resolution 602/99 providing no explanation for this approach. The Tribunal failed also to address Argentina’s objections to Claimants’ initial capital base and economic bids, neither of which had been raised in the *Suez 3/19* and *AWG* cases. The Claimants alleged that the Tribunal was unconvinced by Argentina’s arguments but this is mere speculation because no reasons are offered in the decision. Nor is it true that Argentina’s counterfactual scenario was unrealistic or that it did not reflect a productive and cooperative working relationship between the parties. It did contain modifications to the applicable regulatory framework as well as concrete adjustment proposals with respect to various assumptions.⁴⁶
70. The parties’ agreement to submit these proceedings to identically composed tribunals did not entail an authorization for the arbitrators to resolve them as if they were one and the same, by transposing the findings made in one into the other, while overlooking their differences. This was a decision adopted out of procedural economy concerns - nothing else. Nor does the fact that some of the arguments contained in Argentina’s pleadings are similar

⁴⁵ Argentina’s Memorial, paras. 171-172, citing Decision on Liability, para. 238.

⁴⁶ Argentina’s Memorial, paras. 89-91.

mean that the cases are identical. As a matter of fact, Argentina spent a great deal of effort showing the particularities of this case both in its pleadings on the merits and in its submissions on *quantum*. Following the Decision on Liability, for instance, Argentina reiterated the flexibility measures adopted by the Province of Santa Fe in relation to the Concession, although to no avail.⁴⁷

71. In reproducing the findings of the *Suez 3/19* and *AWG* cases, the “Tribunal failed to apply the applicable law to the facts of *this* case” and therefore manifestly exceeded its powers.⁴⁸ Similarly, by transposing the findings of *Suez 3/19* and *AWG* cases into the present case, instead of adopting a decision based on the facts and arguments of this case, the Tribunal infringed upon the right of the parties to be heard by an open-minded tribunal and prejudged the facts and issues raised by the parties in this arbitration. This constitutes a serious departure from fundamental rules of procedure. Finally, the Tribunal failed to state reasons because it merely reproduced another case’s findings. Neither did the Tribunal address all the issues submitted for decision as required by Article 48(3) of the ICSID Convention, which is a reason for annulment under any and all of the foregoing annulment grounds.
72. Contrary to Claimants’ suggestions, Argentina could not have remedied this problem while the arbitration was pending. As noted above, the remedies of annulment, rectification and supplementation are not available in respect of pre-award decisions. Nor is it possible to file a request for reconsideration against any such decision, as the *Perenco* and *ConocoPhillips* cases have shown. This is not to say that Argentina never expressed any concerns, which it did. In view of the Decision on Liability, Argentina took special care to point out the facts and circumstances that substantially differed in this case from the *Suez 3/19* and *AWG* cases, and it warned that the decisions reached in the *Suez 3/19* and *AWG* cases could not be copied into this arbitration.⁴⁹

⁴⁷ See measures listed in Argentina’s Reply, para. 96.

⁴⁸ Argentina’s Reply, para. 128.

⁴⁹ Letter SPTN No. 92/AI/15 from the Argentine Republic to the Members of the Tribunal, May 22, 2015, A RA 154; see also Argentina’s Response to Dr. Deep’s Request for Additional Information, May 9, 2012, A RA 173, p. 1.

b. Summary of Claimants' Position

73. The Claimants argue that the Tribunal did not exceed its powers when making common findings in this and the *Suez 3/19* arbitration. Nor did the Tribunal depart from a fundamental rule of procedure or fail to state reasons.⁵⁰
74. On the first annulment ground, Argentina has not really identified a single instance of the Tribunal failing to apply the governing law or exceeding its power.⁵¹ That many of the Tribunal's findings are consistent is not an excess of powers nor is it evidence of any impropriety; it is just the natural consequence of the substantial factual and legal parallels between the cases and the parties' desire for consistency by appointing the same tribunal, something to which Argentina consented from the outset.⁵²
75. Indeed, this case and *Suez 3/19* concerned the same type of investments, made by essentially the same companies, and governed by virtually identical terms; the same kinds of unlawful acts by Argentina and its instrumentalities; and the same political and economic background. Additionally, both cases were litigated by the same counsel teams, which presented substantially similar arguments on the many overlapping facts and legal principles relevant to the disputes. Large tracts of Argentina's own pleadings in the two cases are identical. In these circumstances, it is by no means surprising that the Tribunal reached the same or similar conclusions on certain disputed issues. Had Argentina wanted the decision-makers in *Suez 3/17* isolated from the facts and arguments in *Suez 3/19*, Argentina should have insisted on the appointment of different tribunals.⁵³
76. Needless to say, Argentina has grossly overstated the extent to which the Tribunal adopted common factual findings. Its arguments are replete with inaccuracies and exaggerations.⁵⁴ Contrary to Argentina's suggestions, the Tribunal regularly accounted for differences

⁵⁰ See Claimants' Counter-Memorial, paras. 193-199.

⁵¹ *Ibid.*, para. 196.

⁵² *Ibid.*, para. 198.

⁵³ Claimants' Rejoinder, para. 124.

⁵⁴ See, e.g., Claimants' Rejoinder, paras. 128-130.

between these cases. Argentina's own figures reveal this. For instance, the 42.3% overlap that Argentina calculates can hardly be considered a blind copy and paste exercise of which the Tribunal is accused. In any event, this is all beside the point because Argentina has not stated an excess of powers case: The Tribunal's findings of fact, even if they overlapped with its findings in the liability decision of *Suez 3/19* case, are unreviewable on annulment.⁵⁵

77. Insofar as Argentina's second ground for annulment is concerned (i.e. departure from a fundamental procedural rule), the Committee need not even consider it. This claim is clearly time-barred under ICSID Arbitration Rules 9(1) and 27. Argentina's complaints stem mostly from the content of the Decision on Liability, which was issued over five and a half years before the Award. This is not about whether Argentina could or could not have sought the annulment of that decision or its reconsideration by the original Tribunal as Argentina wrongly suggests. Even if it was clear (which it is not) that reconsideration of pre-award decisions is impermissible, the point is that Argentina had the chance to raise this allegation before; it was required to do so and yet it never did until now. Indeed, a review of the evidence relied on by Argentina to show that it did protest reveals actually that it merely argued that differences existed in the two cases that the Tribunal had to take into account at the *quantum* phase.⁵⁶ That is it. Argentina therefore waived its right to object.
78. As for Argentina's allegations concerning the Tribunal's lack of reasoning in respect of its findings on Claimants' FET claim, Argentina's necessity defence and the Tribunal's valuation of damages, they do not really have anything to do with missing reasons. Rather, Argentina seeks to question the quality or correctness of the Tribunal's reasons, which is not a proper basis for annulment.
79. First, the Tribunal's liability and FET findings are clearly supported by reasons. The Tribunal did not "overlook" Argentina's arguments; it rejected them. The Tribunal assessed the evidence submitted by the parties and found that the Province did not reduce APSF's

⁵⁵ *Ibid.*, para. 123.

⁵⁶ See Claimants' Rejoinder, paras. 143-146.

investment commitments after the crisis; it actually increased them and refused to adjust tariffs.⁵⁷ It also found that the renegotiation process had not been “genuine” as the “Province unfairly curtailed APSF’s reasonable freedom to negotiate the terms of the Concession Contract.”⁵⁸ In coming to these conclusions, the Tribunal addressed the specific facts of this case and the actions of the Province of Santa Fe. That the ultimate conclusion is aligned with that in the *Suez 3/19* case is unremarkable: the actions of both the Federal Government and the Province were consistent, and both violated the Claimants’ rights. Whether the Tribunal favored one piece of evidence over another, or did not address a specific document is simply irrelevant.⁵⁹

80. Second, the Tribunal’s reasoning for rejecting Argentina’s necessity defense is also stated in the Award. Far from uncritically reproducing findings from *Suez 3/19*, the Tribunal considered the issues specific to the Province of Santa Fe, such as flooding, but found that the Province could still have adopted more flexible means for dealing with the Claimants’ rights. The Tribunal concluded therefore that Argentina failed to satisfy the “only way” requirement. Argentina also failed to satisfy the “non-contribution” requirement, which is alone sufficient to reject Argentina’s necessity defense. Even if Argentina were correct in the sense that the Tribunal should have done more to establish the full contours of the necessity defense’s legal standard, that would go to the extent or quality of the Tribunal’s reasons and still not be an annulable error.⁶⁰
81. Finally, the Tribunal also stated reasons when deciding common damages issues in this case and *Suez 3/19*. The Tribunal stated in clear terms that it did not find Argentina’s arguments sufficiently detailed or convincing to undermine Dr. Deep’s analysis on the but-for scenario. The Tribunal did not repeat its findings from *Suez 3/19* in the Award; it rejected Argentina’s position. That this is consistent with the *Suez 3/19*’s conclusions is of no surprise. The

⁵⁷ *Ibid.*, para.189.

⁵⁸ *Ibid.*, para. 192, citing Decision on Liability, para. 222.

⁵⁹ Claimants’ Counter-Memorial, paras. 254-255.

⁶⁰ Claimants’ Rejoinder, paras. 195-198.

Tribunal had good reason (in both cases) to disregard Argentina's damages arguments. Argentina never mentions how a reasonable regulator would have fairly and equitably treated APSF and its investments. It instead advocated for a strict and unyielding application of the terms of the Concession in the hypothetical but-for scenario, an approach which the Tribunal rejected altogether.⁶¹

B. PROFESSOR KAUFMANN-KOHLER'S APPOINTMENT AS DIRECTOR OF UBS AND HER FAILURE TO DISCLOSE AND INVESTIGATE

a. Summary of Argentina's Position

82. Argentina claims that Professor Kaufmann-Kohler had a clear conflict of interest for which she should have been disqualified. She was a member of the Board of Directors of UBS, a company holding shares and other interests in Suez, during the arbitration proceedings. Not only did she fail to investigate and disclose this fact to the parties but also she refused to resign. This undermined the integrity of the Tribunal and warrants annulment of the Award for improper constitution of the Tribunal and serious departure from fundamental rules of procedure.⁶²
83. Prof. Kaufmann-Kohler accepted her position in UBS in April 2006. During the three years in which Prof. Kaufmann-Kohler was part of UBS's Board, the parties submitted all their briefs on the merits, a hearing was held in which all relevant evidence was produced on liability, and the arbitrators' deliberations began.⁶³
84. Argentina learned about Prof. Kaufmann-Kohler's engagement in UBS in November 2007 and filed a proposal for disqualification as soon as she confirmed that UBS had indeed shareholdings in Suez of which she was unaware.⁶⁴ UBS also encouraged investment in

⁶¹ *Ibid.*, paras. 199-214.

⁶² Argentina's Reply, para. 138.

⁶³ *Ibid.*, para. 146.

⁶⁴ Letter from Gabrielle Kaufmann-Kohler to UBS, December 17, 2007, attached to Letter from Gabrielle Kaufmann-Kohler to the ICSID, December 21, 2007, A RA 116.

water concessionaires, mentioning among them the businesses of Suez Environment and AGBAR and during 2006 and 2007 it marketed and commercialized investments in water concessionaires, including Suez.⁶⁵

85. With the support of an expert opinion prepared by ethics Professor Charles W. Wolfram, Argentina conclusively established that Prof. Kaufmann-Kohler had at least two distinct interests, which were incompatible with her duty to the parties to exercise independent and impartial judgment. First, she was legally bound by a fiduciary duty to the company that she was a director of, which required her to put the company's interests ahead of her own. Secondly, she had a personal economic interest in the performance of UBS, since she received a significant percentage of her remuneration in UBS shares. She had to accept at least 50% of her remuneration in USB shares, and could accept up to 100% thereof.⁶⁶
86. Notwithstanding this evidence, the unchallenged members of the Tribunal rejected the Proposal for Disqualification and Prof. Kaufmann-Kohler remained as a director of UBS. In doing so, they only performed a *quantitative* analysis of Professor Kaufmann-Kohler's economic self-interest, and did not refer to the fiduciary duty to protect UBS's interests in Suez or her natural inclination to do so, or her institutional duty to advance such interests.⁶⁷ As the *Vivendi* committee noted, such fiduciary duty exists regardless of the value at stake, "however small it may be".⁶⁸ A similar approach was endorsed by the Chairman of ICSID's Administrative Council in the *Blue Bank v. Venezuela* case.⁶⁹
87. As a result of this, the integrity of the proceedings was irreversibly broken and the Tribunal stayed improperly constituted.⁷⁰ Two fundamental rules of procedure were also breached:

⁶⁵ Argentina's Reply, para. 140, citing Disqualification Proposal, Exhibit A RA 115, paras. 30-33.

⁶⁶ See Report of expert Charles W. Wolfram, February 29, 2008, Exhibit A RA 118, paras. 11-15.

⁶⁷ Argentina's Reply, para. 144.

⁶⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for Annulment of the Award rendered on August 20, 2007, August 10, 2010, AL A RA 52, para. 218.

⁶⁹ *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela* (ICSID Case No. ARB/12/20), Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, November 12, 2013, AL A RA 53, para. 40.

⁷⁰ Argentina's Reply, para. 151.

(i) the right to be heard by an impartial and independent tribunal, and (ii) the arbitrators' duty to investigate and disclose.

88. As noted by the *Vivendi* committee, Professor Kaufmann-Kohler should have: (a) properly investigated whether the bank had any connections with the parties to the pending arbitrations; (b) disclosed any such connections to the parties to such arbitrations; and (c) notified the parties of the appointment, regardless of any existing connections, so that they may be properly informed.⁷¹ Professor Kaufmann-Kohler did none of this. Providing UBS with a list of pending matters at the time of her appointment is certainly insufficient. If the *Vivendi* committee did not annul the award in that case it is only because it found that “Professor Kaufmann-Kohler had no actual knowledge of the connection between UBS and the Claimants until after the Award was rendered,” and so it decided that the conflict could not have had any material impact on the decision.⁷²
89. Claimants rely on the *EDF*, *Suez 3/19*, *AWG* and *Azurix* decisions to contest Argentina's arguments. However, the first two tribunals considered that their review was limited, which is not supported by the text of Article 52. Moreover, in *EDF v. Argentina*, the conflict of interest was much less significant, something that weighed heavily in the committee's decision. EDF and UBS had common interests in subsidiary companies and EDF had entered into a financial agreement with a group of companies including UBS. Similarly, the *AWG* award was reviewed under a much higher standard of “manifest lack of impartiality” set out in the US federal Arbitration Act and UBS had no stock in *AWG*. Finally, the *Azurix* decision is unduly restrictive and its reasoning has been rejected, including by Prof. Schreuer and the *EDF* and *Suez 3/19* committees.⁷³

⁷¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for Annulment of the Award rendered on August 20, 2007, August 10, 2010, AL A RA 52, para. 204.

⁷² *Ibid.*, para. 234.

⁷³ Argentina's Reply, paras. 167-170.

b. Summary of Claimants' Position

90. The Claimants contend that Argentina's case is based on the incorrect premise that the Second Challenge Decision was wrongly decided. Even if that were the case, which it is not, this Committee is not tasked with determining whether Argentina's challenge was correctly decided. The Committee's role under either Article 52(1)(a) (i.e. tribunal's improper constitution) or (d) (i.e. serious departure of fundamental rule of procedure) is restricted to determining whether the Second Challenge Decision constituted such an egregious violation of certain basic principles that the Award issued by that Tribunal nine years later cannot stand. Argentina's Application, however, fails under either annulment ground.⁷⁴
91. First of all, the Tribunal's factual determinations and legal conclusions are not open to challenge and, even if they were, they are correct. Argentina misrepresents facts and contends various legal findings that were conclusively established by the Decision on Disqualification, which are not subject to review or reassessment at this stage. A factual record exists, which is binding upon this Committee. Based on such record, the unchallenged arbitrators found that the links between the Claimants and Professor Kaufmann-Kohler were both indirect and highly immaterial. Argentina's biased account omits to mention, for instance, that UBS investments were "passive, portfolio" investments, with a "large portion [being] managed on behalf of clients", whose total value represented a very small fraction of UBS's worldwide investments - only 0.056% considering both UBS's investments in Suez and in Vivendi.⁷⁵ Nor had Prof. Kaufmann-Kohler neglected to investigate potential conflicts. She submitted a list of her arbitrations to UBS to ensure that no conflicts existed before accepting her directorship, which the unchallenged arbitrators viewed as a reasonable effort to investigate potential conflicts.⁷⁶
92. It is not true that the Decision on Disqualification performed a mere *quantitative* analysis of Professor Kaufmann-Kohler's economic interest. Although they did not have to, the

⁷⁴ Claimants' Rejoinder, paras. 8-9.

⁷⁵ *Ibid.*, para. 39, citing Second Challenge Decision, para. 36; see also Claimants' Counter-Memorial, para. 103 and footnote 159.

⁷⁶ Claimants' Counter-Memorial, para. 113.

unchallenged arbitrators evaluated in detail Argentina's allegations with reference to four *qualitative* criteria: proximity, intensity, dependence, and materiality. If they did not address Argentina's allegations concerning Professor Kaufmann-Kohler's fiduciary duty and institutional loyalties, it is because they had already concluded that the interests of UBS in the Claimants were immaterial and could thus have had no potential impact on Professor Kaufmann-Kohler whatsoever.⁷⁷ It is therefore of no surprise that Prof. Wolfram's extreme views on conflicts, which are based on US law, have been rejected by no fewer than four different sets of arbitrators in cases involving Argentina's attempted removal of Professor Kaufmann-Kohler. Not even the US District Court, applying US law, in the *AWG* proceeding, was persuaded by them.⁷⁸

93. The decisions in *Suez 3/19*, *EDF*, and *AWG* are directly relevant and highly persuasive for this Committee. For instance, not only did the *Suez 3/19* committee consider identical arguments on whether the tribunal was properly constituted, the committee's decision was founded on the very same factual and legal record, including the Second Challenge Decision that is now before this Committee. Yet Argentina makes no attempt to address the *Suez 3/19* committee's conclusions to disregard Argentina's application for annulment. The only thing Argentina does is force a distinction between the *EDF* case and this case. But, if anything, there is a great similarity in the two cases insofar as UBS's interests in the claimants were, as both tribunals found, *de minimis*. Argentina also misrepresents the US legal standard of evident partiality in its attempts to distinguish the US District Court's decision in *AWG*. In any event, this case represented yet another instance of an independent decision-maker examining and upholding the same facts and Decision on Disqualification that is now before this Committee.⁷⁹
94. Lastly, Argentina does not dispute that the Tribunal followed the proper procedures for hearing and deciding an arbitrator challenge. Nor does Argentina claim that it was denied an opportunity to present its case on Professor Kaufmann-Kohler's independence and

⁷⁷ Claimants' Rejoinder, para. 44.

⁷⁸ *Ibid.*, para. 48.

⁷⁹ *Ibid.*, paras. 52-57.

impartiality. While arbitrators are subject to a duty to investigate and disclose true conflicts, that duty is not in and of itself a fundamental rule of procedure; it is at most a reflection of the requirement that arbitrators must remain independent and impartial. Nondisclosure in itself cannot be a ground for disqualification where, as here, the facts not disclosed do not evidence a conflict of interest. Therefore, Argentina's Application under Article 52(1)(b) must likewise fail.⁸⁰

C. FAILURE TO COMPLY WITH THE 18 MONTHS' LOCAL LITIGATION REQUIREMENT

a. Summary of Argentina's Position

95. According to Argentina, the Tribunal committed two annulable errors when it permitted AGBAR and Interagua to rely on the MFN clause of the Argentina-Spain BIT to import the dispute settlement provision contained in the Argentina-France BIT and circumvent the otherwise applicable 18-month local court litigation requirement of Article X of the Argentina-Spain BIT.⁸¹ It manifestly exceeded its powers because it exercised jurisdiction without Argentina's consent and in doing so it also failed to state supporting reasons.⁸²
96. The Tribunal "manifestly" exceeded its powers because it went far beyond the parties' consent, something that is readily apparent from a mere reading of the Award. The Tribunal, on the one hand, recognized the 18-month local litigation requirement as a mandatory condition and, on the other hand, it acknowledged that such requirement had not been satisfied by AGBAR and Interagua.⁸³ Yet, it concluded that AGBAR and Interagua were nonetheless permitted by virtue of the MFN clause to bring an ICSID arbitration without having to resort first to the local courts of Argentina. But, as the *ICS v. Argentina* tribunal concluded, an MFN clause cannot be applied to jurisdictional matters unless clear and unambiguous consent to that effect is established. Similarly, a Swedish Court of Appeal

⁸⁰ *Ibid.*, paras. 58-61.

⁸¹ This provision requires an investor to bring a judicial proceeding in the local courts and allows it to have recourse to arbitration only after a further period of eighteen months in the local courts.

⁸² Argentina's Memorial, para. 137; Argentina's Reply, para. 171.

⁸³ Argentina's Reply, para. 189.

recently set aside one of the *Yukos* decisions because the tribunal improperly applied an MFN clause to grant an investor access to arbitration in excess of its jurisdiction.⁸⁴

97. The Tribunal made another annulable error where it failed to explain how jurisdictional issues, which are clearly different from substantive issues, may fall within the scope of “all matters” relating to the term “treatment” in Article IV.⁸⁵ Although it alluded to the wording of this provision and said it was guided by “established principles of treaty interpretation”,⁸⁶ the Tribunal did not really apply such rules when interpreting Article X of the Argentina-Spain BIT. Nor did the Tribunal consider Argentina’s subsequent treaty practice despite Argentina’s arguments both in its written submissions and in oral pleadings.⁸⁷ The evidence, which, according to Claimants was not submitted to the Tribunal, was attached by Claimants themselves.⁸⁸ Therefore, the issue was discussed and addressed at the jurisdictional phase and the Tribunal had all the necessary evidence before it to give due regard to Argentina’s subsequent practice.

b. Summary of Claimants’ Position

98. For the Claimants, Argentina’s arguments on this point are no more than an impermissible attempt to have the Committee revisit the merits of the Tribunal’s interpretation and application of the MFN clause in the Spanish treaty. The relevant question, however, is not

⁸⁴ Argentina’s Reply, para. 192, citing *Russian Federation v. GBI 9000 SICAV S.A., ALOS 34 S.L., Orgor de Valores SICAV S.A. and Quasar de Valores SICAV S.A.*, Case No. 9128-14, Judgment of the SVEA Court of Appeal, January 18, 2016, AL A RA 124, p. 10.

⁸⁵ See Argentina’s Memorial, para. 147.

⁸⁶ Decision on Jurisdiction, para. 54.

⁸⁷ See Argentina’s Memorial, para. 154 (“the State Parties did not intend the MFN Clause contained in Article IV of the Argentina-Spain BIT to apply to the settlement of disputes...[t]his is evidence of the practice subsequently followed in applying the treaty...”). See also Argentine Republic’s Memorial on Jurisdiction of November 26, 2004, paras. 157-158 and Tr. Hear. Jurisdiction, May 9, 2005, 120:1-22 (Claimants’ Statement) (English version), A RA 191, and Tr. Hear. Jurisdiction, May 9, 2005, 160-161 (Argentina’s Statement) (English version), A RA 191.

⁸⁸ See exhibit Counter-Memorial on Jurisdiction, A RA 192, para. 219, fn. 149, List of BITs entered into by Argentina. Exhibit C-148 filed by Claimants together with their Counter-Memorial on Jurisdiction, Exhibit A RA 228.

whether the Tribunal was right or wrong, but whether the Tribunal’s decision is supported by reasons and/or constituted a flagrant jurisdictional overreach.⁸⁹

99. It is clear from the Decision on Jurisdiction that the Tribunal gave due consideration to this issue. It devoted an entire section of nearly 10 pages to it. The Tribunal explained that access to dispute settlement, a “matter” governed by Article X of the Spanish treaty, is a right or privilege covered by the notion of “treatment” that authorizes application of the MFN clause pursuant to the ordinary meaning of the term treatment. Whether Argentina agrees or not with this conclusion, that is irrelevant; reasons were given.⁹⁰
100. Argentina never argued before the Tribunal any subsequent treaty practice concerning the Spanish treaty. Nor did it submit the evidence on the record upon which it now seeks to rely. As the *Suez 3/19* committee held, a tribunal cannot be faulted for failing to address an issue which the parties themselves never raised during the arbitration proceedings.⁹¹ Leaving aside that a tribunal is under no obligation to address every conceivable argument that anyone can think of, in this case Argentina’s invocation of the Contracting State’s alleged subsequent practice by reference to other arbitrations is simply misguided. A position taken by a disputing State in its defensive brief in a specific international arbitration does not amount to State practice under the Vienna Convention. The tribunal in *Telefónica v. Argentina* rejected the same argument from Argentina.⁹²
101. Argentina’s second annulment ground should also be dismissed. As noted above, a jurisdictional error is by no means a *per se* manifest excess of powers. This position not only contradicts extensive authority in ICSID arbitrations, but it would also remove all content from the Article 52 requirement that an excess of powers be “manifest.” The few authorities that Argentina seeks to rely on are of no avail. The *Quasar de Valores* case (formerly *Renta*

⁸⁹ Claimants’ Counter-Memorial, paras. 133-135.

⁹⁰ Claimants’ Rejoinder, para. 156, citing Decision on Jurisdiction, paras. 52-66.

⁹¹ Claimants’ Counter-Memorial, para. 235.

⁹² *Telefónica SA v. Argentine Republic* (ICSID Case No. ARB/03/20), Decision of the Tribunal on Objections to Jurisdiction, May 25, 2006, A/CLA-76, paras. 112-114. See also *Suez 3/19*, Annulment Decision, A/CLA-56, para. 258.

4) concerned a domestic proceeding before the Swedish Court of Appeal and was based on a different treaty. In any event, Sweden is a Model Law jurisdiction, which means that Swedish courts are permitted to review a tribunal's jurisdictional decisions *de novo*, something ICSID annulment committees do not have the power to do.⁹³

102. As several committees have held, for an excess of powers to be “manifest,” the underlying issue cannot be subject to more than one reasonable interpretation or otherwise be open to debate.⁹⁴ In this case, the Tribunal's jurisdictional decision was at the very least reasonable and, in fact, consistent with all prior and subsequent decisions on the scope of the MFN clause in the Spanish treaty. Yet, even if a full merits review were available, Argentina has failed to show any jurisdictional error at all. Extensive case law supports the use of MFN clauses in the present circumstances.⁹⁵

D. NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW

a. Summary of Argentina's Position

103. Argentina contends that the Tribunal manifestly exceeded its powers and failed to state reasons when it rejected Argentina's necessity defence without identifying the applicable legal standards, or analyzing Argentina's concurrent obligation to guarantee the human right to water to its population, or otherwise considering the voluminous evidence submitted by Argentina into the record.⁹⁶

104. First of all, the Tribunal manifestly exceeded its powers by failing to apply the proper law because it did not establish the legal standards applicable in respect of the “only way” and “non-contribution” requirements of the necessity defence. It also failed to state reasons for its decision on this point. Instead, it simply asserted that it was “not convinced” that the first of these requirements had been met as the Province “could have attempted to apply more flexible means”, a statement that is a mere copy of the decision on liability in the *Suez 3/19*

⁹³ See Claimants' Counter-Memorial, paras. 136-142.

⁹⁴ See e.g., *Impregilo, Suez 3/19* and *Daimler*.

⁹⁵ See Claimants' Counter-Memorial, para. 143 and the cases cited by the Claimants therein.

⁹⁶ Argentina's Memorial, para. 165.

and *AWG* cases, and that Argentina did in fact contribute to the crises to the extent that it was brought about by a combination of endogenous and exogenous factors. As noted by the *Enron* committee and more recently by the *Urbaser* tribunal that reasoning is insufficient to make a legal determination on this contentious point. That is the key reason for which the *Enron* committee annulled the award in that case.⁹⁷

105. Secondly, the Tribunal failed to offer support for its decision to disregard Argentina's arguments in connection with its obligation to guarantee the human right to water. Unlike the lengthy analysis of the *Urbaser* decision, the Tribunal in this case simply stated that Argentina could have complied with both obligations under the applicable BITs and the human right to water without offering any analyses or providing any further guidance with regard to how the Province could have done so in the circumstances.⁹⁸
106. Lastly, the Tribunal disregarded all the documentary, witness and expert evidence offered by Argentina in support of its necessity defence, without stating the reasons for which such evidence was considered insufficient, unpersuasive or otherwise unsatisfactory. The evidence included 14 witness statements provided by 9 witnesses; 13 reports prepared by 9 experts, and further documentary evidence comprising dozens of academic papers and newspaper articles from Argentina and the rest of the world, as well as indicators clearly showing the emergency situation and the crisis in Argentina and, particularly, the Province of Santa Fe. As noted above, the few passages in which the Tribunal refers to this matter are copied from the *Suez 3/19* and *AWG* decisions.⁹⁹ This led the Tribunal to overlook the particular situation of the Province of Santa Fe, which was one of the most affected by the crisis, with much higher unemployment and poverty rates. In addition, severe floods hit the Province in 2003, further aggravating the crisis. As the *TECO v. Guatemala* committee pointed out in annulling the award in that case, a tribunal cannot ignore evidence which is relevant for a party and has the "potential", which is all that is required, to affect the outcome

⁹⁷ Argentina's Reply, paras. 197, 199-206; Argentina's Memorial, paras. 167-176.

⁹⁸ Argentina's Reply, paras. 197, 207-213; Argentina's Memorial, paras. 186-188.

⁹⁹ Argentina's Reply, para. 219.

of the case without a proper analysis or explanation.¹⁰⁰ That case is similar to the present one to the extent that both the *TECO* tribunal and the Tribunal in this case ignored significant evidence and, as a result, found against the party who had filed it, following a line of reasoning that is hard to comprehend. It is not true that this evidence was irrelevant. In any event, the Claimants cannot substitute their own analysis for that of the Tribunal.¹⁰¹

b. Summary of Claimants' Position

107. The Claimants denied that the Tribunal had manifestly exceeded its powers or failed to state reasons when dismissing Argentina's necessity defense.¹⁰²
108. The Tribunal did state the legal standards it purported to apply and provided reasons for its interpretation. Argentina does not deny that Section IX of the Award and the reasons stated therein exist; it protests instead that those reasons are insufficient. However, paragraph 238 of the Decision on Liability shows that the Tribunal took the words "only way" to mean that a measure must be the sole available response for addressing a situation of necessity, an interpretation that is reasonable and which it was entitled to make. The Tribunal concluded then that the measures adopted by Argentina were not the "only way" to preserve its essential interests because Argentina "could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Santa Fe and at the same time respected its obligations of fair and equitable treatment."¹⁰³ Although at this point the Tribunal need not address the non-contribution requirement (since both requirements are cumulative), it did so anyway finding that Argentina "substantial[ly] contributed" to the situation of necessity, a statement that was likewise supported by reasons. It is evident that the Tribunal reached this conclusion after interpreting this requirement to mean precisely what those words say, i.e. that "a State must not have contributed to its situation of

¹⁰⁰ *TECO Guatemala Holdings LLC v. Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, April 5, 2016, AL A RA 61, paras. 131, 135 and 138.

¹⁰¹ Argentina's Reply, paras. 214-238.

¹⁰² Claimants' Rejoinder, para. 162; Claimants' Counter-Memorial, para. 238.

¹⁰³ Claimants' Rejoinder, para. 164, citing Decision on Liability, para. 238.

necessity”.¹⁰⁴ Argentina may not like this conclusion and may have wished instead that the Tribunal followed an approach similar to that suggested by the much-criticized *Enron* committee. However, such disagreement does not amount to an annulable error.¹⁰⁵

109. Nor did the Tribunal fail to consider Argentina’s evidence on necessity. As noted above, tribunals are the sole finders of fact, and do not have an obligation to address each and every piece of evidence submitted by a party. The analogy that Argentina seeks to make with the *TECO* decision is misguided. In the *TECO* case, the tribunal affirmatively found that there was insufficient evidence on a central *quantum* issue, even though the parties had in fact introduced such evidence, as a result of which the committee “struggled to understand the Tribunal’s line of reasoning.”¹⁰⁶ None of that happened here. It is plain from the Decision on Liability that the Tribunal weighed the evidence submitted with respect to the “only way” and “non-contribution” requirements.¹⁰⁷ Even Argentina and its experts, Professors Ratti and Roubini, conceded that it had contributed at least in part to the situation of necessity, an admission that disposes of the necessity defense altogether.

110. The Tribunal also gave reasons to reject Argentina’s attempt to shield its actions under the cover of the human right to water. The Tribunal found that Argentina was obliged to respect both its human rights obligations and its treaty obligations and that it could have done so.¹⁰⁸ To support this the Tribunal identified various specific measures that the Province could have taken “that would have protected both its interests and those of the Claimants,” including “reliev[ing] APSF, at least temporarily, of investment commitments that were placing a crippling burden on the Concession,” and “allow[ing] tariff increases for other consumers while applying a social tariff or a subsidy to the poor,” consistent with Article 81

¹⁰⁴ Claimants’ Rejoinder, para. 165, citing Decision on Liability, para. 241.

¹⁰⁵ Claimants’ Rejoinder, paras. 167-168.

¹⁰⁶ Claimants’ Counter-Memorial, para. 247, citing *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No ARB/10/23), Decision on Annulment, April 5, 2016, AL A RA 61, para. 128.

¹⁰⁷ See Claimants’ Rejoinder, paras. 171-174; and Decision on Liability, paras. 215 and 242.

¹⁰⁸ See Decision on Liability, para. 240: “Argentina could have respected both types of obligations.”

of the Water Law and Article 11.5.3 of the Concession Contract. Argentina, however, did none of this.¹⁰⁹

111. Consequently, neither did the Tribunal fail to state reasons nor did it exceed its powers. Argentina simply disagrees with how the Tribunal applied the law to the facts, which is not a ground for annulment.

E. VALUATION OF DAMAGES

a. Summary of Argentina's Position

112. The Tribunal committed several annulable errors in determining damages in this case: (1) it awarded damages for a measure that was not found to violate the applicable BITs; (2) it valued damages by reference to principles that are at odds with the applicable legal framework as established in the Decision on Liability; (3) it ruled that compensation should be awarded in relation to management fees, even though it did not hold the management contract to be a protected investment nor did it determine the nature of such claim, and ordered compensation for services not rendered; and (4) it applied interest rates that exceeded those requested by the Claimants.¹¹⁰
113. First, the Tribunal manifestly exceeded its powers and contradicted itself (thus failing to provide reasons) when it awarded damages for claims arising out of the termination of the Concession Contract. Although the Claimants argued in the original proceedings that the termination was in violation of Argentina's BITs, the Tribunal disagreed and dismissed this claim. In doing so, it also confirmed that it could only compensate Claimants for losses resulting from wrongful acts. When determining damages, however, the Tribunal compensated the Claimants for cash flows until the scheduled end of the Concession in 2025; this is, well beyond the Contract's (lawful) termination in 2006. The Tribunal thus treated the termination as if it had violated applicable BITs. This is not an issue of selecting the right

¹⁰⁹ Claimants' Rejoinder, para. 174, citing Argentina's Reply, para. 209 and Decision on Liability para. 215.

¹¹⁰ Argentina's Reply, para. 240.

valuation date, as the Claimants contend, but one concerning the valuation period used by the Tribunal. The Tribunal's approach could only be justified in case of an expropriation, a finding that the Tribunal never made.¹¹¹

114. Conscious that the 2006 termination had to be considered in its valuation, the Tribunal stated that the termination risk would be factored in as part of the discount rate.¹¹² However, this risk was not really accounted for by the Tribunal's expert. Moreover, this was not even a risk but a fact that actually occurred. A premium should thus have been added to the discount rate applied in respect of cash flows projected after 2006, or the Beta should have been raised; neither of which was done. It cannot be simply assumed that such a consideration was included in the rate absent any indication.¹¹³
115. Secondly, the Tribunal manifestly exceeded its powers, seriously departed from a rule of procedure, and failed to state reasons when it endorsed the valuation proposed by the Tribunal's expert, Dr. Akash Deep. Dr. Deep relied on a proposal to modify the Concession Contract, known as *Acta III*, to build its valuation. This proposal, however, was not part of the applicable framework. The Tribunal explicitly ruled it out in its Decision on Liability stating that no equilibrium principle existed under the Concession Contract. Apart from never being in force, *Acta III* was also at odds with basic principles underlying the Concession Contract, an agreement that was based on targets and objectives subject to business and financial risk. *Acta III*, by contrast, turned the Concession Contract into a rate-of-return arrangement, which ensured the Concessionaire a minimum return at all events. In other words, the Tribunal ended up applying the very same principles that it had excluded and rejected before. In doing so, it manifestly exceeded its powers by failing to apply the proper law and contradicted itself to such an extent that no supporting reasons exist for its decision on this point.¹¹⁴

¹¹¹ *Ibid.*, paras. 241-244.

¹¹² Award, para. 41 (“the risk of termination was always present in the Concession; however, that risk, along with other risks, would be accounted for in the discount rate applied to discount to present value the remaining twenty-three years of projected cash flows.”)

¹¹³ Argentina's Reply, para. 253.

¹¹⁴ Argentina's Memorial, paras. 211-222.

116. Additionally, the Tribunal manifestly exceeded its powers and seriously departed from fundamental rules of procedure where it considered the sponsored debt to be a protected investment for the first time in the Award. This prevented the parties from having the chance to discuss this issue during the arbitration. The Tribunal also exceeded its powers and failed to state reasons where, in contradiction of its own previous findings, it concluded that the Province would only have acted fairly and equitably if it had reviewed tariffs so as to enable APSF to repay the secured debt in full regardless of any other consideration such as the level of financial leverage, thereby effectively removing any financial risk from the Concessionaire.¹¹⁵
117. Thirdly, the Tribunal manifestly exceeded its powers and failed to state reasons by compensating Suez for management fees through 2025. It exceeded its powers because, as with the sponsored debt, it only defined management fees as a protected investment in the Award. It failed to state reasons because it followed conflicting reasoning by which, on the one hand, it determined that the operator's fees were a protected investment and, at the same time, it applied the damages calculation prepared by the expert, which assumed that such fees were a rendered service, not a return on investment. Moreover, such fees were awarded to Claimants for services never provided, after the Contract was terminated in 2006. This in and of itself amounts also to an excess of powers and a failure to state reasons as discussed under Section V(c) and (e) above.
118. Finally, the Tribunal manifestly exceeded its powers and failed to state reasons by using interest rates higher than those suggested, and agreed to, by the parties. At the merits phase, the parties' experts agreed that the applicable rate for all purposes should be the 6-month United States Treasury Bill rate. Such rate was, on average, lower than that proposed by the independent expert and finally used by the Tribunal: the six-month Eurodollar rate. This finding is *ultra petita* and therefore imports a manifest excess of powers. It is also unsupported by any analysis, which constitutes a failure to state reasons.¹¹⁶

¹¹⁵ Argentina's Reply, paras. 274-278.

¹¹⁶ *Ibid.*, paras. 296-306.

b. Summary of Claimants' Position

119. For the Claimants, Argentina's criticisms of the Tribunal's valuation methodology amount to no more than complaints that the Tribunal calculated damages incorrectly. That, however, is not a basis for annulment.
120. The Tribunal acted within its powers and provided copious reasons when calculating damages. Argentina mischaracterizes how the Tribunal valued the Claimants' loss. The Tribunal stated very clearly that it did not attribute any damages to the termination of the Concession. Instead, it based its damages calculation on Argentina's treaty breaches that preceded the termination. It thus measured compensation "at a point in time just before those actions took place" to provide the Claimants with full compensation.¹¹⁷ The subsequent termination of the Concession was considered an event incapable of relieving Argentina of liability. The risk that Argentina would prematurely terminate the Concession was accounted for in the discount rate used by Dr. Deep to reduce to present value the future expected cash flows and, specifically, in his "market risk premium,"¹¹⁸ which incorporates the "systematic risk coefficient (or 'beta')" applied to the discount rate calculation and expressed "the riskiness of a regulated water and sewerage utility such as APSF."¹¹⁹ Argentina's criticism in this regard is simply misplaced. But even if Argentina were right, this would have, at most, resulted in a miscalculation of the discount rate applied to hypothetical cash flows, for which annulment is no remedy. No excess of powers or failure to state reasons exists.
121. The Tribunal also acted within its powers and provided reasons when constructing the "but-for" scenario. During the arbitration, the Tribunal considered and rejected arguments against the use of *Acta III* as one of the parameters to build the but-for scenario. It found that *Acta III* provided the best available guidance of "mutual sacrifice" and cooperative spirit as it reflected policies that had actually been developed and considered by the Provincial government in order to deal with APSF's financial difficulties. Argentina fails to appreciate

¹¹⁷ Claimants' Rejoinder, para. 81, citing Award, para. 41.

¹¹⁸ Claimants' Rejoinder, para. 88. See also Award, para. 41 and Final Report of the Financial Expert to the Tribunal, May 21, 2014, A RA 151, paras. 367-379.

¹¹⁹ See Final Report of the Financial Expert to the Tribunal, May 21, 2014, A RA 151, para. 221.

the difference between the “actual” and “but-for” (hypothetical) worlds. In making its calculation, the Tribunal was not bound by the actual conditions prevailing in Argentina at the time. The Tribunal found that answer in the principles underlying *Acta III*, and in the fact that the investors would have received some liquidity relief in exchange for making financial sacrifices of their own. While Argentina has stated many disagreements with the Tribunal’s reasoning, it has not identified any genuine contradictions or other failures to state reasons in the Tribunal’s decision. Nor has it been able to articulate any basis for an excess-of-powers claim.¹²⁰

122. The Tribunal did not breach any rule of procedure or exceed its powers when determining that APSF’s secured or “sponsored” debt constituted an investment. The status of that debt as a protected investment was not decided for the first time in the Award as Argentina contends; it was just never in question. During the arbitration, the Claimants consistently argued that APSF’s secured debt was a covered investment, and consistently sought damages for that investment. The Claimants’ Counter-Memorial on Jurisdiction specifically identified their debt participation as an investment.¹²¹ Argentina never objected to this characterization and cannot therefore do so now. That is why the *Suez 3/19* committee did not hesitate to dismiss this eleven-hour argument. Argentina’s claim that it should not bear any of the financial consequences sustained as a result of APSF’s inability to service its international loan obligations should likewise be rejected. There is no principle of law which requires the inclusion or exclusion of certain hypothetical facts in the determination of a “but-for” valuation scenario. Argentina may disagree with the Tribunal’s decision on this point but this is not a base for annulment. As noted by other committees, the evaluation of damages falls within the discretionary power of tribunals in light of the circumstances of the case.¹²²
123. The Tribunal also acted within its powers when awarding compensation for management fees and supported this finding by lengthy reasons. The Tribunal explained that it agreed

¹²⁰ Claimants’ Rejoinder, paras. 91-98.

¹²¹ Claimants’ Counter-Memorial, para. 162, referring to Claimants’ Counter-Memorial on Jurisdiction, February 1, 2005, A/C-17, para. 8.

¹²² See Claimants’ Rejoinder, para. 101 and references cited thereunder.

with Dr. Deep’s “middle ground” approach including its decision not to apply interest to unpaid management fees, because this was what a reasonable regulator would have probably done in the circumstances. The Tribunal and Dr. Deep took a consistent view on the characterization of management fees as compensation for services rendered, and not as an “expected return,”¹²³ as Argentina alleges. Argentina may not share these conclusions but it cannot deny that they are clearly stated in the Award and are well within the Tribunal’s powers.¹²⁴

124. The Tribunal did not overstep its powers nor did it fail to state reasons when selecting the applicable interest rate for calculating damages. Contrary to Argentina’s contentions, no party agreement existed on the applicable interest rate. The Claimants sought pre-award interest at three different rates; one for the period between Argentina’s main breach in 2001 and the termination of the Concession in January 2006; another for the 9-month period immediately thereafter and another for the remainder time until the date of the Award (e.g. 2015-2016). Save for a brief period of 9-month overlap where both parties asked for a risk-free rate based on 6-month US T-Bills, the Claimants and their experts never “agreed” with Argentina on interest. In fact, the Eurodollar rate proposed by Dr. Deep, and adopted by the Tribunal was lower than the one proposed by the Claimants.¹²⁵ Notwithstanding the vast discretion that tribunals have in selecting interest rates, the Tribunal took the time to explain its decision on this point. It cannot thus be seriously argued that the Tribunal failed to state reasons or that it acted *ultra petita*.¹²⁶
125. Nor did the Tribunal exceed its powers or fail to state reasons in relation to the figures it used and the interest rate it applied in the Decision on Rectification. The Claimants argued during the arbitration that they should be compensated for the amount payable to the Inter-American Development Bank (“**IDB**”) and International Finance Corporation (“**IFC**”) under the Debt Restructuring Agreement as a result of Argentina’s breaches. The Tribunal agreed with the

¹²³ Claimants’ Counter-Memorial, paras. 269-270.

¹²⁴ *Ibid.*, para. 271.

¹²⁵ See Claimants’ Rejoinder, paras. 112-116.

¹²⁶ Claimants’ Counter-Memorial, paras. 178-182.

Claimants and determined that the Claimants' loss on this point was USD 29.0 million, including interest until December 31, 2012. The Tribunal inadvertently failed, however, to allocate this amount among the individual Claimants and to update it to the date of the Award. In its Decision on Rectification, the Tribunal corrected these clerical mistakes and it applied to this portion of the Award the interest rate provided for in the Debt Restructuring Agreement (i.e. the interest rate effectively paid to the IDB and IFC) by the Claimants in their capacity as co-guarantors, something that is entirely within its powers. The parties had again ample opportunity to discuss this matter. Argentina may not like this conclusion but the Tribunal did provide reasons and in doing so it did not overstate its mandate in any way.¹²⁷

VII. THE COMMITTEE'S ANALYSIS

126. Although the Parties both start from the common position that annulment is governed by the terms of Article 52 of the ICSID Convention, they paint the powers of an annulment committee in somewhat different terms. The Respondent quotes from the *Azurix* decision that annulment is there to preserve "the integrity of the ICSID arbitration system and a state party participant's continued confidence in it".¹²⁸ This leads the Respondent to see a rather broad role for an *ad hoc* annulment committee. It adopts the words of the *Soufraki* committee, which turned the words "integrity of the system" into the "fundamental integrity of the ICSID arbitral process in all its facets".¹²⁹ This means, according to the Respondent, integrity in terms of the tribunal, the proceedings and the award.¹³⁰

¹²⁷ Claimants' Counter-Memorial, paras. 183-191.

¹²⁸ Argentina's Memorial, para. 22, citing *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, December 28, 2007, AL A RA 1, para. 30.

¹²⁹ Argentina's Memorial, para. 23, citing *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, June 5, 2007, AL A RA 51, para. 23.

¹³⁰ Argentina's Memorial, para. 23.

127. The Claimants see it differently. The Claimants describe annulment as an “extraordinary remedy,” concerned with “egregious violations of certain basic principles” which “threaten the very legitimacy of the decision-making process”. Only a complaint that reaches this “exceptionally high” standard can justify annulment.¹³¹ Accordingly, there is a “heavy burden placed on a party seeking annulment”.¹³²
128. The Committee sees no value in engaging in an essentially abstract debate about the scope of Article 52 of the ICSID Convention. It agrees with the *Klockner* committee that Article 52 is to be interpreted neither narrowly nor expansively. Article 52 is a treaty provision and must be interpreted in accordance with the ordinary meaning of the words used, in their context and in light of the object and purpose of the Convention. Article 31(1) of the Vienna Convention on the Law of Treaties requires no less. Where particular issues of interpretation arise that require a consideration of the objectives of annulment, the Committee will deal with them at that time.

A. REPRODUCTION BY THE TRIBUNAL OF THE FINDINGS MADE IN OTHER ARBITRATIONS

129. Argentina argues that the Tribunal has manifestly exceeded its powers (Article 52(1)(b)), seriously departed from a fundamental rule of procedure (Article 52(1)(d)) and failed to state reasons (Article 52 (1)(e)), by reproducing in its Award substantial portions of what was included in the *Suez 3/19* and *AWG* decisions.
130. This reproduction from other awards means that the Tribunal has ignored the factual differences between the cases and the different legal frameworks that are applicable, as well as the particularities of each case including socio-economic differences and the different actions of the parties.¹³³ The magnitude of the overlap between the Award in the present case and the other cases is illustrated, Argentina claims, by the fact that of the 248 paragraphs in the Decision on Liability, 217 of those paragraphs correlate to the decisions in *Suez 3/19*

¹³¹ Claimants’ Counter-Memorial, para. 71.

¹³² *Ibid.*, para. 74.

¹³³ Argentina’s Reply, para. 61.

and *AWG*. Thus, Argentina argues, up to 87% of the Decision on Liability was drawn from the decisions in the other cases.

131. Argentina argues that the approach of the Tribunal had an impact on its finding of a violation of the fair and equitable treatment standard, on the application of the necessity defence and the valuation of damages. In each instance, by reproducing the analysis applicable to the other cases, the Tribunal disregarded the specific factual differences in the present case.
132. The Claimants take issue with the factual allegation of the extent of copying by the Tribunal. In their view the alleged copying is not as extensive as Argentina alleges it to be and there is no evidence that the Tribunal failed to apply the applicable law. Thus there is no foundation to the claim that there had been a manifest excess of power by the Tribunal.
133. The Claimants also argue that there was no departure from a fundamental rule of procedure in part on the ground that such a claim should have been raised much earlier and not at this late stage as part of the annulment process. Argentina has thus waived its right to make this claim. In any event, the Claimants argue, consistency between the decisions is to be expected when a common tribunal is formed to hear similar cases. As regards the claim that copying the decisions in other cases amounted to a failure to state reasons, the Claimants argue that the Tribunal did give reasons for its decision on damages as well as on the necessity defence.
134. The Committee observes that the parties had agreed to have a common tribunal for the three cases and that the parties themselves recognized that there were issues that were in common in the three cases by reproducing the same legal arguments for all of the cases on some issues before the Tribunal. In those circumstances it could have been expected that the Tribunal would have common answers on some issues and the volume of common extracts is not a decisive factor. Therefore, the Committee does not consider that the fact that the language in each case was identical of itself shows that there had been a manifest excess of power, or a violation of a fundamental rule of procedure. Nor does it give any indication that there has been a failure to state reasons.
135. However, the Committee observes that the fact that cases have been placed before a common tribunal is not a license for the tribunal to treat them as if they were a single case. The parties

to each of the cases are entitled to a separate consideration of the issues applicable to them. Thus, a tribunal must take care that when it repeats the same reasoning in each of the cases it has also made clear that each case has been considered on its own merits. Failure to identify the facts and circumstances of a case correctly can readily lead to the impression that the tribunal has not devoted the necessary care to the substantive analysis applicable in each case separately. It is not surprising, therefore, that the extent of repetition identified by the Respondent in this case as well as the errors in identifying facts and circumstances raised concerns that the Tribunal had not given full consideration to the particular issues of this case.

136. The substantive question, therefore, is whether the reproduction from other awards in this case was inappropriate because the extracts related to the other awards were not relevant to *Suez 3/17*. In this regard, the Committee notes Argentina's argument that some of the extracts contained references to facts and circumstances that related to the other cases and not to the claims in the present case.
137. The Committee observes that the reproduction of the text from the other awards appears to fall into three categories.
138. First there are examples where the Tribunal used a term that was applicable to the other cases but not to the present case. These included references to AASA instead of APSF, or to Argentina or the Argentine State when it should have been a reference to Santa Fe Province, or references to a "metropolitan area" when it should have been a reference to the "Santa Fe Concession Area".
139. Second, there are examples where the Tribunal appears to refer to arguments that are relevant to the other cases but not to the present case. These include the use of the terms "abrupt" and "suddenly" with respect to termination which did not apply in the case of the Santa Fe Concession, or references to "serious fault" and "heavy fines", which were not part of the present case, or a "revenue stream of 21 years" which was not applicable in the present case, or a "five year tariff review" which did not apply in the present case.

140. Third, there were examples of reproduction inapplicable to the Santa Fe concession that Argentina argued directly influenced the decision of the Tribunal on fair and equitable treatment, on the necessity defence and on valuation. These include references to a “consistent refusal to revise the tariff” (FET), which had not occurred in the present case, or omissions of references to the harshness of the impact on the Santa Fe area and the flooding that affected that area (necessity) and the failure to provide alternative valuation scenarios which may have been so in the other cases but was not true of the present case.
141. With regard to the first category of reproductions, the Committee observes that there is some laxity by the Tribunal in ensuring that it was referring to the correct entities and to facts relevant to this case. However, the Committee does not consider that this goes far enough to constitute a manifest excess of powers, violation of a fundamental rule of procedure or a failure to state reasons. There would have to be more evidence than this to give some indication that the Tribunal had failed to give due consideration to the arguments of the parties or ignored relevant evidence. There is no evidence that the errors in this category meet that test.
142. With regard to the second and third categories of reproductions, the question is whether they indicate a failure by the Tribunal to consider properly the arguments of Argentina and that this would amount to a manifest excess of power, a violation of a fundamental rule of procedure or a failure to state reasons. The Claimants argue that there could be no manifest excess of powers because there is no allegation that the Tribunal failed to apply the applicable law and that the claim that there was a violation of a fundamental rule of procedure has been made much too late.
143. The Committee agrees with the Claimants that there is no manifest excess of powers. There is no serious allegation of a failure to apply the applicable law or any evidence that the Tribunal in fact failed to apply the applicable law.
144. However, the Committee is not convinced by the Claimants’ argument that Argentina is prevented from arguing a violation of a fundamental rule of procedure by failing to raise its concerns about the Decision on Liability at an earlier stage. As Argentina correctly points

out a decision of a tribunal cannot be annulled; only an award can be annulled.¹³⁴ And while rectification or reconsideration may be a possibility, it was hardly a realistic possibility when Argentina was not claiming that there were errors that could be rectified; its challenge is to the reasoning and analysis of the Decision of Liability that were much more fundamental. The consequence of the Claimants' argument is that a party that believes that an annulable error has been committed must disclose its arguments on annulment long before the opportunity for bringing a request for annulment arises. Such an approach is inconsistent with the equality that the parties must have in being able to manage their claims in arbitration.

145. There remains nonetheless the question whether the second and third category reproductions in the Award result in a departure from a fundamental rule of procedure or constitute a failure to state reasons. In this regard, while recognizing that it is not satisfactory for a tribunal to rely on the reasoning from the decision in another case without differentiation, the Committee has difficulty seeing what rule of procedure has been violated by the reproduction of text from the other arbitrations in this case. Argentina makes no claim that it has been denied due process or denied equal treatment or that its claim has been affected by some procedural irregularity. Argentina asserts that reproduction of text from the other cases constitutes a denial of its right to be heard by an open-minded tribunal, but its objection relates less to being heard than to the reasons advanced by the Tribunal in support of its conclusions.

146. Indeed, the more substantial argument advanced by Argentina relates to the failure to state reasons, specifically in relation to fair and equitable treatment, the necessity defence and valuation. Yet, even here, the Committee is unable to conclude that the Tribunal failed to state reasons or that it had ignored arguments made by Argentina.

¹³⁴ Argentina's Reply, paras. 74-75. See *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para. 62. See also Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary*, 2009, AL A RA 56. p. 921.

147. For example, Argentina claims that the Tribunal concluded on the basis of arguments made in the other cases that “more flexible means”¹³⁵ could have been adopted to relieve the burden on the Concessionaire but that this conclusion is irrelevant in the context of the Santa Fe Concession and some temporary relief was granted. However, in the Committee’s view, rather than a failure to state reasons this constitutes a rejection of the arguments of Argentina that this relief was sufficient. Equally, in respect of the arguments of Argentina regarding the Tribunal’s comments on the “persistent refusal to revise the tariff”¹³⁶ and “forced renegotiation”¹³⁷, the complaints in substance are about the fact that the arguments of Argentina were rejected rather than they were not considered. In the Committee’s view, there was no failure to state reasons.
148. The Committee reaches the same conclusion with respect to Argentina’s arguments regarding the defence of necessity and valuation. The Tribunal did not give the weight to the harshness of the effects on the Province of Santa Fe or that flooding that took place there that Argentina would have liked¹³⁸, although both were mentioned in the Decision on Liability, but that does not constitute a failure to state reasons. The conclusion of the Tribunal that there was no “equally detailed and convincing scenario”¹³⁹ for valuation put forward constitutes a rejection of the scenarios proposed by Argentina for the Santa Fe Concession, not a failure to state reasons. Furthermore, the arguments of Argentina against the adoption by the Tribunal of a valuation model based on *Acta III* are arguments that go to the merits of the decision in respect of valuation; they do not demonstrate a failure to state reasons.
149. Thus, there is no evidence that the Tribunal failed to consider the arguments of Argentina. An inference is sought on the basis of the fact that language has been reproduced from the other awards that the Tribunal had not considered the specific facts of the Santa Fe Concession. But such an inference is not supported by any evidence. And in any event it is

¹³⁵ Argentina’s Memorial, para. 80.

¹³⁶ *Ibid.*, para. 81.

¹³⁷ *Ibid.*, para. 82.

¹³⁸ *Ibid.*, paras. 87-88.

¹³⁹ *Ibid.*, para. 92.

beyond the scope of annulment for a committee to reweigh the evidence considered by the tribunal.

150. In short, the Tribunal relied on reasons with which Argentina did not agree and did not agree with arguments made by Argentina. In substance, Argentina's argument is that the Tribunal was wrong in its conclusions on the merits. But, even if it could be shown that a tribunal is in error on the merits, this is not the basis for the annulment of an award.
151. Accordingly, the Committee rejects Argentina's claim that the reproduction from texts of other awards constitutes a manifest excess of powers (Article 52(1)(b)), a serious departure from a fundamental rule of procedure (Article 52(1)(d)) or a failure to state reasons (Article 52(1)(e)).

B. PROFESSOR KAUFMANN-KOHLER'S APPOINTMENT AS DIRECTOR OF UBS AND HER FAILURE TO DISCLOSE AND INVESTIGATE

152. The Respondent argues that the Tribunal was not properly constituted because one of the arbitrators, Professor Kaufmann-Kohler, did not meet the requirements of the ICSID Convention for appointment as arbitrator. Specifically, during the course of the arbitration Professor Kaufmann-Kohler accepted an appointment as a member of the Board of Directors of UBS, a company that held shares in one of the claimant companies, Suez. This, the Respondent argues, meant that Professor Kaufmann-Kohler could not "be relied upon to exercise independent judgment" contrary to the specific requirement of Article 14(1) of the ICSID Convention.¹⁴⁰ Professor Kaufmann-Kohler failed to disclose this appointment to the parties and once it heard about the appointment the Respondent proposed her disqualification.
153. The two unchallenged members of the Tribunal rejected the proposal for disqualification. However, the Respondent argues, the two arbitrators focused on the question of economic interest and failed to consider the obligation of institutional loyalty that Professor Kaufmann-

¹⁴⁰ *Ibid.*, para. 30.

Kohler had to UBS which created a conflict when she had to consider the interests of Suez in which UBS held shares.¹⁴¹

154. The Claimants argue that the Respondent's challenge under Article 52(1)(a) is based on an assumption that a tribunal may decide anew whether the requirements of Article 14(1) have been met. Moreover, in this case the challenge under Article 52(1)(a) has already been determined by the Tribunal. The Claimants refer to a body of annulment decisions dealing with similar circumstances which, they say, the Respondent has failed to mention, and state that what the Respondent is trying to do is draw the Committee into a *de novo* review of the decision in disqualification.¹⁴²
155. The Claimants identify two lines of reasoning in the annulment cases so far relating to annulments in cases where there has been a decision on disqualification of an arbitrator, neither of which permits a *de novo* consideration of whether the challenged arbitrator should be disqualified. One, based on the *Azurix* decision envisages only a review of the procedure under which that decision was made.¹⁴³ The other decision, *EDF*, contemplates annulment of a decision relating to disqualification only where the decision is "so plainly unreasonable that no reasonable decision-maker could have come to such a decision".¹⁴⁴ That approach was endorsed in the *Suez 3/19* case.¹⁴⁵
156. The Respondent argues that neither the approach in *Azurix* nor the approach in *EDF* find support in the wording of Article 52(1)(a).¹⁴⁶ They both impose limitations on the powers of an annulment committee without explaining how these limitations are justified under the terms of Article 52(1)(a). The fact that there has been a decision on disqualification in the

¹⁴¹ *Ibid.*, para. 129.

¹⁴² Claimants' Counter-Memorial, para. 82.

¹⁴³ *Ibid.*, para. 85.

¹⁴⁴ *Ibid.*, para. 91, citing *Suez 3/19*, Decision on Annulment, May 5, 2017, A/CLA-56, para. 94 (quoting the *EDF* Decision on Annulment).

¹⁴⁵ Claimants' Counter-Memorial, paras. 90-91.

¹⁴⁶ Argentina's Reply, paras. 18 and 26.

context of the original proceedings does not limit the jurisdiction of an annulment committee “to determine the proper constitution of the tribunal”.¹⁴⁷

157. In response, the Claimants object again to the Respondent’s perception of the standard of review and argue that the Respondent’s interpretation of Article 52(1)(a) is incorrect and that decision of *EDF* was based on a “meticulous analysis” of the annulment provisions of the Convention.¹⁴⁸ In any event, the Claimants argue, the Respondent has not shown that the Second Challenge Decision was so plainly unreasonable that no reasonable decision-maker could have come to that decision.
158. The disagreement of the Parties on the standard of review comes to the fore in their consideration of Article 52(1)(a). The Respondent’s position is that since it is the responsibility of the committee to protect the integrity of the process in relation to the constitution of the tribunal in the case for which annulment is sought, it can review whether the tribunal was properly constituted. That to the Claimants constitutes *de novo* review. In short, the Claimants see the Respondent’s approach as essentially an appeal from the Second Challenge Decision.
159. It is widely recognized that the power of annulment under Article 52 of the Convention does not extend to an appeal on facts or law. The question is where the distinction between appeal and annulment should be drawn. The Respondent claims that annulment should not be opposed to an appeal; the scope of annulment is determined by reference to the wording of Article 52 interpreted in accordance with the rules for the interpretation of treaties.¹⁴⁹ The Claimants do not disagree with that assertion, although it disagrees with the Respondent’s interpretation of Article 52(1)(a) which it considers amounts to mandating a *de novo* consideration of the issues. Rather, in the view of Claimants, the Committee must approach the interpretation of Article 52(1)(a) with a “deferential standard of review”.¹⁵⁰

¹⁴⁷ *Ibid.*, para. 30.

¹⁴⁸ Claimants’ Rejoinder, paras. 21-28.

¹⁴⁹ Argentina’s Reply, para. 6.

¹⁵⁰ Claimants’ Rejoinder, para. 30.

160. The Committee sees neither party as capturing accurately the standard of review when annulment is requested under Article 52(1)(a). That provision does not permit an annulment committee to consider the question whether a tribunal has been properly constituted as if it were deciding the matter for the first time. Further, the existence of a Decision on Disqualification by the original tribunal has to be something more than “an element of judgment” for an annulment committee to consider.¹⁵¹
161. But, equally, there is nothing in Article 52(1)(a), or elsewhere in Article 52, that prescribes a deferential standard of review. The Committee has to construe Article 52(1)(a) in light of the facts on which the claim to annulment takes place. Here the facts are that there has been a Decision on Disqualification by the unchallenged members of the original Tribunal and that must be addressed in any request for annulment on the basis that the Tribunal was not properly constituted.
162. In *EDF*, the committee made an important distinction between annulment requests under Article 52(1)(a) where no decision has already been made on disqualification and requests for annulment where a decision has already been made on disqualification by the original tribunal. This case falls into the latter category – a decision has already been made rejecting the request for disqualification.
163. In such a case, an annulment committee cannot take on itself the task of deciding whether the tribunal has been properly constituted. Article 58 has assigned that task to the unchallenged members of the tribunal and when those members have exercised that function an annulment committee is faced with findings of fact, an assessment of those facts and an application of law to those facts.¹⁵² The role of an annulment committee in these circumstances, the *EDF* committee said, is not to act as if it were sitting in appeal on those

¹⁵¹ Argentina’s Reply, para. 30.

¹⁵² *EDF International SA and others v. Argentine Republic* (ICSID Case No ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para. 145.

findings; it can only find that a ground of annulment exists if the decision is “so plainly unreasonable that no reasonable decision-maker could come to such a decision”.¹⁵³

164. The request before the Committee is for the annulment of the decision of the original Tribunal on disqualification and it is the decision of the Tribunal that must be looked at. In this case the Tribunal made a decision on its constitution. It considered the challenge to an arbitrator in accordance with Article 58 and concluded that the challenge could not be sustained. Thus, the request before this Committee is not whether in the abstract the Tribunal was properly constituted but whether the decision to reject the request for disqualification and accordingly that the Tribunal was properly constituted meets the appropriate standard of review.
165. The *EDF* committee, and subsequently the *Suez 3/19* committee, considered that the appropriate standard to apply was whether the decision was “so plainly unreasonable that no reasonable decision-maker could come to such a decision”. This limited standard of review, set forth in *EDF*, is not derived expressly from an interpretation of Article 52(1)(a); it is derived from the view that annulment involves review of a limited nature; it does not operate as an appeal.¹⁵⁴
166. The Committee is of the view that the approach in *EDF* and *Suez 3/19* should be followed. It is consistent with the more limited role that annulment plays in the ICSID system, but at the same time it appropriately protects the integrity of ICSID dispute settlement. The integrity of that system depends not on whether decisions are right or wrong – arbitrators may differ in their conclusions – but the integrity of the system will be under challenge if tribunals reach decisions that no reasonable decision-maker would reach.
167. In their Decision on Disqualification the unchallenged members of the Tribunal carefully reviewed the request made, the facts and arguments on which it was based, the law applicable to disqualification and how that applied to the request in respect of Professor Kaufmann-

¹⁵³ *Ibid.*

¹⁵⁴ *EDF International SA and others v. Argentine Republic* (ICSID Case No ARB/03/23), Decision on Annulment, February 5, 2016, AL A RA 67, para. 145.

Kohler. They identified the criteria to be considered in determining whether an arbitrator's independence or impartiality would be affected. They considered the particular context in which Professor Kaufmann-Kohler operated as a director of UBS. Ultimately, they concluded that the alleged connection between the Claimants and Professor Kaufmann-Kohler did not lead to the conclusion that there was a manifest lack of the qualities of independence and impartiality that an arbitrator must have. Accordingly, they dismissed the request for the disqualification of Professor Kaufmann-Kohler.

168. As other committees have pointed out, there may be disagreements over the assessment of or weight to be given to particular facts or the application of the criteria for determining whether independence or impartiality can be called into question. But, on the basic question of whether the decision on disqualification was so plainly unreasonable that no reasonable decision-maker could have reached such a decision, the answer is clear. The decision on disqualification in the present case could not be regarded as so plainly unreasonable that no decision-maker could have reached that decision. Indeed, decision-makers in other cases have reached precisely the same decision on essentially the same grounds in respect of attempts to disqualify Professor Kaufmann-Kohler as was reached in the present case.
169. Accordingly, the Committee rejects the claim that the Tribunal was not properly constituted on the ground that Professor Kaufmann-Kohler manifestly lacked the necessary independence and impartiality required by Article 14 of the ICSID Convention.
170. In the Committee's view, this conclusion that the Tribunal was not improperly constituted covers equally the contention of Argentina that its right to an impartial and independent tribunal was contravened, leading to a breach of a fundamental rule of procedure pursuant to Article 52(1)(d). The conclusion of the unchallenged members on disqualification that the allegations against Professor Kaufmann-Kohler did not compromise her independence and impartiality was a decision that the Tribunal as composed was an independent and impartial Tribunal. Their conclusions also exonerated Professor Kaufmann-Kohler from breaching any obligation to investigate and disclose which could have amounted to a breach of a fundamental rule of procedure. The question for the Committee is whether that decision

was so plainly unreasonable that no decision-maker could have reached it. Again, it must be answered that it was not.

171. Having said this, the Committee notes the generally unsatisfactory nature of the process for dealing with challenges to arbitrators, which poses a particular burden on the unchallenged members who are required to determine whether the other member of the tribunal should be disqualified. The difficulty of this role extends to formulating the appropriate test for deciding on disqualification in the absence of clear guidance in the Convention. In this regard, the Committee has some reservations about certain aspects of the test applied by the unchallenged arbitrators in deciding on the issue of disqualification in this case. The test, the Tribunal said, is whether the facts show that an “informed reasonable person” would conclude that the person in question “clearly or obviously lacks the quality of being able to exercise independent judgment and impartiality”.¹⁵⁵ Yet, when it comes to their analysis, the unchallenged members show that a quite detailed understanding of the nature of a director’s interest, the way UBS functions and the implications of UBS’s holding shares in other companies is required to assess whether there is a manifest lack of independence and impartiality. In other words, in practice the reasonably informed observer has to be a well-informed observer capable of understanding a level of detail not readily ascertained by the reasonable observer.
172. The Committee’s concern, therefore, is that in establishing the level of knowledge that needs to be had to understand whether there is manifest lack of independence or impartiality, insufficient attention may be given to the question of the perception of lack of independence or impartiality. In this respect there may be a difference between commercial arbitration, for which the IBA rules were developed, and investment arbitration where there is much greater a degree of public interest in the process and outcomes. In the Committee’s view, these are matters that might be taken into account in the future when challenges are made to arbitrators on the basis of a conflict of interest.

¹⁵⁵ Second Challenge Decision, para. 29.

C. FAILURE TO COMPLY WITH THE 18 MONTHS' LOCAL LITIGATION REQUIREMENT

173. Argentina argues that the decision of the Tribunal to allow AGBAR and Interagua, through the application of the MFN provision in Article IV(2) of the Argentina-Spain BIT, to be relieved from the obligation under Article X(3)(a) to commence litigation and pursue it for 18 months before bringing their claim should be annulled. The provisions of the Argentina-France BIT, which had no 18-month local litigation requirement, were invoked as a justification for not complying the 18-month litigation rule. This decision is claimed by Argentina as annulable both on the basis that it constitutes a manifest excess of power and on the basis that there has been a failure to state reasons.
174. The Committee observes that the question of whether an MFN provision in an investment agreement can be invoked in order to obtain the benefits of dispute settlement provisions in another investment agreement, and specifically an 18-month local litigation requirement, has arisen in a good many cases and inspired a substantial scholarly literature. Arbitrators have divided on the question, but there is a considerable body of jurisprudence supporting the position taken by the Tribunal in this case. At the same time there have been a number of cases, including more recent decisions, which have interpreted MFN clauses not to include a reference to dispute settlement provisions.
175. In the Committee's view, the matter depends on the interpretation of the MFN provision in question. The MFN provision in this case, Article IV(2) of Argentina-Spain BIT, provides:

In all matters governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country.

176. Provisions with essentially identical wording have been interpreted to permit the importation of dispute settlement provisions from other BITs and used as a basis for permitting a claimant to bypass the 18-month local litigation requirement.¹⁵⁶ In light of the fact that there is a body of jurisprudence that supports using MFN clauses in this way, the Committee has difficulty

¹⁵⁶ See *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision of the Tribunal on Objections to Jurisdiction, January 25, 2000, AL A RA 91.

seeing how the Tribunal in this case has “manifestly exceeded its powers”. It is true that there are contrary decisions, but even if there were a divided jurisprudence with strong support for the view contrary to that taken by the Tribunal, a claimed excess of power could not be “manifest”. In saying this, the Committee takes no position in the debate over MFN clauses and their application to procedural or dispute settlement provisions.

177. Argentina argues that there was a manifest excess of power because the Tribunal established that there was a mandatory rule in the BIT that there must be an 18-month resort to local jurisdiction but then disregarded that mandatory rule. But here Argentina is begging the question. The 18-month local litigation requirement stands only if it is not superseded by application of the MFN clause. The Tribunal decided that it was so superseded. There can be no manifest excess of power here.
178. In respect of both its claim that there has been a manifest excess of powers and the failure to state reasons, Argentina invokes the argument that the decision of the Tribunal is contrary to the consent that it gave on entering into the Argentina-Spain BIT. But this is an argument on the merits of the use of MFN clauses to incorporate procedural or dispute settlement provisions and it is commonly raised by the parties in cases where the MFN clause has been invoked in respect of such dispute settlement provisions. It is beyond the mandate of an annulment committee to consider the merits of the case and thus these arguments cannot support a claim to annulment.
179. Argentina refers to other instances where it considers that the Tribunal did not take its arguments into account, including its subsequent practice in concluding bilateral investment treaties and other indications of its intent on agreeing to the MFN provision. In this regard, Argentina seeks to build an inference of failing to consider evidence on the basis that there was no specific mention of it. But the Tribunal interpreted the MFN provision on the basis of Article 31 of the Vienna Convention and concluded that it did not find evidence of the intent of the parties for the position claimed by Argentina. It is not possible to draw from this conclusion the supposition that the Tribunal must have ignored arguments for the contrary position. Moreover, Argentina’s arguments essentially go to the merits of the interpretation of the MFN clause. Argentina does not agree with the Tribunal’s interpretation

of the MFN provision in this case, but because there is disagreement with a tribunal's conclusions does not mean that the tribunal has failed to state reasons. In the present case, the Tribunal discussed the arguments of Argentina and reviewed relevant case law. It stated reasons for its decision and disagreement with those reasons or with the result reached cannot lead to the conclusion that the Tribunal failed to state reasons.

180. Accordingly, the Committee rejects Argentina's claim for annulment on the basis that the wrongful application of the MFN provision constituted a manifest excess of power or a failure to state supporting reasons.

D. NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW

181. Argentina argues that the Tribunal exceeded its powers by failing to establish the legal standards applicable to the "only way" and "non-contribution" requirements for the defence of necessity. It also argues that the Tribunal failed to state reasons for its conclusions on these matters, or provide reasons for its rejection of Argentina's arguments on the human right to water. Further, Argentina claims, the Tribunal ignored large volumes of documentary, expert and witness evidence submitted to it by Argentina. It claims that the Tribunal did not meet the standards set out by the *Enron* annulment committee for the consideration and analysis of evidence and arguments.
182. The Tribunal identified the four conditions that must be met to sustain a defence of necessity, on the basis of ILC Article 25(1), and then analyzed each in turn.¹⁵⁷ In respect of the "only way" condition, the Tribunal stated that it was not convinced that the only way for Argentina to satisfy its essential interest in the health and well being of the population was to adopt a measure that violated Argentina's treaty obligations. It stated that more flexible means could have been adopted. In respect of the "non-contribution" condition the Tribunal noted that the word "contribution" was not the same as "cause". The question then was whether Argentina's contribution to the crisis was sufficiently substantial to rule out the defence of

¹⁵⁷ Decision on Liability, paras. 237-242.

necessity. It concluded that government policies and shortcomings were sufficiently substantial contributions to the crisis and as a result rejected the defence of necessity.

183. The Committee notes that the *ad hoc* committee in *Enron*, identified a number of questions that on the facts of that case should have been asked before determining the application of the “only way” test. In the present case, however, it is clear that the Tribunal took the view that if there were other available measures that could have been taken then the “only way” condition would not be satisfied. And it found on the facts that there were other and more flexible means that could have been resorted to. The Committee does not see any failure to articulate the applicable law or any other manifest excess of power here.
184. In respect of the “non-contribution” condition, the Tribunal identified the relevant legal requirement that the contribution be sufficiently substantial to prevent the defence of necessity from being relied on. It made a determination on the facts that the contribution by the Argentine government both through its policies and its failure to act when it might have done so to be sufficiently substantial within the meaning of the test so identified. The Tribunal established the legal standard and applied the facts to it. For the Committee to go behind this would be to engage in an analysis of the substantive issues in the case, something beyond the mandate of an *ad hoc* committee. In short, the Committee does not consider that the Tribunal manifestly exceeded its powers in the application of the “non-contribution” condition in considering the defence of necessity.
185. Accordingly, the Committee rejects Argentina’s contention that the Tribunal manifestly exceeded its powers, contrary to Article 52(1)(b) of the Convention.
186. Argentina’s further argument is that the Tribunal failed to state reasons in its treatment of the necessity defence. According to Argentina, the Tribunal failed to provide reasons for its rejection of Argentina’s argument relating to the human right to water, drawing a comparison with the treatment of that issue in the *Urbaser* decision. It further argued that the Tribunal had disregarded a substantial body of documentary, expert and witness evidence put forward by Argentina. In this respect Argentina invokes the decision of the annulment committee in *TECO v. Guatemala*.

187. The Tribunal indicated in its Decision on Liability that it did not find any basis in international law or the BIT for the view that the human right to water somehow overrode Argentina's obligations under its BIT or gave it a right to disregard those obligations.¹⁵⁸ Those obligations had to exist alongside each other and the Tribunal considered that it was possible to comply with both.
188. The Committee does not find here a failure to state reasons. While it is true that the *Urbaser* tribunal put much more weight on the human right to water, that is a difference in assessing the strength of legal argument, not a failure to provide reasons. The Tribunal stated reasons albeit they were reasons with which Argentina does not agree.
189. Argentina's argument that the Tribunal disregarded a substantial body of documentary, expert and witness evidence is also difficult to sustain. Clearly a tribunal does not have to provide an analysis and conclusions on every piece of evidence before it. Thus, the absence of mention of a specific document or report cannot lead to the conclusion that it was necessarily ignored. As mentioned in the conclusions on the reproduction issue, for example, the Tribunal did refer to the flooding that took place in the Province of Santa Fe. It had before it all of the materials in the pleadings and it was for the Tribunal to assign the appropriate weight to that material. This is not a case like *TECO v. Guatemala* where the tribunal proceeded on the basis that there was no evidence when in fact there was evidence before it on the issue.¹⁵⁹ Again, Argentina is seeking to draw from the fact that the Tribunal disagreed with its arguments an inference that it had failed to consider the evidence in support of those arguments.
190. In short, what Argentina is attacking is the substance of the issue. It does not agree with the Tribunal on the merits of its decision. But that is not a ground on which there can be annulment. The Committee thus rejects Argentina's contention that the Tribunal failed to

¹⁵⁸ Decision on Liability, para. 240.

¹⁵⁹ *TECO Guatemala Holdings LLC v. Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, April 5, 2016, AL A RA 61, para. 133.

state reasons in respect of the necessity defence contrary to Article 52(1)(e) of the Convention.

E. VALUATION OF DAMAGES

191. Argentina identifies four bases for the annulment of the Award of the Tribunal in relation to the valuation of damages. The Committee will deal with each of these separately.
192. Argentina argues that the Tribunal manifestly exceeded its powers, and failed to provide reasons, by awarding damages for termination of the Concession Contract, even though it had found in its Decision on Liability that there had been no breach of the BIT through the termination of the Concession Contract.
193. The Tribunal dealt with this issue when considering the length of the valuation period. Indeed, Argentina had made precisely the same argument to the Tribunal. However, the Tribunal took the view that it was not providing damages as if there had been a termination of the Concession Contract. Rather, it was recognizing that the Claimants were entitled to recover the full extent of their loss, which could not be reduced because of some potential future termination of the Concession Contract. The risk of termination was a factor taken into account in the discount rate applied to the twenty-three years of projected cash flows.¹⁶⁰ Argentina argues that there is no proof that the risk of termination was factored into the discount rate. However, the Claimants argue that a market risk premium included the risk of termination.
194. The Committee notes that the arguments made by Argentina here were precisely those raised by Argentina before the Tribunal and rejected. Thus, Argentina is essentially asking for a reconsideration of the Tribunal's decision on the merits of the damages award. There can be no manifest excess of power where a tribunal makes a decision on a matter that is within its jurisdiction to make – the length of the valuation period for determining loss. In addition, the Tribunal stated reasons for not limiting the period to the date on which termination had

¹⁶⁰ Award, December 4, 2015, paras. 40-42.

taken place. It considered that such a limitation would undercompensate the Claimants for their loss.

195. Furthermore the Tribunal said that the risk of termination had been factored into the discount rate. Argentina queries whether this was so since there was no specific mention on that fact in the Report of the Expert, but in the face of the Tribunal's statement that the risk of termination had been included in the discount rate, there is no basis for speculating otherwise.
196. The Committee thus concludes that the Tribunal did not manifestly exceed its powers or fail to state reasons in respect of the length of the period chosen for the valuation of loss and the treatment of the risk of termination within the discount rate for the twenty-three year period of cash flows.
197. Argentina also argues that the Tribunal manifestly exceeded its powers and seriously departed from fundamental rules of procedure and failed to state reasons in relying on the report of the expert Dr. Deep who had based his valuation on a proposal known as *Acta III*, which had never been adopted and was not part of the applicable framework. The principles behind *Acta III*, Argentina contends, had been rejected by the Tribunal in its Decision on Liability.¹⁶¹
198. Whether it was appropriate to rely on *Acta III* was argued before the Tribunal, which considered the arguments made by Argentina and concluded that the expert Dr. Deep had relied appropriately on *Acta III*, not because it was part of the applicable legal framework, but because it was "strong evidence of how a reasonable regulator would act" in circumstances at the time of the Argentinian crisis.¹⁶² In short, the Tribunal considered the arguments of Argentina opposing reliance on *Acta III* and rejected them giving reasons for doing so. Argentina's complaint is with the decision reached by the Tribunal, but that is not a basis for annulment.

¹⁶¹ Decision on Liability, para. 119.

¹⁶² Award, para. 58.

199. On this basis the Committee can see no manifest excess of power or any serious departure from a fundamental rule of procedure or a failure to state reasons in the reliance placed on *Acta III*.
200. Argentina also argues that the Tribunal manifestly exceeded its powers and seriously departed from a fundamental rule of procedure by including sponsored debt as a recoverable loss even though it did not identify it as a protected investment earlier in the proceedings. Equally, it manifestly exceeded its powers and failed to state reasons in concluding that Argentina would have provided fair and equitable treatment if it had reviewed tariffs to allow APSF to repay the secured debt.
201. The Tribunal rejected Argentina’s view that sponsored debts should not be recoverable because they were highly risky on the basis that all investment contains some risk. The reason for allowing recovery was that losses on sponsored debt were a “direct consequence of Argentina’s treaty violations”.¹⁶³
202. The Committee cannot see how the inclusion of losses on sponsored debt constituted a manifest excess of power. It was part of the process of assessing and quantifying loss, something that is clearly within the power of a tribunal. The Tribunal provided reasons for so doing – it was a loss that flowed from Argentina’s breach of the BIT. Accordingly, the Committee does not find the Tribunal’s treatment of sponsored debt as an annulable error.
203. Argentina further argues that including management fees within the recoverable loss constitutes a manifest excess of power and a failure to state reasons, claiming that management fees were only defined as a protected investment in the decision on damages in the Award. The Tribunal took the view that the management contract, which provided for the payment of fees, was an integral part of the Claimants’ investment¹⁶⁴ and thus the loss of management fees was an appropriate item to include in the loss suffered by Suez as a result of Argentina’s failure to provide fair and equitable treatment.

¹⁶³ *Ibid.*, para. 66.

¹⁶⁴ *Ibid.*, para. 72.

204. The Committee considers that whether management fees were to be recovered fell clearly within the power of the Tribunal to determine damages and thus there can be no manifest excess of power. Thus, Argentina's complaint that recovery should not be allowed for management fees is a complaint about the substantive conclusion of the Tribunal on the merits of the case, which is not a matter for annulment.
205. In concluding that management fees were recoverable, the Tribunal considered extensively the justification in the Management Contract for the payment of such fees and the report of the expert on how those fees and interest were to be calculated. The Committee considered that this ample treatment of the issue fully responds to the need to state reasons.
206. Argentina argues in addition that the treatment of interest by the Tribunal in actualizing damages constituted a manifest excess of power by the Tribunal and a failure to state reasons in that the Tribunal used an interest rate that was higher than that agreed between the parties. It also argued that the Tribunal rectified the decision on contingency debt with an interest rate higher than that suggested by the parties. Thus, the decision of the Tribunal on interest was *ultra petita*. The Claimants deny that there was agreement on an interest rate and argued that what the Tribunal awarded was within the range put forward by the Claimants.
207. The Tribunal had to determine the amount payable on sponsored debt as a result of the APSF's default which was a consequence of Argentina's measures. That default had triggered contingent obligations to pay to the lenders. The losses to the Claimants were determined by the Tribunal to be the amounts actually paid and then actualized to December 31, 2012, on the basis of the interest rate proposed by the expert Dr. Deep of a compounded six-monthly Eurodollar rate. The Claimants had proposed instead a rate based on the APSF's weighted cost of capital. The Tribunal rejected this rate because it was based on treating the amounts payable as an investment rather than as a debt and the Tribunal simply followed Dr. Deep's recommendation of the compounded six-monthly Eurodollar rate.
208. In respect of the rate applied to the rectification of the decision on contingency debt, the Tribunal applied the rate that was stipulated in the Debt Restructuring Agreement of March 3, 2005.

209. The Committee notes that the position of the Claimants on the applicable interest rate did vary in respect of different periods for which damages were payable and that at one point the parties both proposed a risk free rate based on 6-month US Treasury Bills for the period February-November 2006. But for the rest the parties differed. However, as the Claimants point out in Appendix II to their Rejoinder, overall their position on interest was for an amount higher than that of Argentina and than that ultimately adopted by the Tribunal.¹⁶⁵ Argentina produces no evidence to support its proposition that the parties had agreed on the interest rate.
210. Accordingly, the Committee does not see any basis for a claim that the decision of the Tribunal on interest was *ultra petita*. A Tribunal has some discretion in the determination of interest¹⁶⁶ and there is no indication that the decision on interest here exceeded the powers of the Tribunal. Equally, the Committee does not see the adoption of the interest rate set out in the Debt Restructuring Agreement to exceed the powers of the Tribunal. The Committee also considers that the decision of the Tribunal is reasoned. It adopts the analysis of the expert Dr. Deep and explains fully its position on the claims made. There is thus no failure to state reasons.
211. As a result, the Committee finds no manifest excess of power contrary to Article 52(1)(b) or failure to state reasons contrary to Article 52(1)(e) of the Convention in respect of the valuation of loss by the Tribunal.

¹⁶⁵ Claimants' Rejoinder, paras. 113-115.

¹⁶⁶ *Wena Hotels LTD. v. Egypt* (ICSID Case No. ARB/98/4), Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, February 5, 2002, AL A RA 74, para. 97.

VIII. DECISION ON COSTS

A. ARGENTINA'S STATEMENT OF COSTS

212. Argentina requests that the “Claimants bear all of [the] attorneys’ fees and any costs arising from this proceeding.”¹⁶⁷ These costs are broken down in Argentina’s Statement of Costs as follows:

Description	Dollars (USD)
ICSID Costs	675,000.00
Treasury Attorney-General’s Office personnel costs	103,801.31
Airline tickets, hotel and travel expenses	21,850.00
Translations	6,626.10
Courier	4,235.24
Stationary	850.00
Communication expenses	300.00
Total	812,662.65

B. CLAIMANTS’ STATEMENT OF COSTS

213. Claimants request that “Argentina bear all costs and expenses incurred by the Claimants in connection with the present annulment proceedings, including the fees of the Centre, the costs and fees of the *ad hoc* Committee, and the Claimants’ legal fees and expenses.”¹⁶⁸ These costs are broken down in Annex A to the Claimants’ Statement of Costs as follows:

Legal Fees and Expenses	Totals
Legal Fees	\$1,250,783.08
Translations	\$23,468.89
Travel	\$13,542.84
Printing	\$9,618.69
Courier	\$3,428.87
Online Research	\$1,072.73
Total	\$1,301,915.10

¹⁶⁷ Argentina’s Memorial, para. 251; Argentina’s Reply, para. 307.

¹⁶⁸ Claimants’ Counter-Memorial, para. 301.

214. Claimants refer to Article 52(4) of the Convention, which grants annulment committees the power to require losing parties “to pay their opponents’ expenses in appropriate circumstances”. Claimants argue that the circumstances in these proceedings justify Argentina bearing the Claimants’ costs because:
- a. Annulment committees have ordered unsuccessful applicants to pay part or all of the prevailing party’s costs in comparable cases, particularly where applications for annulment have been rejected in their entirety;¹⁶⁹
 - b. Cost-shifting is the only check on the losing party’s temptation to commence annulment proceedings as a matter of course, and holding Argentina accountable for the costs of this proceeding will discourage future abusive requests for annulment. In this regard, the Claimants observe that “it should not be overlooked that Argentina has sought the annulment of every ICSID award rendered against it”¹⁷⁰ and argue that costs should be awarded “to disincentive [sic.] the reflexive use of the annulment mechanism”¹⁷¹ by Argentina.
215. Claimants further observe that “the practice of dividing arbitration costs and legal fees evenly has increasingly fallen out of favor”¹⁷² and that the question before the Committee in this proceeding is “less whether the costs of the proceeding should remain with Argentina and more whether Argentina should also pay the Claimants’ legal fees and expenses.”¹⁷³ Claimants submit that most committees have simply applied the rule that “costs follow the event”, even when they have not cited the weakness of an annulment application as a reason for allocating costs.

C. COMMITTEE’S DECISION

216. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with

¹⁶⁹ *Ibid.*, para. 304.

¹⁷⁰ *Ibid.*, para. 306.

¹⁷¹ *Ibid.*

¹⁷² Claimants’ Rejoinder, para. 217.

¹⁷³ *Ibid.*, para. 218.

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. Such decision shall form part of the award.

217. This provision, together with Arbitration Rule 47(1)(j) (applied to these proceedings by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the arbitration.

218. In accordance with Administrative and Financial Regulation 14(3)(e), Argentina, as the Party seeking annulment of the Award, has been responsible to date for all the advance payments required to cover the costs of the proceeding, including the fees and expenses of the members of the Committee.

219. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to:

Committee's fees and expenses:

Professor Donald M. McRae	USD 72,811.90
Professor Doug Jones	USD 119,653.71
Tan Sri Dato' Cecil W.M. Abraham	USD 87,141.65
ICSID's administrative fees	USD 116,000.00
Direct expenses ¹⁷⁴	USD 52,710.80
Total	USD 448,318.06

220. The Committee notes that the Claimants were successful in opposing the annulment in this case and that success by a party should have an impact on costs. Nonetheless, the Committee does not consider that the request for annulment in this case can be regarded as an abusive request for annulment as the Claimants assert. As the Committee has pointed out, the extent to which the Award of the Tribunal reproduced reasoning from other arbitrations and errors

¹⁷⁴ This amount includes charges relating to court reporting and interpretation, catering and courier, and estimated charges relating to the dispatch of this Decision (courier, printing and copying).

made in identifying facts and circumstances created an understandable apprehension on the part of Argentina, although in the end it did not justify annulment.

221. Accordingly, the Committee decides that the parties should each bear their own costs and share equally the costs and expenses of these proceedings. The Claimants shall thus pay half of the costs of the annulment proceeding, including the fees and expenses of the Members of the Committee and the costs of the Centre.¹⁷⁵

¹⁷⁵ The remaining balance of the advances will be reimbursed to Argentina. The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as all invoices are received, and the account is final.

IX. DECISION

222. For the reasons set out above, the Committee decides as follows:

1. Argentina's request for annulment is denied.
2. Each Party shall bear its own legal costs and expenses incurred in connection with this annulment proceeding.
3. Each Party shall bear half of ICSID's administrative fees and expenses incurred in connection with this proceeding, including the fees and expenses of the Members of the Committee.
4. All other requests by the Parties are dismissed.

[Signed]

Tan Sri Dato' Cecil W.M. Abraham
Member of the *ad hoc* Committee

November 22, 2018

[Signed]

Prof. Doug Jones
Member of the *ad hoc* Committee

November 27, 2018

[Signed]

Prof. Donald M. McRae
President of the *ad hoc* Committee

December 3, 2018