International Centre for Settlement of Investment Disputes

In the annulment proceeding between

TEINVER S.A., TRANSPORTES DE CERCANÍAS S.A. AND AUTOBUSES URBANOS DEL SUR S.A.

Claimants

and

ARGENTINE REPUBLIC

Respondent

ICSID Case No. ARB/09/1

DECISION ON ARGENTINA'S APPLICATION FOR ANNULMENT

Members of the *ad hoc* Committee
Mr. Alexis Mourre, President of the *ad hoc* Committee
Prof. Fernando Cantuarias Salaverrry, Member of the *ad hoc* Committee
Mr. Ricardo Ramírez Hernández, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee
Ms. Mercedes Cordido-Freytes de Kurowski

Date of dispatch to the Parties: May 29, 2019

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Annulment Memorial	Argentina's Memorial on Annulment dated May 15, 2018
Annulment Counter-Memorial	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.'s Counter-Memorial on Annulment dated July 30, 2018
Annulment Reply	Argentina's Reply on Annulment dated October 1, 2018
Annulment Rejoinder	Teinver's Rejoinder on Annulment dated December 3, 2018
Annulment Hearing	Hearing on Annulment held on February 5 and 6, 2019 at the World Bank in Washington D.C.
Award	Award rendered by the Arbitral Tribunal on July 21, 2017
Application for Annulment	Argentina's application for annulment of the Award dated November 17, 2017
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Argentina/Respondent/Applicant	the Argentine Republic
Assignment Agreement	Assignment agreement dated January 18, 2010, pursuant to which the Claimants assigned to Air Comet their rights arising out of this arbitration for no price or consideration
Claimants	Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A.
Committee	*Ad hoc* Committee
Decision on Jurisdiction	Decision on Jurisdiction dated December 21, 2012 issued in the case of Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (ICSID Case No. ARB/09/1)
Decision on Provisional Measures	Decision on Provisional Measures dated April 8, 2016 issued in the case of Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic (ICSID Case No. ARB/09/1)
Funding Agreement	Funding Agreement between Burford Capital Limited and Teinver S.A., Transportes de Cercanías S.A. and

	Autobuses Urbanos del Sur S.A., entered into on April 14, 2010
ICSID or Centre	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
July 2008 Agreement	Memorandum of Agreement between the Argentine State and Interinvest dated July 21, 2008
SEPI	Sociedad Estatal de Participaciones Industriales del Reino de España
SPA	Agreement for the Purchase of Interinvest S.A.'s Shares entered into between Sociedad Estatal de Participaciones Industriales del Reino de España and Air Comet S.A. on October 2, 2001.
Tr. Day [#], [page:line]	English transcript of the Hearing before the Committee
TTN	Argentine Valuation Board (*Tribunal de Tasaciones de la Nación*)

I. INTRODUCTION AND PARTIES

1. This case concerns an application by the Argentine Republic for annulment ("**Argentina's Application**" or the "**Application for Annulment**") of the Award rendered in the underlying arbitration proceedings on July 21, 2017 (the "**Award**"), also comprising the Dissenting Opinion of Kamal Hossain, and the Decision on Jurisdiction dated December 21, 2012 (the "**Decision on Jurisdiction**"), including the Dissenting Opinion of Kamal Hossain.

2. The Award related to a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" " or "**Centre**") on the basis of the Agreement between the Government of the Argentine Republic and the Kingdom of Spain on the Promotion and Protection of Investments, dated October 3, 1991, which entered into force on September 28, 1992 (the "**Treaty" or the "BIT**"), as well as the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "**ICSID Convention**").

3. The Parties are the Argentine Republic ("**Argentina**" or the "**Applicant**"), and the Claimants in the original arbitration proceeding: Teinver S.A. ("Teinver"), Transportes de Cercanías S.A. ("Transportes de Cercanías") and Autobuses Urbanos del Sur S.A. ("Autobuses Urbanos") (collectively, the "**Claimants**").

4. The Applicant and the Claimants are hereinafter collectively referred to as the "**Parties**", and individually referred to as a "**Party**". The Parties' representatives and their addresses are listed above on page (i).

5. The dispute in the underlying arbitration proceeding related to the Claimants' allegations that Argentina had violated the Treaty, international law, and Argentine law, as well as commitments and representations made by Argentina to the Claimants, by unlawfully re-nationalizing and taking other measures regarding the Claimants' investments in two Argentine airlines: Aerolíneas Argentinas S.A. ("**ARSA**") and Austral-Cielos del Sur S.A.

("**AUSA**") (collectively, the "**Airlines**" or the "**Argentine Airlines**") and their subsidiaries. Argentina also made a Counterclaim.

6. In the Award, the Tribunal, by majority, found that Argentina breached: (a) Art. III(1) of the BIT by its unjustified measures in interfering with the Claimants' rights in respect of their investments; (b) Art. IV(1) of the BIT by failing to accord the Claimants a fair and equitable treatment; and (c) Art. V of the BIT by unlawfully expropriating the Claimants' investments in two Argentine airlines. The majority awarded the Claimants USD 320.7 million in damages plus pre-and-post Award compounded interest and USD 3.5 million in legal costs and expenses. Dr. Kamal Hossain attached a Dissenting Opinion concluding that the Tribunal had no jurisdiction, as, in his view, the Claimants failed to establish that they were investors entitled to protection under the Treaty or the ICSID Convention. Dr. Hossain noted that, through a series of agreements, the ultimate beneficiaries of the Award would be a Third-Party Funder and counsel for the Claimants (not the Claimants).

7. Argentina seeks the annulment of the Award on three of the five grounds for annulment set forth in Article 52(1) of the ICSID Convention: (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b)); (ii) there was a serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) the Award failed to state the reasons on which it is based (Article 52(1)(e)).

II. PROCEDURAL HISTORY

8. On November 17, 2017, the Secretary-General of the International Centre for Settlement of Investment Disputes received an application from Argentina seeking the annulment of the Award and requesting that enforcement of the Award be stayed until the Application was decided.

9. On November 22, 2017, 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.

10. By letter dated December 21, 2017, the Parties were notified that, in accordance with Rules 6 and 53 of the ICSID Arbitration Rules, an *ad hoc* Committee composed of Mr. Alexis Mourre (a national of France), Prof. Fernando Cantuarias Salaverry (a national of Peru), and Prof. Ricardo Ramírez Hernández (a national of Mexico) (the "**Committee**") had been constituted. The Parties were also informed that Mr. Mourre would be the President of the Committee and Ms. Mercedes Cordido-Freytes de Kurowski, Legal Counsel at ICSID, would serve as Secretary.

11. As agreed by the Parties, the first session of the Committee was held on March 1, 2018, by telephone conference (the "**First Session**").

12. The Committee issued Procedural Order No. 1 on March 6, 2018, concerning various procedural matters. The Parties confirmed, among others, that the 2006 ICSID Arbitration Rules would apply to the annulment proceedings.

13. On May 3, 2018, Argentina requested the admission of new evidence into the record.

14. On May 11, 2018, the Claimants filed their observations on Argentina's request to introduce new evidence.

15. On May 15, 2018, in accordance with the procedural calendar set out in Procedural Order No. 1, Argentina filed its Memorial on Annulment ("**Annulment Memorial**"), accompanied by 90 Exhibits and 153 Legal Authorities.

16. On May 17, 2018, the Committee, after considering the Parties' positions on Argentina's request to introduce new documents into the record, denied Argentina's request mainly because pursuant to section 15.3 of Procedural Order No. 1, "[i]*n principle, no new evidence shall be admitted in this proceeding*", and because in the Committee's view Argentina did not elaborate or provide a detailed explanation as to why the introduction of the new evidence would be necessary.

17. On June 4, 2018, the Claimants submitted a request to exclude certain new evidence introduced by Argentina in its Memorial, and for the Committee to order Argentina to

submit a revised Memorial removing all citation and references to those documents, as well as any arguments relying upon the same.

18. On June 5, 2018, Argentina filed observations on the Claimants' request for exclusion of evidence.

19. On June 11, 2018, at the Committee's request, the Claimants provided specific indication of the footnotes in Argentina's Memorial (128, 129, 130, 131, 132, 133, 163, 164, 366 and 367) that included reference to the objected documents. Subsequently, by communication of June 11, 2018, the Committee informed the Parties that subject to any eventual observations by Argentina, the references made by Argentina in its Memorial on Annulment, identified in the Claimants' letter, shall not be taken into account by the Committee.

20. On July 30, 2018, the Claimants filed a Counter-Memorial on Annulment ("**Annulment Counter-Memorial**"), accompanied by Exhibits C-1216 to C-1237. A revised Counter-Memorial on Annulment in red lined and clean versions was subsequently filed on August 21, 2018.

21. On October 1, 2018, Argentina filed a Reply on Annulment ("**Annulment Reply**"), accompanied by 21 Exhibits and 41 Legal Authorities.

22. On December 3, 2018, the Claimants filed a Rejoinder on Annulment ("**Annulment Rejoinder**"), accompanied by Exhibits C-1233 and C-1238.

23. On December 17, 2018, the Committee informed the Parties of its availability to hold a Pre-Hearing Organizational Meeting on January 8, 2019, by telephone conference. A Draft Agenda was subsequently sent to the Parties on December 18, 2018. On December 20, 2018, both Parties confirmed their availability on the proposed date.

24. On January 3, 2019, at the invitation of the Committee, the Parties informed the Committee of their agreements on the items of the Draft Agenda for the Pre-Hearing Organizational Meeting, concerning the organization of the Hearing on Annulment and informed the

Committee that the Parties were of the view that the Pre-Hearing Organizational Meeting was no longer necessary.

25. On January 8, 2019, the Committee confirmed that the Pre-Hearing Organizational Meeting, scheduled to be held on that day, had been cancelled, as agreed by the Parties.

26. On January 8, 2019, the Claimants filed a request for the Tribunal to authorize the Claimants' insolvency administrators to attend the Hearing on Annulment, scheduled to be held on February 4 and 5, 2019 in Washington, D.C., via videoconference (i.e., Webex).

27. On January 9, 2019, the Committee issued Procedural Order No. 2 concerning the organization of the Hearing.

28. On January 11, 2019, Argentina filed observations on the Claimants' request of January 8, 2019 for the insolvency administrators to attend the Hearing via videoconference.

29. On January 15, 2019, the Claimants filed a response to Argentina's observations of January 11, 2019.

30. On January 16, 2019, each Party provided its list of participants for the Hearing. Subsequently, on January 17, 2019, the Secretary of the Committee circulated a consolidated List of Participants to the Parties and the Committee.

31. On January 16, 2019, Argentina filed further observations on the Claimants' requests for the insolvency administrators to attend the Hearing via videoconference in light of the Claimants' list of participants.

32. On January 17, 2019, the Committee directed the Claimants to submit by January 22, 2019, a request from each of the insolvency administrators who wished to attend the Hearing via videoconference, who would be authorized to do so. The ICSID Secretariat would make the relevant arrangements for a secure videoconference and would inform the Parties.

33. On January 18, 2019, the Secretary of the Committee informed the Parties of the possibility of holding the videoconference from a venue in Madrid, and of the related costs.

34. On January 18, 2019, the Claimants informed the Committee the names of the insolvency administrators for Teinver and Air Comet, who would be attending the Hearing in person (instead of by videoconference).

35. On January 18, 2019, Argentina filed observations on the Claimants' letter of January 18, 2019.

36. On the same date, the Committee invited the Parties to agree on who would bear the additional costs of the secured platform for the videoconference, and to inform the Committee.

37. On January 19, 2019, the Committee invited the Claimants to comment on Argentina's communications of January 17 and 18, 2019, regarding the insolvency administrators.

38. On January 22, 2019, the Claimants provided responses to the Committee's inquiry as to (i) which party shall bear the costs of securing a video conference in Madrid; (ii) Argentina's objections to the insolvency administrators attending the hearing unless they act in a joint manner; and (iii) Argentina's arguments that Air Comet's insolvency administrators may not attend the annulment hearing. Attached to the Claimants' letter were letters from Mr. Luis Arqued and Ms. Antonia Magdaleno, insolvency administrators for Teinver, S.A., and from Messrs. Jesús Verdes and Miguel Villela Barranchina, insolvency administrators for Transportes de Cercanías regarding their participation in the Hearing by video conference.

39. On January 23, 2019, the Committee authorized the insolvency administrators Mr. Arqued, Ms. Magdaleno, Mr. Verdes and Mr. Villela Barranchina to participate in the hearing by video conference, and the insolvency administrator for Air Comet: Mr. Mariano Hernández and his assistant, Mr. Álvaro Martínez Domingo, to participate in the hearing in person. It was noted that Mr. Arqued might be participating in person. The Committee also decided that the costs related to the video conference in Madrid will be covered with the funds in the case account, subject to the Committee's final decision on costs.

40. On January 30, 2019, following the Claimants' request of January 28, 2019 and Argentina's observations of January 29, 2019, the Committee authorized Mr. Diego

Fargosi, the Claimants' co-counsel during the original arbitration proceeding, to attend the Hearing in Washington, D.C.

41. On February 5 and 6, 2019, the Committee held a Hearing on Annulment at the World Bank's headquarters in Washington D.C. (the "**Annulment Hearing**").

42. The following persons were present at the Hearing:

COMMITTEE	
Mr. Alexis Mourre	President
Mr. Fernando Cantuarias Salaverry	Member
Mr. Ricardo Ramírez Hernández	Member

ICSID SECRETARIAT	
Ms. Mercedes Cordido-Freytes de Kurowski	Secretary of the Committee
Mr. Sebastián Canon	Intern

ARGENTINA	
Counsel:	
Mr. Bernardo Saravia Frías	Procuración 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
Mr. Francisco Javier García Elorrio	Procuración del Tesoro de la Nación
Ms. Inda Valeria Etchechoury	Procuración del Tesoro de la Nación
Mr. José Martín Ryb	Procuración del Tesoro de la Nación
Mr. Nicolás Duhalde	Procuración del Tesoro de la Nación

CLAIMANTS	
Counsel:	
Mr. Doak R. Bishop	King & Spalding
Mr. Roberto Aguirre Luzi	King & Spalding
Mr. Craig S. Miles	King & Spalding
Mr. Eduardo Bruera	King & Spalding
Mr. Brian Jacobi	King & Spalding
Ms. Carol Tamez	King & Spalding

Mr. Diego Fargosi	
Parties:	
Mr. Luis Arqued	Insolvency Administrator, Teinver
Mr. Jesús Verdes	Insolvency Administrator, Transportes de Cercanias (via VC)
Mr. Miguel Vilella Barranchina	Insolvency Administrator, Transportes de Cercanías (via VC)
Mr. Mariano Hernández	Insolvency Administrator, Air Comet
Mr. Álvaro Martínez	Assistant to Air Comet's Insolvency Administrator

INTERPRETERS	
Ms. Silvia Colla	English-Spanish Interpreter
Mr. Daniel Giglio	English-Spanish Interpreter
Ms. Elena Howard	English-Spanish Interpreter

COURT REPORTERS	
Mr. David Kasdan	Worldwide Reporting, LLP, English Court Reporter
Mr. Paul Pelissier	DR-Esteno, Spanish Court Reporter
Mr. Rodolfo Rinaldi	DR-Esteno, Spanish Court Reporter

43. On March 8, 2019, each Party filed a Statement of Costs.

44. The Committee declared the proceeding closed on April 23, 2019, in accordance with Rules 53 and 38(1) of the ICSID Arbitration Rules.

III. THE SCOPE OF ANNULMENT

(1) The Parties' Positions

a. Argentina's Position

45. Argentina highlights the importance of the annulment proceedings for the integrity of the ICSID system, and it accordingly submits that the scope of annulment proceedings should not be construed restrictively.[1]

[1] Annulment Memorial, ¶ 32.

b. The Claimants' Position

46. The Claimants submit that the grounds for annulment provided in Article 52 of the ICSID Convention are "*narrow and limited and that a substantive, or appellate, review of ICSID awards is foreclosed*."[2] The Claimants also contend that '[t]*hese Proceedings are neither an appeal nor a generalized review of the correctness or persuasiveness of the Tribunal's decision-making (though neither of these aspects is seriously contestable). Rather, the Committee's mandate is limited to ensuring the integrity of the underlying Arbitration. Accordingly, for Argentina to prevail on its annulment claims, it must show that the Tribunal manifestly exceeded its powers; seriously departed from a fundamental rule of procedure; or failed to state its reasons for the decisions it reached*."[3]

c. The Committee's Analysis

47. The Committee, as a starting point, notes that there is no disagreement between the Parties as to the fact that an annulment committee under Art. 52 of the Convention does not sit in appeal of the arbitral tribunal's decision. As rightly pointed out by the ICSID Updated Background Paper on Annulment, the scope of review that an annulment committee is entitled to perform under Article 52 is limited. Because "*the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system*", annulment "*was designed purposefully to confer a limited scope of review which would safeguard against 'violation of the fundamental principles of law governing the Tribunal's proceedings*".[4]

48. In view of the Committee, no question of interpretation of Article 52 is at stake here, and defining the scope of the Committee's review does not require any analysis of whether Article 52 should be construed narrowly or broadly. Article 52 must be applied in accordance with its clear terms, which are exclusive of any review of the substance of the award. In substance, annulment is not an appeal allowing reconsideration of the merits of

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[2] Annulment Counter-Memorial, ¶¶ 99-107.

[3] Annulment Rejoinder, ¶ 2.

[4] ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID, May 5, 2016, ("**ICSID's Updated Background Paper on Annulment**"), ¶ 71 (C-1217) (**AL RA 421 bis**), ¶ 71.

the case. As a consequence, an award may only be annulled on the limited grounds listed in Article 52(1).

IV. THE PARTIES' ARGUMENTS AND THE ANALYSIS OF THE COMMITTEE

49. Argentina has argued that the Award should be annulled on grounds of manifest excess of powers (**A**), departure from a fundamental rule of procedure (**B**), and failure to provide reasons (**C**). The Committee will address each of these annulment grounds in turn.

A. MANIFEST EXCESS OF POWERS

50. The Committee will first address the Parties' contentions concerning the legal standard that is applicable to assess whether the Tribunal manifestly exceeded its powers (**1**). The Committee will then address each of the grounds invoked by Argentina to submit that the Award should be annulled on that basis, namely lack of jurisdiction (**2**), the alleged lack of powers of the attorneys representing the Claimants (**3**), the existence of a fraud relating to the use of the SEPI funds (**4**), and the Award's reliance on the July 2008 Agreement (**5**).

(1) Legal Standard

a. Argentina's Position

51. Argentina submits that tribunals derive their power from the parties' consent, and therefore exceed their powers when they act beyond or in breach of such consent.[5]

52. In the instant case, Argentina contends that the Tribunal exceeded its powers with respect to its exercise of jurisdiction by failing to apply the applicable law and to address all the issues raised by the Parties.[6]

53. With regard to jurisdiction, Argentina contends that there is an excess of powers when a tribunal assumes jurisdiction when jurisdiction is lacking, when it exceeds the scope of its

[5] Annulment Memorial, ¶ 35, relying on *CDC Group plc v. the Republic of Seychelles,* ICSID Case No. ARB/02/14 ("***CDC***"), Decision on Annulment, June 29, 2005, ¶ 40 (**AL RA 420**).

[6] Annulment Memorial, ¶ 36.

jurisdiction, or when it does not exercise jurisdiction when jurisdiction exists.[7] A tribunal also exceeds its powers when it fails to apply the applicable law, or applies a law different from the applicable law.[8] Finally, a tribunal exceeds its powers when it decides on issues not submitted to it for resolution, or fails to address an issue raised by the parties.[9]

54. Argentina notes that in accordance with Article 52(1)(b) of the ICSID Convention, the excess of powers must be "manifest", that is, "obvious" or "evident". However, Argentina submits, by relying on *Caratube*, *Occidental*, and *EDF*, that assessing a manifest excess of powers may in some cases require an extensive argumentation and analysis.[10]

b. The Claimants' Position

55. The Claimants submit that pursuant to Article 52(1)(b) of the ICSID Convention, only instances of "manifest" excess of a tribunal's powers may lead to an annulment.[11] The

[7] Annulment Memorial, ¶¶ 37-40, relying on (i) ICSID's Updated Background Paper on Annulment, ¶ 87 (**AL RA 421 bis**); (ii) *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7 ("***Soufraki***"), Decision on Annulment, June 5, 2007, ¶ 42 (**AL RA 64**); and (iii) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11 ("***Occidental***"), Decision on Annulment, November 2, 2015, ¶¶ 49-50 (**AL RA 422**); *see also TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 ("***Teco***"), Decision on Annulment, April 5, 2016, ¶ 77 (**AL RA 423**); *Caratube International Oil Company v. Republic of Kazakhstan,* ICSID Case No. ARB/08/12 ("***Caratube***"), Decision on Annulment, February 21, 2014, ¶¶ 74-75 (**AL RA 424**).

[8] Annulment Memorial, ¶ 41, relying on (i) *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 ("***Enron***"), Decision on Annulment, July 30, 2010, ¶ 218 (**AL RA 398**), and (ii) *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5 ("***Tidewater***"), Decision on Annulment, December 27, 2016, ¶ 126 (**AL RA 419**).

[9] Annulment Memorial, ¶ 42 [footnotes omitted].

[10] Annulment Memorial, ¶¶ 43-45, citing, among others, (i) *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23 ("***EDF***"), Decision on Annulment, February 5, 2016, ¶ 192 (**AL RA 433**); *see also Tza Yap Shum v. Republic of Peru,* ICSID Case No. ARB/07/6 ("***Tza Yap Shum*** "), Decision on Annulment, February 12, 2015, ¶ 82 ("'*manifest'* does not refer to the gravity of the excess but to the clarity with which the excess of powers can be ascertained") (**AL RA 434**); (ii) *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 ("***Sempra***"), Decision on Annulment, June 29, 2010, ¶ 211 (**AL RA 413**); *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23; Decision on Annulment, April 5, 2016, ¶ 77 ("Committee considers that an excess of powers is 'manifest' if it is plain on its face, evident, obvious, or clear") (**AL RA 423**); and (iii) *Caratube,* Decision on Annulment ¶ 84 (**AL RA 424**).

[11] Annulment Counter-Memorial, ¶ 108.

Claimants point out that the ordinary meaning of "manifest" is "obvious or clear", and that Argentina agrees with such interpretation.[12]

56. The Claimants rely on several *ad hoc* committees' decisions supporting the above interpretation and note that the ICSID Updated Background Paper on Annulment confirms that "*the 'manifest' nature of the excess of powers has been interpreted by most ad hoc committees to mean an excess that is obvious, clear or self-evident, discernible without the need for an elaborate analysis of the award.*"[13] Annulment Committees, in line with the *kompetenz-kompetenz* principle, have affirmed that principle when annulment is sought on jurisdictional grounds.[14] The Claimants point out, in this regard, that in *Lucchetti,* the committee declined to opine whether it agreed with the tribunal's interpretation of jurisdiction, decided that the interpretation was "tenable", and therefore refused to annul the award.[15]

57. As to the application of the law, the Claimants submit that "if a tribunal discusses and considers the proper law, its application (even if incorrect) cannot constitute a failure to apply the applicable law unless that application is so untenable and arbitrary as to raise legitimate questions regarding the tribunal members' integrity."[16]

58. Finally, as to the alleged failure of the Tribunal to address all issues raised by the Parties, the Claimants contend that the Tribunal did address all the issues raised by the Parties, and even if it had failed to do so with respect to certain arguments, that would not constitute a ground for annulment.[17]

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[12] Annulment Counter-Memorial, ¶ 109.

[13] Annulment Counter-Memorial, ¶ 110.

[14] Annulment Counter-Memorial, ¶¶ 111-112.

[15] Annulment Counter-Memorial, ¶ 113, citing *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4 ("**Lucchetti**"), Decision on Annulment of September 5, 2007 ¶ 100-101, (**AL RA 444**). Counter-Memorial, ¶ 113, citing Lucchetti.

[16] Annulment Counter-Memorial, ¶ 116.

[17] Annulment Counter-Memorial, ¶ 129.

c. The Committee's Analysis

59. Concerning first of all the exercise of jurisdiction, the starting point is that the powers of a tribunal are defined by the boundaries of the arbitration agreement. A tribunal can therefore not exercise jurisdiction beyond those boundaries, and it has the duty to exercise the jurisdiction that is conferred to it by the agreement. As a consequence, exercise of jurisdiction that is not conferred upon the tribunal is in principle an excess of powers.[18] Likewise, refusal by a tribunal to exercise the jurisdiction conferred to it by the parties is also an excess of powers.[19] However, a mere error in the tribunal's jurisdictional findings does not constitute a ground for annulment. Such an error also needs to be manifest. As decided by many annulment committees, an excess of powers is manifest if it is obvious, clear or self-evident.[20] In this regard, the fact that a tribunal has relied to make its decision

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[18] ICSID's Updated Background Paper on Annulment, ¶ 87, relying on *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, July 3, 2002, ("***Vivendi I***") ¶ 86; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 ("***Mitchell***"), Decision on the Application for Annulment of the Award, November 1, 2006, ¶¶ 47, 48 & 67; *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 ("***CMS***"), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007, ¶ 47 (quoting *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 ("***Klöckner I***"), Decision of the *ad hoc* Committee, May 3, 1985, ¶ 4); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 ("***Azurix***"), Decision on the Application for Annulment of the Argentine Republic, September 1, 2009, ¶ 45 (quoting *Klöckner I*, ¶ 4); *Lucchetti*, Decision on Annulment, ¶ 99; *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6 ("***MCI***"), Decision on Annulment, October 19, 2009, ¶ 56 (quoting *Lucchetti*, ¶ 99); *Occidental*, ¶ 49-51; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No.ARB/11/28 ("***Tulip***"), Decision on Annulment, December 30, 2015 ¶ 55*; EDF*, ¶ 191; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1 ("***Total***"), Decision on Annulment, February 1, 2016, ¶ 242; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9 ("***Dogan***"), Decision on Annulment, January 15, 2016, ¶ 105; *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20 ("***Micula***"), Decision on Annulment, February 26, 2016, ¶ 125; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4 ("***Lahoud***"), Decision on the Application for Annulment of the Democratic Republic of the Congo, March 29, 2016, ¶ 118; *TECO,* ¶ 77.

[19] *Ibid.*

[20] Annulment Rejoinder, ¶ 27, relying on *Compañia Aguas del Aconquija S.A. et al. v. Argentine Republic*, ICSID Case No. ARB/97/3 ("***Vivendi II***"), Decision on Annulment, August 10, 2010, ¶ 245 ("must be 'evident'"), ("obvious by itself"), (**C-1231**); *Azurix,* Decision on Annulment, ¶ 68 ("obvious"), (**C-291**); *Soufraki,* Decision on Annulment, ¶ 39 ("obviousness"; citing Webster's Revised Unabridged Dictionary(1913) definition of "manifest" as meaning "'clear,' 'plain,' 'obvious,' 'evident'...."), (**AL RA 64**); *CDC*, Decision on Annulment, ¶ 41 ("clear or 'self-evident'"), (**AL RA 420bis**); *MCI,* Decision on Annulment, ¶ 49 ("self-evident"), (**AL RA 445**); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 ("***Rumeli***"), Decision of the *ad hoc* Committee, March 25, 2010, ¶ 96 ("evident on the face of the award"), (**C-1219**); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19 ("***Helnan***"), Decision of the *ad hoc* Committee, June 14, 2010, ¶ 55 ("obvious or clear"), (**C-1224**); see generally ICSID's Updated Background Paper on Annulment, (**C-1217**).

on tenable solutions adopted in several previous cases may be considered as an indication that an excess of powers is not manifest.

60. Concerning the allegation that the tribunal failed to apply the proper law, the starting point should be Article 42(1) of the ICSID Convention, pursuant to which the tribunal has the duty to decide the dispute in accordance with the rules of law agreed by the parties. As a consequence, whenever the parties have agreed on the applicable rules of law, failure to apply the same would normally result in an excess of powers.[21] Nonetheless, because annulment committees do not sit in appeal of the tribunal's decisions, a clear distinction must be made between a failure to apply the proper law and an error in the application of the same.[22] Here again, the requirement that an excess of powers be manifest in order to entail annulment comes into play. While entirely disregarding the proper law would normally constitute a manifest excess of powers, an incorrect or imperfect application of such law would not, unless it is so egregious as to amount to a complete failure to apply it.[23]

61. Finally, as to the arguments relating to the Tribunal's failure to address all the issues raised by the Parties, the Committee considers that a failure to address one or more of the Parties' arguments could be relevant to an annulment ground based on a failure to provide reasons, but not to an alleged manifest excess of powers. The Committee considers in this respect necessary to distinguish between an alleged failure to address one of the parties' claims, which may be considered as an excess of power for failure to exercise jurisdiction, and an alleged failure to respond to each and every argument or sub-argument raised by the parties, which would normally not.[24] The Committee will now turn to each of the grounds invoked by Argentina to submit that the Tribunal manifestly exceeded its powers.

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[21] *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4 ("***MINE***"), Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, December 22, 1989, ¶ 5.03.

[22] *Soufraki*, Decision on Annulment, ¶ 885.

[23] Ibid, ¶ 86.

[24] Concerning failure to provide reasons: *Vivendi I*, Decision on Annulment ¶ 64, (**AL RA 431**). *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No ARB/98/4 ("***Wena***"), Decision on Annulment, February 5, 2002 ¶ 81, (**C-621**); concerning excess of powers: *CDC* Decision on Annulment, June 29, 2005, and (ii) *Metalclad*. See Tr. Day 2, 345:2 to 346:6.

(2) Exercise of Jurisdiction

a. Argentina's Position

62. Argentina's avers, first of all, that the Claimants did not make any protected investment. The Claimants, as a matter of fact, invested in Air Comet, a Spanish company. That same Spanish company, pursuant to a Share Purchase Agreement dated October 2, 2001 ("**SPA**"), acquired from Sociedad Estatal de Participaciones Industriales del Reino de España ("**SEPI**"), another Spanish company, shares in the Argentine company Interinvest S.A. ("**Interinvest**"), the holding of ARSA and AUSA.[25] Argentina therefore contends that the alleged investment was an indirect one which does not fall under the protection of the BIT. Any claim against Argentine should therefore have been brought by Air Comet, not by the Claimants.[26]

63. Argentina submits, in this regard, that the clear terms of Article I(2) of the BIT, which defines the term "investment", refers to goods and rights "*acquired or undertaken in accordance with the legislation of the investment's host country*".[27] As a consequence, shares acquired in a Spanish company cannot qualify as an investment made in Argentina.

64. Furthermore, there was no protected investor under the Argentina-Spain BIT given that the Claimants were not parties to the SPA.[28]

65. Argentina also contends that for an investment to be considered as such under Article 25(1) of the ICSID Convention, four elements must be present: (i) a contribution of money or other assets; (ii) a certain duration; (iii) an element of risk and (iv) a contribution to the hots State's development (the "*Salini* test"). Argentina submits that the SPA did not entail a contribution by the Claimants to the host State (Argentina), an assumption of risk by the Claimants, or a significant contribution by the Claimants to Argentina's development.[29]

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[25] Annulment Memorial, ¶ 64. Argentina's Opening, slide 10.
[26] *Ibid.*, ¶ 66.
[27] *Ibid.*, ¶ 69. Argentina's Opening, slide 14.
[28] *Ibid.*, ¶ 64.
[29] Annulment Memorial, ¶ 68. Also, Annulment Reply, ¶ 42. Argentina's Opening, slide 16.

66. Argentina relies, as evidence that the Claimants never had the quality of investors under the BIT, on an assignment agreement dated January 18, 2010, pursuant to which the Claimants assigned to Air Comet their rights arising out of this arbitration for no price or consideration ("**Assignment Agreement**").[30]

67. Finally, Argentina submits that the purported investment and the arbitration were an abuse of the ICSID system aiming at allowing Burford Capital Limited ("**Burford**" or the "**Funder**"), a third-party funder, to benefit from the BIT and the Convention in spite of the fact that it does not qualify as an investor. Argentina relies, in this regard, on the Funding Agreement dated April 14, 2010 between Burford and the Claimants ("**Funding Agreement**"), and submits that under said Funding Agreement, Burford along with the Nominated Lawyers (King & Spalding), were intended to be the principal beneficiaries of the proceeds of any award in the case.[31]

68. Argentina notes, in this respect, that there existed a dispute between the insolvency administrators of Air Comet, the Claimants' insolvency administrators, and Burford, concerning the exact identity of the effective beneficiary of the rights arising out of the arbitration.[32]

69. Argentina relies on decisions made in the *Phoenix*[33] and the *Venezuela Holdings*[34] cases to characterize the claim as an abuse of process which the Arbitral Tribunal should not have condoned. In accepting that situation, Argentina argues, the Arbitral Tribunal manifestly exceeded its powers.

70. In synthesis, Argentina contends that the Tribunal manifestly exceeded its powers by exercising jurisdiction to adjudicate the Claimants' claims in the absence of an investment

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[30] *Ibid.,* ¶ 72. Annulment Reply, ¶¶ 47-48. Argentina's Opening, slides 17-18.

[31] *Ibid.,* ¶¶ 76-78. Annulment Reply, ¶¶ 49-51.

[32] *Ibid.,* ¶ 83. Annulment Reply, ¶ 53.

[33] *Ibid.,* ¶ 79, citing *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5 ("***Phoenix***"), Award, April 15, 2009, ¶ 113 (emphasis added) (**AL RA 85**).

[34] *Ibid.,* ¶ 79, citing *Venezuela Holdings B.V. and others v. Venezuela*, ICSID Case No. ARB/07/27 ("***Venezuela Holdings"***), Decision on Jurisdiction, June 10, 2010, ¶¶ 169, 170, 176 (**AL RA 454**).

and an investor protected under the Argentina-Spain BIT,[35] and by allowing a third party (Burford), which was unrelated to the dispute, was not a protected investor under the BIT, and had made no protected investment, to use the arbitration proceeding against the object and purpose of the ICSID Convention and the principle of good faith.[36]

71. Finally, Argentina submits that the Tribunal's findings relating to the July 2008 Agreement amount to a manifest excess of powers. This argument will be dealt with in Section 5 thereafter.

b. The Claimants' Position

72. Concerning, first of all, Argentina's argument that there is no protected investment under the BIT, the Claimants submit that the Tribunal fully addressed this issue and explained that the definition of "investment" in the BIT applies to both directly and indirectly held assets.[37] The Tribunal further explained that, under Article I(2) of the BIT, the term "investment" refers to "*any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment*", and therefore include "*in particular* […] *shares and other forms of participation in companies*". The Tribunal further noted that while "*Article 1(2) of the* [BIT] *does not explicitly include or exclude 'indirect' investments from its coverage… the broad and inclusive language of this provision suggests that 'indirect' shareholders are protected by the* [BIT]."[38]

73. In light of the above, the Claimants conclude that the Tribunal correctly held that the Claimants' shares in Interinvest, ARSA and AUSA were clearly "*shares and other forms of participation*" in Argentine companies that fell within the BIT's definition of

[35] Annulment Memorial, ¶ 85; Annulment Reply, ¶ 35.

[36] *Ibid.,* ¶ 80. Annulment Reply, ¶¶ 49-51, 55. Argentina's Opening, slides 27-28.

[37] Annulment Counter-Memorial, ¶¶ 191-192.

[38] Annulment Rejoinder, ¶ 28, citing the Decision on Jurisdiction, ¶ 209. Tr. Day 1, 179:8.

"investment", and that the fact those shares were held indirectly by the Claimants does not allow to conclude that they are not protected investments under the BIT.[39]

74. The Claimants further argue that many other tribunals have considered the same arguments in the same context, including under the same BIT, and found that indirect investments are protected.[40]

75. In addition, a manifest excess of powers under Article 52(1)(b) requires an error that is obvious and self-evident, and Argentina has not met that burden.[41]

76. As to Argentina's argument that the shares in Interinvest are in any event not an investment because their acquisition does not meet the *Salini* test, the Claimants first of all submit that the Tribunal substantially adhered to these criteria and verified that the investment complied with the conditions of contribution of assets,[42] assumption of risk,[43] and contributed to Argentina's economic development.[44] The Claimants further submit that the *Salini* criteria are mere indicators for the existence of an investment, which a tribunal is not bound to apply.[45] As a consequence, even if the Tribunal had not strictly adhered to each of the *Salini* criteria, there would be no "manifest" error warranting annulment.[46]

77. The Claimants further refute Argentina's arguments concerning the existence of an abuse of process. First, the Claimants submit that they never assigned the claims prosecuted in the arbitration, but only the proceeds of the arbitration, and that the Tribunal rightly concluded that this assignment did not affect their standing. As to the argument that Burford would be the real beneficiary of the Award, the Tribunal rightly held that it was irrelevant to its jurisdiction.[47] The Claimants submit in this respect that the Funding

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[39] Annulment Rejoinder, ¶ 29.

[40] Tr. Day 1, 180:17. Claimants' Opening, slide 92.

[41] Annulment Rejoinder, ¶ 27.

[42] *Ibid.,* ¶ 35. Claimants' Opening, slide 94.

[43] *Ibid.,* ¶ 36.

[44] *Ibid.,* ¶ 37. Tr. Day 1, 182:10 to 184:10.

[45] C. Schreuer, THE ICSID CONVENTION: A COMMENTARY, 25:159 (2d Ed. 2009), ("***Schreuer***"), **(C-1233)**.

[46] Annulment Rejoinder, ¶ 33.

[47] Annulment Counter-Memorial, ¶¶ 194-195. Tr. Day 1, 186:16-187:13.

Agreement was executed on April 14, 2010, one year after the arbitral proceedings were instituted.[48] The Tribunal first correctly determined that jurisdiction is to be assessed as of the date when the case is filed.[49] The Tribunal then looked at the relevant facts, and correctly found that both the Assignment Agreement and the Funding Agreement postdate the filing of arbitration.[50] The Tribunal concluded that Burford's rights under the Funding Agreement are irrelevant to the Tribunal's jurisdiction.[51]

78. The Claimants finally contend that Arbitrator Hossain's policy opinion that third-party funding agreements are undesirable cannot establish a manifest excess of powers in the Tribunal's exercise of jurisdiction.[52]

c. *The Committee's Analysis*

79. Concerning, first of all, the Tribunal's finding that the Claimants' indirect ownership of shares in Interinvest qualifies as an investment under the BIT, the Committee does not find any reason to annul the Award for manifest excess of powers.

80. The Committee recalls that for an error of law to be annullable, it must be manifest. As said above, for an error to be manifest, it needs to be obvious, clear or self-evident, and whenever the tribunal has relied to make its decision on tenable solutions that have been consistently adopted in previous cases, there should as a matter of principle be no annulment. For an incorrect or imperfect application of law to be annullable, it needs to be so egregious as to amount to a complete failure to apply the law.

81. Turning to the Tribunal's analysis, the Tribunal made a distinction between what it defined as Respondents "*derivative claim*" argument,[53] and its "*intermediary investor*" argument.[54] In so doing, it appears to have followed the structure of Argentina's pleadings. The

[48] Annulment Rejoinder, ¶ 40.
[49] Tr. Day 1, 185:1 to 185:9.
[50] Tr. Day 1, 185:10-17.
[51] Annulment Rejoinder, ¶ 39.
[52] *Ibid.,* ¶ 39.
[53] Decision on Jurisdiction, ¶ 208 seq.
[54] *Ibid.,* ¶ 229 seq.

distinction between the two arguments is however unclear, for both appear to rely on the fact that the Claimants had no direct rights in Interinvest. And both arguments were in fact rejected on the same basis that an indirectly-held shareholding is a protected investment.[55] Argentina's annulment arguments rest on the argument that the Claimants' shareholding in Air Comet is not an investment acquired in accordance with Argentine law pursuant to the BIT, with no distinction between a "derivative claim" and an "intermediary investor" claim.

82. The starting point of the analysis should be Article I(2) of the BIT, defining as investment "*any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment*". The Tribunal noted the broad language of the clause and deducted that it does not exclude indirect investments.[56] The Tribunal concluded that the Claimants' indirect nature of their ownership of shares in Interinvest, ARSA and AUSA did not exclude such shares from the definition of an investment under the BIT.[57] The Arbitral Tribunal, in so doing, rejected Argentina's argument that the terms "*acquired or effected in accordance with the legislation of the country receiving the investment*" mean that the investment needed to be directly acquired in Argentina.[58] The Tribunal concluded that shares indirectly acquired by the Claimants in an Argentine company and in accordance with the laws of Argentina were protected by the BIT. The Tribunal also discussed Argentina's arguments based on Barcelona Traction and general international law,[59] and found that they were not applicable in the context of a BIT. It also concluded that the ICSID Convention does not reject the possibility for the indirect shareholders of a domestic company to bring claims for the harm caused to their investment.[60] The Tribunal then rejected Argentina's arguments based on Argentine law as irrelevant to the decision on its jurisdiction,[61] and rejected what it called

[55] For the "derivative claim" argument, ¶ 209; for the "intermediary investor" argument, ¶ 232.
[56]Decision on Jurisdiction, ¶ 209 seq.
[57] *Ibid.*, ¶ 207-238; Award, ¶ 249.
[58] *Ibid.*, ¶ 214.
[59] Decision on Jurisdiction, ¶¶ 215-221.
[60]*Ibid.*, ¶¶ 222-225.
[61] *Ibid.*, ¶¶ 226-228.

the "*policy argument*" according to which it would be inappropriate to award damages to a shareholder rather than to the company that has actually suffered injury.[62]

83. The Committee finds no manifest excess of powers in the Tribunal's interpretation of the BIT and of the other legal rules invoked by Argentina. Ultimately, the Tribunal's jurisdiction had to be assessed having regard to the BIT. The Tribunal considered that Article I(2) of the BIT encompasses indirect investments, and in so doing it interpreted the terms "*any kind of assets*" as referring to both directly and indirectly owned assets. It follows, according to the Tribunal, that by acquiring shares in Air Comet, a Spanish company which in turn held 99.2% of Interinvest, the Argentine holding company of ARSA y AUSA, the Claimants made an indirect investment in said Argentine companies and that such investment is protected by the BIT. Irrespective of whether these conclusions are correct or not, there is no manifest error in such reasoning. Nor is there any demonstration on the part of Argentina that such interpretation would be contrary to good faith or inconsistent with the object and purpose of the BIT.

84. The Committee notes, in this regard, that in making its decision, the Tribunal has relied on a number of past jurisdictional decisions, some made under the same Spain/Argentina BIT[63] and others under treaties using similar language,[64] having all concluded that

[62] *Ibid.*, ¶ 233.

[63] Decision on Jurisdiction, ¶¶ 210-213, citing *Gas Natural SDG SA v. Argentine Republic*, ICSID Case No ARB/03/10, Decision on Jurisdiction, June 17, 2005 ("***Gas Natural***"), ¶¶ 33-35; *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, May 16, 2006 ("***Suez InterAguas***"), ¶ 49; *and Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, August 3, 2006 ("***Suez Vivendi***"), ¶ 49.

[64] Decision on Jurisdiction, ¶ 228, providing as examples: *CMS,* Decision on Jurisdiction, ¶ 42 ("the applicable jurisdictional provisions are only those of the Convention and the BIT, not those which might arise from national legislation."); *Azurix,* Decision on Jurisdiction, December 8, 2003, ¶ 50, (**C-490**) ("The jurisdiction of the Centre is determined by Article 25 of the Convention. In addition, the competence of the Tribunal is governed by the terms of the instrument expressing the parties' consent to ICSID arbitration. Therefore, the task of the Tribunal [at the jurisdictional stage] is to assess whether the Claimant's request for arbitration falls within the terms of said Article 25 of the Convention and (…) the BIT."); *Siemens v. Argentina,* Decision on Jurisdiction, at ¶ 31 ("Argentina in its allegations has not distinguished between the law applicable to the merits of the dispute and the law applicable to determine the Tribunal's jurisdiction. This being an ICSID Tribunal, its jurisdiction is governed by Article 25 of the ICSID Convention and the terms of the instrument expressing the parties' consent to ICSID arbitration, namely, Article 10 of the Treaty."). Also, *BG Group plc v Argentine Republic*, UNCITRAL, ("***BG Group***"), Final Award, December 24, 2007, ¶¶ 203-04, (**C-340**). Note, that the Final Award rendered by the Tribunal was subsequently denied enforcement on different grounds by the United States Court of Appeals for the District of Columbia Circuit. The D.C.

indirectly owned assets qualify as protected investments. The Committee also notes that Argentina did not refer to any past decision having in similar circumstances concluded to the contrary. Although this Committee does not need to opine as to whether such past decisions were correct or not, these circumstances lead the Committee to consider that any possible error in the Tribunal's conclusion that indirectly owned assets fall under Article I(2) of the BIT would in any event not qualify as a manifest excess of powers.

85. Second, Argentina has averred before the Committee that the Tribunal would have exceeded its powers by upholding its jurisdiction in spite of the fact that the investment did not comply with the objective requirements established by the so-called *Salini* test.[65]

86. As an initial observation, the Committee notes that the *Salini* test has not been raised by Argentina before the Tribunal as a jurisdictional argument, which is the reason why it is not dealt with in the Decision on Jurisdiction. The argument is rather addressed in different parts of the Award dealing with admissibility,[66] where the Tribunal addresses issues of contribution and risk in the context of a debate on the existence of other investments made by the Claimants beyond their indirect acquisition of shares in Interinvest.[67] It is unclear to the Committee why these questions are dealt with in the Award as part of a section on admissibility. At any rate, framed as a jurisdictional question, the argument is inadmissible before the Committee. A rightly explained by Christoph Schreuer: "*a party may not present new arguments on fact and law that it failed to put forward in the original arbitration proceeding*" .[68] Because Argentina did not argue the *Salini* test as part of its jurisdictional objections before the Tribunal, it cannot rely on such argument before the Committee to submit that the Tribunal's jurisdictional findings would amount to a manifest excess of powers.

Circuit decided the appeal on the basis of arbitrability, finding that BG and Argentina had not agreed to submit the arbitrability question itself to arbitration, and that the BG tribunal did not have jurisdiction to consider the matter of its own competence. *See Republic of Argentina v. BG Group plc*, D.C. Cir., No. 11-7021 (January 17, 2012).

[65] Annulment Memorial ¶ 68. Annulment Reply, ¶ 42, Argentina's Opening, slide 16.

[66] Award, ¶¶ 251, 253, 254, 260, 261, 262.

[67] Award, ¶ 250.

[68] The ICSID Convention, a Commentary, Second Edition, p. 932, ¶ 108.

87. Even if non-compliance with the *Salini* test were admissible as a jurisdictional annulment argument (which it is not), it would in any event not succeed. Whether the argument relates to jurisdiction or admissibility, the Claimants correctly point out[69] that whether the standards established by the arbitral tribunal in the *Salini v. Morocco* case are mandatory has been much debated. Christoph Schreuer writes in this respect that "*it is not entirely clear whether the tribunals regarded the criteria as essential requirements for the existence of investments or merely as typical characteristics or indicators*",[70] and that "*the development in practice from a descriptive list of typical features towards a set of mandatory legal requirements is unfortunate*. […] *To the extent that the 'Salini' test is applied to determine the existence of an investment, its criteria should not be seen as distinct jurisdictional requirements each of which must be met separately. In fact, tribunals have pointed out repeatedly that the criteria that they applied were interrelated and should be looked at not in isolation but in conjunction*".[71] An annulment committee has in this respect annulled an award for having elevated one of the *Salini* criteria to the level of a jurisdictional requirement.[72] It follows that a failure to apply the so-called *Salini* test would not in itself constitute a manifest excess of powers.

88. The Committee is furthermore satisfied that the *Salini* criteria, had they been relevant to this case, were in any event complied with. The Tribunal accordingly found that the conditions of contribution,[73] risk,[74] and contribution to the host State's economic development[75] had been met. As to the criteria of duration, it does not appear to have been discussed by Argentina, but it was clearly met as well in the context of the acquisition of two airlines, which are businesses requiring long term investments and planning.

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[69] Annulment Rejoinder, ¶ 33.

[70] The ICSID Convention, a Commentary, p. 130, ¶ 159.

[71] *Ibid.,* p. 133, ¶ 171.

[72] *Malaysian Historical Salvors v. Malaysia*, ICSID Case ARB/05/10, Decision on the Application for Annulment, April 16, 2009.

[73] Annulment Rejoinder, ¶ 35; Award, ¶¶ 251, 254.

[74] Annulment Rejoinder, ¶ 36; Award, ¶¶ 253, 261, 262, 373.

[75] Annulment Rejoinder, ¶ 37; Award, ¶¶ 255, 256, 315.

89. The Committee now turns to Argentina's arguments relating to the alleged simulation that would be evidenced by the assignment, for no consideration, of the proceeds of the Award to Air Comet. Argentina submits that this assignment is an acknowledgement that the claims brought forward in the arbitration belonged in reality to Air Comet, and not to the Claimants.[76]

90. This Assignment Agreement[77] was however entered into in January 2010, almost 9 years after the investment and more than one year after the Request for Arbitration. The Tribunal held that, in accordance with international case law, jurisdiction is generally to be assessed as of the date the case is filed.[78] This point has not been disputed by Argentina. As a consequence, and as the Claimants rightly point out, the 2010 Assignment Agreement could not affect the Tribunal's jurisdiction.[79] Moreover, as the Claimants also argued, the assignment did not apply to the interests in dispute in the arbitration, but to the claim to money that would possibly arise from the Award.[80] It is therefore clear that the Claimants continued to own their disputed rights against Argentina until the Award, and that their standing to pursue the claims was not affected. The Tribunal finally held that any possible illegality of the assignment would also be irrelevant to jurisdiction as long as the investment had been legally acquired.[81] The Assignment Agreement can therefore not sustain the argument that the Tribunal lacked jurisdiction, that the Claimants had no legal standing in the arbitration, or that the arbitration was a simulation.

91. The Committee will now address Argentina's argument that the Burford Funding Agreement was the vehicle of a fraud to the ICSID system by allowing a third party, who was not an investor, to act against Argentina.[82] According to Argentina, as a consequence, the Tribunal manifestly exceeded its powers in accepting to entertain a claim made in bad

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[76] Annulment Memorial, ¶ 72.

[77] RA 159.

[78] Decision on Jurisdiction, ¶ 255.

[79] Annulment Counter-Memorial, ¶ 195.

[80] "*Los cedentes acuerdan expresamente la cesión de los derechos netos de cobro que se obtengan de la demanda presentada ante el Tribunal Internacional CIADI*", RA 159, Clause 1.

[81] Decision on Jurisdiction, ¶ 257.

[82] Annulment Memorial, ¶ 78.

faith and in fraud of Argentina's rights.[83] The Committee does not find merits to the argument.

92. First, the Funding Agreement was made between the Claimants and Burford Capital in April 2010, which is 16 months after the Request for Arbitration. The Tribunal found that, because it postdates the filing of the case, it is irrelevant to the assessment of both the Tribunal's jurisdiction and the Claimants' standing.[84] That decision finds support in international case law and past investment awards, as analysed by the Tribunal in its Decision on Jurisdiction.[85]

93. Second, the Funding Agreement[86] does not provide for any assignment in favour of the Funder of the interests in dispute or of the proceeds of the Award. There is nothing in the Funding Agreement that would allow concluding that Burford had become the owner of the claims and the real claimant in the arbitration. The Claimants continued to instruct the Nominated Lawyers. Clause 6.1 of the Funding Agreement provides in this respect that "*in consideration of the Funder's undertakings in this Agreement, the Claimant agrees to pay to the Funder the Recovery Amount immediately following receipt of all or any part of the Award*". As a consequence, pursuant to this provision, the right to enforce the Award and to collect against Argentina continues to belong to the Claimants. Clause 6.2 provides, as a guarantee of the Funder's right, the setting up of an escrow account on which the proceeds of the Award would have to be paid, but this remains an *inter partes* arrangement that would not in any way affect the Claimants' standing in the arbitration. As a consequence,

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[83] *Ibid.*, ¶ 79.

[84] Decision on Jurisdiction, ¶¶ 256-257.

[85] Decision on Jurisdiction, ¶¶ 255-257, citing *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium),* Judgment, February 14, 2002, I.C.J. Reports 2002, p. 3, ¶ 26 (**C-762**); *Vivendi II*, Decision on Jurisdiction, November 14, 2005, ¶¶ 60, 61 and 63. See also Schreuer, The ICSID Convention: A Commentary (**C-761**) at 92 ("It is an accepted principle of international adjudication that jurisdiction will be determined by reference to the date on which the judicial proceedings are instituted. This means that on that date all jurisdictional requirements must be met. It also means that events taking place after that date will not affect jurisdiction."); *Ceskoslovenska Obchodni Banka, a.s. (CSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, May 24, 1999, ("***CSOB***"), ¶ 31 (**C-539**); *Gustav F.W. Hamester GmbH & Co. KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010 ("***Hamester***"), ¶ 96 (**AL RA 73**).

[86] RA 160.

the Committee does not find support to Argentina's submission that, based on the Funding Agreement, the real claimant in the arbitration was Burford.

94. Argentina notes that the Funding Agreement gave rise to an exchange of letters between the insolvency administrators of Air Comet and Burford as to the entitlement to the proceeds of the Award.[87] The Committee fails to see how this exchange can be relevant to the annulment proceedings. The Award was in fact made in favour of the Claimants, and neither Air Comet nor Burford have any right to enforce it. Nor was there any uncertainty in the arbitration as to who the claimant parties were. Argentina states in the Reply that this "dispute" between Air Comet and Burford would show the serious consequences deriving from the Tribunal's decision to uphold its jurisdiction.[88] But it fails to explain what these consequences are and why the role of a Funder should be characterized as an abuse of process or a breach of the BIT or the ICSID Convention. Argentina also invokes the recent release by Burford of a communication according to which it transferred its rights on the proceeds of the Award,[89] without however any explanation as to why this circumstance is relevant to its argument that by affirming its jurisdiction the Tribunal exceeded its powers.

95. Based on the foregoing, the Committee concludes that there is no manifest excess of powers in the Tribunal's Decisions on Jurisdiction.

(3) Lack of Capacity of the Claimants' Counsel

a. Argentina's Position

96. Argentina points out that "[a]*fter the original arbitration proceeding was commenced, the three Claimant companies became subject to insolvency proceedings in Spain between late 2010 and early 2011. Subsequently, in April 2013, Claimants' management and disposition powers were suspended and transferred to the respective Trustees in Insolvency*."[90]

97. Argentina submits that the insolvency administrators were the persons vested with standing to act in the arbitration proceeding, that the powers of attorney previously granted by the

[87] Annulment Memorial, ¶¶ 81-83.
[88] Annulment Reply, ¶ 53.
[89] Annulment Memorial, ¶ 84.
[90] Annulment Memorial, ¶¶ 86, 89.

Claimants no longer conferred capacity to King & Spalding to represent the debtor in the insolvency proceedings, that King & Spalding did not obtain similar powers of attorney from the insolvency administrators, and that they therefore lacked the power to represent them in the arbitration proceeding.[91]

98. Argentina contends that although the Tribunal recognized that the law applicable to the Claimants' capacity and representation was Spanish law, it nonetheless failed to apply it by holding that: "[I]*n the circumstances of an international arbitration which has been ongoing for a number of years, one must question whether the strict application of the formalities of granting powers of attorney at Spanish law appropriately apply*."[92]

99. Argentina submits in this regard that neither the 2011 or 2013 letters nor the 2015 public deed relied upon by the Claimants meet the requirements set forth by Spanish law for the granting of powers of attorney.[93] According to Argentina, the reason why King & Spalding did not obtain powers of attorney from the insolvency administrators is that the variation or termination of the existing powers of attorney would have put at risk the Funding Agreement by entitling Burford to unilaterally terminate it and to receive a USD 100 million compensation,[94] an issue that the Tribunal would have failed to address.[95]

100. Argentina concludes that: "*in considering that King & Spalding's attorneys had capacity of representation for the arbitration proceeding following the suspension of Claimants' management and disposition powers and their replacement by the respective trustees in insolvency, the majority of the Tribunal failed to apply the applicable law, thus manifestly exceeding its powers within the meaning of Article 52(1)(b) of the ICSID Convention*."[96]

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[91] Annulment Memorial, ¶¶ 86, 88, 105. Annulment Reply, ¶¶ 67-68.
[92] Annulment Memorial, ¶¶ 98, 100 citing Award, ¶¶ 221-222. Annulment Reply, ¶¶ 58-60.
[93] Annulment Reply, ¶¶ 70-73.
[94] Annulment Memorial, ¶¶ 106-107. Annulment Reply, ¶¶ 78-80.
[95] Annulment Memorial, ¶ 108.
[96] Annulment Reply ¶. 81.

b. The Claimants' Position

101. The Claimants argues that Argentina's submission is nothing more than a disagreement with the Tribunal's decision.[97] The Tribunal found that, because the Claimants are Spanish nationals, the law applicable to their capacity and to the powers of attorney in dispute is Spanish law,[98] in particular the Spanish Bankruptcy Law. Under that law, the Tribunal found that "*the re-organization administrators step into the shoes of the debtor upon the commencement of liquidation proceedings/suspension of powers of administration and disposition of assets*."[99] The Tribunal also noted that "*each set of re-organization administrators had reaffirmed King & Spalding's powers of representation and ratified the actions taken by that firm on behalf of Claimants*."[100]

102. The Claimants refute Argentina's submission that, pursuant to Article 48(3) of the Spanish Bankruptcy Law (which provides that "[a]*ny power of attorney existing at the time of the initiation of the insolvency proceedings shall be affected by the suspension or control of financial and property-related powers*"[101]), the powers of attorney were extinguished or terminated. The correct interpretation of Spanish law is that "*the powers of attorney of company administrators (or liquidators) will be affected only to the same extent as the powers of administration and disposition of the bankruptcy estate*" .[102] Since the insolvency administrators remain "*able to perform all other acts provided such acts do not consist in the administration or disposition of the estate*",[103] including the pursuit of claims in arbitration, the powers of attorney relating to the arbitration necessarily remain valid. In its analysis of this matter, the Tribunal observed that when Spanish law does seek to extinguish contractual arrangements through the operation of law, it does so expressly.[104]

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[97] Annulment Counter-Memorial, ¶ 143.

[98] *Ibid.,* ¶ 144. Award, ¶ 203.

[99] Award, ¶ 218.

[100] Annulment Counter-Memorial, ¶¶ 144-145. Award, ¶ 218.

[101] Annulment Counter-Memorial, ¶¶ 146, citing Award, ¶ 209.

[102] Expert Report of Dr. Aurora Martínez Flórez, July 31, 2013, ("***Expert Report of Dr. Martínez Flórez***") ¶ 34.

[103] Annulment Counter-Memorial, ¶ 146.

[104] Annulment Counter-Memorial, ¶ 146, citing Award, ¶ 220.

103. The Claimants argue that, based on Spanish law, the Tribunal held that "*the powers of attorney granted to King & Spalding were initially, and have continued throughout these proceedings to be, valid*", so that "*Claimants ha*[d] *proved that there was no obligation at Spanish law to produce a new power of attorney in the circumstances of this case*."[105]

104. The Claimants also point out that the insolvency administrators ratified the Claimants' power of attorney by (i) letters from the insolvency administrators of all three Claimants filed on June 16, 2011; (ii) three additional letters, one from each of the three insolvency administrators, submitted with the Claimants' Reply in August 2013; and (iii) public deeds executed by the insolvency administrators, attesting to King & Spalding's powers to act in the arbitration, filed in October 2015. [106]

105. The Tribunal found on this issue that (i) "*the*[se] *public deeds submitted by the court-appointed receivers should be admitted into evidence in the* […arbitration] *proceedings*";[107] (ii) "[t]*he public deeds are relevant to a number of issues before the Tribunal* [… and] *they clearly relate to the question of the validity of King & Spalding's powers of attorney and their authority to represent Claimants in the arbitration*";[108] and (iii) "*the statements made in the public deeds are consistent with the previous statements in evidence from the receivers*."[109]

106. The Claimants' also note the Tribunal's finding that it was reasonable to assume, based on the public disclosure of the Funding Agreement, "*that the re-organization administrators for each of Claimants were fully aware of the Funding Agreement*," and that Burford, given its financial stake in the matter, was aware of the Claimants' insolvency proceedings.[110]

107. With respect to the 2013 Ratification Letters, the Claimants submit that only the Spanish Bankruptcy Law applied to the Arbitration and the Tribunal was therefore correct in

[105] Annulment Counter-Memorial, ¶ 147, citing Award, ¶ 223.
[106] Counter-Memorial, ¶¶ 148-150.
[107] Decision on Provisional Measures, ¶ 172.
[108] Decision on Provisional Measures, ¶ 172.
[109] Decision on Provisional Measures, ¶ 172. Annulment Counter-Memorial, ¶ 150
[110] Annulment Counter-Memorial, ¶ 153.

declining to enforce Spanish Civil Procedure rules which only apply in court and to which neither party to the Treaty had agreed.[111] The Tribunal emphasized in this respect that "[t]*he Spanish Bankruptcy Law does not require any particular form in which the re-organization administrators must appear in arbitral proceedings or ratify the conduct of proceedings*".[112] The Tribunal had also admitted into the record the October 2015 deeds confirming the original June 2011 letter provided by the insolvency administrators.[113]

108. The Tribunal therefore correctly concluded, by applying Spanish Bankruptcy law, that the powers of attorney granted to the Claimants' counsel have always been valid under Spanish law and were not extinguished by the bankruptcy filings.[114] In sum, the Tribunal issued a comprehensive, thoughtful, and correct decision rejecting Argentina's arguments on two separate grounds and did not manifestly exceed its powers on this issue.[115]

c. The Committee's Analysis

109. The thrust of Argentina's argument is that the Tribunal manifestly exceeded its powers by failing to apply the relevant Spanish law rules to the question of the validity of King & Spalding's powers of representation after the three claimant companies versed into receivership at the end of 2010 and at the beginning of 2011. More specifically, the Parties disagree on the consequences of the suspension provided by Article 145 of Spanish Bankruptcy law, and as to whether Articles 48.3 and 52.1 of the same law, as well as Article 1732(3) of the Spanish Civil Code (relating to termination of the mandate), were properly applied.

110. As an initial matter, the Committee agrees that failure to apply the law agreed by the parties may be a basis for annulment for excess of powers. This is because, as rightly pointed out by Christoph Schreuer, "*the provisions on applicable law are essential elements of the*

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[111] *Ibid.,* ¶ 163.

[112] Award, ¶ 217.

[113] Decision on Provisional Measures, ¶ 172.

[114] Annulment Counter-Memorial, ¶¶ 155-158.

[115] *Ibid.,* ¶ 154.

parties' agreement to arbitrate".[116] The Committee also holds that choice of law can be made implicitly, in particular by common reliance on a given law.[117] In the case at hand, both Parties have relied on Spanish law to discuss the question of representation in dispute. As a consequence, a failure by the Tribunal to apply that law may be characterized as an excess of powers. However, because annulment committees do not sit in appeal of the tribunal's decision, a clear distinction needs to be made between non-application of the proper law and a mere error in its application: while a complete disregard of the applicable rule of law may be an excess of power, an incorrect or imperfect interpretation or application of such rule will as a matter of principle not. While the distinction between the two situations may be in practice difficult to draw, the requirement that the excess of power be manifest is of particular relevance to assist committees in deciding whether an award should be annulled. As rightly decided by the *MTD v. Chile ad hoc* committee: "*an award will not escape annulment if the tribunal while purporting to apply the relevant law actually applies another, quite different law. But in such a case the error must be 'manifest', not arguable, and a misapprehension (still less mere disagreement) as to the content of a particular rules is not enough*".[118]

111. As an initial matter, Argentina has put much emphasis[119] on the first sentence of paragraph 222 of the Award, where the Tribunal says that "*in the circumstances of an international arbitration which has been ongoing for a number of years, one must question whether the strict application of the formalities of granting powers of attorney at Spanish law appropriately apply*". Argentina sees that statement as evidence that instead of applying Spanish law, the Tribunal decided to disregard it in favour of a solution of its own. The Committee, however, does not give relevance to that statement. It is unclear to what formalities the Tribunal referred to, and what is exactly meant by their "*strict application*". As any rate, even if that sentence was perhaps unfortunate, it was surely superfluous to substantiate the Tribunal's reasoning. The basis for the Tribunal's decision that the powers of attorney granted to King & Spalding remained valid throughout the arbitration are to be

[116] Commentary, p. 954, ¶ 192.

[117] *Ibid.,* p. 573, ¶ 70.

[118] Decision on Annulment, March 21, 2007, ¶ 47.

[119] Annulment Memorial, ¶¶ 100-101, 225, 258. Annulment Reply, ¶¶ 60, 77.

found elsewhere in the Award. As a consequence, the Committee finds that particular sentence to be irrelevant.

112. The crux of the dispute was whether, in spite of the insolvency proceedings initiated against each of the three claimant parties at the end of 2010 and at the beginning of 2011, and in spite of court decisions made on April 10, 2013 (Autobuses Urbanos), April 22, 2013 (Teinver), and April 23, 2013 (Transportes) to dissolve the three claimant parties, to suspend the representative powers of their legal representatives, and to empower the insolvency administrators to represent the bankruptcy, the Representation Contract and powers of attorney granted by the Claimants to King & Spalding in November 2008 remained valid.

113. The Tribunal's starting point was Article 52 of the Spanish bankruptcy law, according to which "*arbitration proceedings that are pending at the time of the reorganization proceedings declaration shall continue until the award becomes final*".[120] The Tribunal noted however that pursuant to Article 51(2) of that same law, in case of a suspension of the debtor's powers of administration and disposition, the insolvency administrators would have to replace the Claimants in the arbitration with no need of a specific authorization by the court.[121] The Tribunal then noted that the three insolvency administrators each signed an undated letter (which letters were submitted with the Reply in August 2013) ratifying the existing powers of attorneys and stating their intention to appear before the Tribunal. The Tribunal further states that the March 4, 2014 (merits) and November 3, 2015 (provisional measures) hearings were attended by the insolvency administrators Messrs. Arqued, Hernández and Martínez.[122] The Claimants submitted to the Tribunal, on October 22, 2015, the public deeds confirming the capacity of the insolvency administrators.[123]

114. The Tribunal then made a number of findings. First, the Tribunal relied on the opinion of the legal expert witness presented by the Claimants to hold that Article 1732(3) of the

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[120] Award, ¶ 203.

[121] Award, ¶¶ 204-205.

[122] Award, ¶ 208.

[123] *Ibid.*

Spanish Civil Code (which provides that a mandate terminates in case of insolvency or incapacity of the debtor) "*does not apply to contracts like the Representation Agreement*" between the Claimants and King & Spalding.[124] In that same paragraph, the Tribunal also seemed to accept that, although Article 1732(3) does not apply to the Representation Agreement because it is "*a bilateral service agreement*", it may have applied to the power of attorney "*which was granted separately*".[125] Oddly, however, the Tribunal had previously ruled that the Spanish Bankruptcy law should "*primarily*" prevail, as *lex specialis*, over Article 1732.[126] Although these two findings may seem contradictory, the Committee understands that the Tribunal intended to say that whether the Representation contract with King & Spalding and the powers of attorney remained valid or not is an issue that should be resolved by reference to the Bankruptcy law.

115. The Tribunal then held that "*Article 61(2) of the Spanish Bankruptcy law provides that bilateral contracts to which the debtor is a party remain in effect despite the commencement of the re-organization proceedings and their validity is not affected*", that "*the re-organization administrators* […] *may request from the court the termination of a contract if it is deemed in the interests of the insolvency proceedings*", and that "*the re-organization administrators have not requested the termination of the Retainer Agreement between Claimants and King & Spalding*".[127] As a consequence, the Representation Contract was unaffected by the bankruptcy proceedings.

116. The Tribunal went on by rejecting Argentina's contention that the powers of attorney had terminated by effect of Article 48(3) of the Spanish Bankruptcy law, by holding that the provision of said article - according to which the existing powers of attorney are "affected" by the suspension - does not mean that they are terminated, but rather that "*the actions of*

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[124] Award, ¶ 219.
[125] *Ibid.*
[126] Award, ¶ 214.
[127] Award, ¶ 218.

the debtor through its counsel/authorized representative are subject to the approval of the re-organization administrators".[128]

117. The Tribunal held that the powers of attorney were in any event ratified by way of the letters submitted to the Tribunal in August 2013, and decided that the objections raised by Argentina to the legal effects of these letters are "*highly formal and somewhat arbitrary*".[129] In this regard, Argentina has submitted that in Spanish law, these letters could not be executed unilaterally by the insolvency administrators, and should have been authorized by the Court.[130] The Tribunal addressed these arguments by saying that "*the Spanish bankruptcy law does not require any particular form in which the re-organization administrators must appear in arbitral proceedings or ratify the conduct of the proceedings. The only specific instances in which court authorization is required are for the withdrawal, acceptance or settlement of claims against the debtor*".[131] The Tribunal added that, in any event, "*as they have been appointed by the court and regularly appeared before it, it is reasonable to assume that they are not likely to engage into unauthorized action, particularly with respect to the pursuance of this arbitration, which is known to the court*".[132]

118. Again, it is not the Committee's role to act as an appellate body and to assess whether that reasoning was correct in Spanish law. The relevant question here is whether in reaching its conclusion, the Tribunal applied Spanish law. The Committee considers that it did. The reasoning is based on an analysis of the various legal provisions at stake, in view of the legal opinion of a Spanish law professor upon which the Claimants relied. It essentially rests on (i) the Tribunal's analysis of Article 61(2) of the Spanish Bankruptcy law, according to which the Retainer Agreement between the Claimants and King & Spalding was still in force in absence of termination, (ii) the Tribunal's analysis of Article 48(3) of that same law, according to which the powers of attorney had been "*affected or limited*"

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[128] Award, ¶ 220.

[129] Award, ¶ 221.

[130] Award, ¶ 198; Annulment Memorial, ¶ 103.

[131] Award, ¶ 217

[132] Award, ¶ 221.

but not terminated as a consequence of the suspension, and (iii) its finding that said powers had in any event been ratified by way of the undated letters signed by the insolvency administrators and that said ratification was not subject in Spanish law to a specific form. The Tribunal also found that the October 2015 public deeds were relevant to the question of the validity of the King & Spalding's powers of attorney and their authority to represent the Claimants in the arbitration.[133] Irrespective of whether these reasons are correct or convincing, there is no doubt in the eyes of the Committee that in reaching its conclusions, the Tribunal applied Spanish law. As a consequence, there is no manifest excess of powers.

(4) Misappropriation of the SEPI Funds

a. Argentina's Position

119. Argentina points out that under the SPA – which is invoked by the Claimants as the basis of their alleged investment –, Air Comet agreed to contribute USD 50 million as a capital increase and received from SEPI about USD 803 million to be distributed as follows:

a) USD 300 million to pay the liabilities of the Argentine Airlines;
b) USD 205 million to pay any adjustments needed as per the transfer and adjustment balance sheet;
c) USD 248 million to implement an Industrial Plan in the Argentine Airlines; and
d) USD 50 million against the payment of a promissory note payable by Interinvest.[134]

120. Argentina contends that those funds were not used for their intended purpose, that Air Comet failed to make most of the capital contributions it had agreed to make,[135] and that Air Comet breached its undertakings under the SPA in detriment of the Argentine Airlines and the Argentine Republic, and in violation of the principle of good faith.

121. Argentina also argues that in rejecting Argentina's objection to jurisdiction based on the misappropriation of funds received from SEPI and alleged lack of good faith, the Tribunal decided that such facts would be dealt with in the merits phase of the arbitration.[136]

[133] Decision on Provisional Measures, ¶ 172.

[134] Annulment Memorial, ¶¶ 112-114. Annulment Reply, ¶ 82. Argentina's Opening, slide 42.

[135] Annulment Memorial, ¶ 115. Argentina's Opening, slides 43-56, 63-71, 73-81.

[136] Argentina's Opening, slides 87-89.

However, the Tribunal failed to address Argentina's argument that the above-mentioned conduct was a breach of the principle of good faith under international law.[137] The Tribunal also failed to address the failure by Air Comet to use the USD 205 million to pay ARSA's and AUSA's debts or liabilities.[138]

122. To conclude, Argentina contends that "*the undue use of funds contributed by SEPI and the non-compliance with the terms of the SPA breached the principle of good faith under international law. Accordingly, the investment invoked by Claimants could not benefit from the protection of the BIT and such conduct triggered the inadmissibility of the claim under international law. In granting protection to the alleged investment and admitting Claimants' claim, the majority of the Tribunal manifestly exceeded its powers within the meaning of Article 52(1)(b) of the ICSID Convention.*"[139]

b. The Claimants' Position

123. The Claimants submit that the Tribunal did not manifestly exceed its powers in its findings and conclusions regarding how Air Comet used the SEPI funds.[140]

124. The Claimants first note that Argentina was not a party to the SPA, and therefore has no standing to complain about an agreement to which it was extraneous. Any complaint as to the use of funds provided by the SPA should have been raised by SEPI.[141] As found by the Tribunal: "*As in the case of USD 300 million, the evidence indicates that SEPI was aware of how Air Comet was using the USD 248 million intended for the execution or implementation of the Industrial Plan. Apart from applying a penalty of USD 86,957 for failure to supply one airplane, SEPI does not appear to have invoked any contractual remedies against Air Comet for the possible failures to comply with the terms of the SPA.*

[137] Annulment Reply, ¶ 111.
[138] Annulment Memorial, ¶ 139. Argentina's Opening, slides 58-62.
[139] Annulment Reply, ¶ 120.
[140] Annulment Counter-Memorial, ¶¶ 208-224. Annulment Rejoinder, ¶¶ 79-105.
[141] Claimants' Opening, slide109.

Nor did SEPI or the Spanish government seek to revoke the agreement on the basis of possible non-compliance by Air Comet."[142]

125. The Claimants contend that the Tribunal extensively discussed and rejected Argentina's arguments on the misappropriation of funds. The Tribunal first explained in its Decision on Jurisdiction that Air Comet's alleged breaches "*could not affect jurisdiction because they would have only occurred subsequent to Claimants' acquisition of the investment*."[143] Regarding the USD 300 million, the Tribunal observed the there was no doubt that SEPI was aware of how these funds were being used: "*Although Respondent argues that the purchase of ARSA's debt and subrogation to ARSA's creditor's claims was not in compliance with the terms of the SPA, the references above indicate that SEPI was, indeed, aware of the purchase of the debt and subrogation by Air Comet and consented, as found by the Spanish audit court. In these circumstances, it appears that while the acquisition and subrogation may not have been in accordance with the SPA as originally contemplated, the parties subsequently agreed to a different handling of the USD 300 million contributed by SEPI. There is no indication that SEPI ever complained of this or that it sought to annul the SPA on this basis. In fact, SEPI's position before the Tribunal de Cuentas was that this was permitted by the SPA*."[144]

126. As to Argentina's complaint that the USD 248 million contributed by SEPI to carry out the Industrial Plan was not applied to that end, but mostly to operating costs,[145] the Claimants note that SEPI was aware of how the funds were being used, and that such funds were subject to auditing. The Tribunal also found that SEPI would only release each transfer after receiving from PriceWaterhouseCoopers ("**PwC**") a certification confirming that the previous transfer was spent in accordance with the SPA.[146]

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[142] Award, ¶ 300.

[143] Annulment Counter-Memorial, ¶ 110, citing Award, ¶ 267. *See*, Decision on Jurisdiction, ¶¶ 324-28. Claimants' Opening, slide 111.

[144] Award, ¶ 289.

[145] Annulment Memorial, ¶. 126.

[146] Tr. Day 1, 198:20 -201:4.

c. The Committee's Analysis

127. As said above, Argentina's argument is that, because of the alleged breach of the principle of good faith in the use of funds contributed by SEPI and of the non-compliance by Air Comet with the terms of the SPA, "*the investment invoked by Claimants could not benefit from the protection of the BIT and such conduct triggered the inadmissibility of the claim under international law*".[147] The argument, therefore, does not go to the jurisdiction of the Arbitral Tribunal. In fact, as correctly pointed out by the Claimants,[148] the alleged breaches of the SPA all occurred after the acquisition of the investment and could not form the basis for a jurisdictional argument.

128. Argentina's argument is that the misuse of the SEPI funds by Air Comet amounted to a fraud which should have led the Tribunal to dismiss the claim on its merits as inadmissible, and that failing to do so was a manifest excess of powers.[149] Argentina also avers that the Tribunal failed to address its argument relating to the use of the USD 205 million aimed at covering the Airlines' liabilities, and that such omission is also a manifest excess of powers. The Committee will address each of these two arguments in turn.

129. Concerning, first of all, the alleged breach of the principle of good faith, Argentina relies on the award in *Churchill Mining*[150] to submit that the existence of a fraud in the operation of an investment renders an international claim arising from that investment inadmissible. The Committee notes, in this regard, that from Argentina's own argument, the case in *Churchill Mining* was related to frauds and falsifications committed by the investor in the intent to obtain additional mining licenses. The Committee agrees, in this respect, that the fact for an investor to use the investment to commit a fraud to the detriment of the host State may be considered as depriving the investment from the protection granted to it by international law. In the Committee's view, however, not every breach of an obligation, whether or not contractual, is susceptible to be characterized as a fraud in international law. In order for a breach to constitute a fraud, it needs to be wilful, and to have been

[147] Annulment Reply, ¶ 120.

[148] Rejoinder, ¶¶ 80; 109.

[149] Annulment Memorial, ¶ 138.

[150] Annulment Memorial, ¶¶ 136-137.

orchestrated to obtain an undue advantage to the detriment of the host State. In the instant case, Argentina does not explain why the facts in dispute should be considered as such a breach of good faith in international law, why they affected the Airlines, and why they should lead to deprive the investors of the protection afforded to them by the BIT.

130. The Tribunal has, in the Award, carefully analysed the grievances of Argentina with respect to the use of the SEPI funds.

131. As to the use of the USD 300 million which, in accordance with the SPA, had to be used to pay off certain liabilities of the Airlines, Argentina complains that instead of paying off liabilities, Air Comet purchased the debts, subrogated itself in the rights of the creditors, to then transfer them to Interinvest which then turned them into capital contributions, thus increasing its stockholding and thereby lowering that of Argentina in ARSA.[151] The Tribunal found that Air Comet's use of the funds did not violate the SPA and was not in breach of any law.[152] That conclusion was not contradicted by its review of the Spanish criminal proceedings, which appear to be related to allegations of tax evasion to the prejudice of the Spanish treasury.[153] Concerning, in particular, the December 9, 2013 judgment of Criminal Court of Madrid, upon which Argentina relies,[154] The Tribunal found that such judgment had made "*no finding of fraud or harm, as it relates to the actual use of the funds Air Comet received from SEPI, to the airlines, its creditors, or otherwise*".[155]

132. The Committee does not find any reason to question such findings. It is undisputed that, through the assignment of the relevant credits to Air Comet and their subsequent conversion into a capital contribution, the relevant liabilities of ARSA were indeed extinguished. There is no evidence that such conversion ran against the SPA or any other commitment or obligation of Air Comet, and even less that it amounts to a fraud to the

[151] Annulment Reply, ¶ 87.
[152] Award, ¶¶ 263-315.
[153] Annulment Counter-Memorial, ¶ 214.
[154] Annulment Reply, ¶ 92.
[155] Award, ¶ 320 n. 237.

prejudice of Argentina that could entail the inadmissibility of the claim for breach of the principle of good faith in international law.

133. With respect to the allegation that the USD 248 million contributed by SEPI to carry out the industrial plan was not used to that end but to finance operating costs, Argentina provides no explanation as to why this would amount to a fraud to the prejudice of the Airlines.[156] The Tribunal, in this respect, noted that SEPI was aware of the way the funds were used and had approved it.[157]

134. As to the USD 50 million capital contribution, the Tribunal noted that "*neither Party indicate[*d*] that Air Comet was ever found to be in default of its obligations to make the USD 50 million investment, nor that SEPI took any steps under the SPA or otherwise in this regard*".[158] The Tribunal also noted that "*in its report N° 765, the Spanish Audit Court concluded that Air Comet had complied with its obligation to increase the capital of ARSA by USD 50 million (albeit somewhat late)*", and that "*The Tribunal de Cuentas determined that Air Comet paid in cash approximately 25% of the amount on February 19, 2003 and the balance by February 11, 2005*".[159] Argentina has not demonstrated, in addition, why the alleged failure to proceed to the capital contribution would amount, beyond being a breach of the SPA, to a fraud to the prejudice of the Airlines.

135. The Committee now turns to Argentina's argument that the Tribunal failed to address its argument that the USD 205 million contributed by SEPI to cover the Airlines' debts were instead used to pay for operational expenses, and that such failure is a manifest excess of powers.

136. As an initial matter, the Committee considers that while a failure to decide a claim may amount to a manifest excess of powers, the failure to address a factual or legal argument supporting a claim normally does not. As a matter of fact, a tribunal has the obligation to fulfil its mandate, which is to resolve the dispute brought before it by the parties by

[156] Annulment Reply, ¶ 102.
[157] Annulment Counter-Memorial, ¶ 216.
[158] Award, ¶ 304.
[159] Annulment Rejoinder, ¶ 77.

deciding on their respective claims. Failing to do so may therefore amount to a manifest excess of powers. To the contrary, the Tribunal has no obligation to address each and every single argument or sub-argument advanced by the parties in support of their claims.

137. In the instant case, the alleged misuse of the USD 205 million is one of the arguments that Argentina has put forward before the Committee to sustain its claim that the Tribunal's decision with respect to the SEPI fund amounts to a manifest excess of powers. As such, even if the argument had not been addressed, there would be no manifest excess of powers.

138. In any event, as rightly pointed out by the Claimants, the Tribunal did address the question and decided that these sums could be used to cover operational losses.[160] Argentina's argument was also rejected implicitly by the Tribunal's finding that SEPI was generally aware of the use of funds by Air Comet and did not object to it.[161] Finally, there is no explanation on the part of Argentina of the reason why the use of the USD 205 million to cover operational losses instead of debts would constitute a fraud to the detriment of the Airlines and a breach of the principle of good faith under international law.

139. Based on the foregoing, the Committee holds that the Tribunal did not commit a manifest excess of powers in rejecting Argentina's arguments based on the alleged misuse of the SEPI funds.

(5) The July 2008 Agreement

a. Argentina's Position

140. Argentina submits that the only basis for the Tribunal's finding that Argentina breached the BIT was its alleged non-compliance with the July 2008 Agreement.[162] Such contract was concluded between Argentina and Interinvest in the context of the delicate financial

[160] Annulment Counter-Memorial, ¶ 220; Annulment Rejoinder, ¶ 77; Award, ¶ 377.

[161] Award, ¶ 300, fn 178.

[162] Annulment Memorial, ¶ 144.

situation of the Argentine Airlines,[163] and its purpose was to determine the price of the Airlines' shares, which were to be purchased by Argentina.[164]

141. Article 6 of the July 2008 Agreement reads as follows:

> "*ARTICLE 6: The prices for the purchase of the stock interests in AEROLÍNEAS and AUSTRAL shall be determined as follows:*
>
> *(i) The purchase price for AUSTRAL's stock interest shall be determined based on the valuation provided by a valuation entity to be appointed therefor by IV and the valuation to be performed at the request of the STATE OF ARGENTINA*
>
> *(ii) The purchase price for AEROLÍNEAS's stock interest shall be determined based on the valuation provided by a valuation entity to be appointed therefor by IV and the valuation to be performed at the request of the STATE OF ARGENTINA*
>
> *The STATE OF ARGENTINA shall seek the abovementioned valuations from the Appraisal Board, which agency shall assess the value of the airlines as a whole. Should the valuations thus performed yield different results and/or if an agreement cannot be otherwise reached as to the price of the two stock interests, a third valuation shall be sought from an impartial local or foreign entity of international renown specialized in the purchase and sale and/or valuation of international airlines; the valuation thus obtained shall be final and definitive as between the Parties.*
>
> *The valuation shall be performed using the discounted cash flow method. Such future cash flows shall be calculated using the following assumptions: (i) the cost of fuel at its current subsidized value of $1.85 (one Argentine peso and eighty-five cents) per liter plus VAT; said price is to be changed using reference prices and proportionately to price variations in the market; and (ii) the current fare for*

[163] *Ibid.*, ¶ 145.
[164] *Ibid.,* ¶ 146.

domestic flights, modified proportionately to any changes projected for all other costs."[165]

142. The Tribunal noted that "*there had been no agreement on the transfer price for the shares in the Airlines*" and that Interinvest therefore "*request*[ed] *the selection of a third-party valuator, pursuant to the terms of the July 2008 Agreement*."[166] Given the disagreements between Interinvest and the Argentine State, the third valuator was however not appointed. Thereafter, the Argentine Congress enacted a law declaring the shares of the Argentine Airlines of public interest and subject to expropriation.[167]

143. The Tribunal found that the Argentine Republic was liable for breaching the July 2008 Agreement by failing to comply with its obligation to purchase Interinvest's shares in the Argentine Airlines pursuant to the mechanism set forth under Article 6 of the July 2008 Agreement, and that such breach was a breach of the fair and equitable treatment standard established by the BIT[168] and an unjustified measure.[169] The Tribunal also concluded that the expropriation was unlawful, for Argentina failed to perform the procedure established in the July 2008 Agreement and the expropriation of the shares had therefore not been carried out in accordance with the Argentine law.[170]

144. Argentina first submits that the Tribunal had no jurisdiction to base its findings on the July 2008 Agreement, because (i) the Claimants are not party to that contract, and (ii) the breach of the July 2008 Agreement was a contractual breach that could not be elevated to the level of a treaty breach.[171]

145. Argentina further submits that "*the Tribunal manifestly exceeded its powers in completely failing to apply the guidelines it had identified as legal principles applicable to Claimants'*

[165] July 2008 Agreement, Article 6 (**RA-559**).
[166] Annulment Memorial, ¶ 148, citing the Award, ¶ 448.
[167] *Ibid.,* ¶ 148.
[168] Award, ¶ 857.
[169] *Ibid.,* ¶ 925.
[170] Annulment Memorial, ¶ 149.
[171] *Ibid.,* ¶ 174 and 264.

compensation. The Tribunal arbitrarily decided to adopt the valuation submitted by one of the parties to the July 2008 Agreement—the Credit Suisse valuation submitted by Interinvest—[172] *in direct contradiction to the guidelines the Tribunal itself had determined were applicable to the case, i.e. that the value of the shares of Interinvest in the Argentine Airlines was to be assessed in accordance with the valuation methodology set out in Article six of the July 2008 Agreement, by means of a valuation prepared by a third independent valuator specialised in the sector*."[173]

b. The Claimants' Position

146. The Claimants submit that the question of whether a breach of the July 2008 Agreement may *also* cause a violation of the FET standard is a question that pertains to the merits and not to jurisdiction.[174]

147. The Claimants point out that the Tribunal's finding of a violation by Argentina of the FET standard was not only based on its breach of Article 6 of the July 2008 Agreement. It rather had a wider scope and included: "*Respondent's lack of transparency in agreeing to the July 2008 Agreement, passing Law 26,412 which resulted in the TTN applying a valuation methodology that was inconsistent with that agreed to in the July 2008 Agreement and its arbitrary decision to expropriate the investment rather than proceed to a third-party valuation as agreed*."[175]

148. The Claimants submit that other tribunals, such as the *Murphy II* tribunal, found that conduct giving rise to a breach of contract may also breach the FET standard.[176] The Claimants conclude that "*the Tribunal properly and clearly held that Argentina's conduct, including but not limited to its breach of Article 6 of the July 2008 Agreement, violated the FET standard. The Tribunal provided logical and sound reasons for its finding, and fully*

[172] Award, ¶ 1114.
[173] Annulment Reply, ¶ 143
[174] Annulment Counter-Memorial, ¶ 238
[175] *Ibid.,* ¶ 239; Award, ¶ 1010.
[176] Annulment Counter-Memorial, ¶ 240 (footnotes omitted).

addressed Argentina's arguments in this respect. In addition, the Tribunal found Argentina liable under the Treaty on two additional grounds separate from the FET standard."[177]

c. The Committee's Analysis

149. The Committee will first address Argentina's argument that the alleged breach of the July 2008 Agreement was a contract breach on which the Tribunal had no jurisdiction, to then deal with the argument that the Tribunal could not without exceeding its powers assess damages in disregard of the procedure established by that Agreement.

150. Concerning, first of all, the argument that the breach of the July 2008 Agreement was a contract breach falling outside the scope of the Tribunal's jurisdiction, the Committee will as an initial matter note that the Tribunal rejected the arguments made by the Claimants, based on the BIT's MFN clause, to the effect that they would be entitled to rely on an umbrella clause.[178] That is undisputed. The Committee however finds the discussion on this point[179] to be irrelevant to the question whether the Tribunal could without exceeding its powers find that in breaching the July 2008 Agreement, Argentine also breached the BIT.

151. The fact that the Claimants could not rely on an umbrella clause may have been relevant to the question whether a breach of a contractual obligation entered into between the parties could be elevated to the level of a treaty breach. In the case at hand, however, the findings of the Tribunal were based on breaches by Argentina of its treaty obligations, rather than on its contractual conduct. In finding that the refusal by Argentina to comply with Article 6 of the July 2008 Agreement was a breach of the FET standard, the Tribunal noted that Argentina had acted, in so doing, in its capacity as sovereign, and not merely as a contracting party. The Tribunal first noted that "*Argentina's purpose for entering into the July 2008 Agreement was to fulfil its obligation to guarantee the provision and continuity*

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[177] *Ibid.,* ¶ 244.
[178] Award, ¶ 892.
[179] Annulment Memorial, ¶ 177; Annulment Rejoinder, ¶ 136.

of air transportation services in Argentina".[180] The Tribunal concluded that "*the July 2008 Agreement was not simply a commercial agreement*".[181]

152. The July 2008 Agreement was part of the legal framework established by Argentina for the operation of the investment and the possible sale of the Airlines by Interinvest.[182] As such, a breach by Argentina of that contract could also be a breach of Argentina's treaty obligations, irrespective of the existence of an umbrella clause. And this is precisely the conclusion that the Tribunal reached by finding, with respect to the measures following the July 2008 Agreement, that "*Respondent's lack of transparency in agreeing to the July 2008 Agreement, passing Law 26,412 which resulted in the TTN applying a valuation methodology that was inconsistent with that agreed to in the July 2008 Agreement and its arbitrary decision to expropriate the investment rather than to proceed to a third-party valuation as agreed, have all been found to be a breach of the FET obligations*".[183]

153. The Tribunal has therefore not elevated mere contract breaches to the international plane. It has rather found that the facts in dispute, irrespective of whether they were also contract breaches, were inconsistent with the state's international obligations. The Tribunal, to that effect, has considered that the July 2008 Agreement was part of the legal framework applicable to the investment,[184] and that the Claimants had a legitimate expectation that Argentina would act consistently with that legal framework.[185] In so doing, the Tribunal did not exceed its powers. As a matter of fact, a tribunal may without exceeding its powers hold that a breach by a state of its obligations under a contract is also a breach of its international obligations under a treaty. In so doing, a tribunal does not ignore the distinction between contract claims and treaty claims.

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[180] Award, ¶ 854.

[181] *Ibid.*

[182] Award, ¶¶ 435, 778. *Acta Acuerdo* (Agreement) between the Argentine State and Interinvest dated July 21, 2008 ("***July 2008 Agreement***"), Article 3. (**C-190**).

[183] Award, ¶ 1010.

[184] Award, ¶¶ 782, 850.

[185] Award, ¶¶ 850-851, 854.

154. The foregoing also disposes of Argentina's argument that the Tribunal could not base its findings on the July 2008 Agreement because the Claimants were not parties to that contract and had no right to invoke that contract.[186] Although the Claimants were not part to the July 2008 Agreement, the Tribunal found that they had a legitimate expectation that it would be complied with as part of the general legal framework applicable to the investment.[187] Having found that its obligations under the July 2008 Agreement were assumed to fulfil its public obligation to guarantee the provision and continuity of air transportation services in Argentina, and that the Claimants had a legitimate expectation that the July 2008 Agreement would be complied with, the Tribunal could conclude without exceeding its powers that Argentina's refusal to comply with the procedure established by Article 6 of said contract was also a breach of its international obligations.

155. The Committee will now address Argentina's argument that the Tribunal manifestly exceeded its powers by adopting the Credit Suisse valuation as a basis to assess damages. The Tribunal, in this regard, held that "[T]*he Tribunal considers the Credit Suisse valuation to be the most reliable expression of the value of the Airlines as agreed by the Parties under the July 2008 Agreement and the best evidence of the fair market value of the Airlines in late 2008*."[188]

156. According to Argentina, in so doing, the Tribunal disregarded the July 2008 Agreement, upon which it has relied to find Argentina liable for breach of its FET obligations. Because Article 6 of the July 2008 Agreement provided that the price would be established, in case of a disagreement on the valuations submitted by the parties, on the basis on an independent valuation, the Tribunal should have appointed an independent expert to proceed to the valuation.[189] Argentina therefore submits that, in modifying the agreed valuation method, the Tribunal failed to apply the international law principle according to which the damages

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[186] Annulment Memorial, ¶ 186 seq.

[187] Award, ¶¶ 850-851, 854. Annulment Counter-Memorial, ¶ 87.

[188] Annulment Memorial, ¶ 161, citing the Award, ¶ 1112.

[189] Annulment Memorial, ¶ 152.

should replace the parties in the situation in which they would have found themselves in absence of breach, and that by doing so it manifestly exceeded its powers.[190]

157. The argument, however, erroneously assumes that the proper remedy should have been the specific performance of the price fixing mechanism provided by Article 6 of the July 2008 Agreement. However, the Tribunal has rejected the Claimants' argument that specific performance should be ordered, and the Claimants reinstated in their investment.[191] That part of the decision is not challenged by either party. As a consequence, the Tribunal had to assess reparation by equivalent, i.e. by fixing damages corresponding to the fair market value of the shares.

158. The question then becomes a question of the assessment by the Tribunal of the evidence before it, which an annulment committee cannot revisit on the merits. The Tribunal, in this respect, relied on the Credit Suisse valuation not as part of the mechanism established by Article 6, but as reliable evidence of the fair market value of the shares at the time. The Tribunal, in so doing, also relied on three other contemporaneous valuations by PriceWaterHouseCoopers, Deloitte and Morgan Stanley, as well as on Compass Lexecon's adjusted valuation.[192] It held that the fact that Claimants' experts adjusted their model to provide a proxy for the value of AUSA in 2008 assuming no breaches of the Treaty provided a check on the reasonableness of the Credit Suisse valuation.[193] The Tribunal then concluded that the Credit Suisse provided the most reliable valuation and was therefore an acceptable evidence of the fair market value of the shares at the time of the taking.

159. Although a more detailed analysis of the Credit Suisse valuation could perhaps have been provided in the Award, it is not up to the Committee to assess whether that decision was correct and whether the Credit Suisse overvalued the shares. What matters is only whether in the assessment of damages the Tribunal manifestly exceeded its powers by relying on the Credit Suisse report. It did not.

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[190] Annulment Memorial, ¶ 159 seq.

[191] Award, ¶ 1098.

[192] Award, ¶¶ 1107, 1113.

[193] Award ¶ 1113.

160. Based on the foregoing, the Committee concludes that the Tribunal did not exceed its powers in its assessment of damages.

B. SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

(1) Legal Standard

a. Argentina's Position

161. Argentina submits that this ground is concerned with principles of natural justice, and with the integrity and fairness of the arbitral process.[194] Argentina gives some examples of fundamental rules of procedure under Article 52(1)(d) of the ICSID Convention: "*due process, the right of defence, the right of both parties to be heard and to submit their claim or defence by presenting any arguments and evidence in support of their position, the right of each party to properly respond to the arguments and evidence presented by the other party, equality between the parties, deliberation among the members of the tribunal, independence and impartiality of the members of the tribunal, the treatment of evidence, the burden of proof, and the rules on legal standing, among others*."[195]

162. With regard to the seriousness of the departure that is required to entail annulment, Argentina, relying on the *Pey Casado* and *TECO*'s annulment committees' decisions, contends that "*the party applying 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 award from the one it actually rendered*."[196]

b. The Claimants' Position

163. The Claimants submit that this ground of annulment is concerned with the integrity and fairness of the arbitral process.[197] The Claimants contend that the threshold for a procedural violation to constitute a ground of annulment under Article 52(1)(d) of the ICSID

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[194] Annulment Memorial, ¶ 46, citing ICSID's Updated Background Paper on Annulment, ¶ 98 (**AL RA 421**).

[195] Annulment Memorial, ¶ 48.

[196] *Ibid.*, ¶¶ 49- 51.

[197] Counter-Memorial, ¶¶ 117-121.

Convention is very high, and rely on Professor Schreuer's view that: "*Even a serious violation of a rule of procedure would not constitute a ground for annulment if the particular rule was not fundamental. Conversely, the violation of even a fundamental rule could not lead to annulment if the violation was not serious. All of this makes clear that proof of a procedural impropriety in the proceedings before the tribunal will not be enough. In particular, a simple violation of the Arbitration rules is not, by itself, a ground for annulment*."[198]

c. The Committee's Analysis

164. The Committee holds that this ground of annulment applies to protect the integrity and fairness of the proceedings, in particular the fundamental principles of due process, such as the right to be heard, the principle of equal treatment of the parties, and the independence and impartiality of the arbitral tribunal. To the contrary, the ground of serious departure from a fundamental rule of procedure does not allow a party to seek a review of the substance of the award, which would convert an *ad hoc* committee into an appellate body. Only serious matters of procedure can be argued under Article 52(1)(d) of the ICSID Convention.

(2) Exercise of Jurisdiction

a. Argentina's Position

165. Argentina submits that the Tribunal seriously departed from a fundamental rule of procedure by (i) exercising jurisdiction in this proceeding despite the fact that the Claimants did not discharge their burden of proof to show their capacity as investors under the Treaty or their investment in Argentina under the terms of the BIT; (ii) allowing counsel deprived of powers to appear before it; and (iii) allowing Burford, which is not an investor under the BIT, to be the principal beneficiary, together with King & Spalding, of the proceeds of the Award,[199] which in Argentina's view was an evident abuse of process.[200]

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[198] Counter-Memorial, ¶ 117, citing *Schreuer*, **(C-1233)**.

[199] Annulment Memorial, ¶ 194; Annulment Reply, ¶ 166. Argentina's Opening, slide 27.

[200] Annulment Reply, ¶ 169. Argentina's Opening, slide 19.

166. Regarding the first of the above submissions, Argentina asserts (i) that one of the fundamental rules of procedure identified by *ad hoc* committees is "*the treatment of evidence and burden of proof*";[201] (ii) that the Claimants failed to discharge their burden of proof to show their capacity as investors under the Treaty or that their investment in Argentina was protected under the terms of the Treaty;[202] and (iii) that this was also noted by Arbitrator Hossain in his dissenting opinion.[203]

167. Argentina also asserts that the Funding Agreement in this case was based on champerty, which consists in providing funding for an action in return for a share of the proceeds if the action is successful,[204] which may be characterised as an abuse of process,[205] affects the validity of a funding agreement, thereby rendering it unenforceable, and is contrary to international law and the object of the ICSID Convention.[206]

168. Argentina, relying on *Phoenix v. Czech Republic,* submits that arbitral tribunals have the duty not to protect an abuse of the system of international investment protection under the ICSID Convention or bilateral investment treaties.[207]

169. Argentina contends that Burford imposed King & Spalding in the arbitration, which also constitutes an abuse of process.[208]

170. Argentina finally submits that the Funding Agreement releases the Funder from the payment of any sums or costs awarded against the Claimants,[209] which undermines the purity of justice or corrupts justice and must therefore be declared to be contrary to public policy.[210]

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[201] Annulment Memorial, ¶ 195, citing ICSID's Updated Background Paper on Annulment, ¶ 99 (**AL RA 421**).
[202] Annulment Memorial, ¶¶ 194, 197-203; Argentina's Opening, slides 20-22.
[203] Annulment Memorial, ¶ 201; Dissenting Opinion of Kamal Hossain attached to the Award, ¶ 15.
[204] Annulment Memorial, ¶ 206.
[205] Annulment Reply, ¶ 170; Argentina's Opening, slides 34-35.
[206] Annulment Memorial, ¶ 207.
[207] Argentina's Opening, slide 30.
[208] Annulment Memorial, ¶ 214; Argentina's Opening, slides 35-36.
[209] Annulment Memorial, ¶ 217; see also, Funding Agreement, clause 2.4 (**RA 160**); Argentina's Opening, slide 34.
[210] Annulment Memorial, ¶ 218.

b. The Claimants' Position

171. The Claimants refute Argentina's submission that the Tribunal seriously departed from a fundamental rule of procedure when affirming jurisdiction over the underlying dispute.

172. Regarding Argentina's argument that the Tribunal violated Argentina's due process rights when it rejected its objection concerning the absence of a protected investment, the Claimants submit that this argument does not involve any question of "due process" because Argentina's submissions were thoroughly addressed by the Tribunal in its Decision on Jurisdiction.[211]

173. As to Argentina's submission that the Tribunal seriously departed from a fundamental rule of procedure by failing to refrain from benefiting Burford under the Funding Agreement, the Claimants contend that the Tribunal did not take and did not have to take any position on the validity of the Funding Agreement.[212]

c. The Committee's Analysis

174. The Committee will first address Argentina's argument that the Tribunal's jurisdictional findings were a serious departure from the rules applicable to the burden of proof. The Committee will then deal with Argentina's arguments regarding the lack of powers of King & Spalding, and with the Funding Agreement and the role of Burford.

175. Concerning the argument relating to the burden of proof, the Committee considers, first of all, that an annulment committee has no powers to revisit the assessment of evidence made by the tribunal. Pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility as well as of the probative value of the evidence, and it is not up to an annulment committee to second-guess its findings in this regard. As rightly held by the *ad hoc* Committee in *CDC v. Seychelles*, an error in the tribunal's appreciation of the evidence does not in itself constitute a ground for annulment.[213]

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[211] Annulment Counter-Memorial, ¶¶ 198-202.

[212] Annulment Counter-Memorial, ¶¶ 203-204.

[213] *CDC,* ¶¶ 59-61. See also *Schreuer*, ¶¶ 52, 330-331.

176. Argentina sustains that the Claimants did not discharge their burden of proving their quality of investors and the existence of an investment under the BIT. As an initial matter, Argentina does not explain which fundamental rule of procedure would have been breached by the Tribunal in assessing the Claimants' arguments in this regard. There does not seem to have been any substantial difference between the Parties as to the facts that were relevant to the assessment of the Tribunal's jurisdiction. The factual matrix was essentially agreed. The matters in dispute were therefore of a legal nature, and essentially bore on the interpretation of Article 1 of the BIT (and whether indirect ownership of the shares deprived the Claimants to claim the existence of an investment), on the objective criteria for the existence of an investment, and on the arguments relating to the lack of powers of King & Spalding and the existence of funding on the part of Burford. On each of these matters, the Claimants put forward their arguments, with the support of legal evidence. The Tribunal found these arguments to be convincing. There was therefore no reversal of the burden of proof. Argentina considers that the Tribunal erred in its assessment of the legal questions involved by its jurisdictional objections. However, it is not up to an annulment committee to review the tribunal's assessment of the evidence.

177. Based on the foregoing, the Committee finds that there was no serious departure from a fundamental rule of procedure in the Tribunal's jurisdictional findings.

(3) Lack of Capacity of the Claimants' Counsel

a. Argentina's Position

178. Argentina contends that "*in considering that King & Spalding's attorneys had capacity of representation for the arbitration proceeding, following the suspension of the Claimant companies' management and disposition powers and their replacement by the respective trustees in insolvency, the majority of the Tribunal acted in breach of basic standing and representation principles. This amounts to a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention*."[214]

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[214] Annulment Reply, ¶ 177. *See also*, Annulment Memorial, ¶¶ 220-227 and Reply, ¶¶ 177-182.

b. The Claimants' Position

179. The Claimants submit that the argument is no more than an attempt to review the Tribunal's findings on the matters in dispute, which is not within the powers of an annulment committee.[215] In addition, Argentina has not established whether the principles of representation relied upon by Argentina are a fundamental rule of procedure under Article 52(1)(d), or that the alleged departure was a serious one.[216]

c. The Committee's Analysis

180. Argentina avers that the Tribunal's decision that King & Spalding had valid powers of attorney to represent the Claimants is a serious departure from a fundamental rule of procedure.[217] The Committee of course accepts that false representation may be a breach of a fundamental rule of procedure. Allowing a person that is deprived of powers to purportedly represent a party may be a procedural breach entailing the annulment of the award. To the contrary, a mere procedural irregularity in the release of a power of attorney should not, under Article 52(1)(d), result in the annulment of the award.

181. In the case at hand, Argentina's complaints are formal in nature. The will of the insolvency administrators to be represented by King & Spalding in the arbitration has clearly been confirmed in the 2013 letters. The Committee has no reason to doubt that these letters are authentic and that they express the genuine intention of their authors. The insolvency administrators were aware of the arbitration and of the fact that King & Spalding was representing them, and they did not object to that situation or appoint another counsel; to the contrary, they even appeared to several hearings in the arbitration in the presence of the King & Spalding team. There is therefore no doubt, in the eyes of the Committee, that the insolvency administrators intended to be represented by King & Spalding in the arbitration.

182. The alleged irregularities, in reality, lie in the fact that King & Spalding should, according to Argentina, have obtained fresh powers of attorney from the insolvency administrators after the dissolution of each of the claimant parties, and that the 2013 letters did purportedly

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[215] Annulment Rejoinder, ¶ 69.
[216] *Ibid.,* ¶ 71.
[217] Annulment Memorial, ¶ 220 seq.

not comply with requirements of form established by Spanish law. In the Committee's view, in absence of any evidence that the insolvency administrators did not intend to be represented in the arbitration by King & Spalding, a failure to comply with purported requirements of form established by Spanish law does not establish a departure from a fundamental rule of procedure.

(4) Funding Agreement and role of Burford

a. Argentina's Position

183. Argentina first submits that the Funding Agreement amounts to a substitution of Burford as the real party in the arbitration, and that agreements based on principles of *champerty* and *maintenance* are an abuse of process that is contrary to public policy,[218] as well as to international law and the ICSID Convention.[219] According to Argentina, the Tribunal failed to verify that the Funding Agreement complied with good practices applicable to third-party funding, so as to avoid any situation of conflicts of interest and the improper exercise of an undue control on the arbitration.[220] As a consequence, the Tribunal's decision to take jurisdiction in spite of the illegal Funding Agreement was a serious departure from a fundamental rule of procedure.[221]

b. The Claimants' Position

184. The Claimants object that the Tribunal did not have to take any position on the validity of the Funding Agreement, which is irrelevant to the resolution of the dispute between the Claimants and Argentina.[222] The Claimants also submit that Argentina failed to identify the fundamental rule of procedure at issue[223] and that there is no evidence that Burford exercised any control on the arbitration.[224]

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[218] Annulment Memorial, ¶ 217.
[219] Annulment Memorial, ¶¶ 205-208.
[220] Annulment Memorial, ¶¶ 209-217.
[221] Annulment Memorial, ¶ 219.
[222] Annulment Rejoinder, ¶ 46.
[223] *Ibid.,* ¶ 48.
[224] *Ibid.,* ¶ 49.

c. The Committee's Analysis

185. The thrust of Argentina's argument is that the Funding Agreement is illegal, first because it implied a transfer to Burford of the Claimants' interest in the arbitration,[225] and second because it allowed Burford to exercise control over the arbitration in disregard of recognized good practices aimed at avoiding conflicts of interest.[226]

186. As an initial matter, the Committee considers that the fact that the Funding Agreement may be contrary to public policy[227] or to international law and to the object and purposes of the ICSID Convention[228] would not necessarily be in itself sufficient to entail annulment under Article 52(1)(d) of the ICSID Convention. In order for the Committee to annul the Award on that ground, Argentina needs to identify a serious departure from a fundamental rule of procedure in the arbitration proceedings. The simple fact that the Funding Agreement may be illegal or contrary to public policy does not necessarily imply a serious departure from a fundamental rule of procedure.

187. The Committee also finds that Argentina has not demonstrated that the prohibition of *maintenance* and *champerty* applies in the context of a treaty-based ICSID arbitration. Nor has Argentina demonstrated that the best practices for third-party funding, such as those identified by Prof Catherine Kessedjian[229] or the Code of Conduct of litigation funders,[230] are a fundamental rule of procedure that should mandatorily be complied with in an ICSID arbitration. The Committee accepts that disregard on the part of the funded party and the funder of recognized good practices may in certain egregious cases be relevant to the assessment of whether a fundamental rule of procedure applying to the arbitration was breached. However, the applicant still has the onus of identifying the rule of procedure

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[225] Annulment Memorial, ¶¶ 205 and 209.

[226] *Ibid.*, ¶¶ 211-217.

[227] *Ibid.*, ¶ 218.

[228] *Ibid.*, ¶ 207.

[229] *Ibid.*, ¶ 211.

[230] *Ibid.*, ¶¶ 212-215.

applying to the arbitration that has so been breached. Argentina did not identify any such breach in this case.

188. As to the allegation that the Funding Agreement entailed a transfer of the rights in dispute in the arbitration,[231] so that Burford would have become the real claimant party,[232] the Committee considers that it is a fundamental rule of procedure that a party may not appear on behalf of another without disclosing the representation and being empowered to that effect. As a matter of fact, a party is entitled to know against whom it is litigating.

189. In the instant case, however, the Committee already found that the Funding Agreement did not operate a transfer to Burford of the rights in dispute in the arbitration.[233] Article 3.1 of the Funding Agreement states that its purpose is to "*enable the Claimant to pursue its Claim*", thus confirming the Claimants' ownership of the claim. Article 3.2 further states that "*the Claimant may at any time without the consent of the Funder settle the claim for any amount or on any basis*". Also, Article 6 of the Funding Agreement confirms that the Claimants will receive the proceeds of the Award ("*the Claimant agrees to pay to the Funder the Recovery Amount immediately following receipt of all or any part of the Award*"), which confirms that the Claimants continued to own the claims in dispute at all times during the arbitration. In sum, there is nothing in the Funding Agreement suggesting that the rights in dispute would have been transferred to the Funder. The fact that the Claimants agreed to pay to Burford the Recovery Amount (as defined in Schedule 2 to the Funding Agreement), i.e. a portion of the proceeds of the Award, does not mean that Burford had acquired ownership of the rights in dispute, and even less that it had become the real party to the arbitration. In conclusion, the Funding Agreement has not deprived the Claimants of their standing to pursue their claims.

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[231] *Ibid.,* ¶ 209.

[232] *Ibid.,* ¶ 205.

[233] *See* ¶ 92 *Supra*.

190. Argentina contends, in this regard, that the Funding Agreement improperly imposed the presence as counsel of King & Spalding, which would amount to exercising control over the dispute.[234]

191. Article 5.1 of the Funding Agreement provides, in this regard, that "*the Claimant, (having taken or had* (sic) *the opportunity to take legal advice for itself in relation to this agreement* […] *and all other arrangements between itself), the Funder and the Nominated Lawyers, shall promptly appoint the Nominated Lawyers to prepare the Claim, submit the Claim to the Arbitration, prosecute the arbitration proceedings and enforce and recover any resulting Award favourable to the Claimant*". The Nominated Lawyers are King & Spalding.

192. As an initial matter, it is to be noted that the presence of King & Spalding as the Claimants' counsel in the case predates the Funding Agreement. There can therefore be no doubt that King & Spalding was selected by the Claimants, and not by Burford. The Committee, in addition, fails to see why the inclusion in a funding agreement of provisions identifying the counsel in charge of representing the funded party, and providing that there shall be no non-agreed change in representation,[235] would amount to an abusive control of the funder on the case. As a matter of fact, it seems entirely reasonable that funding be released in consideration of an agreement between the funder and the funded party on the identity of counsel in charge of the case. Also, the fact that the funded party assumes the obligation to instruct the agreed counsel does not mean that such counsel would cease to represent that funded party, or that that the funder would in any way take control over the case. In any event, Argentina failed to identify the fundamental rule of procedure that these provisions of the Funding Agreement would offend.

193. Argentina further contends that the Funding Agreement resulted into an undue interference[236] in the arbitration by Burford. Argentina relies,[237] in this regard, on the fact

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[234] Annulment Memorial, ¶ 274.
[235] Funding Agreement, Art. 6.3.
[236] Annulment Memorial, ¶ 216.
[237] Annulment Memorial, ¶ 215.

that the Funding Agreement provides for the Claimants' obligation to accept a settlement agreement at certain conditions,[238] that the Funding Agreement establishes a duty of cooperation,[239] on the existence of limitations to the Claimants' right to initiate other legal proceedings,[240] and on the fact that Burford had a right of access to information relating to the case.[241]

194. Argentina, again, does not identify the fundamental rule of procedure that these provisions of the Funding Agreement would breach. As said above, the Code of Conduct of the Litigation Funders Association is not a fundamental rule of procedure in an ICSID proceeding. Nor are the opinion of Prof. Catherine Kessedjian on funding good practices or the ruling of the Paris Bar referred to by Argentina.[242] In addition, Argentina does not show that any of the provisions of the Funding Agreement it criticizes could amount in any way to an improper interference by Burford in the arbitration. Art. 3.2 essentially provides for an agreement between the Funder and the Claimants that any settlement agreement for an amount at least equal to USD 250 million shall be accepted with no need of a further agreement on the part of the Claimants. This is no more than an agreement between the parties to the Funding Agreement on what a reasonable settlement amount would be. The Committee does not find in Argentina's case any demonstration that such an agreement deprives the Claimants of their control over the case. Likewise, the provisions relating to the Claimants' duty of cooperation[243] essentially aim at ensuring that the Claimants will provide King & Spalding with the necessary support and information for the claim to succeed. If anything, these provisions demonstrate that King & Spalding was at all times being instructed by the Claimants, not by Burford. The fact that the Claimants undertook not to initiate other legal proceedings that could prejudice the arbitration also seems to be entirely reasonable. Finally, the Committee fails to understand why the Funder's right to

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[238] Funding Agreement, Art. 3.2 *in fine*.
[239] *Ibid.,* Art. 4.1.
[240] *Ibid.,* Art. 4.3.
[241] *Ibid.,* Art. 12.1.
[242] Annulment Memorial, ¶ 216.
[243] Funding Agreement, Art. 4.1 and 4.2.

receive information relating to the case would amount into an impermissible interference in the conduct of the Claimants' defence by King & Spalding.

195. Finally, Argentina has referred to the possibility that the Funding Agreement would result in conflicts of interest between King & Spalding and the Funder.[244] Argentina, however did not specify to what conflicts of interests it referred to, and why they should be relevant to the decision of the Committee. There is indeed no demonstration whatsoever by Argentina of any conflict of interest arising from the Funding Agreement, involving either the Claimants, King & Spalding or any member of the Tribunal.

196. In sum, Argentina has not identified any fundamental rule of procedure that would be inconsistent with the Funding Agreement. It has also not provided any demonstration of the reason why the Funding Agreement amounted to an improper or abusive control on the case by Burford. Based on the foregoing, the Committee concludes that the Tribunal did not depart from any fundamental rule of procedure with respect of the Funding Agreement and the role of Burford.

(5) Misappropriation of Funds Received from SEPI

a. Argentina's Position

197. Argentina submits that the Tribunal seriously departed from a fundamental rule of procedure by granting protection to the investment in spite of the improper use by Air Comet of funds received from SEPI.[245] Argentina, in this respect, makes two arguments. First, the Tribunal reversed the burden of proof regarding the capital increase of USD 50 million by imposing on Argentina the burden of proving the Claimants' investment.[246] Second, the Tribunal failed to deal with its argument relating to the misuse of USD 205 million received from SEPI for the payment of debts of the Airlines.[247]

[244] Annulment Memorial, ¶¶ 212-213; Argentina's Opening, slide 35.
[245] Annulment Memorial, ¶¶ 228-237; Annulment Reply, ¶¶ 183-191.
[246] Annulment Memorial, ¶¶ 229, 232; Argentina's Opening, slides, 104-106.
[247] Annulment Memorial, ¶ 236.

b. The Claimants' Position

198. The Claimants point out that the Tribunal explained in its Decision on Jurisdiction and in the Award that Air Comet's alleged breaches could not affect jurisdiction because they would have occurred subsequent to the Claimants' acquisition of the investment.[248] The Claimants also aver that the Tribunal dealt in the Award with all the issues relating to the use of funds provided by SEPI, and did not reverse the burden of proof concerning the USD 50 million capital contribution.[249]

c. The Committee's Analysis

199. In the Committee's views, the arguments raised by Argentina concerning the misappropriation of the SEPI funds do not establish a ground for annulment for breach of a fundamental rule of procedure. Argentina's argument rather goes to the assessment of the evidence. An annulment committee has no powers to revisit the assessment of evidence made by the tribunal. Pursuant to Arbitration Rule 34(1), the tribunal is the judge of the admissibility as well as of the probative value of the evidence, and it is not up to an annulment committee to second-guess its findings in this regard. As a consequence, as said above,[250] an error in the assessment of the evidence is no ground for annulment under Article 52.

200. Argentina first claims that the Tribunal reversed the burden of proof with respect to the USD 50 million capital contribution. In *Klöckner II*, the *ad hoc* Committee found that the burden of evidence is a procedural rather than a substantive issue, and that a reversal of the burden of proof may therefore amount to a departure from a fundamental rule of procedure.[251] In such a case, however, the departure must also be serious, meaning that it needs to have seriously affected the other party's right to present its case. At any rate, the

[248] Annulment Counter-Memorial, ¶ 210. See also, Award, ¶ 267; and Decision on Jurisdiction, ¶¶ 324-328.

[249] Annulment Rejoinder, ¶¶ 107-108.

[250] *See* ¶ 174 *supra.*

[251] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 ("***Klöckner II***"), Decision on Annulment, May 17, 1990, ¶ 6.80, unpublished and quoted in *Schreuer*, 52.327.

Committee does not need to opine on whether, as a general matter, a reversal of the burden of proof may entail annulment, for in this case it is clear that there was no such reversal.

201. Argentina refers to paragraphs 303 and 305 of the Award to submit that there was a reversal of the burden of proof with respect to this matter.[252] At paragraph 303 of the Award (and footnote 202), however, the Tribunal makes clear reference to the arguments and evidence put forward by the Claimants to submit that contributions were made. Based on that evidence, the Tribunal found that "*Respondent has failed to demonstrate the alleged breach of the SPA and that Claimants made additional capital contributions to the Airlines after their initial investment*".[253] The Tribunal, as a consequence, reached its conclusion on the basis on arguments and evidence put forward by the Claimants. There was no reversal of the burden of proof.

202. Argentina also makes the argument that the Tribunal failed to address its arguments relating to the misuse of USD 205 million provided by SEPI to Air Comet. The Committee has however already decided that a tribunal has no obligation to address each and every single argument advanced by the parties in support of their claims, and that a failure to address the alleged misuse of the USD 205 million would not amount to a manifest excess of powers.[254] For the same reasons, the same argument cannot serve as a basis for annulment for serious departure from a fundamental rule of procedure. The Committee has also found[255] that, in any event, the Tribunal did address the question and decided, explicitly and implicitly, that these sums could validly have been used to cover operational losses.[256]

203. Based on the foregoing, the Committee decides that the Tribunal did not depart from a fundamental rule of procedure in its findings relating to the SEPI funds.

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[252] Annulment Memorial, ¶ 232.
[253] Award, ¶ 305.
[254] *See* ¶¶ 135, 137 *supra*.
[255] *See* ¶¶ 138-139 *supra*.
[256] Award, ¶ 377.

C. FAILURE TO STATE THE REASONS ON WHICH THE AWARD IS BASED

204. Argentina alleges (i) that the Tribunal failed to provide reasons with respect to its findings as to the existence of an investment,[257] (ii) that the Tribunal's reasoning is contradictory with respect to the question of the validity of the powers of attorney,[258] as well as (iii) with respect to the SEPI funds,[259] and that (iv) it failed to express reasons regarding the international law principles on good faith.[260] Argentina also relies on Article 52(1)(e) concerning the alleged failure to provide reasons on the use of the USD 205 million received from SEPI.[261] Argentina then submits that the Tribunal failed to express reasons or expressed contradictory reasons with regard to the July 2008 Agreement,[262] as well as to its assessment of damages.[263]

(1) Legal Standard

a. Argentina's Position

205. Argentina avers that the requirement that tribunals state the reasons for their decisions is an essential aspect of the ICSID arbitration.[264] In this regard, Argentina cites the *Tidewater* annulment committee, according to which "… [t]*he legitimacy of an arbitral decision to invalidate a sovereign act would be severely undermined if the tribunal did not have to explain why the act contradicts the law*."[265]

206. Argentina submits that annulment committees have considered as a ground for annulment under Article 52(1)(e), amongst others: a total absence of reasons, incoherent reasons or reasons that do not allow to understand the solution, frivolous, contradictory, insufficient

[257] Annulment Memorial, ¶¶ 241, 242.
[258] *Ibid.,* ¶ 255.
[259] *Ibid.,* ¶¶ 262, 264.
[260] *Ibid.,* ¶ 268.
[261] *Ibid.,* ¶ 271.
[262] *Ibid.,* ¶ 279.
[263] *Ibid.,* ¶¶ 295-296; 308.
[264] Annulment Memorial, ¶ 52.
[265] Annulment Memorial, ¶ 53, citing *Tidewater,* Decision on Annulment, ¶ 165 (**AL RA 419**).

or inadequate reasons, the failure to deal with a question that may affect the final decision of that tribunal and even the failure to address certain relevant evidence.

207. Finally, Argentina contends that in the presence of a failure to state reasons, an annulment committee cannot imagine or make up what could have been the tribunal's reasons, and should therefore annul the award.[266]

b. The Claimants' Position

208. The Claimants submit that, as held by many annulment committees and emphasized by commentators, the requirement to state reasons is intended to enable readers to understand and follow the reasoning of the tribunal.[267] Failure to state reasons therefore requires "*a finding that the tribunal failed to provide any reasons at all or, at a minimum, provided reasons so extremely flawed that a good-faith reader cannot follow the reasoning in the award through its conclusion*."[268] Finally, tribunals have no duty to discuss each and every question raised by the parties and must be allowed a degree of discretion regarding how they express their reasoning.[269]

c. The Committee's Analysis

209. The Committee considers, consistently with many committees having addressed arguments based on Article 52(1)(e),[270] that Article 52(1)(e) expresses the minimum requirement that a good faith reader of the award can understand the motives that led the Tribunal to adopt its decisions. In assessing whether that is the case, the award must be considered in its entirety. The mere fact that reasons are unclear or imperfectly expressed is therefore insufficient to annul an award. Likewise, contradictory reasons may only entail annulment

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[266] Annulment Memorial, ¶¶ 60-61.

[267] Annulment Counter-Memorial, ¶¶ 122-123.

[268] Annulment Counter-Memorial, ¶ 125.

[269] Annulment Counter-Memorial, ¶¶ 129-130.

[270] *See, e.g., MINE,* ¶ 5.08-5.09, (**AL RA 418**); *Vivendi I,* ¶ 64, **(C-403)**; *Wena*, Decision on Annulment, ¶¶ 79-81, **(C-621)**; *CDC* ¶¶ 70-75, (**AL RA 420 *bis***); *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 ("***Fraport***"), Decision on Annulment, December 23, 2010 ¶ 277, (**AL RA 145**); *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on Annulment, , December 10, 2010 ¶ 355 (**AL RA 446**).

if the contradiction is such that it becomes impossible to understand the motives that led such tribunal to adopt its solution.

210. The Committee also agrees with the Claimants that a tribunal has no duty to follow the parties in the detail of their arguments, and that the sole fact of failing to address one or more of the same does not in itself entail annulment, unless the argument in question was so important that it would clearly have been determinative of the outcome. Likewise, a tribunal has no duty to address in its award all the evidence that is in the record, and failure to do so does not entail annulment unless the evidence that such tribunal failed to address was manifestly so important as to change the outcome of the arbitration. Apart from that situation, it is not the role of a Committee to step into the shoes of an arbitrator and engage into speculation as to the relevance that a piece of evidence that a tribunal did not address would have had on the award.

211. Finally, the control of the existence of reasons is exclusive of any review of the award on the merits, and a committee may not annul an award for failure to provide reasons on the basis that the reasoning is incorrect in fact or in law.

(2) Jurisdictional finding concerning the existence of an investment

a. Argentina's Position

212. Argentina submits that the Tribunal failed to explain how the Claimants' shareholdings in the Spanish company Air Comet could be considered to be assets in Argentina, and how Air Comet's shareholdings in Interinvest could be considered to be assets acquired by the Claimants, in accordance with the definition of investment under the Argentina-Spain BIT and the ICSID Convention.[271]

b. The Claimants' Position

213. The Claimants submit that the Award did not fail to state the reasons on which the Tribunal supported its finding that the Claimants had standing to bring the Arbitration. The Tribunal

[271] Annulment Memorial, ¶ 249; Reply, ¶ 194.

explained its reasons on this issue clearly and coherently across more than 30 paragraphs, some of which are cited in paragraph 182 of the Claimants' Counter-Memorial.[272]

214. The Claimants also contend that the Tribunal dedicated several pages in the Decision on Jurisdiction and in the Award explaining and describing the Claimants' various "investments" in Argentina, and they provide a summary of the Tribunal's reasoning and findings on this issue.[273]

c. *The Committee's Analysis*

215. Contrary to Argentina's averment, the Tribunal's decision as to the existence of an investment and of an investor under the BIT is reasoned. The Tribunal explained why the Claimants qualified as investors under the BIT.[274] The Tribunal also explained, at paragraphs 208 to 232 of the Decision on Jurisdiction, why in its view Article I(2) of the BIT protected not only investments directly made in Argentina, but also indirect investments. The Tribunal also discussed in the Award whether the objective requirements of contribution and risk were met.[275] The reasoning followed by the Tribunal is exempt of contradictions. Argentina says that the Tribunal failed to apply the Vienna Convention in its interpretation of Article I(2) of the BIT.[276] But what matters in the context of Article 52(1)(e) is that there is an understandable explanation of how the Tribunal reached its conclusion. There is no failure to provide reasons unless such failure makes the decision impossible to understand, which is not the case here.

216. Argentina also complains that the Tribunal relied on a decision made on the basis of another bilateral treaty.[277] However, such a circumstance does not constitute a failure to state reasons.

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[272] Annulment Counter-Memorial, ¶ 178-184.
[273] Annulment Counter-Memorial, ¶ 185.
[274] Decision on Jurisdiction, ¶¶ 207, 214, 221-32.
[275] Award, ¶¶ 250-57, 267, 315, 373, 381.
[276] Annulment Memorial, ¶¶ 239; 246.
[277] Annulment Memorial, ¶ 244.

217. Based on the foregoing, the Committee finds that the Tribunal did not fail to provide reasons in its jurisdictional findings.

(3) Lack of Capacity of the Claimants' Counsel

a. Argentina's Position

218. Argentina submits that the Tribunal contradicted itself in first accepting that Spanish law was applicable to King & Spalding's powers of attorney, to then ignore that same law that it had identified as applicable.[278]

b. The Claimants' Position

219. The Claimants' position on this issue is reflected under paragraphs 101-108 *supra.*

c. The Committee's Analysis

220. The Committee has already addressed Argentina's argument in the context of the discussion on manifest excess of powers.

221. At paragraph 118 of this Decision, the Committee found that the Tribunal's reasoning on the validity of the powers of attorney was "*based on an analysis of the various legal provisions at stake, in view of the legal opinion of a Spanish law professor upon which the Claimants relied*", and that the Tribunal's findings rested "*on (i) the Tribunal's analysis of Article 61(2) of the Spanish Bankruptcy law, according to which the Retainer Agreement between the Claimants and King & Spalding was still in force in absence of termination, (ii) the Tribunal's analysis of Article 48(3) of that same law, according to which the powers of attorney had been "affected or limited" but not terminated as a consequence of the suspension, and (iii) its finding that said powers had in any event been ratified by way of the undated letters signed by the insolvency administrators and that said ratification was not subject in Spanish law to a specific form*". The Committee also noted that "*[t]he Tribunal also found that the October 2015 public deeds were relevant to the question of the validity of the King & Spalding's powers of attorney and their authority to represent*

[278] Memorial, ¶¶ 254-261. Reply, ¶¶ 207-217.

the Claimants in the arbitration."[279] In the eyes of the Committee, these conclusions are reasoned and are not contradictory.

(4) Misappropriation of Funds Received from SEPI

a. Argentina's Position

222. Argentina first submits that the Tribunal contradicted itself by, on the one side, stating that the Claimants acknowledged that Air Comet did not pay the entirety of the USD 50 million capital contribution and, on the other side, finding that Argentina had failed to prove that Air Comet breached the SPA.[280] Argentina also avers,[281] with respect to the USD 300 million funds, that the Tribunal also contradicted itself by, on the one hand, acknowledging that the acquisition and subrogation of the debt had not been made in accordance with the SPA and, on the other, holding that "*there is no basis to conclude that the alleged non-compliance with the terms of the SPA has been made out nor that any deviation from the original terms of the SPA would provide a basis for finding that the transaction was illegal or would justify denying jurisdiction on the basis that the investment was not made in accordance with Argentina's legislation*".[282] Finally, Argentina complains that the Tribunal failed to address its argument relating to the USD 205 million funds.

b. The Claimants' Position

223. The Claimants essentially submit that SEPI never complained about the use of the funds under the SPA, and that there was no evidence that this matter was relevant to the jurisdiction or to the merits. The Tribunal's decision had clear record support, even if it was not stated so expressly.[283]

224. Regarding Argentina's complaint that the Tribunal "*did not analyse or settle the issue concerning the use of the USD 205 million contributed to SEPI*",[284] the Claimants note that

[279] Decision on Provisional Measures, ¶ 172.
[280] Annulment Memorial, ¶ 263.
[281] *Ibid.,* ¶ 264.
[282] Award, ¶ 289.
[283] Tr. Day 1, 202:22-203:7.
[284] Claimants' Opening, slide 128, citing Annulment Reply, ¶ 96.

such funds were principally used for leasing and operational expenses,[285] and submit that the use of those funds were also subject to auditing by PriceWaterHouseCoopers under the terms of the SPA.

225. The Claimants contend that Argentina had the remedy for this issue: it could have sought a supplementary decision under Article 49(2) of the ICSID Convention and Arbitration Rule 49, but it chose not to avail itself of that remedy, and it cannot now seek annulment under those same grounds here.[286]

c. *The Committee's Analysis*

226. As an initial matter, the Committee notes that the Tribunal devoted no less than fifteen pages of its Award[287] to discuss in detail Argentina's averments concerning the use of the SEPI funds. In view of the Committee, in so doing, the Tribunal has provided a comprehensive and detailed answer to Argentina's arguments, which generally satisfies the requirement under Article 48(3) of the ICSID Convention that the Award be reasoned. The Tribunal had no duty to follow the Parties in the detail of their case and a failure to address each and every single argument put before it does not in itself amount to a failure to provide reasons. The Committee will now address the two specific complaints articulated by Argentina under Article 52(1)(e) of the Convention.

227. Concerning first of all the argument relating to the use of the USD 50 million contribution, there is no contradiction in the Tribunal's reasoning. The Tribunal's conclusion that "*the Respondent has failed to demonstrate the alleged breach of the SPA*"[288] was based on its earlier finding that "*neither Party indicates that Air Comet was ever found to be in default of its obligation to make the USD 50 million investment, nor that SEPI took any steps under the SPA or otherwise in this regard*", and that "*the Spanish Audit Court concluded that Air Comet had complied with its obligation to increase the capital of ARSA by USD 50 million (albeit somewhat late). The Tribunal de Cuentas determined that Air Comet paid in cash*

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[285] Claimants' Opening, slide 129, citing Rejoinder on Jurisdiction, ¶¶ 202, 212.
[286] Claimants' Opening, slide 131. Tr. Day 1, 203:8-203: 13.
[287] Award, pp. 69-84.
[288] Award, ¶ 305.

approximatively 25% of the amount on February 9, 2003 and the balance by February 11, 2005".[289] The Tribunal therefore explained that its finding that no breach occurred with regard to the USD 50 million payment was based on the fact that SEPI never complained about any breach, and that the Spanish Audit Court had found that the obligations provided by the SPA had been complied with.

228. As concerns the USD 300 million funds, contrary to Argentina's averment,[290] the Tribunal did not acknowledge that the acquisition and subrogation had not taken place in accordance with the SPA. The exact words of the Tribunal are that "*while the acquisition and subrogation may not have been in accordance with the SPA as originally contemplated, the parties subsequently agreed to a different handling of the USD 300 million contributed by SEPI*".[291] Here again, the basis for the Tribunal's finding are clear: the Tribunal found that SEPI had acknowledged before the *Tribunal de Cuentas* that the way the funds had been used was permitted by the SPA.[292] As a consequence, there was no basis to find that the SPA had been breached. There was therefore no contradiction in the Tribunal's reasoning.

229. Finally, for what concerns the USD 205 million funds, Argentina's argument is that this amount should have been used to extinguish debts and liabilities of ARSA and AUSA, and that they were instead used to pay off operating costs, fees and gasoline costs.[293] It is true that the argument is only cursively addressed in the Award. The Tribunal noted that "*SEPI later agreed to contribute an additional USD 205 million to cover the operational losses suffered by the Airlines between July and October 2001*",[294] but says nothing concerning the way these funds were effectively used.

230. The Tribunal, however, appears to have implicitly concluded that SEPI had no complaint as to the way these funds had been used. The Tribunal, as a matter of fact, held that

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[289] Award, ¶ 304.

[290] Annulment Memorial, ¶ 264.

[291] Award, ¶ 289.

[292] *Ibid.*, "*SEPI's position before the Tribunal de Cuentas was that this was permitted by the SPA*".

[293] Annulment Memorial, ¶ 271.

[294] Award, ¶ 377.

"*Claimants' investment was also the subject of further review by the Tribunal de Cuentas. In Report N°765 dated July 19, 2007, the court again addressed the transfer of the USD 300 million and the various other post-closing obligations contained in the SPA. In its conclusion, the court noted that SEPI had submitted a number of other documents, which did not demonstrate that the debts had been finally contributed to ARSA. This appears to have led the court to again address this subject in its next report (N°811), discussed below. The Court did note that SEPI submitted documentation demonstrating that other requirements under the SPA, such as Air Comet's capital contribution of USD 50 million to ARSA, had been performed*".[295] The Committee understands the references to the "*the various other post-closing obligations contained in the SPA*" and to "*other requirements under the SPA*" to cover not only the USD 300 million and USD 50 million funds, but also the USD 205 million quantified based on Article 11 of the SPA. This means that the *Tribunal de Cuentas* had no objection as to the way these funds had been used. The Tribunal held that any breach of the SPA with respect to these payments could not affect jurisdiction, [296] and it also found that "*there is no basis to conclude that* […] *any deviation from the original terms of the SPA would provide a basis for finding that the transaction was illegal or would justify declining jurisdiction on the basis that the investment was not made in accordance with Argentina's legislation*".[297] These findings apply to the various funds paid by SEPI to Air Comet pursuant to Articles 9 and 11 of the SPA, including the USD 205 million. Because the Award allows understanding the Tribunal's findings on all aspects of the use of the SEPI funds, there is no failure to provide reasons, including with respect to the USD 205 million fund.

231. Finally, Argentina did not explain in the annulment proceedings why a departure from the SPA concerning these payments (i.e. the use of the USD 205 million to cover operational costs instead of debts and liabilities) would have been a breach of the principle of good faith in international law susceptible to entail the inadmissibility of the claims. As a consequence, any omission to deal with that argument would have been immaterial and

[295] Award, ¶ 285.

[296] Award, ¶ 267.

[297] Award, ¶ 289.

would not have been such as to entail the annulment of the Award for failure to provide reasons.

232. Based on the foregoing, the Committee finds that the Tribunal did not fail to provide reasons concerning the use of the SEPI funds, and that any failure to provide reasons in respect of the USD 205 million argument would not be such as to entail the annulment of the Award.

(5) The July 2008 Agreement

a. Argentina's Position

233. Argentina submits that "*in establishing the international responsibility of Argentina for the breach of the BIT based on the non-compliance with the July 2008 Agreement and determining the damages flowing from such breach, the majority of the Tribunal failed to state reasons on crucial issues and incurred irreconcilable contradictions. This warrants annulment of the Award within the meaning of Article 52(1)(e) of the ICSID Convention*."[298]

234. Argentina first avers that the Award does not allow understanding how the breach of a contract could be a treaty breach.[299] Argentina further contends that the Tribunal's reasoning on the assessment of damages is completely illogical[300] and contradictory.[301] Finally, Argentina submits that the Tribunal failed to address the criticism raised in the arbitration to the Credit Suisse valuation.[302]

b. The Claimants' Position

235. The Claimants submit that the Tribunal did not fail to state reasons in finding that Argentina breached the BIT.[303] The Tribunal explained in detail the various elements of Argentina's

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[298] Annulment Reply, ¶ 231. Annulment Memorial, ¶¶ 278-315. Annulment Reply, ¶¶ 231-272.
[299] Annulment Memorial, ¶ 288.
[300] *Ibid.,* ¶ 289.
[301] *Ibid.,* ¶¶ 295, 307.
[302] *Ibid.,* ¶¶ 308, 311.
[303] Counter-Memorial, ¶¶ 232-244.

conduct that gave rise to the breach of the July 2008 Agreement, why that breach also violated the FET standard, and the Tribunal further addressed Argentina's submission that contract breaches cannot be equated to the FET standard,[304] as well as its findings on quantum.[305]

c. The Committee's Analysis

236. Concerning first of all Argentina's averment that the Award does not allow understanding how a breach of contract could be held to be a treaty breach, the Tribunal expressed clear and coherent reasons.

237. The Tribunal has considered Argentina's argument that not every breach of contract by a State constitutes a violation of the duty of fair and equitable treatment. It accepted that proposition,[306] but nonetheless held that "*the July 2008 Agreement was not a simple commercial agreement*",[307] and therefore that "*Interinvest and the Claimants legitimately expected Respondent to comply with its commitment to purchase all the shares in the Airlines at the price determined by the agreed mechanism in Article 6 of the July 2008 Agreement*".[308] The Tribunal then found that Argentina's refusal to comply with the procedure established by Article 6 was a breach of these legitimate expectations and further found that its conduct "*in relation to the introductory message and bill seeking approval of the July 2008 Agreement, the adoption of Law N° 26,412, the objections as to the form of the Credit Suisse valuation, the injunction appointing a controller over the Airlines, the maintenance of Mr. Alak as General Manager of the Airlines and the decision to proceed by expropriation lacked transparency and was arbitrary*".[309] The Tribunal therefore concluded that Argentina "*breached the FET standard in the Treaty*".[310]

[304] *Ibid.,* ¶ 232. Award, ¶ 854.
[305] *Ibid.,* ¶¶ 92-93. Annulment Rejoinder, ¶¶ 138-144. Award, ¶¶ 1074-1092, 1098, 1102, 1105-07, 1109, 1111-14, 1116, 1127.
[306] Award, ¶ 854.
[307] *Ibid.*
[308] *Ibid.,* ¶ 855.
[309] *Ibid.,* ¶ 856.
[310] *Ibid.,* ¶ 857.

238. It is not for the Committee to opine as to whether these findings are correct. These findings are however reasoned, clear, and understandable.

239. Argentina also contends that the Tribunal failed to provide reasons for its decision to reject its umbrella clause argument. However, the Tribunal explained why it rejected the argument made by the Claimants, based on the BIT's MFN clause, to the effect that they would be entitled to rely on an umbrella clause.[311]

240. For what regards the assessment of damages, Argentina's first argument is that the Tribunal's reasoning is contradictory because the Tribunal could not on the one hand accept that the function of damages is to replace the aggrieved party in the situation that would have prevailed in the absence of breach (i.e. an assessment of the price of the shares made by an independent valuator) and on the other hand fix damages on the basis of the valuation proposed by Interinvest in the price fixing procedure provided by Article 6 of the SPA.[312]

241. The Committee finds no contradiction in the Tribunal's reasoning on point. The Tribunal concluded that "*the Credit Suisse valuation* [is] *the most reliable expression of the value of the Airlines as agreed by the Parties under the July 2008 Agreement and the best evidence of the fair market value of the Airlines in late 2008*".[313] That conclusion was based not only on an analysis of the Credit Suisse valuation, but also of third-party valuations made in the context of the May 2008 Agreement by Deloitte, Morgan Stanley and PriceWaterHouseCoopers.[314] The Tribunal also analysed the valuations proposed by Compass Lexecon for the Claimants,[315] and by KPMG for Argentina, which it found unreliable.[316] The Tribunal explained why in its view the Deloitte, Morgan Stanley, PriceWaterHouseCoopers and Credit Suisse third-party valuations were a reliable indicator

[311] Award, ¶¶ 884-892.
[312] Annulment Memorial, ¶ 295 seq.
[313] Award, ¶ 1112.
[314] *Ibid.,* ¶ 1102.
[315] *Ibid.,* ¶ 1105.
[316] *Ibid.,* ¶ 592.

of the value of the Airlines[317] and having compared them it found that the one proposed by Credit Suisse was the best evidence of the Airlines' fair market value in late 2008.

242. Argentina's argument rests on a conceptual error: in adopting the Credit Suisse valuation, the Tribunal did in fact not purport to enforce the July 2008 Agreement. Argentina avers that Credit Suisse was not independent, and criticizes the Tribunal for holding that circumstance to be irrelevant.[318] Argentina further contends that this lack of independence did not allow the Tribunal to adopt its conclusions as being "*final and binding*", as provided by Article 6 of the July 2008 Agreement.[319] However, the Tribunal did not adopt the Credit Suisse valuation as the final and binding valuation provided by Article 6 of the July 2008 Agreement. Nor did it, as suggested by Argentina, adopt the Credit Suisse valuation as a substitute to the valuation provided for by Article 6 of the July 2008 Agreement.[320] It rather found, based on the other available valuations in the record, that the Credit Suisse valuation was the best available evidence of the fair market value of the Airlines at the time of the taking, which is different.

243. The Tribunal found that the FET standard had been breached. It did not decide to order specific performance. As a consequence, in accordance with the full reparation standard in international law, the Claimants were entitled to damages equal to the fair market value of the Airlines at the time of the taking. The Tribunal found that fair market value was reflected by the Credit Suisse valuation. There is no contradiction in that reasoning. Nor is the Tribunal's reasoning unclear and even less incomprehensible.

244. Whether, in assessing damages, the Tribunal over-compensated the Claimants is not a question that an *ad hoc* Committee has the power to assess under Article 52 of the ICSID Convention.

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[317] *Ibid.,* ¶ 1106.

[318] Annulment Memorial, ¶ 312.

[319] *Ibid.*

[320] *Ibid.,* ¶ 314.

245. Argentina also points out that the Tribunal had acknowledged the difficult financial situation of the Airlines, which would be inconsistent with a valuation exceeding USD 300 million.[321] The Tribunal has indeed found that the Airlines were "*in a very difficult financial condition by the end of 2007 and early 2008*".[322] According to Argentina, this finding is contradictory with the assessment of a positive fair market value.

246. The Committee disagrees. As an initial matter, the Tribunal found that ARSA had no value and that only AUSA had value. Second, there is no conceptual inconsistency in finding that a company in a difficult situation may generate value in the future. Such a finding may well be based on the financial assumptions concerning the future business perspectives of the Airlines at the time of the taking, which an *ad hoc* committee may of course not assess or second guess.

247. The Committee will finally address Argentina's argument that the Tribunal failed to deal with the comments and criticisms contained in the KPMG report and in the TTN valuation report on the Credit Suisse valuation.[323] Argentina, in this respect, asserts that both reports made a number of specific criticisms to the Credit Suisse report, which the Tribunal should have considered and addressed.[324]

248. The Claimants respond that the Tribunal did discuss the KPMG and TTN reports in different parts of the Award.[325] These sections of the Award, however, do not discuss the criticism made by KPMG and TTN to the Credit Suisse report. These sections rather address the valuations proposed by KPMG and TTN, and explain why the Tribunal did not find them to be reliable.[326]

249. The Committee, however, does not believe that this situation can entail the annulment of the Award. As a matter of fact, as long as the award allows understanding the basis for the

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[321] Annulment Memorial, ¶ 307.

[322] Award, ¶ 750.

[323] Annulment Memorial, ¶ 308 seq.

[324] Annulment Memorial, ¶ 310 for the KPMG report and ¶ 309 for the TTN report.

[325] For the KPMG report, Award, ¶¶ 510-511, 592-593, 823, 825, 1112-1113 (see transcript, Tr. Day 2 – 356:11 to 364:3); for the TTN report, Annulment Counter-Memorial, ¶ 278 (referring to ¶¶ 830-834 and 1112 of the Award.

[326] For KPMG report, Award, ¶¶ 592-593, dealing however with the different question whether airfare increases matched increases on the Airlines costs. For TTN, Award, ¶ 1112.

tribunal's findings (which it does), a tribunal has no duty to comment on the details of all the evidence produced by the parties. A failure by the Tribunal to comment on certain portions of an expert report produced by a party, which the Tribunal may have found to be irrelevant, is therefore not such as to entail the annulment of the Award. This is all the more so that Argentina does not allege to have relied, in its submissions before the Tribunal, on the parts of the KPMG and TTN reports upon which it now relies to sustain that the Tribunal failed to provide reasons.

250. Based on the foregoing, the Committee finds that the Tribunal did not fail to provide reasons with respect to its assessment of the damages.

V. COSTS

A. ARGENTINA'S COST SUBMISSIONS

251. In its submission on costs, Argentina argues that the Claimants should bear the total arbitration costs incurred by Argentina, including legal fees and expenses, totalling USD 884,319.88, broken down as follows:

CONCEPT	ARS	USD
Translations	93,467.95	2,296.51
Airfare, accommodation, travel	1,069,319.45	27,992.66
Courier	68,014.88	1,671.13
Office supplies	7,500.00	184.28
Communication costs	1,500.00	36.86
ICSID costs	-	725,000.00
PTN personnel expenses	2,981,134.97	127,138.46

Total	**4,220,937.25**	**884,319.88**

B. The Claimants' Cost Submissions

252. In their submission on costs, the Claimants request that the Committee order Argentina to bear all the costs incurred by Claimants in this annulment proceeding, comprising Claimants' legal fees and expenses totalling USD 1,531,833.00, broken down as follows:

CATEGORY	AMOUNT (IN USD)
Legal Fees & Expenses	
• King & Spalding Fees Expenses	 $1,514,322.00 $17,512.00
• TOTAL	1,531,833.00

C. The Committee's Decision on Costs

253. Article 61(2) of the ICSID Convention, applicable to this proceeding by virtue of Article 52(4) of the ICSID Convention, provides as follows:

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

254. The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD): 359,060.45[327]

Committee Members' fees and expenses	
Mr. Alexis Mourre,	USD 100,999.96
Prof. Fernando Cantuarias Salaverrry,	USD 67,903.54
Mr. Ricardo Ramírez Hernández	USD 53,796.93
ICSID's administrative fees	USD 84,000.00
Direct expenses (estimated)[328]	USD 52,360.02
Total	**USD 359,060.45**

255. The above costs have been entirely paid out of the advances made by Argentina.[329]

256. The Committee considers that, Argentina having failed in all the arguments that it has advanced in order to seek the annulment of the Award, it should bear the entirety of the costs of the proceedings. Argentina having advanced said costs in their entirety, the Claimants are not entitled to any payment in this respect.

257. As to the Parties' legal costs and expenses, the Committee considers, for the same reasons, that the Claimants having prevailed in the annulment proceedings, they are entitled to be compensated for their costs. However, the Committee notes a significant disproportion between the representation costs of each party. While the Claimants have spent USD 1,514,322 in fees, Argentina has only spent 2,981,134.97 ARS (i.e slightly more than USD127,138.46). It is widely accepted that *ad hoc* committees enjoy a wide discretion in assessing the reasonableness of the parties' representation costs.[330] In view of the complexity of the case and the interests at stake, the Committee decides that the Claimants

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

[328] This amount includes estimated charges relating to the dispatch of this Decision (courier, printing and copying).

[329] The remaining balance will be reimbursed to Argentina.

[330] ICSID Convention Articles 52(4) & 61(2); Arbitration Rules 47(1)(j) & 53; Administrative and Financial Regulation 14(3)(e). See ICSID's Updated Background Paper on Annulment"), ¶ 65 (**C-1217**) (**AL RA 421 bis**).

are entitled to be reimbursed of their representation costs in an amount of USD 1,000,000, in addition to their expenses, i.e. a total amount of USD 1,017,512.

VI. DECISION

258. For the reasons stated *supra*, the Committee decides as follows:

(1) Argentina's request for annulment is denied;

(2) Argentina shall bear the entirety of the costs of the proceedings and shall pay to the Claimants an amount of USD 1,017,512 on account of their representation costs;

(3) All other claims are dismissed.

[signed]

Mr. Fernando Cantuarias Salaverry
Committee Member

Date: 6 May 2019

[signed]

Mr. Ricardo Ramírez Hernández
Committee Member

Date: 9 May 2019

[signed]

Mr. Alexis Mourre
President of the *ad hoc* Committee

Date: 13/05/2019