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

In the annulment proceeding between

EL PASO ENERGY INTERNATIONAL COMPANY

and

THE ARGENTINE REPUBLIC

ICSID Case No. ARB/03/15

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

Members of the Committee
Ms. Teresa Cheng, Member of the Committee
Prof. Dr. Rolf Knieper, Member of the Committee
Mr. Rodrigo Oreamuno, President

Secretary of the Committee
Natalí Sequeira

Date of dispatch to the Parties: September 22, 2014

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GLOSSARY

Argentina	Argentine Republic or the Applicant
Argentinian Companies	Compañías Asociadas Petroleras; Capex S.A.; Central Costanera S.A.; and Gasoducto del Pacífico S.A.
Award	Award rendered on October 31, 2011
BIT	Treaty between the Argentine Republic and the United States of America concerning Reciprocal Encouragement and Protection of Investments signed on November 14, 1991, in force since October 20, 1994
Counter-Memorial on Annulment	El Paso's Counter-Memorial on Annulment dated December 21, 2012
El Paso	El Paso Energy International Company
FET	Fair and Equitable Treatment
GA	Government of Argentina
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, dated March 18, 1965
ICSID Financial Regulations	ICSID Administrative and Financial Regulations
ICSID or the Centre	International Centre for the Settlement of

	Investment Disputes
ILC's Draft Articles	Draft Articles on State Responsibility prepared by the United Nations' International Law Commission
Memorial on Annulment	Argentina's Memorial on Annulment dated October 5, 2012
Post-Hearing Counter-Submission – Argentina	Observations of the Argentine Republic dated November 14, 2013, in connection with El Paso's Post-Hearing Brief on Annulment
Post-Hearing Rejoinder – Argentina	The Argentine Republic's Rejoinder dated December 27, 2013 in response to El Paso's Reply of December 5, 2013
Post-hearing Reply – El Paso	El Paso's Reply, dated December 5, 2013, in connection with Argentina's Observations on El Paso's Post-Hearing Brief
Post-Hearing Submission – El Paso	Post-Hearing Submission of El Paso dated October 24, 2013
Rejoinder on Annulment	El Paso's Rejoinder dated May 10, 2013
Reply on Annulment	Argentina's Reply on Annulment dated February 21, 2013

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an arbitration submitted to the **International Centre for Settlement of Investment Disputes** ("ICSID" or the "Centre") on the basis of the **BIT** and the **ICSID Convention**.

2. The Parties are **El Paso Energy International Company**, a company incorporated under the laws of the State of Delaware (United States of America), and the **Argentine Republic**.

3. **El Paso** and **Argentina** are hereinafter collectively referred to as the "**Parties**." The Parties' respective representatives and their addresses are listed on page (2).

4. On October 31, 2011, the **Tribunal**[1] in the original arbitration proceeding rendered an **Award**, partially upholding **El Paso's** claims and awarding it US$43.03 million, plus compound interest as compensation. The **Tribunal** concluded that **Argentina** had breached its obligation to accord fair and equitable treatment to **El Paso's** investment, under the **BIT**.

5. For the preparation of this decision the Committee reviewed and evaluated all the arguments of the Parties and the documents submitted by them in this proceeding. In making their arguments, the Parties submitted and cited numerous awards and decisions dealing with issues relevant to this decision on annulment. The Committee considered these documents carefully, but obviously the Committee is responsible for deciding on the issue of annulment raised by **Argentina** through an independent analysis of the **ICSID Convention**, the **Arbitration Rules,** and the particular facts of this case, which does not prevent the Committee from taking into consideration the findings of other annulment committees.

[1] Presided by Professor Lucius Caflisch (Swiss), appointed by the Chairman of the ICSID Administrative Council, by Prof. Piero Bernardini (Italian), appointed by the Claimant; and Professor Brigitte Stern (French), appointed by the Respondent.

6. In order to facilitate a better understanding of some of the issues decided by the **Tribunal**, the Committee reproduces the following passages from the **Award**:

> "...the Claimant is an energy company. It alleges that, up until 2003, it owned indirect and non-controlling shareholdings in a number of Argentinian entities: Compañías Asociadas Petroleras (CAPSA) and CAPEX SA (El Paso contends that it held a 45% indirect interest in CAPSA which, in turn, owned 60.36% of the shares of CAPEX); Central Costanera SA (Costanera), in which El Paso claims to have acquired a 12.335% indirect interest; and Gasoducto del Pacífico SA (Pacifico), in which its indirect interest was said to amount to approximately 13.4% (preferred shares), and 11.8% (ordinary shares) respectively. These four entities have been collectively referred to, in the present proceedings, as the "Argentinian companies." El Paso further alleged an indirect controlling interest (99.92%) in SERVICIOS El Paso, another entity incorporated in Argentina, and a 61.6% interest in the Triunion Energy Company."[2]
>
> "In April 1997, El Paso acquired, through KLT Power Inc., an indirect non-controlling shareholding of 12.335% in Costanera. The latter, a local company engaged in the generation and sale of electricity, with a total capacity of 2311 megawatt-hour (MWh), is the largest thermal generator in Argentina."[3]
>
> "In January 1998, El Paso acquired an indirect non-controlling interest in Pacifico, which owns and operates a natural gas pipeline linking Argentina to the Chilean city of Cochabamba."[4]
>
> "SERVICIOS was established by El Paso as an Argentinian subsidiary in March 1998 and entered thereafter into an agreement with an Argentinian branch of the Bank of Boston to lease a gas processing plant located on the Agua de Cajón field in Neuquén Province. Pursuant to a ten-year gas processing agreement with CAPEX, SERVICIOS transformed gas produced at CAPEX's facilities into liquid petroleum gas (LPG) by-products that were sold by CAPEX."[5]
>
> "It is alleged that, from 1997 to 2001, El Paso invested US$336 million in the Argentinian companies, and that its parent company guaranteed around US$24 million of SERVICIOS' lease obligations. El Paso sold its interest in the companies' shares in two sales, one in June 2003 – in CAPSA (consequently in CAPEX) and in SERVICIOS – another in October 2003 – in Costanera."[6]

[2] Award, ¶ 7.
[3] Id., ¶ 10.
[4] Id., ¶ 11.
[5] Id., ¶ 12.
[6] Id., ¶ 13.

II. PROCEDURAL HISTORY

7. On February 28, 2012, **ICSID** received from **Argentina** an application for annulment and request for stay of enforcement of the Award (the "**Application"** and the "**Request for Stay,"** respectively).

8. On March 7, 2012, pursuant to Rules 50(2)(a) and (b) of the **ICSID Arbitration Rules**, the Secretary General of ICSID registered the **Application** and notified the Parties of the provisional stay of enforcement of the **Award**, pursuant **ICSID Arbitration Rule** 54(2).

9. On May 22, 2012, the *ad hoc* Committee was constituted pursuant to Article 52(3) and Rule 6(1) of the **ICSID Arbitration Rules**.

10. On May 22, 2012, the Secretary General, in accordance with Rule 6(1) of the **ICSID Arbitration Rules** notified the Parties that the three members of the *ad hoc* Committee had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. The *ad hoc* Committee is composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President of the Committee; Ms. Teresa Cheng, a national of China; and Prof. Dr. Rolf Knieper, a national of Germany. Ms. Natalí Sequeira, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

11. On May 31, 2012, the *ad hoc* Committee invited the Parties to file written observations on the Request for Stay, prior to the first session. **Argentina** was invited to submit its observations by June 11, 2012 and **El Paso** by June 22, 2012.

12. On May 31, 2012, pursuant to **ICSID Arbitration Rules** Rule 54(2) and the Request **for Stay**, the Committee extended the stay of enforcement of the **Award** until it had heard the Parties and reached a final determination on the continuation of the stay.

13. On June 4, 2012, pursuant to Regulation 14(3)(e) of the **ICSID Financial Regulations**, the **Centre** requested the **Argentine Republic** to make a first advance

payment of US$225,000 within thirty (30) days to cover the initial costs of the annulment proceedings, including the first meeting of the Parties with the Committee.

14. As scheduled, on June 11, 2012 **Argentina** filed its "Observations on the Continuation of the Stay of Enforcement of the Award." On June 22, **El Paso** filed its "Response to Observations of Argentina on the Continuation of the Stay of Enforcement of the Award."

15. On July 10, 2012, the Centre informed the Parties that as of that date the requested payment had not been received, and therefore invited either Party to pay within 15 days.

16. In response to the communication referred to in the preceding paragraph, **Argentina** informed the Centre that the Ministry of Economy was processing the advance payment. In view of this information, the Committee confirmed that the first session would be held, as scheduled, by telephone conference.

17. The Committee held a first session with the Parties on July 18, 2012 by telephone conference. The Parties confirmed that the Members of the Committee had been validly appointed. It was agreed *inter alia* that the applicable **Arbitration Rules** would be those in effect from April 10, 2006, that the procedural languages would be Spanish and English and that the place of the proceeding would be Washington, D.C. The Parties further agreed on a schedule for the submissions of pleadings on the application for annulment. The agreement of the Parties was embodied in Procedural Order No. 1 dated August 30, 2012 signed by the President and circulated to the Parties.

18. On August 13, 2012, **Argentina** stated that the advance payment requested by the Centre had already been processed. The Centre received that payment on August 27, 2012.

19. On November 14, 2012 the Committee issued its Decision on Argentina's Request for Stay of Enforcement of the **Award**. The Committee ordered that the stay of enforcement of the Award be maintained until there was a ruling on the merits of

annulment proceedings requested by **Argentina**. That stay was not conditioned on the submission of any kind of guarantee from Argentina.

20. On October 5, 2012 **Argentina** submitted its Memorial on Annulment; **El Paso** submitted its Counter-Memorial on Annulment on December 21, 2012; **Argentina**'s Reply on Annulment was submitted on February 21, 2013; **El Paso**'s Rejoinder on Annulment was submitted on May 10, 2013.

21. The hearing on annulment was held at the seat of the World Bank in Washington, D.C. on October 8 and 9, 2013.

22. The following persons attended the hearing:

Members of the ad hoc Committee

Mr. Rodrigo Oreamuno
Ms. Teresa Cheng
Prof. Dr. Rolf Knieper

Secretary of the Tribunal

Ms. Natalí Sequeira

For Vinson & Elkins LLP

Mr. James L. Loftis, Esq
Mr. Mark Beeley, Esq.
Mr. William T. Teten, Esq.
Mr. Timothy E. Tyler, Esq.

For Pérez Alati, Grondona, Benites, Arntsen & Martinez De Hoz (Jr.)

Mr. José A. Martinez De Hoz (Jr.)
Ms. Jimena Vega Olmos, Esq.

For El Paso

Mr. John L. Shoemaker

For the Argentine Republic

Dr. Horacio Pedro Diez
Dr. Gabriel Bottini

Dr. Carlos Mihanovich
Dr. Tomás Braceras
Dr. Nicolás Duhalde

Court Reporters

Mr. Dante Rinaldi (Spanish Language Reporter)
Mr. William Prewett (English Language Reporter)

23. **El Paso** filed a Post-Hearing Brief on October 24, 2013; **Argentina** filed Observations on El Paso's Post-Hearing Brief on November 14, 2013; **El Paso** filed a Reply to Argentina's Observations on December 5, 2013; and **Argentina** filed a Rejoinder on December 27, 2013.

24. The Centre, with the authorization of the Committee, requested two advance payments from **Argentina** pursuant to ICSID Administrative and Financial Regulation 14(3)(e). The first for US$225,000, was requested on June 4, 2012 and the second for US$250,000 was requested on June 12, 2013. Both payments were received by the **Centre**.

25. On August 19, 2014, the Committee declared the proceeding closed pursuant Rule 38(1) of the ICSID Arbitration Rules.

26. The Committee will summarize the position of the Parties on each annulment argument; it will then examine the grounds for annulment under Article 52 of the **ICSID Convention** in relation to these arguments.

III. POSITION OF THE PARTIES ON THE ALLEGED ANUNULMENT OF THE AWARD

27. In this section the Committee will summarize the arguments for annulment of the **Award** submitted by **Argentina,** pursuant to Article 52 of the **ICSID Convention** and it will summarize the response of **El Paso** to each one of these arguments.

28. **Argentina** claimed that the **Tribunal** manifestly exceeded its powers; that the **Award** has failed to state the reasons on which it was based; and that there has been a

serious departure from a fundamental rule of procedure. It claimed those grounds with regard to: (a) jurisdictional issues; (b) the causal link between the measures adopted by **Argentina** and the sale of **El Paso's** interest in the Argentine Companies; (c) the measures adopted by **Argentina** in relation to the spot price and the capacity payments; (d) the cumulative effect, determined by the **Tribunal,** of the measures adopted by **Argentina**; and (e) the analysis of the defense of necessity raised by **Argentina** in the arbitration proceeding.

A. **Jurisdictional issues**

29. As described in detail in paragraph 41, **Argentina** divided the issues of this claim as regards "jurisdictional issues" and before explaining each issue outlined some general arguments which are summarized below:

30. **Argentina** stated that **El Paso's** claim was derivative or indirect, noting that the **Tribunal** held in paragraph 175 of the **Award** that **El Paso**'s contentions in their present form do not seem viable because they amount to claiming twice for damage caused by the same events: once for the taking of the rights of the Argentine Companies and once for the diminution in value of the shares of those companies held by **El Paso**.[7]

31. **Argentina** argued that the **Tribunal** lacked jurisdiction: "The Tribunal clearly lacks the jurisdiction to amend a claim so as to make it viable because, among other things, this implies rendering an *ultra petita* decision."[8] Furthermore, **Argentina** argued that the **Tribunal** failed to state the reasons on which its decision was based "... when it sought to justify the exercise of its jurisdiction by stating that the Treaty grants shareholders a right of direct action."[9]

32. **El Paso** stated that **Argentina** was wrong to claim that an *ultra petita* award was rendered because the **Tribunal** did not amend the claims submitted by that company,

[7] Memorial on Annulment, ¶ 18.
[8] Id., ¶ 19.
[9] Id., ¶ 26.

rather it accepted one of three heads of claim (i.e., El Paso's claim based on its shareholding in the Argentine Companies) while rejecting others.[10]

33. **El Paso** concluded that the "... contended amendment is related to the merits of the dispute which exceeds the limited role of Annulment under Article 52 of ICSID Rules."[11]

34. After referring to what was said by the **Tribunal** in paragraphs 188, 194, 195, 198 and 214 of the Award as regards what it considered to be investments protected by the **ICSID Convention** and the **BIT**, **Argentina** stated that the **Tribunal** contradicted itself and manifestly exceeded its powers because in defining investment it ruled that it included the shares of **El Paso** in the Argentine Companies, not the rights and licenses of these companies but, nevertheless, it adopted the damage valuation submitted by LECG (**El Paso**'s damages expert) "... which implicitly referred to the damage allegedly sustained by the Argentine Companies."[12]

35. **El Paso** answered as indicated in the preceding paragraph based on paragraph 206 of the **Award**, in which the **Tribunal** concluded that the method employed by LECG was the most accurate for calculating the damages **Argentina** owed to **El Paso** "... based on its 'right to compensation for loss of value of stocks imputable to measures taken by the host State.'"[13]

36. On the same issue, **El Paso** stated that the **Tribunal** did not contradict itself and was acting reasonably and within its discretion when it adopted LECG's DCF method, after duly considering the reports and testimonies of the experts retained by each Party as well as those provided by the **Tribunal**'s appointed expert. **El Paso** also noted that this decision on the merits is not a ground for annulment.[14]

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[10] Counter-Memorial on Annulment, ¶ 58.
[11] Id., ¶ 67.
[12] Memorial on Annulment, ¶ 21; Award, ¶ 714.
[13] Counter-Memorial on Annulment, ¶ 70; Award ¶ 206.
[14] Id., ¶¶ 74 and 79.

37. With regard to paragraphs 687 and 509 of the **Award**, in which the **Tribunal** stated that the measures taken by **Argentina** were among the reasons that contributed to the damage sustained by **El Paso** in the loss of value of its investment, **Argentina** stated that the **Tribunal** did not provide the reasons for its decision and manifestly exceeded its powers.[15]

38. **Argentina** also argued that "... the Tribunal allowed El Paso to bring a claim for contract breaches which, at the same time, purportedly amount to violations of the obligations assumed by Argentina to investors under the BIT."[16] Therefore, according to **Argentina**, the **Tribunal** allowed a double recovery by the Argentine Companies and **El Paso**. In its Reply on Annulment it indicated that with the decision of the **Tribunal** there had been a manifest excess of powers and failure to state the reasons for its decision.[17]

39. **El Paso** stated that the **Tribunal** awarded it damages for its direct claim for the loss in value of its shares in the Argentine Companies, an investment expressly protected under the **BIT**.[18] It also noted that after a comprehensive analysis, which appears in paragraphs 178 to 214 of the **Award**, the **Tribunal** analyzed the issue and concluded that the investment protected by the **BIT,** were the shares in the Argentine Companies.[19]

40. After citing part of paragraph 214 of the **Award**, **Argentina** argued that the **Tribunal** "... confuses the legal standing that a shareholder may have, in general terms, to bring a claim under the BIT with the substantial rights arising from its shares."[20] **El Paso** answered this argument by explaining that **Argentina** made an incorrect

[15] Memorial on Annulment, ¶ 22.
[16] Id., ¶ 24.
[17] Reply on Annulment, ¶ 11.
[18] Counter-Memorial on Annulment, ¶ 41.
[19] Id., ¶¶ 45-57.
[20] Memorial on Annulment, ¶ 29.

interpretation of Article I of the **BIT** and that all jurisdictional arguments are based on the merits of the case and not grounds for annulment.[21]

41. As noted in paragraph 29 above, **Argentina** divided the claim on jurisdictional issues into various issues: 1. Manifest excess of powers; 2. Failure to provide reasons for the decision; 3. Risk of double recovery in indirect claims; 4. Argentine law does not recognize these types of claims; and 5. General international law does not allow indirect actions to be taken in this case. The Committee will describe in that same order **Argentina's** arguments and **El Paso's** response in each case.

1) **Manifest excess of powers**

42. **Argentina** argued that the **Tribunal** manifestly exceeded its powers in exercising jurisdiction over claims filed by **El Paso** since none of the rights held by that company was affected. The measures taken by **Argentina** were in relation to the electricity and the hydrocarbons sector of which the Argentine Companies, and not **El Paso,** were part.[22]

43. According to **Argentina**, the **Tribunal's** decision to award damages to **El Paso** on the basis of the rights of the Argentine Companies is inconsistent with the **ICSID Convention** and the **BIT** and, with that decision, the **Tribunal** acted beyond the scope of its jurisdiction as set forth in Article 25(2) of the **ICSID Convention**. It also noted that the **BIT** does not provide for the possibility that a shareholder may bring a claim for the rights of a local company nor does it establish mechanisms to avoid the risk of double claims and double recovery; accordingly, the **Tribunal** has manifestly acted beyond the scope of its competence.[23]

44. **El Paso** responded that the position of **Argentina** in stating that shareholders cannot bring claims for damages is contrary to every reported decision of arbitral tribunals

[21] Counter-Memorial on Annulment, ¶¶ 82-87.
[22] Memorial on Annulment, ¶ 31.
[23] Id., ¶¶ 38 and 39.

concerning this matter. It also reiterated that its claim was a direct claim for the loss in value of its shares in the Argentine Companies.[24]

2) Failure to state reasons

45. **Argentina** stated that: "... in direct opposition to its conclusion that contracts and licenses are not protected investments, the Tribunal awarded damages to El Paso for measures that only affected contracts and licenses belonging to the Argentine Companies."[25]

46. **Argentina** ended this allegation with the following sentence: "Under the terms of Article 52(1)(e) of the ICSID Convention, the Tribunal failed to state the reasons on which the Award was based. This failure to state the reasons warrants the annulment of the decision."[26]

47. **El Paso** answered the argument of failure to provide reasons as follows:

> "In its Memorial, Argentina employs a handful of artifices to dress up merits as process. First, it seeks to create the illusion that the Award fails *"to state the reasons on which it is based"* due to the non-existent contradictions that Argentina attempts to read into it. However, instead of a correct portrayal of the award's reasoning, Argentina pulls citations out of context, plucking individual phrases hundreds of paragraphs apart, and contrasting them in an attempt to insert a contradiction where none exists."[27]

3) The risk of double recovery in filing indirect claims

48. **Argentina** stated that one of the main problems posed by admitting this type of indirect claim is the risk of double recovery, which must be avoided through legal considerations that the **Tribunal** is required to establish for these purposes, such as

[24] Counter-Memorial on Annulment, ¶¶ 40 and 41.
[25] Memorial on Annulment, ¶ 40.
[26] Id., ¶ 41; Reply on Annulment, ¶¶ 21 and 22.
[27] Counter-Memorial on Annulment, ¶ 15.

who is the subject of the rights affected, and who is entitled to compensation. According to **Argentina**, the **Tribunal** made no such analysis.[28]

49. **El Paso** asserted that based on paragraphs 202 and 214 of the **Award**, the **Tribunal** held that **El Paso**'s rights can be ascertained independently from the rights of the Argentine Companies and also, **El Paso** had a direct cause of action under the **BIT** in connection with its investment, according to which the **Tribunal** awarded damages on the basis of a direct claim.[29]

4) **This type of claims are not allowed under Argentine law**

50. **Argentina** asserted that derivative or indirect actions are not provided for under Argentine law (which is the applicable law under Article 42(1) of the **ICSID Convention**). It added that the Argentine Corporations Law No. 19,550 establishes is the mechanisms available to the board of directors of corporations to file claims on their behalf. That Law also regulates intra-company court actions to which a shareholder might resort to defend the corporation's interests. These actions tend to protect the corporations as a whole and not a single shareholder such as El Paso.[30] It follows from these provisions that El Paso was not entitled to file a claim.

51. **El Paso** submitted that the **Tribunal** awarded damages not for an alleged "derivative or indirect" claim, but instead for its direct claim for the loss of its shares in the Argentine Companies.[31]

5) Under general international law indirect actions are not permitted

52. **Argentina** claimed that under general international law indirect actions, such as those filed by **El Paso,** are not allowed. It based its argument on what the International Court of Justice stated on the matter and noted that the rights claimed by that

[28] Memorial on Annulment, ¶¶ 42 and 43.
[29] Counter-Memorial on Annulment, ¶¶ 43 and 44.
[30] Memorial on Annulment, ¶¶ 44-48.
[31] Counter-Memorial on Annulment, ¶41.

company are not directly vested in it, but in the Argentine Companies. It also indicated that such derivative actions must be expressly permitted.[32]

53. In conclusion, **Argentina** stated that **El Paso** had no legal standing under the **BIT** to bring an indirect claim.[33]

54. **El Paso** answered claims 4 and 5 above together; it stated that the **Tribunal** found that **El Paso**'s claims were direct claims and that the *lex specialis* was governed by Article 25 of the **ICSID Convention** and Article I of the **BIT**. Therefore, the requirements for admissibility of derivative claims in international law asserted by **Argentina** are irrelevant. It also stated that this argument is nothing more than an attempt to revisit the **Tribunal**'s decision on jurisdiction.[34]

55. **El Paso** concluded that the jurisdictional arguments of the Memorial on Annulment are an unending discussion of the merits of the case and exceed the limited role of Annulment.[35]

56. **Argentina** replied:

> "El Paso is mistaken in attempting to show that *ius standi* is not a relevant criterion for the purposes of annulment. Quite on the contrary, Article 52 of the ICSID Convention allows the annulment of an award to be requested based on any of the grounds provided for therein, which include the manifest excess of powers by the Tribunal. The issue of *ius standi* is closely connected to jurisdiction."[36]

57. **El Paso** reiterated its position, based on a series of arbitral awards, that its claim was not derivative but direct.[37]

B. The causal link between the measures adopted by Argentina and the sale of El Paso's interest in the Argentine Companies

[32] Memorial on Annulment, ¶¶ 49 and 50.
[33] Id., ¶ 52.
[34] Counter-Memorial on Annulment, ¶¶ 88-92.
[35] Id., ¶¶ 93 and 94.
[36] Reply on Annulment, ¶ 30.
[37] Rejoinder on Annulment, ¶¶ 9-15.

58. **Argentina** alleged that the **Tribunal** failed to state the reasons for the **Award**, manifestly exceeded its powers and seriously departed from a rule of procedure when referring to the causal link between the measures adopted by **Argentina** and the sale of **El Paso's** interest in the Argentine Companies. **Argentina** claimed that during the arbitration proceedings it found out that **El Paso** faced a difficult financial situation and, for that reason, it had engaged in a massive sale of assets all over the world, including in Argentina, where the sole exception to that sale was the Gasoducto del Pacífico, engaged in the transport of natural gas. **Argentina** cited paragraphs 276 and 277 of the **Award** in which, in its opinion, the **Tribunal** confirmed these claims.[38]

59. According to **Argentina** "the Tribunal recognized that **it did not find a causal link** between the measures adopted by Argentina and the sale by El Paso of its interest in the Argentine Companies" (emphasis in the original).[39]

60. **El Paso** pointed out that **Argentina** failed to cite any evidence to support its assertion in the previous paragraph.[40] **El Paso** also explained that the Tribunal found "two different causation standards." To evaluate the claim of expropriation and discrimination it used the "sole cause" "test" or standard (paragraph 270 of the **Award**), and held that no automatic causal link had been recognized by the Tribunal between **Argentina**'s measures and the sale of **El Paso's** shares. It also noted that the **Tribunal** was careful to point out that its decision on expropriation and the "sole cause" test did not deprive **El Paso** of its right to compensation under other BIT standards. **El Paso** added that the other "test" was the "prevailing cause" test and, after explaining its reasoning in paragraphs 488-509 of the **Award**, the **Tribunal** held that **Argentina's** measures were the prevailing cause of **El Paso**'s sale of its shares in 2003.[41]

61. **Argentina** stated in its Reply on Annulment that in the **Award** there is no reference to the "sole cause" and the "prevailing cause" "tests" and that those standards are a

[38] Memorial on Annulment, ¶¶ 54-59; Reply on Annulment, ¶ 34.
[39] Id., ¶ 62.
[40] Counter-Memorial on Annulment, ¶ 95.
[41] Id., ¶¶ 96-102.

construct of **El Paso** with a view to justifying the Tribunal's failure to state the reasons for the **Award**.[42]

62. **Argentina** also criticized the fact that, as it stated in the conclusion of paragraph 506 of the **Award**, the **Tribunal** referred only to journalistic information presented by **El Paso**.[43]

63. **Argentina** also noted that the conclusion in paragraph 507 of the **Award** is contradictory, provides no reasons for the decision, and violates a fundamental rule of procedure.[44]

64. **El Paso** contradicted the above statements and asserted that the **Tribunal** provided detailed reasoning for its decision at paragraphs 488 to 509 of the **Award**.[45]

65. **Argentina** also noted an alleged contradiction in paragraph 508 of the **Award** and stated that it is so manifest that it must lead to the annulment of **Award** in full.[46]

66. Regarding the contradiction alleged by **Argentina**, **El Paso** stated that there was none and that this "... again is a decision the Tribunal made based on the merits of the case and involves a nuanced weighting of the evidence presented by both parties."[47] In addition, **El Paso** stated that the **Tribunal** itself answered this claim of **Argentina** in paragraphs 683 and 684 of the **Award** in which reference is made to the alleged failure to find the causal link between the measures taken by **Argentina** and the damage suffered by **El Paso**.[48]

67. **El Paso** concluded that this claim is only **Argentina**'s "dissatisfaction" with the analysis and determinations of the **Tribunal**.[49]

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[42] Reply on Annulment, ¶ 36.
[43] Memorial on Annulment, ¶ 63.
[44] Id., ¶ 64.
[45] Counter-Memorial on Annulment, ¶ 102.
[46] Memorial on Annulment, ¶ 65.
[47] Counter-Memorial on Annulment, ¶ 106.
[48] Id., ¶¶ 107 and 108.
[49] Rejoinder on Annulment, ¶ 19.

C. **Measures adopted by Argentina in relation to the spot price and the capacity payments**

68. In order to facilitate an understanding of this argument put forward by **Argentina**, the Committee reproduced the following paragraph of the **Award**:

> "Within the Electricity Regulatory Framework, a competitive system, the Wholesale Electricity Market (WEM), was established in order to organise the sale of energy by its generators. The two markets established within the WEM were: (i) the term market, where producers and buyers could freely agree on sales, conditions and prices; and (ii) the spot market, where energy was supplied, on an hourly basis, for a uniform price linked to the short-term marginal cost of the energy produced."[50]

69. **Argentina** argued that the "... only attempt to provide reasons in the ruling [of the Award] is contained in paragraphs 512-514."[51] It also stated that the **Tribunal** analyzed separately each measure adopted by **Argentina** in the electricity sector and did not find any violation of the rights of **El Paso**. The **Tribunal** stated that there was no concession contract embodying a stabilization clause and no contract with the State resulting in rights capable of being invoked by **El Paso**. **Argentina** cited the **Tribunal'**s conclusions expressed in paragraphs 416 and 419 of the **Award**, in relation to the measures taken by **Argentina** to adapt the functioning of the WEM, noting that capacity payments were subject to regulation by the Secretary of Energy. **Argentina** also stated that with regard to the setting of the spot price and the seasonal price the **Tribunal** did not find that such changes were unfair and inequitable. It referred specifically to paragraph 422 of the **Award** in which the **Tribunal** stated that none of the measures adopted in the electricity sector "is considered, *per se*, as a violation of the WEM, nor a violation of FET."[52]

70. Nevertheless, according to **Argentina**, these findings were contradicted with no basis by the **Tribunal** itself in paragraph 512 of the **Award** without any reasons being provided. "No reasons are stated and no evidence is mentioned in order to justify the assertion that 'the very reason' for the capacity payments was 'to attract

[50] Award, ¶ 61.
[51] Memorial on Annulment, ¶ 70.
[52] Id., ¶ 80.

investment.'"[53] **Argentina** also noted a contradiction between the assertions outlined in the previous paragraph and paragraph 514 of the **Award**. "The Tribunal fails to explain why a commitment allegedly made 'towards the companies in which El Paso invested'—which according to the Tribunal itself, are neither investors nor investments protected under the Treaty—may be invoked by El Paso. The failure by the Tribunal to state the reasons on which its decision was based is self-evident."[54]

71. **Argentina** concluded that the contradictory conclusions and unfounded statements that it had pointed out constitute sufficient grounds for the annulment of the **Award** since they amount to a failure to state reasons, a manifest excess of powers and a serious departure from a rule of procedure.[55]

72. **El Paso** said that **Argentina** was only trying to re-open the findings of the **Tribunal** and "disguise as a request for annulment an appeal of the Award."[56]

73. **El Paso** denied that the **Tribunal'**s reasoning was contained only in paragraphs 512 and 514. It noted that the issue of fair and equitable treatment was analyzed by the **Tribunal** from paragraph 330; first it analyzed the measures individually and then as a whole. **El Paso** noted that in paragraphs 510-512 the **Tribunal** did not analyze **Argentina**'s measures individually, but the legal framework in general.[57]

74. **El Paso** added that these complaints by **Argentina** are an attempt to discuss issues of fact and the application of law by the **Tribunal**. It also stated that in making the argument of lack of reasoning it ignores the reasoning contained in over two hundred paragraphs in the **Award**.[58]

[53] Id., ¶ 81.
[54] Id., ¶ 82.
[55] Id., ¶ 83.
[56] Counter-Memorial on Annulment, ¶ 141.
[57] Id., ¶ 147.
[58] Id., ¶ 148.

75. **Argentina** did not address this issue in its Reply on Annulment and **El Paso** only indicated in its Rejoinder on Annulment that it is confident that simply by reading the Committee will conclude that **Argentina's** arguments are without merit.[59]

D. **The cumulative effect of the measures adopted by the Argentine Republic**

76. **Argentina** stated that:

> "…the Tribunal created a new standard, as if it had the power to create law or to modify the BIT, and applied it to the facts of the case. Indeed, according to the Tribunal, 'in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard.' This is unprecedented in the history of investment arbitration and is the reason why the Tribunal could not cite even a single international rule, arbitral decision or paper by a legal author mentioning this new concept of creeping violation of the standard of fair and equitable treatment, which was invented by the Tribunal. Hence, the Tribunal manifestly exceeded its powers by seeking to create a rule referring to a new way of violating the standard of fair and equitable treatment that was not provided for by the parties to the Treaty.(emphasis in the original)"[60]

77. **Argentina** further asserted that the Tribunal resorted to Article 15 of **the ILC's Draft Articles** which contains the concept of composite acts. However—according to **Argentina—**for such a composite act to exist, there must be a primary rule providing that "... an accumulation of certain (lawful or wrongful) acts entails the breach of a new obligation," which, according to **Argentina**, is not the case here.[61] In its Reply on Annulment, **Argentina** added that it never had the opportunity to present arguments against the existence of an alleged "composite act" within the meaning of Article 15 of **the ILC's Draft Articles**.[62]

78. **Argentina** noted that the **BIT** "...does not contain a standard condemning the performance of a series of lawful acts or the commission of creeping violations of the fair and equitable treatment standard and the Tribunal lacks the legislative capacity to create it." It also stated that there was no evidence whatsoever that Argentina and the

[59] Rejoinder on Annulment, ¶ 25.
[60] Memorial on Annulment, ¶ 85.
[61] Id., ¶¶ 87 and 88; Reply on Annulment, ¶49.
[62] Reply on Annulment, ¶ 47.

United States intended to establish a type of composite fair and equitable treatment, and therefore the **Tribunal** did not resort to the applicable law, but to a different law it created by itself.[63]

79. **Argentina** indicated that the doctrine of composite act refers to a series of conducts and the intent to cause damage as elements thereof; however, in this case the **Tribunal** found that there was no intention to cause damage and, "as a result, on the basis of this line of reasoning, the use of the concept of composite acts is not admissible either."[64]

80. **Argentina** argued that allowing a tribunal to punish a State for adopting a series of lawful measures which, taken together, allegedly amount to a wrongful act affects legal certainty and constitutes both a manifest excess of powers and a serious departure from the rules of procedure. It also claimed that the **Tribunal** violated the guarantee of due process and the right to defense because **Argentina** did not have the opportunity to defend itself against this position (cumulative effect) at any stage of the proceedings.[65]

81. **Argentina** argued that when there is a wrongful application of the law, and it is egregious (as in this case), this is considered to be a ground for annulment. It added that "what the Tribunal did here was not to misinterpret an Article of the BIT, but to modify its content, thus turning it into a rule that provides for composite acts, which amounts to a manifest excess of its powers."[66]

82. **Argentina** concluded this allegation as follows:

> "...the Tribunal's 'judicial creation,' which jeopardizes legal certainty—not only in this case, but also in future proceedings if this theory starts to be followed by other tribunals—amounts to a manifest excess of the powers of the Tribunal, a failure to state the reasons on which the decision was based, and a serious departure from the rules of procedure, which warrants the annulment of the Award."[67]

[63] Memorial on Annulment, ¶ 89.
[64] Id., ¶¶ 93- 95.
[65] Id., ¶¶ 96 and 97.
[66] Reply on Annulment, ¶ 55.
[67] Memorial on Annulment, ¶ 101.

83. According to **El Paso**, the **Tribunal** did not commit any error likely to cause the annulment of the **Award** when it ruled that the cumulative effect of the measures violated the standard of fair and equitable treatment. It cited paragraph 517 of the **Award** to assert that the **Tribunal** explained how it viewed "...Argentina's wholesale dismantling of the legal framework in the electricity market, not just individual, incremental changes in the regulatory scheme."[68]

84. According to **El Paso**, the **Tribunal** did not create any new standard, but made an analogy between Argentina´s actions that supposedly violated the **FET** standard and to creeping expropriation to explain its decision. It added that even if the **Tribunal** had misinterpreted the FET standard it would merely have been a misapplication of law and not been a ground for annulment.[69] It also stated that the **BIT** did not contain a definition for the fair and equitable treatment standard because the signatory States of that treaty did not agree on a definition; so the **Tribunal** had to analyze it in order to define it and apply it to the facts of the case.[70]

85. **El Paso** also argued that in all the memorials the Parties discussed the concept of fair and equitable treatment relative to the complete regulatory framework. It denied that **Argentina** did not have the opportunity to defend itself against those arguments.[71]

86. **El Paso** also stated, based on several quotes from other awards, that the **Tribunal** did not elaborate a new standard.[72] It also criticized **Argentina**'s arguments in relation to the reference made by the **Tribunal** to Article 15 of **the ILC's Draft Articles**, since the latter are secondary rules, cited by the **Tribunal** as a reference point in its interpretation of the proper law, the **BIT**.[73]

87. **El Paso** cited several paragraphs of the "Claimant's Memorial," the "Claimant's Reply," the "Claimant's Statement" submitted on the first day of the hearing and the

[68] Counter-Memorial on Annulment, ¶ 113.
[69] Id., ¶¶ 114 and 118.
[70] Id., ¶ 119.
[71] Id., ¶¶ 117.
[72] Id., ¶ 122 .
[73] Counter-Memorial on Annulment, ¶¶ 124 and 126; Post-Hearing Counter-Submission – Argentina, ¶ 44.

"Respondent's Rejoinder" as a basis for its claim that in the proceedings there was indeed reference to "... the legal regime… in terms of a composite regime ..."[74]

88. Based on the *Klöckner v. Cameroon* case,[75] **El Paso** argued that an arbitral tribunal is entitled to formulate its own argument so long as that argument does not go beyond the legal framework established by the Parties; in its opinion, the **Tribunal** did not exceed this framework.[76] For **El Paso**, the **Tribunal** did not fail to state its reasons nor was its reasoning contradictory concerning the cumulative effects of the measures adopted by **Argentina** which violated the fair and equitable treatment standard.

89. **Argentina** referred at length to the previous issue and concluded that "... there is no doubt that the Tribunal that ruled on this case went beyond the legal framework established by the parties."[77]

90. At the end of the hearing on October 8 and 9, 2013, the Committee asked the Parties to clarify several issues. Specifically, it asked **El Paso** to indicate:

> "… why it states that Argentina was aware, from the beginning, about El Paso's claim that the violations caused by the measures taken by Argentina, while they did not violate the FET standard individually, when considered cumulatively, qualify as violations of the FET and was, thus, in a position to defend itself, during the arbitration proceeding, from the consequences of such claim."[78]

91. The Committee also granted **Argentina** time so it could discuss the response it would provide to **El Paso**. Subsequently, the parties submitted additional observations in a second round of memorials. In the following paragraphs the Committee will summarize the positions expressed in these briefs.

92. **El Paso** stated that its claim of unfair and inequitable treatment was based on a cumulative basis and maintained that the opinions of **Argentina**'s own expert

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[74] Counter-Memorial on Annulment, ¶ 129.

[75] *Klöckner Industrie-Anlagen GmbH et al. v. Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 [hereinafter "*Klöckner*"], Decision of the *ad hoc* Committee on the Application for Annulment of the Arbitral Award, May 3, 1985.

[76] Id., ¶ 131.

[77] Reply on Annulment, ¶ 59.

[78] Letter from the Secretary of the Committee dated October 11, 2013.

witnesses show that they were instructed to defend the claims on a cumulative basis.[79] It added that, even if **Argentina** did somehow fail to understand the case it had to meet, it managed to serve the appropriate evidence it deemed necessary "and so any different understanding would not have produced any substantially different result."[80] **El Paso** also stated that there is no "legal standard of composite acts," that the "legal standard" is "treatment" and the **Tribunal** interpreted the term "fair and equitable treatment".[81] For **El Paso,** how **Argentina** chose to present its case was Argentina's advocacy choice and this Committee should not allow Argentina to re-cast such tactical choice.[82]

93. According to **El Paso**, "the Tribunal was free to interpret 'treatment' in Article II (2)(a) of the BIT as comprising all measures, considered collectively or on an individual basis." "The BIT does not define what 'treatment' must be for FET, and it in no way excludes the possibility that the primary rule may be violated by multiple acts."[83]

94. **El Paso** also indicated that, based on what was said by the Annulment Committee in the *Wena v. Egypt* case,[84] in order for the departure from a fundamental rule of procedure to be a ground of annulment it must be serious, and the applicant must show that the departure substantially affected the outcome of the case. It alleges that **Argentina** failed to do so.[85]

95. **El Paso** cited several paragraphs of the various pleadings filed by the Parties during the arbitration process and the reports of the experts offered by both Parties, whereby

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[79] Post-Hearing Brief-El Paso, ¶¶ 6 and 8.
[80] Id., ¶ 9.
[81] Id., ¶ 11.
[82] Id., ¶ 18.
[83] Id., ¶¶ 37 and 38; Post- Hearing Reply - El Paso, ¶¶ 13 and 14.
[84] *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, [hereinafter "*Wena Hotels*"] Decision on the Application for Annulment of the Arbitral Award, February 5, 2002.
[85] Post-Hearing Brief - El Paso, ¶ 42.

in its opinion it is shown that from the beginning of the proceedings it filed a claim based on the cumulative effect of the measures.[86]

96. According to **El Paso**, through its submissions during the proceedings, **Argentina** defended the measures it adopted, individually and collectively. It did this when it described the context in which the measures and the electricity and hydrocarbons regulatory frameworks in general were adopted at a time of crisis in that country.[87]

97. **El Paso** referred to other documents in which **Argentina** recognized that there could not be an isolated analysis of the measures challenged in the arbitral process and further argued that **El Paso** had alleged violation of the **BIT** because of a set of measures taken by the Argentine government.[88] It also claimed that even at the hearing it was demonstrated that "the cumulative FET issue was in play"[89] when, for example, in the examination of experts provided by the Parties, the latter indicated that they had analyzed all the measures as a package, and the cumulative effect of these measures.[90]

98. Regarding the term "treatment," **Argentina** stated that the **Award** did not relate the meaning of that term to Article II(2)(a) of the **BIT**; it further argued that the **Award** mentions the concept of "composite act" only in the title and at the end of paragraph 519.[91]

99. Furthermore, **Argentina** contended that the "Claimant never argued, not even in the alternative, that the measures at issue, *while they did not violate the FET standard individually*, amounted to a breach of that standard when considered cumulatively" (emphasis in the original).[92]

[86] Id., ¶¶ 54-70.
[87] Id., ¶¶ 71-89.
[88] Id., ¶¶ 94 and 95.
[89] Id., ¶ 101.
[90] Id., ¶¶ 102-104.
[91] Post-Hearing Rejoinder, ¶¶ 14 and 15.
[92] Post-Hearing Counter-Submission – Argentina, ¶ 2.

100. **Argentina** also referred to the terms "composite act" and "creeping violation of the standard of fair and equitable treatment," describing concepts "... which came as an unpleasant surprise in the Award. Be that as it may, it should be noted that El Paso was also unable to rely on any other reason, concept or theory it had invoked in its submissions to the Tribunal, to try and argue that each of the measures at issue in isolation *did not breach the FET* standard but should otherwise be considered a breach of FET."[93] (emphasis in the original)

101. **El Paso** rejected **Argentina's** contention as follows:

> "…mere surprise at the Tribunal's decision does not entitle Argentina to annulment. Argentina has the additional burden of showing that the alleged error substantially affected the outcome of the case."[94]

102. For **Argentina**, "[t]he claim presented was about individual breaches of the Argentina-US BIT and about an *accumulation of breaches*, never about an accumulation of lawful acts that somehow turn[ed] into an illegal act."[95] (emphasis in the original). Moreover, in its opinion, the problem is that **El Paso** never argued the "'cumulative effect' of lawful acts."[96]

103. **Argentina** also stated:

> "Suffice it to mention only some of the issues Argentina was never able to discuss or even raise before the Award was rendered:
> Which lawful acts can be considered in the "accumulation" of measures and which cannot?
> If the series in question is not just an accumulation of BIT breaches but of lawful acts, does the "cumulative effect" of the measures suffice to conclude that there has been a composite wrongful act, or in this case does the latter concept require some other factor that links all the acts?
> Should the fact that each and every measure, when considered individually, does not breach the BIT have an impact on, for example, the calculation of damages?
> Given that all of the measures individually considered do not breach the BIT, what should be the date of valuation for damage calculation purposes?"[97]

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[93] Id., ¶ 4.
[94] Post-Hearing Reply, ¶ 49.
[95] Post-Hearing Rejoinder, ¶ 6.
[96] Id., ¶ 13.
[97] Post-Hearing Counter-Submission – Argentina, ¶ 14.

104. **Argentina** argued that El Paso analyzed the measures in question one by one and maintains that each of them violated the standard of fair and equitable treatment.[98] It also stated that "... the Tribunal never indicated, much less "clearly," that it had concerns about each measure being, in isolation, consistent with the FET but in breach of such standard when considered collectively."[99] It concluded that **Argentina** had no opportunity to present written and oral presentations on that concept which **El Paso** did not raise.[100]

105. According to **El Paso**, the **Tribunal**'s decision on the issue of whether the various measures adopted by **Argentina** were arbitrary and discriminatory has no bearing on the determination of the total effect of these measures as unfair and inequitable treatment.[101] **El Paso** also argued that **Argentina** failed to demonstrate that if the concept of the violation of the standard of fair and equitable treatment in a cumulative manner had not been raised in the arbitration process, this fact would have affected the final outcome.[102]

106. **Argentina** insisted that the concepts of composite act and creeping violation of the FET standard first appeared in the **Award,** therefore it did not have the opportunity to challenge such arguments.[103] It was not allowed to discuss whether it is possible that the concept of composite act may be said to be contained in the **BIT,** the conditions for the application of these concepts, or the consequences of their application in terms of liability and in terms of damages.[104]

107. **Argentina** also questioned paragraphs 459 and 515 of the **Award**, for, in its opinion, there is a contradiction between them with reference to the effects of pesification in the Argentine Companies. It also noted that the Award must be annulled for manifest excess of powers because the **Tribunal** could not conclude that the **BIT** was violated

[98] Id., ¶ 29.
[99] Id., ¶ 43.
[100] Id., ¶ 43.
[101] Post-hearing Reply, ¶ 19.
[102] Id., ¶ 31.
[103] Post-Hearing Rejoinder, ¶ 2.
[104] Id., ¶ 3.

by measures that were not subject to the jurisdiction of the **Tribunal**. It noted also that the use of "etc." in paragraph 515 of the **Award** demonstrates the failure to state the reasons for the decision since one cannot conclude precisely which measures were considered by the **Tribunal**.[105]

E. **The necessity defenses raised by the Argentine Republic**

108. Regarding the defense of necessity, **Argentina** stated that the **Tribunal** did not apply Article XI of the **BIT** which contains the so-called "non-precluded measures provision." According to **Argentina**, that Article does not contain the "non-contribution" requirement and the fact that the **Tribunal** considered applying it with a view to excluding the application of this rule, constituted a failure to rely on the applicable law.[106] **Argentina** also stated that the **Tribunal** was not consistent and extrapolated the requirements laid down in other instruments absolutely inapplicable to this case,[107] and furthermore the **Tribunal** wrongly equated the "non-contribution" requirement to the "state of necessity" when, in fact, they are different.[108]

109. **Argentina** also argued that the **Tribunal** did not address the defense that it filed of state of necessity under customary international law independently of Article XI of the **BIT**, which was inconsistent with the analysis made by the **Tribunal** in the **Award**. It indicated that there are differences between Article XI of the **BIT** and Article 25 of the **ILC's Draft Articles** on the sphere of application of these rules, their nature, operation, content, and scope.[109]

110. Once **Argentina** explained the differences identified, it stated that it demonstrated in the arbitral proceedings that Article XI of the **BIT** is a self-judging provision, i.e., that the **BIT** Contracting State has the right to interpret that rule. It referred to the evidence it brought to the proceedings in this matter and stated that the **Tribunal** "...-acting in a purely arbitrary manner and manifestly exceeding its powers - did not

[105] Post-Hearing Counter-Submission – Argentina, ¶ 13; Post-Hearing Rejoinder, ¶¶ 27 and 28.
[106] Memorial on Annulment, ¶¶ 106 and 107.
[107] Id., ¶ 139.
[108] Id., ¶ 140.
[109] Memorial on Annulment, ¶¶ 109-123.

mention, let alone take into account, such critical piece of evidence *submitted in the course of these arbitration proceedings*, in unjustifiably rejecting the self-judging nature of the provision, disregarding what had been clearly acknowledged by both parties to the BIT."[110] (emphasis in the original)

111. **Argentina** also argued that the **Tribunal** did not explain why the term "essential security interests" in Article XI of the **BIT** should be limited to matters of external security instead of including internal security issues, especially in a crisis such as the one experienced by Argentina.[111]

112. **Argentina** also argued that the **Tribunal** did not state reasons and manifestly exceeded its powers when it reached its conclusion in paragraph 591 of the **Award**. For **Argentina**, what was done by the **Tribunal** amounts to non-application of the applicable law.

113. **Argentina** alleged a failure to state reasons, a serious departure from a fundamental rule of procedure, and a manifest excess of powers in relation to the **Tribunal**'s statement that, unless the contrary is specified, the provisions of the **BIT** are not self-judging in nature, because according to **Argentina**, in the conclusion expressed in paragraphs 590 and 610 of the **Award**, the **Tribunal** disregarded the evidence submitted by Argentina.[112]

114. Regarding the same issue, **Argentina** stated that the **Tribunal** "... refers in general terms to the alleged object and purpose of the Treaty, without even considering critical and irrefutable evidence that demonstrates that the intention of the parties to the BIT is wholly inconsistent with its proposition."[113]

115. **Argentina** also pointed out that the statement made by the **Tribunal** in paragraph 603 of the **Award**, in which reference was made to Argentina's knowledge of the

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[110] Id., ¶ 127.
[111] Id., ¶ 128.
[112] Id., ¶¶ 132 and 142.
[113] Id., ¶ 135.

self-judging nature of Article XI of the **BIT** is unfounded and inconsistent with the evidence contained in the record.[114]

116. In addition, according to **Argentina**, the **Tribunal** did not apply Article IV(3) of the **BIT** because the **Tribunal** reached the conclusion that this rule would have no effect; in addition, no reasons were given for that decision, and therefore this amounted to the **Tribunal** manifestly exceeding its powers.[115]

117. **Argentina** further argued that there is an inconsistency in the **Award** because the majority of the **Tribunal** held that **Argentina** had not met the "non-contribution" requirement and did not indicate what legal standard it analyzed in order to demand that requirement. **Argentina** ended this argument as follows:

> "...the majority [of the Tribunal] did not state the reasons on which that part of the Award was based, failed to explain the legal standards applied by it —particularly, the meaning ascribed to 'non-contribution' in adopting its criterion— and referred only to economic (rather than legal) arguments)."[116]

118. **El Paso** contended that **Argentina** did not link its arguments in this section with the grounds for annulment under Article 52 of the ICSID Convention. It considered that the **Tribunal,** by invoking the "non-contribution" requirement from Article 25 of **the ILC's Draft Articles** was interpreting the "necessity" language of Article XI of the **BIT**; that its reasoning was adequate and it applied the proper law.[117]

119. Regarding customary international law, **El Paso** stated that tribunals have discretion as to how to express the reasons for their decisions. In the **Award**, the **Tribunal** gave a lengthy explanation of the scope of Article XI with respect to the requirements of international law; it also established that the *lex specialis* was Article XI and, after stating that **Argentina** failed to meet the "non-contribution" requirement, the Tribunal did not analyze the other requirements of Article 25 of the **ILC's Draft**

[114] Id., ¶ 138.
[115] Id., ¶¶ 143 and 144.
[116] Id., ¶ 157.
[117] Counter-Memorial on Annulment, ¶ 155.

Articles. **El Paso** concluded that the truth is that **Argentina** does not agree with the reasoning and the conclusions of the **Tribunal**.[118]

120. Regarding the self-judging nature of Article XI of the **BIT**, **El Paso** stated that **Argentina** was claiming that the Committee should re-examine the evidence received regarding this issue. It further argued that **Argentina** could not prove that at the time of signing of the **BIT**, there was a bilateral understanding on the self-judging nature of that standard. It also alleged that, although the **Tribunal** did not specifically refer to the evidence presented by **Argentina**, it gave sufficient reasons for it to be understood why it would not consider it relevant or decisive.[119]

121. **El Paso** stressed that the **Award** is not annullable because **Argentina** does not share the **Tribunal**'s position on the relevance of the evidence and it reiterated that, under Rule 34(1) of the **ICSID Arbitration Rules** the **Tribunal** has wide latitude with regard to the weighing of evidence.[120]

122. Regarding Article IV(3) of the **BIT**, **El Paso** stated that the **Tribunal** explained the position of the parties on this standard and, in paragraph 559 of the **Award**, concluded that **Argentina's** argument in this regard went against the plain meaning of the text and explained its position. For **El Paso**, **Argentina's** claim is nothing more than its dissatisfaction with the **Tribunal'**s decision.[121]

F. Issues related to the valuation of damages

123. **Argentina** argued that the amount of compensation awarded by the **Tribunal** is contrary to applicable law and that there was manifest excesses of powers on the part of the **Tribunal** in this matter. It indicated that, in terms of causality, there was a failure to give reasons for decisions and manifest excess of powers because the proper law was not applied.[122] According to **Argentina**, **El Paso** did not invoke the

[118] Id., ¶¶ 165-166.
[119] Id., ¶¶ 173-177.
[120] Id., ¶ 178.
[121] Id., ¶¶ 181-184.
[122] Memorial on Annulment, ¶ 163.

cumulative effects of the measures and, therefore, the **Tribunal** must conclude that the valuation carried out by **El Paso**'s experts cannot be deemed to satisfy the causation requirement. The valuation considered by the **Tribunal** was done by LECG which made the valuation of damages for each measure, not by accumulation thereof. **Argentina** argued that the **Tribunal** did not observe the "test" of causality in relation to **El Paso**'s sale of shares in the Argentine Companies.[123]

124. **Argentina** also claimed that the **Tribunal** used the information in the *Chorzów Factory* case[124] in terms of the compensation standard, however case law is not a source of law in international arbitration. In addition there was contradiction in applying the findings of *Chorzów* because in that case it was a dispossession of an industrial enterprise, whereas this is not a case of expropriation; thus, the **Award** is contradictory.[125]

125. **Argentina** also stated that the **Tribunal** "in blatant contradiction with this approach, by a majority decision, and manifestly exceeding its powers, adopted a valuation taking values projected in 2003, after the alleged breaches by Argentina, placing El Paso in a different situation than that existing before the alleged 'creeping measures.'"[126]

126. For **Argentina**, the compensation ordered by the **Tribunal** is disproportionate and arbitrary. In addition, in determining the amount of damages, the **Tribunal** did not take into account the sales price of **El Paso's** shareholding but rather adopted a method that assumed that **El Paso** continues to keep those shares. According to **Argentina**, these contradictions are evidence of the **Tribunal's** failure to state the reasons on which the decision is based.[127]

127. **Argentina** concluded as follows:

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[123] Id., ¶¶ 158-168; Reply on Annulment, ¶ 117.
[124] *Factory at Chorzów* (Germany v. Poland) [hereinafter "*Chorzów*"], 1927 P.C.I.J. (ser. A) No. 9 (July 26)
[125] Memorial on Annulment, ¶¶ 169-170; Reply on Annulment, ¶ 123.
[126] Memorial on Annulment, ¶ 171.
[127] Id., ¶¶ 173-174.

"The Tribunal held Argentina liable for the violation of a standard that is not contained in the Treaty and then awarded damages to Claimant relying on a damage assessment that was based on alleged BIT violations that are different from those invoked by Claimant. In deciding on issues that had not been submitted to it, the Tribunal seriously violated Argentina's right of defence."[128]

128. **El Paso** pointed out that arbitral tribunals have a discretionary power to set the amount of damages. It also noted that the argument that the **Tribunal** misapplied the law is an insufficient ground for annulment. According to **El Paso**, **Argentina** does not challenge the application of the proper law but essentially disagrees with the **Tribunal's** findings on damages. **El Paso** insisted that the **Tribunal** analyzed the valuation mechanisms presented by the Parties and took into account LECG's DCF model endorsed by the **Tribunal's** independent expert.[129]

129. Regarding the reference by the **Tribunal** to the *Chorzów Factory* case for the adoption of the standard of compensation, **El Paso** explained that since the **BIT** does not specify the applicable standard, the Tribunal looked to that case to determine the standard. **El Paso** also indicated that, based on the decision of *Compañía de Aguas del Aconquija S.A. y Vivendi Universal S.A. v. Argentina*[130] and what was expressed by Professor Christoph Shreuer, an arbitral tribunal need not explicitly address every single detail of what was argued by the parties. The Tribunal is afforded discretion as to the way in which it expresses its reasoning in fixing damages whether it is stated succinctly or at length.[131]

130. **El Paso** acknowledged that case law is not a source of law, but noted that the *Chorzów Factory* judgment is part of customary international law and a general principle of international law that has been considered as the cornerstone of compensation claims.

[128] Id., ¶ 177.
[129] Counter-Memorial on Annulment, ¶¶ 188, 190-191.
[130] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic,* ICSID Case No. ARB/97/3 [hereinafter "*Vivendi I*"], Decision on Annulment, July 3, 2002.
[131] Id., ¶¶ 197-198.

131. Regarding the application of the *Chorzów* standard and dispossession of an industrial undertaking, which did not happen in this case, **El Paso** stated that in paragraph 702 of the **Award** the **Tribunal** explained the reason why it applied that standard to a situation such as this, which involves the breach of the standard of fair and equitable treatment, as other Tribunals have done.[132]

132. Regarding the use of prices projected in 2003, **El Paso** stated that the **Tribunal** explained in paragraphs 704 and 733 to 736 its reasons for applying these projected values. It also emphasized the discretion enjoyed by the Tribunal in this matter. Here again this is not an issue of manifest excess of powers, but of **Argentina**'s dissatisfaction with the **Tribunal's** findings.[133]

133. Regarding the sale price of the shares and **Argentina's** contention that the **Tribunal** assumed that **El Paso** kept those shares and that that is a contradiction so as to form a basis for annulment of the **Award**, **El Paso** indicated, based on several annulment decisions, that the Committees should be extremely careful when reviewing allegations of alleged contradictions in awards. It also analyzed the cost reports provided by the arbitration records and the analysis submitted by the **Tribunal's** own expert and denied that there was any contradiction in this case.[134]

134. **El Paso** alleged that **Argentina** is seeking to reopen the merits of this dispute and wishes the Committee to be converted into an appellate tribunal. It added that **Argentina's** assertion that it was denied procedural rights is unfounded. According to **El Paso**, the **Award** contains a proper application of the law and a thoughtful, well-reasoned, and calculated weighing of the factual evidence. It does not involve any excess of power by the **Tribunal** or serious departure from the fundamental rules of procedure. For these reasons, it requested the rejection of the alleged grounds for

[132] Id. ¶¶ 199- 200.
[133] Id., ¶¶ 201- 202; Rejoinder on Annulment, ¶ 83.
[134] Counter-Memorial on Annulment, ¶¶ 204- 208.

annulment and application for annulment; confirmation of the Tribunal's Award; and an order that **Argentina** pay costs.[135]

IV. ANALYSIS OF THE COMMITTEE

135. The Committee carefully considered the claim for annulment brought by **Argentina**. In its submissions, **Argentina** presented three grounds which the Committee summarized in the previous section. If the Committee were to analyze these grounds in the same order in which they were presented, there would be unnecessary repetition, as **Argentina** split its arguments on each ground into several sections. For this reason, in the chronology set out below, the Committee will follow the order in which Article 52(1) of the **ICSID Convention** provides the grounds for annulment applicable to the case.

136. In order to fully understand **Argentina**'s claim and the position of **El Paso** in this annulment proceeding, the Committee believes it is convenient to reproduce the following rules:

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

"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
(a) that the Tribunal was not properly constituted;
(b) that the Tribunal has manifestly exceeded its powers;
(c) that there was corruption on the part of a member of the Tribunal;
(d) that there has been a serious departure from a fundamental rule of procedure; or
(e) that the award has failed to state the reasons on which it is based."

Article IV(3) of the BIT states:

"Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses."

[135] Id., ¶¶ 209-211.

Article XI of the BIT provides:

> "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests".

137. In the following paragraphs, the Committee will review the allegations raised by **Argentina** corresponding to those which are exhaustively listed in Article 52 of the **ICSID Conventio**n; the remaining allegations, which do not refer to the grounds for annulment, will be rejected without any analysis.

A. Manifest excess of powers

138. The manifest excess of powers of an arbitral tribunal may take place when a Tribunal is resolving jurisdictional issues or issues concerning the merits of the case. This can happen when a tribunal rules on matters that the parties did not submit for its decision; when it did not to apply the proper law; or when it did not apply the law agreed on by the parties. In these cases, the excess of powers must be "manifest."

139. The Committee considers it important to highlight the following:

> "...*Ad hoc* Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence. This means that the Tribunal has the power to decide whether it has jurisdiction to hear the parties' dispute based on the parties' arbitration agreement and the jurisdictional requirements in the ICSID Convention. In light of this principle, the drafting history suggests—and most *ad hoc* Committees have reasoned—that in order to annul an award based on a Tribunal's determination of the scope of its own jurisdiction, the excess of powers must be "manifest." However, one *ad hoc* Committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case."[136]

[136] Background Paper on the Annulment Mechanism for the ICSID Administrative Council, August 10, 2012, ¶ 89.

140. "Manifest excess of power" has been defined as that which is obvious, clear, or self-evident; discernible without the need for elaborate interpretations.[137] However, for some *ad hoc* committees that concept is more complex; e.g., for the committee in the *Fraport* case manifest excess must be demonstrable and substantial and not lead to doubt. That committee said: "The Committee considers that the excess of jurisdiction should be demonstrable and substantial and not doubtful." [138] "It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantially serious".[139]

141. The Committee considers that not every excess of powers may result in the annulment of an award because, in accordance with Article 52 of the **ICSID Convention**, an award may be annulled only if the excess of powers is "manifest."

142. Pursuant to the plain meaning of the word "manifest" in the context of Article 52 of the **ICSID Convention** and considering the finality and binding nature of awards, features set forth in Article 53 of said Convention, for this Committee, the excess of powers should be obvious, evident, clear, self-evident and extremely serious.

143. Regarding the failure to apply the proper law, "[t]he drafting history of the ICSID Convention shows that a Tribunal's failure to apply the proper law could constitute a manifest excess of powers, but that erroneous application of the law could not amount to an annullable error, even if it is manifest … there is no basis for an annulment due to an incorrect decision by a Tribunal, a principle that has been expressly recognized by many *ad hoc* Committees."[140]

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[137] *Wena Hotels,* Decision on the Application for Annulment of the Arbitral Award, February 5, 2002 ¶ 25; *Azurix Corp. v. Argentina,* ICSID Case No. ARB/01/12, Decision on Annulment, September 1, 2009 ¶ 68; *M.C.I. Power Group and New Turbine Inc. v. Ecuador,* ICSID Case No. ARB/03/6, [hereinafter "*M.C.I*"], Decision on Annulment, October 19, 2009, ¶ 49 and *Impregilo S.P.A. v. Argentine Republic,* ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, January 24, 2014, ¶ 128.

[138] *Fraport Frankfurt Airport Services Worldwide v. Republic of the Philippines* [hereinafter "*Fraport*"], ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶¶ 43 and 44.

[139] *Hussein Nuaman Soufraki v. United Arab Emirates,* ICSID Case No. ARB/02/7, Decision on Annulment, June 5, 2007, ¶ 40.

[140] Background Paper on the Annulment Mechanism for the ICSID Administrative Council, August 10, 2012, ¶ 91

144. In the opinion of this Committee, it is necessary to distinguish between the failure to apply the proper law and an error in the application of that law. The first is a ground for annulment under Article 52, the second is not. Reviewing the substantive reasoning by which an arbitral tribunal reached its conclusions would require reexamining how the tribunal applied or interpreted the law, which would transform annulment committees into appellate tribunals. Under this scenario, committees would necessarily have to evaluate the facts and the evidence as well as the legal principles put forward by the parties all of which were already analyzed by the respective arbitration tribunal. This would change the very nature of the **ICSID** arbitration system.

145. In this case, **Argentina** argued that the **Tribunal** manifestly exceeded its powers under Article 52(1)(b) of the **ICSID Convention** regarding: i. jurisdictional issues; ii. the causal link between the measures adopted by **Argentina** and the sale of **El Paso's** interest in the Argentine Companies; iii. the measures adopted in relation to the spot price and the capacity payments; iv. the cumulative effect of the measures; v. the necessity defenses raised by **Argentina** during the arbitration process and vi. issues related to the valuation of damages. The Committee will examine each of these arguments in turn.

i. Jurisdictional Issues

146. **Argentina** argued that the **Tribunal** manifestly exceeded its powers in relation to jurisdictional issues:

a) When the **Tribunal** recognized in paragraph 175 of the **Award** that the arguments of **El Paso** were not viable because they entailed claiming twice for damages caused by the same event, the **Tribunal** should have rejected the claim. According to **Argentina**, the **Tribunal** clearly lacks the jurisdiction to amend a claim so as to make it viable because this implies rendering an *ultra petita* decision;[141]

[141] Memorial on Annulment, ¶ 19.

b) When the **Tribunal** acted in a contradictory manner by accepting the damages valuation submitted by LECG which implicitly referred to the damage sustained by the Argentine Companies;[142]

c) When the **Tribunal** ruled that the measures taken by Argentina were one of the reasons that contributed to the damage sustained by **El Paso** and that there is a causal link between these measures and the alleged damage suffered;[143]

d) When the **Tribunal** sought to justify its jurisdiction by stating that the **BIT** grants shareholders a direct right of action;[144] and

e) When the **Tribunal** exercised jurisdiction over **El Paso's** claims for damages even though none of the rights held by that company was affected by the measures taken by **Argentina**. For **Argentina**, the **Tribunal**'s decision to award damages to **El Paso** on the basis of the alleged rights of the Argentine Companies is inconsistent with the **ICSID Convention** and the **BIT**, so the **Tribunal** exceeded the limits of its powers set forth in those rules.[145]

147. Next, the Committee will focus on analyzing the five overriding arguments related to the **Tribunal**'s manifest excess of powers in relation to jurisdictional issues submitted by **Argentina**:

148. In its claim regarding paragraph 175 of the **Award** (subparagraph (a) of paragraph 146 above), **Argentina** stated that the **Tribunal** had no jurisdiction to amend a claim to make it viable and in doing so it acted *ultra petita* (see paragraph 31 above). According to **Argentina**, the **Tribunal** by accepting **El Paso's** claim exhibited a manifest excess of powers.

149. In the Committee's opinon that there was no amendment nor was there a situation of *ultra petita* as alleged by Argentina and even less an obvious or self-evident excess of powers discernible without the need for an elaborate interpretation.

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[142] Id., ¶ 21.
[143] Id., ¶ 22.
[144] Id., ¶¶ 26 and 27.
[145] Id., ¶¶ 31 and 38.

150. The Committee notes that paragraph 175 of the **Award** is linked to paragraph 174, in which the **Tribunal** explained that **El Paso** argued that Article I of the **BIT** has a very broad wording, so in its opinion , it could include the shares in the Argentine Companies, as well as legal and contractual rights of these companies. Accordingly, the **Tribunal** stated in paragraph 175 of the **Award** that these arguments were not feasible because they involved claiming twice for damages arising from the same event. In paragraphs 178 to 198 of the **Award**, the **Tribunal** examined the arguments of **El Paso** and stated what in its opinion were not investments under the **BIT**, while in paragraphs 199 to 214 it defined which of **El Paso's** claims were indeed investments protected by Article I of the **BIT**. It carefully distinguished between the Argentine Companies' contractual rights, which it does not consider protected investments, and El Paso's shares, which it does consider as such. This distinction clarifies that the Tribunal concentrates on the claim that El Paso brought in its own right and avoids at the same time the danger of double compensation.

151. **Argentina** did not show how, in its view, in those paragraphs or others of the **Award**, the **Tribunal** "amended" **El Paso's** claim in those paragraphs or others of the **Award** and thus committed the violation of *ultra petita*, thereby, manifestly exceeding its powers.

152. For the above reasons, the Committee will reject the *ultra petita* argument raised by **Argentina** under the heading of manifest excess of powers.

153. Regarding the allegation of contradiction that caused the **Tribunal** to supposedly display manifest excess of powers (subparagraph (b) of paragraph 146 above), **Argentina** claimed that this contradiction occurred when the **Tribunal** accepted the valuation of damages made by LECG, which implicitly referred to the damage that the **Argentine Companies** would supposedly have suffered, while in paragraphs 188, 194, 195, 198 and 214 of the **Award**, the **Tribunal** stated that rights, licenses or contractual rights were not investments protected by the **BIT**, and only the shares were.

154. The Committee believes that it is necessary to point out that any incidental contradictions in the **Award** is not necessarily a ground for annulment because the Committee cannot review whether the **Award** is fair or not, right or wrong. Nor can it evaluate the evidence, as claimed by **Argentina** on this particular issue, when it tells the Committee that the report providing a valuation of damages and which was considered by the **Tribunal** implicitly has content that is inconsistent with the view expressed by that **Tribunal** in the **Award**.

155. The **ICSID Convention** does not empower this Committee to evaluate the evidence referred in paragraph 153, which the **Tribunal** already evaluated, nor to decide whether implicitly or explicitly, that report included damages that should not have been included. Nor can it judge whether such damages were valued by the **Tribunal** improperly or unfairly. To do so would convert the recourse of annulment into an appeal.

156. As indicated above, the Committee will also reject the application for annulment filed by **Argentina** for alleged manifest excess of powers by contradictions in the **Award** with respect to damages.

157. Another annulment argument related to jurisdictional issues refers to paragraphs 175 and 687 of the **Award** in which the causal link between the measures adopted by **Argentina** and the damage suffered by **El Paso** (subparagraph (c) of paragraph 146 above) is analyzed. **Argentina** stated that "... the Tribunal, dogmatically and without providing the reasons for its decision, manifestly exceeded its powers."[146] **Argentina,** after criticizing the method used for valuing the alleged damage,[147] stated "...the Tribunal allowed El Paso to bring a claim for contract breaches which, at the same time, purportedly amount to violations of the obligations assumed by Argentina to investors under the BIT, as if there was no corporate distinction between El Paso and the Argentine Companies in which it is a shareholder and as if the Tribunal itself had

[146] Memorial on Annulment, ¶ 22.
[147] Id., ¶ 23.

not expressly recognized that the contracts of the Argentine Companies are not protected investments."[148]

158. **Argentina's** arguments contained in the preceding paragraph are complaints typical of an appeal. Clearly, **Argentina** disagrees with the valuation method used by the **Tribunal** and further stated that the Tribunal "…allowed El Paso to bring a claim for contract breaches which, at the same time, purportedly amount to violations of the obligations assumed by Argentina to investors under the BIT"[149] and allowed a double recovery.[150] The Committee considers it important to state that an arbitral tribunal cannot "allow" or "prevent" a party from claiming what it considers appropriate. What is finally granted by the Tribunal may or may not be the full amount claimed by the claimant; thus, in paragraphs 174 and 175 of the **Award** the **Tribunal** stated that **El Paso's** claims were contradictory and therefore not viable. By stating the contradiction in the Claimant's reasoning, the **Tribunal** did not incur in a cause for annulment, as **Argentina** stated. The possibility of a "double recovery" is an issue that the **Tribunal**, (not the Committee), should and did consider. The causal link between the measures taken by the Government of **Argentina** and the damages claimed was precisely what the **Tribunal** analyzed in the **Award.** To this end it examined the reports of the experts of the Parties and another independent expert appointed by the **Tribunal**. The Committee cannot and should not decide whether the causal link made by the **Tribunal** based on the evidence received is correct or incorrect.

159. For the foregoing reasons, the Committee will also reject **Argentina's** argument presented in the preceding two paragraphs.

160. Another allegation of **Argentina** on jurisdictional issues[151] that would allegedly lead to the annulment of the **Award** is founded on the **Tribunal's** decision to exert its competence (subparagraph (d) of paragraph 146 above) "... by stating that the Treaty

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[148] Id., ¶ 24.
[149] Id., ¶ 24.
[150] Id., ¶ 25.
[151] Id., ¶¶ 26-30.

grants shareholders a right of direct action,"[152] "…allowing a shareholder to take advantage of the ICSID system... amounts to a manifest excess of powers by the Tribunal..."[153] Immediately after **Argentina** made those statements it stated:

"As previously stated, the Tribunal held that the investment protected under the BIT 'was constituted by the shares in the Argentinian companies that belonged to El Paso' and that protection applies to 'the shares, all the shares, but only the shares.' This justification confuses the legal standing that a shareholder may have, in general terms, to bring a claim under the BIT with the substantial rights arising from its shares. If the Argentine Republic had adopted measures with respect to El Paso's rights arising from its protected investment under the Treaty—i.e., the shares—(for example, the right to transfer its shares or receive dividends) such measures would have referred to the rights arising from the shares held by El Paso. In this case, however, Argentina did not adopt any measures that might affect the rights of El Paso as a shareholder in the Argentine companies."[154]

161. The above quote proves that **Argentina** is asking this Committee to determine that Argentina did not take any action that affected the rights of **El Paso**. Obviously, such a determination could only be made by the **Tribunal**, not by this *ad hoc* Annulment Committee.

162. From paragraphs 199 to 214 of the **Award** the **Tribunal** analyzed what was the investment of **El Paso**. In its summary of paragraphs 213 and 214 it stated that the investment protected by the **BIT** is constituted by the shares in the Argentine Companies that belonged to El Paso. It is obvious that said paragraph cannot be read in isolation, as in the preceding paragraph the **Tribunal** stated that "... El Paso's shareholdings in the Argentinian companies are protected regardless of whether they are majority or minority participations." The Committee does not find that the **Tribunal** "confuses the legal standing that shareholders may have, in general terms, to bring a claim under the BIT with the substantial rights arising from its shares" or that this "confusion" would bring about the cancellation of the **Award**.

163. Based on the conclusion in the preceding paragraph, the Committee also will reject this argument for annulment founded on "jurisdictional issues."

[152] Id., ¶ 26.
[153] Id., ¶ 27.
[154] Id., ¶ 29.

164. The last allegation of manifest excess of powers based on jurisdictional issues is that, supposedly, the **Tribunal** exercised jurisdiction over damage claims filed by **El Paso** without any of the rights of that company having been affected by the actions of **Argentina** (subparagraph (d) of paragraph 146 above).

165. This Committee believes that the **Tribunal** decided on its jurisdiction and decided broadly what could constitute an investment under the **BIT** and what would not. The **Tribunal** also considered carefully the decisions of other Tribunals in relation to that **BIT** standard and summarized its conclusions on the protection of majority or minority interests and rights of foreign shareholders in local companies.[155] The Committee does not consider that the **Tribunal** manifestly exceeded its powers in the matters indicated; it is of the opinion that the **Tribunal** made an extensive analysis of many issues before defining what applied to the case and what did not. Besides, this Committee's analysis cannot judge whether any of **El Paso**'s rights was affected, as the damages claim has already been decided by the **Tribunal**.

166. As indicated in the previous paragraph, the Committee also will reject this last argument based on "jurisdictional issues."

ii. The causal link between the measures adopted by Argentina and the sale of El Paso's interest in the Argentine Companies

167. **Argentina** argued that the **Tribunal** manifestly exceeded its powers when referring to the causal link between the measures adopted by Argentina and the sale of **El Paso's** interest in the Argentine Companies. It explained that in the arbitration proceedings it demonstrated that it was the global situation of the company itself why **El Paso** chose to sell those shares; it criticized the evaluation made by the **Tribunal** from the journalistic evidence supplied by **El Paso** and pointed to inconsistencies in paragraph 508 of the **Award**.[156]

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[155] Award, ¶¶ 205-212.
[156] Memorial on Annulment, ¶¶ 53-68.

168. The Committee notes that although **Argentina,** in the paragraphs relating to this claim, reiterated its allegation of manifest excess of powers by the **Tribunal**, it gave no grounds for annulment of the **Award** on the basis of these facts. The evaluation made by the **Tribunal** from journalistic evidence is a task for that body, not for this Committee. That evaluation criticized by **Argentina** concerning the reasons why **El Paso** sold the shares is a matter over which the **Tribunal** alone has powers. It fully exercised them in a long explanation of the facts in paragraphs 114 to 122 of the **Award**, and in a carefully reasoned argumentation, according to which the measures were not the only but certainly the prevailing reason for El Paso's sales (paragraph 507 of the **Award**). This Committee cannot and should not discuss Argentina's allegation of "El Paso's serious crisis"; neither is the Committee authorized to determine what other assets **El Paso** sold or did not sell in other countries during the crisis in Argentina.

169. Regarding "... the inconsistency …so manifest" claimed by **Argentina**,[157] the Committee reiterates that, even if it existed, any contradiction on its own is not grounds for annulment. Inherent inconsistencies must be such that they are material to the outcome and thus, amount to a ground of annulment. In theory, there might be instances where inherent inconsistencies may amount to a lack of reasons or a manifest excess of powers, but this is not the case here. Paragraph 508 of the **Award** about which **Argentina** claims there is an "inconsistency" should be read in conjunction with paragraph 509, since the former refers to the measures taken by **Argentina** considered individually, while in paragraph 509 the **Tribunal** stated that it would analyze the effects of those measures as a whole to determine whether there was a violation of the standard of fair and equitable treatment.

170. Without judging in any way whether the measures taken by **Argentina**, individually or collectively, were what led to **El Paso's** sale of the shares, this Committee does not find that paragraphs 508 and 509 are contradictory, since they refer to two kinds of analyses made by the **Tribunal**. Nor does it find that there is any basis to assert that

[157] Id., ¶ 65.

paragraph 508 demonstrates a manifest excess of powers because in it the **Tribunal** analyzes the measures claimed by **El Paso** as violating its rights.

171. For the foregoing reasons, the Committee will reject this argument for annulment.

172. **Argentina** also stated: "In direct opposition to the analysis of the sale process of the Argentine Companies, the Tribunal—which thus manifestly exceeded its powers—concluded that the measures adopted by the Argentine Republic were the prevailing reason for the sale by El Paso in 2003 and that this was a violation of the standard of fair and equitable treatment."[158]

173. The way in which **Argentina** presented the arguments for annulment requires the Committee to reiterate that contradictions *per se* are not valid grounds for annulling an award. In addition, the Committee considers it necessary to indicate that in the Memorial on Annulment and then in the Reply on Annulment, **Argentina** repeated the reference to paragraphs 277 and 508 of the **Award** and reiterated that the **Tribunal** manifestly exceeded its powers when it decided that the main reason for the sale of the shares held by **El Paso** were the measures adopted by **Argentina**. The Committee has found no explanation that would lead it to conclude that the **Tribunal** made a decision on matters that the Parties did not submit for its decision, or that it did not apply the proper law on this issue. The Committee therefore does not consider that the **Tribunal** by reaching its conclusion on this matter exceeded its powers. Accordingly, it will reject this argument for annulment.

iii. Spot price and capacity payments

174. Regarding the measures taken by **Argentina** in connection with the spot price and capacity payments, Argentina alleged a manifest excess of powers on the part of the **Tribunal** by contradicting itself in the analysis of the measures adopted in the electric power sector. The **Tribunal** held that there was no contract between **El Paso** and **Argentina** embodying a stabilization clause; that the Electricity Act does not

[158] Id., ¶ 67.

provide for capacity payments to be stated in dollars; and that the Tribunal did not consider that unfair and inequitable changes were made in the setting of the spot price and the seasonal price. According to **Argentina**, the conclusion in paragraph 512 of the **Award** contradicts the above analysis of the **Tribunal**. These contradictory conclusions and unfounded statements are, in the opinion of **Argentina**, a manifest excess of powers.[159] **Argentina** also argued that the above statements contradict paragraph 514 of the **Award**[160] and that these allegedly contradictory findings are a cause for annulment since they amount to a manifest excess of powers.

175. The Committee reiterates that the alleged contradictions on their own, even if they existed, are not grounds for annulment of the **Award**. The Tribunal analyzed the Argentinian measures first in the general macroeconomic context (paragraphs 390-402) and then, more specifically, for the electricity sector (paragraphs 403-458). It carefully analyzed caps on spot prices (paragraphs 410-416) and the changes of the capacity payments (paragraphs 417-422). It concluded that these measures were not a violation of the FET (paragraphs 422). It continued to analyze further measures in the oil and gas sector (paragraphs 423-449) including pesification (paragraphs 450-458). It concluded that none of the measures individually constitutes a violation of the FET standard. The Committee is unable to see any contradiction nor any cause for annulment in this reasoning.

176. Paragraph 512 of the **Award** shows that for the foreign investor the important thing was that payments are made in dollars. That statement was supported by the **Tribunal** in the opinion of **El Paso's** expert reproduced in paragraph 511 of the **Award**. In the second sentence of paragraph 512 the **Tribunal** held that **Argentina** did not consider the ultimate goal of capacity payments, which was to attract foreign investment. According to **Argentina** that statement is contradictory and by that finding the **Tribunal** manifestly exceeded its powers. The Committee believes that those issues were presented by the Parties to consider whether there had been a

[159] Id., ¶¶ 69-83.
[160] Id., ¶ 82.

violation of the standard of fair and equitable treatment, so the **Tribunal** did not exceed its powers in analyzing them.

177. As regards what was expressed by the **Tribunal** in paragraph 514 in relation to the currency agreed on in the contracts and the possible consideration that said agreement was a special commitment to the investor, it is important to note that the abovementioned cannot be understood in isolation, instead it must be read at least in conjunction with the two preceding paragraphs in which the **Tribunal** indicated the matters that, in its view, the investor considered when making the investment. In the opinion of this Committee, if there is any contradiction in the wording of paragraph 514 when compared to paragraph 458, it is not of such a magnitude as to affect the final outcome of the **Award** which held **Argentina** liable for the cumulative effect of the measures, not for the consequences of pesification.

178. Accordingly, the Committee does not consider that the **Tribunal** manifestly exceeded its powers and therefore will reject this argument for annulment.

iv. Cumulative effect of the measures

179. Regarding the cumulative effect of the measures adopted by **Argentina**, the latter argued in its Memorial on Annulment that the Tribunal manifestly exceeded its powers[161] because, in its opinion, the **Tribunal** created a new standard by referring in the **Award** to the creeping violations of the standard of fair and equitable treatment;[162] also because, according to **Argentina**, the **Tribunal** did not resort to the applicable law, but to a different law created by itself.

180. The Committee carefully reviewed the above-mentioned argument and concluded that what the **Tribunal** did in the **Award** was an interpretation of fair and equitable treatment of the **BIT** in relation to the facts of the case, based on what was decided by

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[161] Id., ¶¶ 85-87 and 89.
[162] Award, ¶518.

the Tribunals in the *Société Générale v. The Dominican Republic*[163] and the *LG&E et al. v. Argentina*[164] cases.

181. The Committee also considers that the **Tribunal** developed in paragraphs 515 to 517 the reasons for the conclusion that it reached in paragraph 519 concerning the cumulative effects of the measures taken by **Argentina**. It argued that one must not only look at these measures individually but in their totality and "that a combination of all these measures completely altered the overall framework" (paragraph 515). It added referring to *Société Générale v. The Dominican Republic,*[165] "that acts that are not illegal can become such by accumulation" (paragraph 516). These are the arguments (and not the reference to the concept of *creeping expropriation*), that led the **Tribunal** to the conclusion that a breach of the fair and equitable treatment standard existed. The **Tribunal** drew the parallel in paragraph 518 and found that it reinforced its argumentation. The Committee does not understand the **Tribunal** as stating that **Argentina** is liable because there had been a creeping violation of the standard of fair and equitable treatment. Although this concept was mentioned in paragraph 518 of the **Award**, this was not the reason for the finding of liability.

182. Paragraph 518 is not the basis for the conclusion that the **Tribunal** reached in paragraph 519 of the **Award**, in which it found that there had been a violation of fair and equitable treatment by the cumulative effects of the measures adopted by **Argentina**. Thus, there was no creation of a new standard nor was another law applied to the case. Accordingly, the Committee considers that the **Tribunal** did not manifestly exceed its powers in this matter.

183. The Committee is of the opinion that it is useful to consider the statement in the *AES et al v. Hungary* case in which the *ad hoc* committee discussed a similar argument for annulment, since the arbitral tribunal in that case stated the following in the award:

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[163] *Société Générale v. Dominican Republic,* Case LCIA No. UN 7927 [hereinafter "*Société Générale*"], Award on Preliminary Objections to Jurisdiction, September 19, 2008.

[164] *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1 [hereinafter "*LG&E*"], Decision on Liability, October 3, 2006.

[165] *Société Générale,* Award on Preliminary Objections to Jurisdiction, September 19, 2008.

"In 2001, there was a great probability that there would be no administrative pricing after 2004, but this does not equate to absolute certainty giving rise to internationally protected legitimate expectations".[166] The committee in that case examined the position of the parties with respect to the claimants' argument for annulment in that the arbitral tribunal applied a nonexistent standard when it spoke of the "absolute certainty standard" and stated:

> "Regarding the 'absolute certainty' issue, the Committee is unable to find that the Tribunal has introduced a distinct legal standard which is invented, illogical or otherwise incorrect. As noted by Hungary, the reference only appears in the Award after the Tribunal found that, as a matter of law, in order to be legitimate and bind government conduct, an expectation has to be based on express governmental assurances and representations. The Tribunal then found, as a matter of fact, that AES failed to produce evidence of those assurances or representations."[167]

184. Similar to the *AES* case, in the present case it is not possible to consider that the **Tribunal** created a new standard in the **Award**.

185. **Argentina** also stated that an error of law, when it is egregious, is considered to be grounds for annulment. According to Argentina, what the Tribunal did "was not to misinterpret the **BIT**, but to modify its content, thus turning it into a rule that provides for composite acts, which amounts to a manifest excess of its powers."[168]

186. The Committee reiterates the following concept which it has already stated in a different way in this decision:

> "The drafting history of the ICSID Convention also demonstrates that annulment 'is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment].' It does not provide a mechanism to appeal alleged misapplication of law or mistake in fact. The Legal Committee confirmed by a vote

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[166] *AES Summit Generation Limited and AES-Tisza Erömü KFT v. Hungary*, ICSID Case ARB/07/22 [hereinafter "*AES*"], Award, September 23, 2010, ¶ 9.3.25.; *AES*, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012, ¶82.
[167] *AES*, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2012,¶ 95.
[168] Reply on Annulment, ¶ 55.

that even a ‘manifestly incorrect application of the law’ is not a ground for annulment.”[169]

187. The Committee does not consider that there is a “modification” in the contents of the **BIT** as **Argentina** claimed. As the **Tribunal** pointed out in paragraph 338 of the **Award**, the **BIT** does not define what is meant by fair and equitable treatment; **El Paso** made the same point in paragraph 38 of its Post-Hearing Brief. In the opinion of the Committee, **El Paso** is right to indicate that the **BIT** does not exclude any form of violation of that standard, whether through individual acts or through the cumulative effects of the acts indicated as violations of that standard. The **Tribunal**, after giving a detailed explanation of the content of the standard of fair and equitable treatment, analyzed both forms of violation, based on its reasoned interpretation of the **BIT**.

188. For the above reasons, the Committee finds that there was no manifest excess of powers on the part of the **Tribunal**, arising from the decision on the cumulative effects of the measures taken by **Argentina**.

v. Defenses of necessity

189. **Argentina** also argued manifest excess of powers with regard to the defenses raised. It stated that**:**

a) In analyzing Article XI of the **BIT** to determine whether or not it is a self-judging standard the Tribunal did not even mention the evidence submitted by **Argentina** in the course of the arbitration proceedings.[170]

b) The Tribunal also erred when it concluded in paragraph 591 of the **Award** that **Argentina** could not rely on the BITs entered into after 1991 nor on the 1992 Model Treaty.[171]

[169] Background Paper on the Annulment Mechanism for the ICSID Administrative Council, August 10, 2012, ¶ 73.
[170] Memorial on Annulment, ¶ 127.
[171] Id., ¶ 131.

c) The Tribunal also exceeded its powers when it employed a speculative exercise in paragraph 594 of the **Award**.[172]

d) The Tribunal failed to apply Article VI (3) of the **BIT**.[173]

e) The Tribunal failed to examine the defense of necessity under customary international law[174]

190. In the following paragraphs, the Committee will consider these five arguments of Argentina:

191. Regarding the alleged violation related to the evidence that **Argentina** submitted about the nature of Article XI of the **BIT** (subparagraph (a) of paragraph 189 above), the Committee must, once again, reiterate that it is not an appeal tribunal and therefore cannot or should not decide whether evidence was well or ill-considered or not considered at all by the **Tribunal**. Rule 34 (1) of the **Arbitration Rules** is clear when it indicates that the **Tribunal** alone is empowered to decide on two fundamental issues related to the allegation of **Argentina**: the admissibility of evidence and its probative value.

192. Moreover, the Committee considers it is important to note that the **Tribunal** in paragraphs 563 to 587 of the **Award**, analyzed evidence submitted by **Argentina** and **El Paso** on this specific issue and referred to it when addressing the arguments of each Party. Therefore, the Committee does not observe a manifest excess of powers on the part of the **Tribunal** because the Parties requested this specific issue to be resolved. The Tribunal had full authority to accept or reject the evidence and to assess it.

193. For the above reasons, the Committee will reject this argument for annulment.

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[172] Id., ¶ 133.
[173] Id., ¶¶ 143 and 144.
[174] Id., ¶¶ 145-157.

194. **Argentina** also asserted that the **Tribunal** demonstrated manifest excess of powers in its statement in paragraph 591 of the **Award** (subparagraph (b) of paragraph 189 above).[175] It argued that " [n]othing in the Vienna Convention or under general international law justifies the conclusion that no instrument issued after the conclusion of a treaty may be taken into account for the purpose of determining the intent of the parties, particularly where those acts by the State were prior to the execution of the treaty. The Tribunal's assertion constitutes a failure to rely on the applicable law."[176]

195. The **Tribunal** analyzed the position of **Argentina** in connection with the self-judging nature of Article XI of the **BIT** in paragraphs 563 to 573 of the **Award**. In paragraphs 568 and 569 it referred to the evidence that **Argentina** filed, including documents to show that one year after the signing of the **BIT** the State Department of the United States of America introduced similar treaties and a model treaty to the Senate and in the latter the self-judging nature of a provision similar to Article XI of the **BIT** was established; it also cited a statement by the U.S. Senate in favor of the self-judging nature of Article XI of the **BIT**. The **Tribunal** held that such evidence was irrelevant.[177] The Committee notes that the **Tribunal** assessed the evidence provided by **Argentina** to interpret the **BIT** in light of the Vienna Convention; later on[178] the **Tribunal** considered other evidence. The **Tribunal** conducted an analysis of the wording of Article XI of the BIT;[179] then went on to analyze the context[180] of that Article; it also considered subsequent practices (Article 31(3) of the Vienna Convention)[181] and the object and purpose of the treaty.[182] The **Tribunal** concluded that Article XI is not self-judging and that said body had the power to interpret it.[183]

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[175] The Committee clarifies that Argentina cited footnote number 152 of the Memorial on Annulment paragraph 590 of the Award, but this should be 591.
[176] Memorial on Annulment, ¶ 131.
[177] Award, ¶591.
[178] Id., ¶¶ 593-596.
[179] Id., ¶ 590.
[180] Id., ¶ 599.
[181] Id., ¶ 602.
[182] Id., ¶ 604.
[183] Id., ¶ 610.

196. From the above summary, the Committee concludes that the **Tribunal** analyzed, from different points of view and with diverse methods of interpretation, the alleged self-judging nature of Article XI of the **BIT**. The analysis is *lege artis* and thorough. Therefore, the **Committee** does not find that the **Tribunal** failed to apply the applicable law nor that it manifestly exceeded its powers when it performed its analysis. The assessment of the evidence and interpretation of the applicable law must be performed only by the **Tribunal**, not by the Committee. For these reasons, the Committee will reject this argument for annulment.

197. **Argentina** also alleged manifest excess of powers because, in its view, in paragraph 594 of the **Award** (subparagraph (c) of paragraph 189 above) the **Tribunal** contradicted the very arguments presented by the US Department of State and made an unfounded speculative exercise when it stated that the US did not seek to attribute a self-judging character to Article XI of the **BIT**.[184]

198. In the following paragraph **Argentina** mentioned the evidence that shows that, in its opinion, the United States of America and Argentina did have the intention of making Article XI of the BIT self-judging in nature.[185] **Argentina** then stated:

> "The Tribunal seems to ignore the fact that, if a State has no means of protecting its external and internal security, there is no way of creating a stable and prosperous investment climate. Moreover, the Tribunal refers in general terms to the alleged object and purpose of the Treaty, without even considering critical and irrefutable evidence that demonstrates that the intention of the parties to the BIT is wholly inconsistent with its proposition."[186]

199. The Committee concludes that, obviously, this argument of **Argentina** is actually an attempt to get the Committee to assess "critical and irrefutable evidence that demonstrates … the intention of the parties to the BIT." This is impossible in an annulment proceeding, so the Committee will reject this argument.

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[184] Memorial on Annulment, ¶ 133.
[185] Id., ¶ 134.
[186] Id., ¶ 135.

200. **Argentina** further argued that the **Tribunal** manifestly exceeded its powers when it failed to apply Article VI (3) of the **BIT** (subparagraph (d) of paragraph 189 above).[187] The Committee carefully reviewed the arguments on this issue contained in **Argentina**'s Memorial on Annulment and in **Argentina's** Reply and found that they were inaccurate, especially when **Argentina** affirmed that the interpretation given to that Article by the **Tribunal** "... is the same as that deriving from the application of other Treaty provisions… Therefore, Article VI (3) would have no useful effect."[188]

201. **Argentina** also noted that the tribunal that decided the *L.E.S.I. v. Algeria* case[189] analyzed a bilateral investment treaty provision similar to Article VI (3) of the **BIT**, interpreted it in a very different manner from the **Tribunal,** and concluded that "a different interpretation would deprive the provision of any meaning and effect."[190]

202. The Committee, after weighing the arguments of **Argentina,** reiterates that arbitration case law is not binding so that the decision in the *L.E.S.I v. Algeria* case[191] was not binding on the **Tribunal**. It reiterates that not following the line of reasoning of another arbitral tribunal is not grounds for annulment just as interpreting an article of the **BIT** in one sense or another is also not grounds for annulment. The **Tribunal** had, indeed, analyzed Article IV (3) and concluded that it was not applicable to "the matter at hand".[192] This is a reasoned opinion. The fact that **Argentina** does not agree with this interpretation of Article IV (3) of the **BIT** is not a ground for an annulment. Consequently, the Committee will therefore reject this argument.

203. **Argentina** further contended that the **Tribunal** did not address separately the defense of necessity under customary international law.[193] The Committee considers that the **Tribunal** explained its methodology in paragraphs 552-555 of the Award and came to the conclusion that Article XI of the **BIT** was *lex specialis* and that only if Article

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[187] Id., ¶¶ 143 and 144.
[188] Id., ¶ 144; Reply on Annulment, ¶ 99.
[189] *Consorzio Groupement L.E.S.I. - Dipenta (Italy) v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/03/8, [hereinafter "*L.E.S.I.*"], Award, January 10, 2005.
[190] Reply on Annulment, ¶ 100.
[191] *L.E.S.I.,* Award, January 10, 2005.
[192] Award ¶¶ 556-560.
[193] Memorial on Annulment, ¶ 145.

XI did not apply, a further analysis would be necessary. Having found that Article XI was applicable, any further inquiry was held to be superfluous. **Argentina** may disagree with the **Tribunal's** approach but that is no ground for an annulment. The Committee therefore will reject this claim.

vi. Issues related to the valuation of damages

204. On the issue of the valuation of damages, **Argentina** argued that the **Tribunal** manifestly exceeded its powers because:

a) The amount of compensation awarded is contrary to applicable law and to the legal principles established by the **Tribunal** itself.[194]

b) **El Paso** did not claim for the cumulative effects of the measures, therefore the valuation cannot be deemed to satisfy the causation requirement.[195]

c) The **Tribunal**, in paragraph 704 of the **Award**, adopted a valuation taking values projected in 2003, after the alleged breaches of **Argentina**, for the purpose of defining the standard of compensation.[196]

d) The **Tribunal** used the standard of compensation established by the Permanent Court of International Justice in the *Chorzów* case, when case law is not a source of law, therefore the **Tribunal** did not specify the law applicable for that standard.[197]

205. In the following paragraphs, the Committee will consider these four arguments for annulment put forward by **Argentina**:

206. **Argentina** indicated that the amount of compensation awarded by the **Tribunal** is contrary to applicable law and to the legal principles established by the **Tribunal** itself (subparagraph (a) of paragraph 204 above). In its Reply on Annulment, it stated:

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[194] Id., ¶ 161.
[195] Id., ¶¶ 163, 167 and 168.
[196] Id., ¶ 171.
[197] Id., ¶ 172.

> “The Tribunal is under a duty to decide every dispute in accordance with the law and is only entitled to decide cases *ex aequo et bono* where the parties have so agreed. In this case, the parties have not authorized the Tribunal to decide the case *ex aequo et bono*. El Paso cannot seek to justify the Tribunal’s decision by relying upon its alleged discretion, disregarding the law that the very Tribunal recognized as applicable.”[198]

207. The Committee believes that arbitration tribunals may proceed with some discretion in quantifying damages. A reasoned exercise of such discretion, as performed by the **Tribunal,** does not amount to a decision *ex aequo et bono*. The Committee did not find convincing arguments to explain in what way the **Tribunal** failed to apply the applicable law and decided *ex aequo et bono* and therefore will reject these assertions by **Argentina**.

208. Regarding causation, **Argentina** stated that **El Paso** did not claim for the cumulative effects of the measures, and that the valuation cannot be deemed to satisfy the causation requirement (subparagraph (b) of paragraph 204 above).

> “The Tribunal maintains that it examined ‘the relationship between the sale of El Paso’s shares in the Argentinian companies and the GOA measures in the context of determining whether such measures may be considered a violation of the FET standard, concluding that the measures were the prevailing cause of the sale.’ Nonetheless, the result of such analysis is not conclusive as regards the causal link between the alleged breach of the Treaty and the damage allegedly deriving from such breach. That the measures were allegedly one of the reasons for the sale of El Paso’s shares does not mean that any loss that might derive from such sale has a ‘sufficient causal link’ with the alleged violation of the Treaty.”[199]

209. The Committee reiterates that it cannot decide on the matter to which **Argentina** refers in the paragraph reproduced; such valuation is the exclusive responsibility of the arbitral tribunal.

210. The Committee finds that the **Tribunal** did not manifestly exceed its powers when it decided on damages as stated by **Argentina**, so it will reject this ground for annulment.

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[198] Reply on Annulment, ¶ 114.
[199] Memorial on Annulment, ¶168.

211. According to **Argentina**, the **Tribunal** manifestly exceeded its powers by adopting in paragraph 704 of the **Award**, for purposes of compensation, a valuation taking "values projected in 2003, after the alleged breaches by **Argentina** (subparagraph (c) of paragraph 204 above), placing **El Paso** in a different situation than that existing before the alleged 'creeping measures.'"[200]

212. Part of paragraph 704 of the **Award** states:

> "The fair market value in the *but for* scenario shall be calculated considering also data and information which became known after 1 January 2002, including after El Paso's sales in 2003, to the extent they are representative of financially assessable damages. Arbitrator Stern considers that a fair market value evaluation of damage resulting from a violation of FET should only take into account what a willing buyer and a willing seller could foresee at the time of the interference with the investor's rights. However, as, for reasons explained in paragraph 736, the Tribunal finally relies on a valuation taking into account the prices of oil as foreseen in 2003, at the time of the sale, she does not expand on the theoretical aspects of the question of the indemnification standard and the time of valuation."

213. The decision about which values should be considered to define the amount for which **Argentina** shall be liable can only be taken by the **Tribunal** that heard the facts and evidence submitted by the Parties. The Committee cannot assess the facts and the evidence submitted in the proceedings. Nor does the Committee find that there was a manifest excess of powers because the **Tribunal** took into account the 2003 or other data; it therefore will reject this argument for annulment.

214. **Argentina** argued that the **Tribunal** manifestly exceeded its powers when it used the standard of compensation established by the Permanent Court of International Justice in the *Chorzów* case (subparagraph (d) of paragraph 204 above) to set the standard of compensation, disregarding the fact that case law is not a source of law. Therefore, according to **Argentina**, the **Tribunal** did not specify the law it applied to determine damages.[201]

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[200] Id., ¶ 171.
[201] Id., ¶ 172.

215. The **Tribunal** stated its views on the standard of compensation that it employed and in paragraph 700 of the **Award** stated its reasoning. It referred to the silence of the **BIT** in this area, to the *Chorzów* case, and it considered what other tribunals had decided on the damage caused by the violation of the standard of fair and equitable treatment. It further pointed out the reasons why it considered that fair market value ought to determine the compensation.[202]

216. As stated in Article 42 (2) of the **ICSID Convention**, if the primary standard does not give a solution to a matter to be resolved by an arbitral tribunal, that silence is no excuse for the tribunal not to decide said matter. Arbitral tribunals must resort to different methods of interpretation to decide the dispute according to the mandate received from the parties. The fact that in this case the **Tribunal** looked at the *Chorzów* case to be helped in its interpretation does not imply a manifest excess of powers. While case law is not a source of law, as **Argentina** has stated, this does not prevent it being used as the basis of the reasoning for a decision taken by an arbitral tribunal. Consequently, the Committee will reject this argument for annulment.

B. **Failure to state reasons**

217. Subsequently, the Committee will turn to this ground for annulment. In the opinion of the Committee there is no ground for annulment of the award if it is based on an alleged inaccuracy of the arbitral tribunal's reasoning or because the reasons underlying its decisions were not convincing to the Party requesting the annulment of the Award. The Committee agrees with other committees which have ruled along this line repeatedly[203] because unconvincing reasons do not amount to a lack of reasons.

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[202] Award, ¶¶ 700-703.

[203] *Klöckner*, Decision of the *ad hoc* Committee on the Application for Annulment of the Arbitral Award, May 3, 1985, ¶ 129; *Maritime International Nominees Establishment v. Republic of Guinea,* ICSID Case No. ARB/84/4, [hereinafter "*MINE*"], Decision on the Application for Partial Annulment of the Arbitral Award, December 14, 1989, ¶¶ 5.08 and 5.09; *Vivendi I*, Decision on Annulment, July 3, 2002, ¶ 64; *Wena Hotels*, Decision on the Application for Annulment of the Arbitral Award, February 5, 2002 ¶ 79; *CDC Group plc v. Republic of the Seychelles,* ICSID Case No. ARB/02/14 [hereinafter "*CDC*"], Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2005, ¶¶ 70 and 75; *M.C.I.*, Decision on Annulment, October 19, 2009, ¶ 82; *Fraport*, Decision on Annulment, December 23, 2010, ¶ 277; and *Sociedad Anónima Eduardo Vieira v. Republic of Chile,* ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment, December 10, 2010, ¶ 355.

Annulment committees are concerned with the existence of reasoning and not the correctness, content or adequacy of the same. Unless the findings cannot be supported by any reasons reflected in the award, there is no basis for annulment. Reasons need not be detailed but they must be sufficient for a reader to follow how, from the evidence and arguments filed by the parties, the tribunal reached its conclusions.

218. An arbitral tribunal must refer to all claims of the parties, as it is called upon to decide what the parties involved are requesting; moreover, reasons must be given for the Award, as stipulated in Article 48 of the ICSID Convention.

219. It is also necessary to consider the following concerning this issue:

> "The drafting history of the Convention concerning annulment based on a failure to state reasons does not provide further guidance as to when such a failure has occurred, nor does the Convention specify the manner in which a Tribunal's reasons should be stated."[204]

220. According to the Committee, because the history of the ICSID Convention or the Convention itself fail to define what the lack of statement of reasons means, the arbitration tribunal enjoys some, even though limited, freedom. As pointed out by other committees,[205] the requirement to state reasons is intended to ensure that the Parties can understand the reasoning of the Tribunal, and also that a well-informed reader can understand the facts and the law by which the tribunal reached its conclusions.

221. Similarly, it is obvious to this Committee that it cannot annul an award because one of the parties involved in the case disagrees with the reasons given by the arbitral tribunal. The ground laid down in Article 52(e) of the **ICSID Convention** is very clear: it is the failure to state reasons, i.e., the absence of the statement of reasons

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[204] Background Paper on the Annulment Mechanism for the ICSID Administrative Council, August 10, 2012, ¶ 103.

[205] *MINE*, Decision on the Application for Partial Annulment of the Arbitral Award, December 14, 1989 ¶ 5.09; *Vivendi I*, Decision on Annulment, July 3, 2002 ¶ 64; *Wena Hotels*, Decision on the Application for Annulment of the Arbitral Award, February 5, 2002 ¶ 81; and *Compagnie de Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic,* ICSID Case No. ARB/04/5, Decision of the *ad hoc* Committee on the Application for Annulment, May 11, 2010, ¶ 88.

when the claims of the parties in the arbitration proceedings are being analyzed. The statement of reasons which are contradictory to a point to neutralize each other fall into that same category.

222. **Argentina** indicated that there are several manifestations of this ground: the total absence of reasons; the total failure to state reasons on a particularly key issue; the statement of contradictory reasons; and the reasons given are insufficient. This Committee considers that the main manifestation of this ground is the failure to state reasons referred to in the previous paragraph.

223. **Argentina** alleged the following failures to state reasons for its decisions:

a) In paragraph 175 of the **Award** the **Tribunal** failed to state the reasons for the causal link.[206]
b) The Tribunal "...sought to justify the exercise of its jurisdiction by stating that the Treaty grants shareholders a right of direct action."[207]
c) There is a contradiction between the **Tribunal's** conclusion that contracts and licenses are not investments protected by the **BIT** and the granting in the **Award** of compensation in favor of **El Paso** for measures affecting only contracts and licenses belonging to the Argentine Companies.[208]
d) The Tribunal did not state in paragraph 507 of the **Award** the reasons on which it based the fundamental conclusion that allowed it to find **Argentina** liable.[209] (referring to the sale by **El Paso** of the shares in the Argentine Companies)
e) The **Tribunal** clearly contradicts itself in its analysis of the measures adopted in the electric power sector; "... the only attempt to provide reasons in the ruling is contained in paragraphs 512-514."[210]
f) The **Tribunal's** "judicial creation".[211]
g) The conclusions expressed in paragraph 588 of the **Award**.[212]

[206] Memorial on Annulment, ¶ 22.
[207] Id., ¶ 26.
[208] Id., ¶ 40.
[209] Id., ¶ 64.
[210] Id., ¶¶ 69 and 70.
[211] Id., ¶ 101.

h) The conclusion expressed in paragraph 591 of the **Award**.[213]

i) The Tribunal failed to refer to the key evidence related to the self-judging nature of Article XI of the **BIT**.[214]

j) The Tribunal's statement in paragraph 603 of the **Award** about Argentina's 'awareness' of the self-judging nature of Article XI of the **BIT**.[215]

k) The **Tribunal** equated the "non-contribution" requirement to the "necessity" requirement in paragraphs 555 and 613 of the **Award**.[216]

l) The **Tribunal's** conclusion with respect to Article IV(3) of the **BIT**.[217]

m) The **Tribunal** did not state the legal standards it applied nor the meaning of "non-contribution" and referred only to economic, rather than legal, arguments in the analysis of this matter.[218]

n) The contradiction in the Tribunal adopting the valuation carried out by LECG.[219]

o) The **Tribunal** adopted a valuation method that assumes that **El Paso** retained holdings in the Argentine Companies.[220]

224. The Committee will discuss below the fifteen allegations of failure to state reasons submitted by **Argentina**.

225. Regarding the alleged failure to state reasons in paragraph 175 of the **Award** (subparagraph (a) of paragraph 223 above), particularly in the sentence "[t]hat the loss of share value is linked to the taking of the rights belonging to the local company appears obvious,"[221] the Committee points to the fact that this paragraph is part of the section in which the **Tribunal** defined "investment" in light of Article I(1)(a) the **BIT**. The **Tribunal** expressly linked the sentence quoted above to paragraph 204 of

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[212] Id., ¶ 128.
[213] Id., ¶131. The Committee notes that the quote in the footnote of the Memorial on Annulment refers to paragraph 590 but this should be 591.
[214] Memorial on Annulment, ¶ 132.
[215] Id., ¶ 138.
[216] Id., ¶ 140.
[217] Id., ¶ 144
[218] Id., ¶ 157.
[219] Id., ¶ 164.
[220] Id., ¶ 174.
[221] Award, ¶ 175.

the **Award.** It explained in the two paragraphs that double compensation for **El Paso** should be avoided. The Committee understands that sentence and the one in paragraph 204 are part of the statement of reasons for the **Tribunal's** conclusion a few paragraphs later (213 and 214 of the **Award**). Here, the **Tribunal** held that the contracts and licenses are not part of the investment protected under the **BIT**, but only the shares of **El Paso** in the Argentine Companies.

226. **Argentina** stated that the **Tribunal** "... failed to state the reasons on which its decision was based when it sought to justify the exercise of its jurisdiction by stating that the Treaty grants shareholders a right of direct action" (subparagraph (b) of paragraph 223 above).[222]

227. **Argentina** stated in its Memorial on Annulment that "[u]nder general international law, indirect actions such as those filed … in this arbitration are not permitted,"[223] despite the quotation in the previous paragraph. This is a confusing reasoning. Additionally, the Committee considers necessary to clarify another issue: the **ICSID Convention** does not include requirements on how to plead annulment, but logic dictates that it must be a clear and precise allegation and in this case **Argentina** did not give any reference as to the paragraph in which the **Tribunal** "sought to justify the exercise of its jurisdiction by stating that the Treaty grants shareholders a right of direct action."[224]

228. **Argentina** stated that the **Award** does not state the reasons for its decisions (Subparagraph (c) of paragraph 223 above). Specifically, it stated:

> "the Argentine Republic has explained that, even though an investment in shares was indeed a protected investment under the Treaty, a shareholder only had a valid claim under the Treaty to the extent that its rights as such were affected by governmental measures. However, in direct opposition to its conclusion that contracts and licenses are not protected investments, the Tribunal awarded damages to El Paso for measures that only affected contracts and licenses belonging to the Argentine Companies."[225]

[222] Memorial on Annulment, ¶ 26.
[223] Id., ¶ 49.
[224] Id., ¶ 26.
[225] Id., ¶ 40.

229. In its Reply, **Argentina** added:

> "Argentina explained why there is a failure to state the reasons for the Award which warrants its annulment, with respect to the recognition of El Paso's rights as a shareholder in the Argentine Companies. In this regard, Argentina made it clear that even though an investment in shares is indeed a protected investment under the Treaty, a shareholder only has a valid claim under the Treaty to the extent that its rights as such are affected by governmental measures."[226]

230. In the opinion of the Committee, **Argentina** did not explain its allegation that the **Tribunal** gave **El Paso** compensation for measures that affected only those contracts and licenses of the Argentine Companies and that said conclusion was made without the **Tribunal** stating the reasons which would permit an understanding of its decision in this regard.

231. In addition, **Argentina** stated the following about the infringement of the rights of shareholders:

> "As previously stated, the Tribunal held that the investment protected under the BIT 'was constituted by the shares in the Argentinian companies that belonged to El Paso and that protection applies to 'the shares, all the shares, but only the shares.' This justification confuses the legal standing that a shareholder may have, in general terms, to bring a claim under the BIT with the substantial rights arising from its shares. If the Argentine Republic had adopted measures with respect to El Paso's rights arising from its protected investment under the Treaty—i.e., the shares—(for example, the right to transfer its shares or receive dividends) such measures would have referred to the rights arising from the shares held by El Paso. In this case, however, Argentina did not adopt any measures that might affect the rights of El Paso as a shareholder in the Argentine companies."[227]

232. From a combined reading of the statement made by **Argentina** reproduced in paragraphs 228, 229 and 231 above, the Committee concludes that, in fact, what Argentina wants is for the Committee to make an analysis of the merits of the case, in order to annul the **Award**. The basis of this claim would be that "Argentina did not adopt any measures that might affect the rights of El Paso as a shareholder in the Argentine companies," concluding that the **Tribunal** awarded "damages to El Paso

[226] Reply on Annulment, ¶ 21.
[227] Memorial on Annulment, ¶ 29.

for measures that only affected contracts and licenses belonging to the Argentine Companies." As repeatedly stated, the Committee cannot analyze the merits of the case nor adjudicate on the alleged errors on the merits that an arbitral tribunal may have committed in an arbitration award.

233. In another of its allegations **Argentina** noted (subparagraph (d) of paragraph 223 above):

> "Nevertheless, contrary to its previous assertions, without providing any reasons and in violation of a fundamental rule of procedure, the Tribunal decided to rule against the Argentine Republic for the sale by El Paso of the Argentine Companies. Thus, it held that 'the GOA measures were, if not the only, certainly the prevailing reason for El Paso's sales in 2003.' However, the Tribunal failed to state the reasons for this essential conclusion that led it to rule against Respondent, especially bearing in mind that a series of documents produced by El Paso itself refer to other reasons, but not to the measures adopted by Argentina."[228]

234. The Committee notes with respect to the argument reproduced in the above paragraph that the **Tribunal** described the measures taken by **Argentina** in paragraphs 98 to 104 of the **Award** and described the sale of the shares held by **El Paso** in the Argentine Companies (paragraphs 114 to 120). In paragraph 277 it pointed out which were the factors that, in its opinion influenced the sale: the financial situation of **El Paso** in several countries as well as **Argentina's** economy and the measures taken by that State. In paragraph 279 it noted that it had not identified an automatic causal link between the measures and the sale of the shares for purposes of an expropriation claim, but it had to determine it in the case of a violation of other standards of the **BIT**. Later on, the **Tribunal** analyzed each measure taken by **Argentina** in the electricity and oil and gas sectors. In paragraph 459 of the **Award**, the **Tribunal** said that it would analyze the overall role of the measures on the sale of the shares and said it would focus on the defenses raised by **Argentina** on this issue: whether the liquidity problems of **El Paso** since late 2001 and the principal activity of the company were the causes that led to the sale. This analysis was made in paragraphs 489 to 503. The **Tribunal** considered **Argentina**'s arguments in defense in paragraph

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[228] Id., ¶ 64.

504 of the **Award**, it reviewed the reports submitted by **El Paso** to the American authority on securities (*i.e.* the U.S. Securities and Exchange Commision "SEC"); and it referred to the sale of other companies and, based on that analysis, held in paragraph 507 that the measures were the primary reason for the sale of the shares.

235. The Committee is of the opinion, based on what was said in the previous paragraph, that the **Tribunal** did express reasons for its decision in a very detailed way. It has no authority to assess whether these reasons were insufficient or inadequate because the grounds stated in Article 52(e) of the **ICSID Convention** is the failure to state the reasons, not if these were inadequate or insufficient.

236. The Committee concludes that the **Tribunal** analyzed, indeed, why it considered that the measures were the primary reason for the sale of the shares.

237. **Argentina** also alleged a contradiction between the analysis made by the **Tribunal** of the measures adopted by Argentina in the electricity sector and what it stated in paragraphs 512 and 514 of the **Award** (subparagraph (e) of paragraph 223 above). Regarding the first paragraph **Argentina** argued that the **Tribunal,** without providing any reasons, reached the conclusion that the Argentine Government disregarded the very reason for which capacity payments were created, that is, to attract foreign investment and expand capacity by allowing investors to recover their capital costs in US dollars, destroying the relationship between capacity payments and how they are calculated in dollars. **Argentina** also noted that the **Tribunal,** contrary to its previous assertions and without providing reasons, states in paragraph 514 that the fact that the contracts were in US dollars could be viewed as a special commitment towards the companies in which **El Paso** invested while in other paragraphs of the **Award** the **Tribunal** states that **Argentina** was not a party to any agreement with **El Paso** and that there were no specific commitments. **Argentina** further argued that the companies in which **El Paso** invested were neither investors nor investments protected under the **BIT**.[229]

[229] Id., ¶¶ 81-83.

238. The Committee carefully reviewed the paragraphs to which **Argentina** referred to and the analysis made by the **Tribunal** of the measures adopted by that State. In its view, these paragraphs must be read in conjunction with others, in particular 84, 98 and 408. In the first, the **Tribunal** described the actions that **Argentina** took to attract investment in the energy sector. Argentina conducted seminars and "road shows" in which it stressed, among other things, that capacity payments would be in dollars. In paragraph 98 of the **Award** the **Tribunal** set out in detail the measures adopted by **Argentina** in the electricity sector that affected the values provided in the Wholesale Electricity Market, and in 408 stated the main purpose of capacity payments. From the above, the Committee concludes that in the statement by the **Tribunal** in paragraphs 512 and 514 there is no contradiction that could lead it to conclude that the **Award** failed to state reasons on this issue.

239. **Argentina**'s other argument for annulment is the **Tribunal's** "judicial creation" (subparagraph (f) of paragraph 223 above). **Argentina** stated:

> "In conclusion, the Tribunal's 'judicial creation,' which jeopardizes legal certainty— not only in this case, but also in future proceedings if this theory starts to be followed by other tribunals— amounts to a manifest excess of the powers of the Tribunal, a failure to state the reasons on which the decision was based, and a serious departure from the rules of procedure, which warrants the annulment of the Award."[230]

240. The Committee does not understand fully **Argentina's** argument. Case law is created with the repetition of judgments of tribunals over time. The essence of expressing reasons is to explain why a tribunal decides an issue in one way and not the other. This process is the opposite to a failure to state reasons. The award is an element of the emergence of case law and not its creation. The conditions to annul the **Award** for a failure to state reasons are obviously not met in this context.

241. **Argentina** further argued a lack of statement of reasons in Article 588 of the **Award** (subparagraph (g) of paragraph 223 above):

[230] Memorial on Annulment, ¶ 101; Reply on Annulment, ¶ 64.

> "The Tribunal merely notes that 'the evidence presented by the Respondent relates to a single element of Article XI, 'essential security interests,'" while Article XI mentions two other possible justifications: the maintenance of public order and the fulfilment of the State's obligations regarding the maintenance or restoration of international peace or security. In accordance with the Tribunal, 'at first glance, the present case does not, however, seem to concern (external) security interests but possibly the maintenance of (internal) public order, which would not be a self-judging matter at all under Article XI of the BIT.' The Tribunal does not explain why the expression 'essential security interests' should be limited to matters of external security, instead of including internal security issues, as the *Continental* tribunal did, particularly the gravity of the economic, social and political crisis experienced by Argentina and acknowledged by the very Tribunal. In arriving at this arbitrary conclusion, the Tribunal only takes a 'first glance,' yet it should have expressed the reasons for its decision on this fundamental matter."[231]

242. In order to understand **Argentina's** argument, the Committee carefully reviewed paragraph 588 of the **Award**. The Committee cannot and ought not review whether the evidence presented by **Argentina** concerning Article XI of the **BIT** relates or not to "essential security interests." Moreover, it considers that it was on that evidence that the **Tribunal** stated that "[t]his could be taken to suggest that the self-judging character of Article XI is, at any rate, limited to 'essential security interests' and cannot extend to the other elements, in particular the maintenance of public order." The **Tribunal** in the first part of that paragraph stated that it was necessary, before analyzing the Article in question in light of the Vienna Convention, to indicate that the evidence on the self-judging character introduced by **Argentina** referred only to one aspect of the three contained in Article XI (essential security interests, the maintenance of public order, and the fulfilment of the State's obligations regarding the maintenance or restoration of international peace or security). The **Tribunal** also stated at the end of that paragraph "[a]t first glance, the present case does not, however, seem to concern (external) security interests but possibly the maintenance of (internal) public order, which would not be a self-judging matter at all under Article XI of the BIT." These statements made by the **Tribunal**, were based on its consideration of the evidence provided by **Argentina**. The Committee therefore does not find any failure to state reasons under this issue.

[231] Memorial on Annulment, ¶ 128.

243. **Argentina** also alleged failure to state reasons in paragraph 591 (subparagraph (h) of paragraph 223 above). This paragraph of the **Award** refers to the analysis made by the **Tribunal** of the evidence presented by **Argentina** to define whether Article XI of the **BIT** was self-judging or not. In paragraph 590 the **Tribunal** stated that it would analyze the BIT in order to make a decision on that issue. In paragraph 591, it developed its interpretation and referred to the statement made by another arbitral tribunal in the *LG&E* case.[232] The Committee considers that the **Tribunal** was clear in stating that it would use the Vienna Convention as a basis for its reasoning and furthermore it analyzed what was said by the *LG&E* arbitral tribunal. The **Tribunal** did indeed express the reasons for its decision and did indeed indicate the sources it used for its interpretation.

244. **Argentina** further submitted that there was a failure to state reasons when the **Tribunal** omitted critical evidence (the so-called letter from Mr. Sofaer) that **Argentina** presented to demonstrate the self-judging character of Article XI of the **BIT** (subparagraph (i) of paragraph 223 above). **El Paso** acknowledged that the **Tribunal** did not specifically mention the Sofaer letter in **Award**, and instead analyzed other evidence to support its conclusions on the issue.

245. In the opinion of the Committee, the **Award** is clear and as to the analysis made by the **Tribunal** in paragraphs 588 to 610, where it referred to the evidence adduced by the parties, used different methods of treaty interpretation and considered what other arbitral tribunals had ruled on the issue. The **Tribunal's** reasoning is clear, and the conclusion of the **Tribunal** and the reasons for said conclusion can be clearly understood. The Committee finds that that the absence of a specific mention of the Sofaer letter does not affect the reasoning of the **Award** on this issue. Furthermore, the fact that the **Tribunal** did not refer to a specific piece of evidence, which, according to **Argentina**, was essential, cannot be analyzed by this Committee, which has no authority to make any assessment of the evidence presented in the arbitral proceedings.

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[232] *LG&E,* Decision on Liability, October 3, 2006.

246. **Argentina** argued that paragraph 603 of the **Award** contains an unfounded statement, which contradicts the evidence in the record (subparagraph (j) of paragraph 223 above). The **Tribunal**, at the end of said paragraph, stated that "[f]inally, the 'awareness' of Argentina [in connection with the alleged self-judging character of Article XI of the BIT] seems to be of recent origin, having made its first appearance in the written pleadings on the substance of the present dispute." The Committee notes that **Argentina** argued that it had this awareness since *CMS*,[233] a case in which Argentina had also claimed the same defense as in this case. The Committee reiterates that it cannot analyze the evidence adduced by the parties in the arbitration process, much less check whether **Argentina** argued this issue in another case to determine when, in its view, it acquired the awareness of the self-judging character of Article XI of the **BIT**. The Committee carefully read paragraph 603 of the **Award**, and found in it that the **Tribunal** expressed some of its reasons for concluding that the rule was not of that character. The deliberation of the **Tribunal** at the end of paragraph 603 does not affect the reasoning in that paragraph, nor does it demonstrate that the **Award** omitted the statement of the reasons on which its conclusions are based and therefore it cannot be a ground for annulment.

247. **Argentina** also argued the following in relation to the analysis of Article XI of the **BIT** made by the **Tribunal** (subparagraph (k) of paragraph 223 above):

> "The 'non-contribution' requirement by no means precludes the application of Article XI, as it is not contained in that provision. Such requirement may not be equated with the 'necessity' requirement, as arbitrarily done by the Tribunal, since these are two different and clearly distinguishable requirements."[234]

248. The Committee considers that paragraphs 555 and 613 of the **Award** to which **Argentina** referred in the quote above cannot be analyzed separately from the rest. The **Tribunal**, in paragraphs 613-624, explained why it considered the degree of **Argentina's** contribution to the situation that arose in that country, for purposes of the concept of state of emergency, in order to determine whether in the case at hand,

[233] *CMS Gas Transmission Company v. Argentine Republic* [hereinafter "*CMS*"], ICSID Case No. ARB/01/8, Award, May 12, 2005.
[234] Id., ¶ 140.

Article XI of the **BIT** (containing the non-precluded measures provision) applied. In those paragraphs reference is made to the Vienna Convention, the purpose of the **BIT**, the doctrine of State responsibility, the dicta of other arbitral tribunals in the *LG&E*[235] and the *Continental*[236] cases, and the UNIDROIT Principles. The Committee does not find that the **Tribunal** made that "equating" unreasonably; on the contrary, it considers that the **Tribunal** explained broadly the reasons it had for considering "non-contribution" in this issue. Therefore, there is no failure to state reasons in the paragraphs alleged by **Argentina**.

249. According to **Argentina**, (subparagraph (l) of paragraph 223 above) the conclusion reached by the **Tribunal** in relation to Article IV(3) of the **BIT** is unfounded.[237] It also cited the conclusion of the arbitral tribunal in the *L.E.S.I. v. Algeria* case[238] which had a different interpretation of a provision similar to Article IV (3) of the **BIT**.[239]

250. In paragraphs 557 and 558 of the **Award**, the **Tribunal** summarized the position of the Parties on the interpretation of Article IV(3) of the **BIT,** and in paragraph 559 it interpreted this rule based on its "plain meaning" and relied on dicta on the same Article by the arbitral tribunal in the *CMS* case.[240] The fact that there is a different interpretation (*L.E.S.I.* case), as pointed out by **Argentina,** or another interpretation, does not mean that the **Award** is not supported by reasoning. The decision of the **Tribunal** with respect to Article IV (3) of the **BIT** is very clear and does not constitute grounds for annulment based on the lack of reasons.

251. **Argentina** also claimed, based on the dissenting opinion, that the majority did not state reasons for the conclusion expressed in paragraph 665 of the **Award** that **Argentina** contributed substantially for the crisis to occur, so that Argentina could

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[235] *LG&E,* Decision on Liability, October 3, 2006.
[236] *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award [hereinafter "*Continental*"], September 5, 2008.
[237] Id., ¶ 144.
[238] *L.E.S.I.,* Award, January 10, 2005.
[239] Reply on Annulment, ¶ 100.
[240] *CMS,* Award, May 12, 2005.

not rely on Article XI of the **BIT** in its defense (subparagraph (m) of paragraph 223 above). **Argentina** specifically alleged:

> "…as stated by one of the members of the Tribunal, the majority did not state the reasons on which that part of the Award was based, failed to explain the legal standards applied by it—particularly, the meaning ascribed to 'non-contribution' in adopting its criterion— and referred only to economic (rather than legal) arguments. The Award must therefore be annulled."[241]

252. The Committee considers it important to clarify that the dissenting opinion in the **Award** does not state exactly what **Argentina** indicated. On the contrary, the **Tribunal** was unanimous in considering that Article XI is not self-judging. The dissent concerns the interpretation of the evidence received in the proceedings. Professor Stern concludes that "... the substantial contribution of the Argentine authorities to the crisis has not been sufficiently proven by strong and uncontroverted evidence... the evidence is insufficient to conclude that the policies adopted by the GOA before the crisis were mainly responsible for the crisis."[242]

253. The fact that there is a dissenting opinion does not mean that the majority vote is unfounded and that, therefore, it should be annulled. In this case, moreover, the dissent is not on the legal standards applicable, or on the meaning of 'non-contribution,' but consists of a different assessment of the evidence, an issue on which the Committee cannot intervene in any way.

254. The Committee carefully studied paragraphs 613 to 626 of the **Award** which are based on the uncontested statement that Article XI of the **BIT** has to be analyzed first, since it is *lex specialis* with respect to other provisions (paragraph 550 of the **Award**): in paragraph 613 the **Tribunal** indicated what standard it considered appropriate for interpreting Article XI of the **BIT**. In paragraphs 614 and 615 the **Tribunal** held that, in considering the object and purpose of the **BIT**, as noted by the Vienna Convention on the Interpretation of Treaties, it was possible to determine the role of a State's contribution to a crisis or state of necessity. It indicated in paragraph

[241] Memorial on Annulment, ¶ 157.
[242] Award, ¶¶ 666 and 670.

618, based on a part of the doctrine, what kind of State's contribution should be considered for this purpose. In paragraphs 619 and 620 the **Tribunal** considered the decision in two other cases (*LG&E* and *Continental*) on the same Article of the **BIT** that it was analyzing. In paragraphs 621 to 623 it stated what other rules **of the ILC's Draft Articles** and the Unidroit Principles provide on the exclusion of liability and the degree of contribution to a state of necessity to conclude, in paragraph 624, that there is a principle of international law related to the exclusion of liability and non-contribution; accordingly it did explain what principle would apply to the case.

255. In paragraph 611 of the **Award**, the **Tribunal** stated that a state of emergency may be economic in nature. In paragraphs 651 to 665 it analyzed the evidence presented in relation to the crisis suffered by **Argentina**. It considered what the experts of the Parties, the International Monetary Fund reports, the statements of Argentine authorities, and the opinions of economists and researchers had stated. It concluded in paragraph 665 that **Argentina** had contributed substantially to the crisis, and, consequently, in the opinion of the **Tribunal**, it could not rely on Article XI of the **BIT** in its favor.

256. Based on what the Committee observed in the **Award**, it is impossible to conclude that the **Tribunal** did not define the legal standards it applied or that it did not indicate what, in its opinion, 'non-contribution' meant; nor is it possible to conclude that the **Tribunal** only referred to economic and not legal arguments. The Committee therefore does not find that there is any merit to **Argentina's** arguments. The **Tribunal** was clear in its analysis; it stated reasons and explained amply the decisions taken on this issue.

257. **Argentina** also alleged (subparagraph (n) of paragraph 223above):

> "The contradiction arises when the Tribunal takes the valuation carried out by LECG based merely on the fact that it was 'satisfied that LECG has calculated the Claimant's damage under its DCF valuation method by considering only damage directly attributable to the GOA measures.' Leaving aside the fact that the Tribunal's interpretation of LECG's valuation is erroneous; the Tribunal does not follow the abovementioned premise that it should determine the existence of a sufficient causal

link between the damage and the treaty violation. This constitutes a failure to state reasons regarding the causation principle."[243]

258. In the paragraph reproduced, **Argentina** criticized the **Tribunal**'s interpretation of the valuation carried out by LECG (**El Paso**'s damages expert). This issue is obviously an assessment of the evidence which power rests entirely in the **Tribunal** and cannot be grounds for annulment. In paragraphs 674 and 685 of the **Award**, the **Tribunal** indicated that the LECG's damages report used a methodology called "discounted cash flow"; the calculation presented included only the damage caused by the measures taken by **Argentina** and excluded damages due to macroeconomic conditions, which, according to the Tribunal, was confirmed directly by the Tribunal's own appointed expert.[244] That is, the **Tribunal** based its decision on what was included in the LECG's damages report and the report of a third expert, appointed by the Tribunal.

259. Regarding the causal link between the measures and the losses supposedly suffered by **El Paso**, the **Tribunal** evaluated the position of **Argentina**, in the sense that for the causal link to exist, the international wrongful act must be the proximate cause between the measures and the losses.[245] The **Tribunal** concluded that in this case the "proximate cause" did not exist and, based on what other tribunals ruled, used the method of sufficient link.[246] That is, the **Tribunal** examined two possible ways to assess causation, concluded that **El Paso** had not contributed to the damages and then referred to the conclusion reached in paragraph 507 of the **Award**, to the effect that the measures adopted by **Argentina** were the main reason for the sale of the shares held by **El Paso** in the Argentine Companies.

260. The Committee does not find any failure to state reasons in this issue. The **Tribunal** was clear, it analyzed the positions of the Parties, and considered what was said by their experts and by the third expert appointed by the **Tribunal** itself.

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[243] Memorial on Annulment, ¶ 164.
[244] Award, ¶ 686.
[245] Id., ¶ 677.
[246] Id., ¶ 682.

261. The last argument of **Argentina** on the failure to state reasons (subparagraph (o) of paragraph 223 above) referred to the fact that the **Tribunal** considered a method of valuation which assumes that **El Paso** retained holdings in the Argentine Companies. Specifically, **Argentina** stated:

"The Tribunal held Argentina liable stating that: 'taking an all-encompassing view of consequences of the measures complained of by El Paso, including the contribution of these measures to its decision to sell its investments in Argentina, [the Tribunal] concludes that, by their cumulative effect, they amount to a breach of the fair and equitable treatment standard.' Nonetheless, in determining the amount of damages, the Tribunal did not take into account the sales price of El Paso's shareholding but, rather, adopted a valuation method that 'assumes that the Claimant continues to keep its shareholding in said companies.' This contradiction also evidences the Tribunal's failure to state the reasons on which the decision was based."[247]

262. The statements made by **Argentina** in the previous paragraph is nothing more than a disagreement with the decision of the **Tribunal**, since the valuation of the sale price or the fact of noting that **El Paso** retained its shares in order to estimate the damage, is the **Tribunal's** own valuation, in which matter the Committee cannot intervene. This is not a failure to state reasons but simply that the **Tribunal** chose a method that **Argentina** considered "assumes that the Claimant continues to keep its shareholding in said companies" and not "the sales price of El Paso's shareholding."

263. For the reasons set forth in paragraphs 225 to 262 above, the Committee will reject the 15 requests for annulment filed by **Argentina** referred to in paragraph 223 above.

264. **Argentina** also claimed in its Memorial on Annulment on the subject of the cumulative effect of the measures adopted by **Argentina** that the **Award** failed to state the reasons[248] on which the decision was based; in its Reply the argument was summarized as follows:

"In its Counter-Memorial, El Paso shows that it does not fully understand why Argentina contends that the Tribunal failed to state the reasons for its decision when applying the 'new standard' (something like a 'creeping fair and equitable treatment' standard). As stated by Argentina, in order for there to be a composite act in the sense

[247] Memorial on Annulment, ¶ 174.
[248] Id., ¶ 101.

of Article 15 of the ILC's Draft Articles, a series of requirements developed by legal authors and the ILC itself must be met. For example, the Tribunal does not explain why Article II(2)(a) of the US-Argentina BIT—referring to 'fair and equitable treatment'—allegedly provides for a composite act, that is, an obligation arising from the cumulative character of the conduct, as required by the ILC; or how many actions or omissions are needed in order for there to be a violation of the obligation concerned, as required as well by the ILC itself; or what part of the Article demands 'a systematic policy' or 'plan,' as that referred to by legal authors and Prof. Crawford, one of the Special Rapporteurs of the ILC who participated in the preparation of the Draft in question. Likewise, the Tribunal fails to specify which lawful act caused the series of measures individually considered as lawful by the Tribunal to become unlawful."[249]

265. The Committee carefully reviewed paragraph 518 of the **Award** which refers to the creeping violation of the FET standard and states:

"The Tribunal considers that, in the same way as one can speak of *creeping expropriation*, there can also be creeping violations of the FET standard. According to the case-law, a creeping expropriation is a process extending over time and composed of a succession or accumulation of measures which, taken separately, would not have the effect of dispossessing the investor but, when viewed as a whole, do lead to that result. A *creeping violation of the FET standard* could thus be described as a process extending over time and comprising a succession or an accumulation of measures which, taken separately, would not breach that standard but, when taken together, do lead to such a result" (emphasis in the original).

266. In the paragraph quoted the **Tribunal** used the conditional or subjunctive verb form, "could." That part of the paragraph is then hypothetical; it is an attempt by the **Tribunal** to illustrate its standard of interpretation, developed in the previous paragraphs. It is not the basis for the finding of liability that was the result of the **Tribunal's** interpretation of the cumulative effects of the measures (absolute change in the legal setup). Therefore, the Committee concludes that the **Tribunal** did not create a new standard and that the **Award** is not without a statement of reasons on this issue.

C. Serious departure from a fundamental rule of procedure

[249] Reply on Annulment, ¶ 50.

267. Before analyzing **Argentina's** allegations about alleged serious departures from fundamental rules of procedure it is necessary to consider the following concepts stated by the ICSID Administrative Council:

> "It appears from the drafting history of the ICSID Convention that the ground of a 'serious departure from a fundamental rule of procedure' has a wide connotation including principles of natural justice, but that it excludes the Tribunal's failure to observe ordinary arbitration rules."[250]

268. The Committee considers that there is a logical conclusion from the above quotes: because a "serious departure from a fundamental rule of procedure" is such a broad concept, the party alleging the existence of such a ground must indicate what is the fundamental rule affected and define clearly where the serious departure lies, so it can be considered by the Committee.

269. It is also necessary to indicate that for this ground of annulment to exist, as clearly established in the ICSID Convention, two basic criteria are required: there has to be a *serious* departure from a *fundamental* rule of procedure, not just any rule of procedure. Furthermore, this Committee agrees with what other committees have stated that in order to be grounds for annulment, the departure has to have a material impact on the outcome of the award.[251]

270. **Argentina** alleged that there was a serious departure from a fundamental rule of procedure:

[250] Background Paper on the Annulment Mechanism for the ICSID Administrative Council, August 10, 2012, ¶ 99.

[251] *Amco Asia Corporation, Pan American Devleopment Limited, and P.T. AMCO Indonesia (AMCO) v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on the Applications for Annulment and Partial Annulment and the Application for Annulment of the Supplemental Award, December 17, 1992, ¶¶ 9.05-9.10; *Klöckner*, Decision of the *ad hoc* Committee on the Application for Annulment of the Arbitral Award, May 3, 1985 ¶¶ 89-92; *Wena Hotels*, Decision on the Application for Annulment of the Arbitral Award, February 5, 2002 ¶ 58; *CDC*, Decision of the *ad hoc* Committee on the Application for Annulment, June 29, 2005, ¶ 49; *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru,* ICSID Case No. ARB/03/4, Decision on the Application for Annulment, September 5, 2007,¶ 71; and *Fraport*, ICSID Case No. ARB/03/25, Decision on Annulment, December 23, 2010, ¶197.

a. Because there was a contradiction in the **Tribunal's** conclusion on the process of the sale of the Argentine Companies and its conclusion that the measures taken by **Argentina** were the primary reason for the sale;[252]

b. Because of the contradictions and unfounded statements contained in paragraphs 512 and 514 of the **Award**;[253]

c. Because "allowing a tribunal to punish a State for adopting a series of lawful measures which, taken together, allegedly amount to a wrongful act affects legal certainty and constitutes both a manifest excess of powers and a serious departure from the rules of procedure";[254]

d. Because the **Tribunal** did not mention the evidence consisting of the so-called "Sofaer Letter";[255]

e. Because the **Tribunal** failed to analyze the most relevant evidence in support of Argentina's position regarding the self-judging nature of Article XI of the **BIT** and presented contradictory arguments in referring to the remaining pieces of evidence on that same issue;[256]

f. Because in determining damages, the **Tribunal** did not consider the defenses raised by **Argentina**;[257]

g. Because the **Tribunal** decided on issues that were not raised by **El Paso**, i.e., *ultra petita*;[258] and

h. Because the **Tribunal** held **Argentina** liable for the violation of a standard that is not contained in the **BIT** and then awarded damages, relying on a

[252] Memorial on Annulment, ¶ 67.
[253] Id., ¶ 83.
[254] Id., ¶ 96.
[255] Id., ¶ 132.
[256] Id., ¶ 142.
[257] Id., ¶ 175.
[258] Id., ¶ 176.

damage assessment that was based on alleged **BIT** violations that are different from those invoked by **El Paso**.[259]

271. **Argentina** was very concise in explaining the reasons why, in its opinion, there was a serious departure from fundamental rules of procedure. The allegations based on contradictions, failure to mention one piece of evidence that was considered essential for **Argentina** (the Sofaer letter), and the alleged failure to analyze other evidence do not constitute grounds for annulment of the **Award** for a serious departure from fundamental rules of procedure and, accordingly, the Committee will reject the arguments set forth in subparagraphs (a), (b), (d), and (e) above.

272. In analyzing the allegation referred to in subsection (f) of paragraph 270 above, the Committee notes that **Argentina** did not state what were the defenses it objected to in the arbitration process in relation to damages and that the **Tribunal** did not analyze, thereby causing the alleged serious departure from a fundamental rule of procedure. In addition, **Argentina** did not even mention this issue in its Reply. Because of this lack of substantiation, the Committee will reject the application for annulment based on that reasoning.

273. Regarding subparagraph (g) of paragraph 270 above, in paragraphs 151 and 152 above, the Committee rejected **Argentina's** argument on the alleged manifest excess of powers of the **Tribunal** for having acted supposedly *ultra petita*. For the same reasons, it will reject this argument based on the grounds alleged here.

274. The claims outlined in subparagraphs (c) and (h) of paragraph 270 above still have to be analyzed. In the former, **Argentina** stated that the **Tribunal** affected legal certainty and committed a serious departure from a procedural rule:

> "…for adopting a series of lawful measures which, taken together, allegedly amount to a wrongful act …"[260]

[259] Id., ¶ 177.
[260] Id., ¶ 96.

275. The Committee notes that its specific role is to analyze whether there are grounds in the **Award** or in the arbitration process to allow the **Award** to be partially or totally annulled. Specifically, the duty of the Committee with regard to the ground for annulment that it is examining here is to ensure the integrity of the arbitration process. **Argentina** in this case did not explain why it considers that there was a manifest excess of powers nor did it indicate the fundamental rule of procedure from which the **Tribunal** seriously departed; for these reasons, the Committee will reject this argument.

276. In subparagraph (h) of paragraph 270 above there is a summary of **Argentina's** argument that the decision must be annulled because the **Tribunal** held **Argentina** liable for the violation of a standard that is not contained in the **BIT** and awarded damages relying on a damage assessment that was based on alleged **BIT** violations that are different from those invoked by **El Paso**.[261]

277. The Committee notes once again that **Argentina** did not state what fundamental rule of procedure was affected by the **Tribunal's** ruling, nor did it argue about the seriousness of the departure from this rule. Additionally it is important to reiterate what is stated in paragraphs 180 to 182 above in which the Committee concluded that the **Tribunal** did not create a new standard or apply a different law; therefore it also will reject this argument for annulment.

278. In its Memorial on Annulment and its Reply on Annulment[262] **Argentina** alleged serious departure from a fundamental rule of procedure and stated that its right to due process and to defense at trial had been adversely affected because it never had the opportunity to present arguments against the existence of an alleged "composite act" within the meaning of Article 15 of the ILC's Draft Articles.

279. The **Tribunal** referred to Article 15 in paragraph 516 of the **Award**; paragraph 515 is about the cumulative effect of the measures. n paragraph 517 after making an analysis

[261] Id., ¶ 177.
[262] Id., ¶¶ 96 and 97; Reply on Annulment, ¶ 47.

of each measure the **Tribunal** determined what was, in its opinion, the cumulative effect and stated that it was "... a total alteration of the entire legal setup for foreign investment."[263]

280. The **Tribunal** analyzed the electricity and hydrocarbons regulatory frameworks in relation to fair and equitable treatment, as of paragraph 390 of the **Award**. In paragraph 390 the **Tribunal** referred to the opinion of **El Paso** as follows:

> "…El Paso indeed finds that Argentina's measures go beyond the limits authorised by the BIT: in its view, the decisions and regulations in issue did not result from a normal exercise of regulatory powers but, in reality, were measures that brought a radical alteration of key rules, effectively eviscerated the existing regulatory frameworks, and therefore exceeded normal regulatory powers."

281. The Committee notes that the **Tribunal** analyzed individually the measures taken by **Argentina** and also referred to the "legal setup," the "legal order," and the "legal framework," and that in paragraph 519 of the Award it concluded that the consequences of the measures, because of their cumulative effects, constituted a violation of the standard of fair and equitable treatment.

282. The following quotations show that the Claimant fought the measures that affected the "legal framework":

> "When El Paso made its investment, it had legitimate and reasonable expectations that were created and encouraged both by the fundamental rules of the regulatory frameworks enacted and the assurances and representations made by the GOA, its President, its Minister of Finance and the Energy Secretariat… It reasonably expected that the GOA would not unforeseeably change the fundamental rules of the game that it established to attract foreign investment."[264]

> "The aggregate effect of all these economic distortions cannot be overcome in the short term, and the GOA's measures are likely to last for years."[265]

> "Despite the new regulatory legal environment that it had established, the Government interfered with the Electricity and Hydrocarbons Regulatory Frameworks and El Paso's investment lost a substantial portion of its value due to the

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[263] Award, ¶ 517.
[264] Claimant's Memorial of August 20, 2004, ¶ 537.
[265] Id., ¶ 322.

acts and omissions of the Government and its subdivisions and instrumentalities. The damage continued to escalate until 2003, when E1 Paso sold its investments in the Argentine Companies at a price that represented a significant loss."[266]

"In January 2002, Argentina abruptly and drastically changed the rules on the basis of which the investment decisions had been made. These drastic changes to the Electricity and Hydrocarbons Regulatory Frameworks withdrew fundamental rights and protections previously provided to investors in the electricity and hydrocarbons sectors."[267]

"Argentina's actions in dismantling the Electricity Regulatory Framework and the Hydrocarbons Regulatory Framework and the frustration of rights contained in concession agreements were taken through measures that only a government can take. They involved legislation, decrees and resolutions and were clearly in the exercise of *"puissance publique."* Therefore, Argentina's repudiation of El Paso's contractual rights amounts to a violation of fair and equitable treatment even under the more restrictive of the two theories."[268]

"In the present case, the series of actions by the Argentinean authorities indicates that they were acting consciously to abrogate the rights under the Electricity Regulatory Framework and the Hydrocarbons Regulatory Framework. Bad faith would be demonstrated if it were to be proved that some of the measures taken did not primarily serve the purpose ostensibly relied upon but were taken to deprive the investor of its rights. For instance, the export withholdings were introduced with the stated purpose of compensating the banks for the asymmetrical pesification suffered by them, but the revenue was apparently never used for that purpose. On the other hand, even a credible assertion of good faith on the part of Argentina will not controvert a finding of a violation of the fair and equitable treatment standard."[269]

"In terms of previous decisions this treatment may be described as improper and discreditable, as arbitrary, idiosyncratic, unjust and disproportionate. More specifically, Argentina has thereby violated the principles of transparency, stability and of protecting the investor's legitimate and reasonable expectations. After creating regulatory frameworks for the electricity and hydrocarbons sector that were designed to project a stable legal and business environment, Argentina dismantled this system thereby removing the guarantees upon which El Paso had relied. Therefore, Argentina's behavior lacked transparency, predictability, consistency and coherence and failed to honor the investors' basic expectations."[270]

[266] Opinion prepared by Dr. Christoph Schreuer, dated November 3, 2006, submitted by El Paso, ¶ 24.
[267] Id., ¶ 25.
[268] Id., ¶ 359.
[269] Id., ¶ 377.
[270] Id., ¶ 386.

> "Argentina [is] … portraying the measures taken by the GOA… as if they were decisions and regulations resulting from an exercise of normal regulatory powers when, in reality, the measures in question constituted a radical alteration of key rules and effectively eviscerated the Energy Regulatory Framework…"[271]
>
> "What matters is the cumulative effect of the government's measures on the legitimate expectations of the foreign investor, expectations that may be reinforced by contractual obligations, unilateral government statements, rights granted in regulatory frameworks to induce investment, and, above all, the BIT itself, which establishes the normative legal environment upon which foreign investors may justifiably rely".[272]

283. In the arbitration proceedings **Argentina** very clearly outlined the legal and regulatory framework of that nation:

> "…El Paso's claim to prevent adapting the regulatory framework to the new context existing as a result of the crisis and the abandonment of the currency board system has no legal and factual background."[273]
>
> "The legitimate expectations of any investor entering the market had to include the true possibility of changes and amendments to the Procedures. If these changes occurred before El Paso entered the market and continued taking place at a similar rate in the period prior to the crisis, the adjustment after the emergency cannot be deemed a modification to game rules."[274]
>
> "El Paso seems to claim that its investment was protected against all risks and that Argentine Government was required to guarantee—always and under any circumstances—certain profitability over its investment. That is incorrect and would imply completely denaturalizing the regulatory framework applicable and the protection granted by bilateral investment treaties."[275]
>
> "El Paso holds that the measures adopted by the Argentine Republic in 2002 to ensure the supply to the domestic market of oil and gas violated the applicable regulatory framework. Such assertion is wrong."[276]
>
> "El Paso alleges that it was legitimate and reasonable to expect that the electricity and hydrocarbons regulatory frameworks would not change. However, it is unreasonable to expect a state not to amend its rules…"[277]

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[271] Reply on the Merits, November 28, 2006, ¶ 26.
[272] W.M. Reisman, Supplemental Opinion of 5 November 2006, Claimant's Exhibit 210, ¶ 10.
[273] Counter-Memorial on the Merits, September 1, 2006, ¶ 275 (English version); ¶ 274 (Spanish version).
[274] Id., ¶ 276 (English version); ¶ 275 (Spanish version).
[275] Id., ¶ 314 (English version); ¶ 313 (Spanish version).
[276] Id., ¶ 380 (English version); ¶ 379 (Spanish version).
[277] Rejoinder on the Merits, March12, 2007, ¶ 368.

"In this case, the regulations challenged by El Paso are general. Furthermore, there are no specific and direct commitments towards Claimant. Therefore, the existence of an expectation that applicable regulations would not be amended cannot be invoked, especially in the face of a crisis …"[278]

"The analysis is focused on the measures adopted by the Argentine government within the framework of the 2002 crisis in order to determine the extent to which such measures constitute a deviation from industry regulatory frameworks unduly affecting the investments in the energy industries by impinging on the investors' legitimate expectations."[279]

"The facts on which we have to render an opinion refer to a set of legislative measures that allegedly violate the BIT, ... and which constitute the basis of the claim filed by El Paso Energy International Company …"[280]

"Within the framework of this Treaty, the company El Paso challenges the implementation of a set of measures."[281]

"Regarding the situation of the concession, El Paso invokes the right to be compensated for the adoption of a number of measures that affect the concessionaires CAPSA and CAPEX. El Paso's allegations are based on a kind of *inalterability* of the situation derived from the concession. However, the alleged inalterability may only be expected, in principle, with respect to the rights arising from the concession regarded as a contract, never from the rules making up the regulatory framework" (emphasis in the original).[282]

284. From the transcribed citations, the Committee concludes that during the arbitration proceedings the Parties did discuss whether **Argentina**'s measures constituted a departure from the regulatory legal framework. The **Tribunal** analyzed each measure separately, but in various paragraphs of the **Award** it referred to the general effects on the legal framework to reach the conclusion expressed in paragraph 519 of the **Award**. It seems to the Committee that the **Tribunal** formed its opinion in the course of the written and oral submissions and discussions of the Parties during the proceedings, assisted by several expert opinions. **Argentina** was fully involved in these discussions, had ample

[278] Id., ¶ 369.
[279] "*Analysis on the Valuation of Damages on the Value of El Paso's Investments in Argentina*", August 29, 2006, report prepared by MacroConsulting, submitted by Argentina, ¶ 6.
[280] Report of César García Novoa, March 6, 2007, submitted by Argentina, ¶ 21.
[281] Id., ¶ 25.
[282] Id., ¶ 69.

opportunity to defend itself and counter all the arguments brought by the Claimant and its experts. The Committee has carefully studied the Parties' post-hearing submissions and confronted them with the submissions made during the original proceedings. It found that the substance of the problem which finally led to the **Tribunal's** reasoning and decision had been exposed: that the cumulative effect of a series of measures which might be inoffensive and legal one by one may alter the global situation and the legal framework in a way that the investor could not have legitimately expected. The **Tribunal** concluded from the debate that the combined measures caused an illegal violation of the FET standard even when any one of those measures, appraised individually, were legal. It is not for this Committee to determine if the **Tribunal's** reasoning is correct. In the process of determining whether the Tribunal disrespected a fundamental rule of procedure, the Committee has to appraise if the **Tribunal** did not allow the Respondent to present its argument that a group of legal measures, taken together, cannot amount to an illegal breach of the **BIT**. The Committee is convinced that **Argentina** was not prevented from developing this argument. The fact that the **Tribunal** used the term "creeping" with the intention to summarize its line of reasoning by the use of such expression does not change the Committee's mind. The term was a way for the tribunal to synthesize its reasoning, which did not add to the **Tribunal's** argumentation. It was based on material that was introduced into the proceedings and legal considerations that were discussed in substance.

285. The **Tribunal** decided to enhance the expression of its considerations using, with respect to fair and equitable treatment, a concept typical of expropriation; it did not need to have recourse to that academic process in order to justify its reasoning but decided to do it that way. This procedure does not harm the Respondent at all, who defended vigorously throughout the arbitration proceedings, each of the measures it adopted and the effects of those actions on the overall legal environment in which the Claimant made its investment. No matter how it is looked at, the **Tribunal's** idea of the cumulative effects of the actions of the Respondent is simply a way to express the

reasoning that led to its conclusions and, as such, cannot be a ground for annulment of the **Award**.

286. For the reasons set forth in the preceding paragraphs, the Committee considers that in this case there was no violation of due process or the right of defense, as fundamental rules of procedure. **Argentina** had the opportunity to defend itself and to express its point of view on the effect of the measures that it adopted during the crisis, and on the general legal framework. For this reason the Committee will reject **Argentina**'s application for annulment, based on this and its other arguments.

V. COSTS

287. Pursuant to Article 52(4) of the ICSID Convention, Chapter VI of the Convention (Articles 59 to 61) shall apply *mutatis mutandis* to the annulment proceedings.

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

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom these 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."

289. In the First Session (paragraph 4.1) held on July 18, 2012, the Parties did not agree on a method for allocation of costs other than that provided for in Article 61(2) of the ICSID Convention.

290. Although **Argentina's** application will be dismissed in its entirety, the Committee does not believe that this application was frivolous and considers that it was entirely legitimate for **Argentina** to raise some of the issues in which it based its request for annulment of the **Award**, in particular the question of due process. Therefore, in exercise of the discretion given to it by Article 61(2) of the **ICSID Convention**, in the following section, the Committee will decide as follows:

(a) **Argentina** shall bear the costs of the proceedings, which include the fees and expenses of the Members of the Committee, as well as the costs arising from the use of the **Centre**; and

(b) Each party shall bear the costs and fees it incurred in regard to this annulment proceeding.

VI. **DECISION**

291. For the foregoing reasons, the Committee unanimously decides as follows:

i. The Application for Annulment of the Award presented by Argentina is dismissed in its entirety.

ii. The suspension of enforcement of the Award, ordered by decision of November 14, 2012, is terminated.

iii. Each party shall bear its own costs and fees in relation to this annulment proceeding.

iv. The Republic of Argentina shall bear the costs of this proceeding, which include the fees and expenses of the Members of the Committee, as well as the costs arising from the use of the **Centre.**

[*Signed*]

Ms. Teresa Cheng
Member of the *ad hoc* Committee
Date: 26/08/2014

[*Signed*]

Prof. Dr. Rolf Knieper
Member of the *ad hoc* Committee
Date: 21/08/2014

[*Signed*]

Mr. Rodrigo Oreamuno
President of the *ad hoc* Committee
Date: 28/8/2014