INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the annulment proceeding between

CASINOS AUSTRIA INTERNATIONAL GMBH AND CASINOS AUSTRIA AKTIENGESELLSCHAFT

Respondents on Annulment

and

ARGENTINE REPUBLIC

Applicant on Annulment

ICSID CASE NO. ARB/14/32
Annulment Proceeding

DECISION ON ANNULMENT

Members of the Committee
Mr. Toby Landau KC, President
Prof. Andrea Bjorklund, Member
Mr. Felipe Bulnes Serrano, Member

Secretary of the Committee
Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 6 November 2025

REPRESENTATION OF THE PARTIES

Representing Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft:

Mr. Florian Haugeneder
Ms. Natascha Tunkel
Ms. Sophie Wotschke
Ms. Arnela Maglic
KNOETZL HAUGENEDER NETAL
Rechtsanwälte GmbH
Herrengasse 1
A-1010 Vienna
Austria

Representing the Argentine Republic:

Dr. Santiago María Castro Videla
Procurador del Tesoro de la Nación
Dr. Juan Ignacio Stampalija
Subprocurador del Tesoro de la Nación
Dr. Julio Pablo Comadira
Subprocurador del Tesoro de la Nación
Sra. Mariana Mabel Lozza
Directora Nacional de Asuntos y Controversias Internacionales
Sra. María Alejandra Etchegorry
Subdirectora Nacional de Asuntos y Controversias Internacionales
Procuración del Tesoro de la Nación
Posadas 1641, CP 1112
Buenos Aires
Argentine Republic

TABLE OF CONTENTS

I. INTRODUCTION 11
II. PROCEDURAL HISTORY 13
III. RELEVANT FACTUAL BACKGROUND 19
IV. GROUND 1: MANIFEST EXCESS OF POWERS - ART 52(1)(B) 24
A. THE PARTIES' POSITIONS 24
(1) ARGENTINA 24
a. The Standard 24
b. Challenges 28
1. Exercise of Jurisdiction 28
(i) Taking on the role of an appellate court 29
(ii) Non-compliance with the terms of Argentina's offer to arbitrate 33
(iii) Turning a domestic contract dispute into a claim under the BIT 35
(iv) Failure to hear or analyze Argentina's defence regarding the License revocation 35
2. Failure to Apply the Law Applicable to the Dispute 36
(2) CASINOS 39
a. The Standard 39
b. Challenges 40
1. Exercise of Jurisdiction 40
(i) Taking on the role of an appellate court 40
(a) The assessment of the actions of ENREJA under international law 41
(b) The Tribunal's conclusion on jurisdiction 43
(c) The treatment of Argentina's claims as treaty claims under the BIT 45
(d) Police powers 45
2. Failure to Apply the Law Applicable to the Dispute 46
B. THE COMMITTEE'S ANALYSIS 49
(1) THE STANDARD 49
(2) CHALLENGES 54

1. Exercise of Jurisdiction 54
(i) Taking on the role of an appellate court 54
(a) The assessment of ENREJA's actions 56
(b) The Tribunal's conclusion on jurisdiction 65
(c) The treatment of Argentina's claims as treaty claims under the BIT 76
(d) Police powers 78
2. Failure to Apply the Law Applicable to the Dispute 83
(i) Failure to apply Argentine law by relying on the "sole effects" doctrine 83
(ii) Failure to apply Argentine law on the powers conferred upon ENREJA 86
(iii) Replacement of Argentine law with the standard of "systematic disregard" 87
(iv) Applying a test of "systematic disregard" found in neither Argentine nor international law 87
(v) Failure to apply Article 8(6) of the BIT 88
(vi) Failure to apply international law in failing to analyze Casinos' contribution to the injury 89
(vii) Failure to apply applicable rules of customary international law governing the regulatory and police powers of sovereign States . 89

V. GROUND 2: SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE - ART 52(1)(D) 93

A. THE PARTIES' POSITIONS 93

(1) ARGENTINA 93

a. The Standard 93
b. Challenges 95
1. Burden of Proof 96
2. Failure to Consider Evidence 98

(2) CASINOS 101

a. The Standard 101
b. Challenges 103

1. Burden of Proof 103
2. Failure to Consider Evidence 105

B. THE COMMITTEE'S ANALYSIS 107

(1) THE STANDARD 107

(2) CHALLENGES 113

1. Burden of Proof 113
   (i) The obligations of ENJASA under the regulatory framework and the consequences of a breach 114
   (ii) The sanctions for ENJASA's failure to apply for an authorization to hire third party operators 117
   (iii) The revocation of the License as a breach of the BIT 121
2. Failure to Consider Evidence 123
   (i) ENJASA's administrative breaches 124
   (ii) Previous acknowledgement of breaches and previous warnings 128
   (iii) The evidence of Mr Biagosch regarding payment by cheque 130
   (iv) The testimony of the Parties' experts on the notion of "operator" 131
   (v) Argentina's allegations on "final beneficiaries" 132

VI. GROUND 3: FAILURE TO STATE REASONS - ART 52(1)(E) 133

A. THE PARTIES' POSITIONS 133

(1) ARGENTINA 133

a. The Standard 133
b. Challenges 137
   1. Contradictory Reasons 137
      (i) Reasoning on lack of proportionality 137
      (ii) Reasoning on arbitrariness 140
      (iii) Reasoning on domestic law 141
      (iv) Reasoning on expropriation 143
   2. Failure to State Reasons 143
      (i) ENJASA's breaches & "systematic disregard" 144
      (ii) Reasoning on Proportionality 145

3. Frivolous Reasons 146
(i) International law requirements and the "sole effects" doctrine .. 146
(ii) Normalizing of ENJASA's breaches 147
(2) CASINOS 148
a. The Standard 148
b. Challenges 149
1. Contradictory Reasons 150
(i) Reasoning on lack of proportionality 150
(ii) Reasoning on arbitrariness 151
(iii) Reasoning on domestic law 151
(iv) Reasoning on expropriation 151
2. Failure to State Reasons 152
(i) ENJASA's breaches and "systematic disregard" 152
(ii) Reasoning on Proportionality 152
3. *Frivolous Reasons* 153
(i) International law requirements and the "sole effects" doctrine .. 153
(ii) Normalizing of ENJASA's breaches 154
B. THE COMMITTEE'S ANALYSIS 154
(1) THE STANDARD 154
(2) CHALLENGES 160
1. Contradictory Reasons 160
(i) Reasoning on lack of proportionality 160
(ii) Reasoning on arbitrariness 162
(iii) Reasoning on domestic law 163
(iv) Reasoning on expropriation 164
2. Failure to State Reasons 165
(i) ENJASA's breaches and "systematic disregard" 165
(ii) Reasoning on Proportionality 166
3. Frivolous Reasons 168
(i) International law requirements and the "sole effects" doctrine .. 168

(ii) Normalizing of ENJASA's breaches 168
VII. COSTS 170
A. THE PARTIES' POSITIONS 170
(1) ARGENTINA 170
a. The Standard 170
b. Allocation of Costs 171
c. Assessment of Costs 171
d. Interest 172
(2) CASINOS 173
a. The Standard 173
b. Allocation of Costs 174
c. Assessment of Costs 174
d. Interest 175
B. THE COMMITTEE'S ANALYSIS 177
(1) THE STANDARD 177
(2) ALLOCATION OF COSTS 178
(3) ASSESSMENT OF COSTS 179
(4) INTEREST 180
VIII. DECISION 182

TABLE OF SELECTED ABBREVIATIONS / DEFINED TERMS

AA-[#]	Argentina's Exhibit in the Annulment Proceedings
AALA-[#]	Argentina's Legal Authority in the Annulment Proceedings
Application	Application for Annulment filed by the Argentine Republic on 4 March 2022
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Argentina's Closing Statement	Argentina's Closing Statement in the form of a slide deck, dated 13 September 2023
Argentina's Costs Submissions	Argentina's Submission on Costs dated 11 October 2023
Argentina's Memorial	Argentina's Memorial on Annulment dated 1 December 2022
Argentina's Opening Statement	Argentina's Opening Statement in the form of a slide deck, dated 11 September 2023
Argentina's Reply	Argentina's Reply Memorial on Annulment dated 2 May 2023
Argentina's Reply Costs Submissions	Argentina's response to Casinos' Costs Submissions, dated 25 October 2023
Award	Award rendered on 5 November 2021 in the arbitration proceedings between Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft, and the Argentine Republic (ICSID Case No. ARB/14/32), which incorporates a Decision on Jurisdiction dated 29 June 2018
BIT	Agreement between the Republic of Austria and the Republic of Argentina for the Promotion and Protection of Investments, signed on 7 August 1992 and in force since 1 January 1995

BPAS	Banco de Préstamos y Asistencia Social
C-[#]	Exhibits submitted by Casinos in the underlying arbitration proceeding
Casinos' Closing Statement	Casinos' Closing Statement in the form of a slide deck, dated 13 September 2023
Casinos' Costs Submissions	Casinos' Submission on Costs dated 11 October 2023
Casinos' Opening Statement	Casinos' Opening Statement in the form of a slide deck, dated 11 September 2023
Casinos' Counter-Memorial	Casinos' Counter-Memorial on Annulment dated 31 March 2023
Casinos' Rejoinder	Casinos' Rejoinder Memorial on Annulment dated 1 June 2023
Casinos' Reply Costs Submissions	Casinos' Comments on Argentina's Submission on Costs, dated 25 October 2023
CLA -[#]	Legal authorities submitted by Casinos in the underlying arbitration proceeding
Committee	The *ad hoc* Annulment Committee consisting of Mr. Toby Landau KC (President); Prof. Andrea Bjorklund (Member); and Mr. Felipe Bulnes Serrano (Member)
Decision on Jurisdiction	Decision on Jurisdiction dated 29 June 2018 rendered by a majority of the Arbitral Tribunal, forming part of the Award
Dissenting Opinion on Jurisdiction	Dissenting Opinion of Prof. Torres Bernárdez from the Decision on Jurisdiction
Dissenting Opinion on the Merits	Dissenting Opinion of Prof. Torres Bernárdez from the Award
ENJASA	Entretenimientos y Juegos de Azar S.A.

ENREJA	Ente Regulador de Juegos de Azar (Games of Chance Regulatory Agency of the Province of Salta)
FATF	Financial Action Task Force
Hearing	Annulment hearing held on 11 and 13 September 2023
ICSID Background Paper 2016	ICSID Secretariat's *Updated Background Paper on Annulment for the Administrative Council of ICSID* (5 May 2016)
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
License	The exclusive license granted to ENJASA in September 1999 by the Executive of the Province of Salta (Decree No. 3616/1999 - AA-0003) for the operation of games of chance throughout the province for a term of 30 years.
Majority	The Majority
R-[#]	Exhibits submitted by Argentina in the underlying arbitration proceeding
RA-[#]	Casinos' Exhibit in the Annulment Proceedings
RALA-[#]	Casinos' Legal Authority in the Annulment Proceedings
RLA -[#]	Legal authorities submitted by Argentina in the underlying arbitration proceeding
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Tribunal	Arbitral Tribunal that rendered the Award

VCLT	Vienna Convention on the Law of Treaties

I. INTRODUCTION

1. This annulment proceeding concerns an application for annulment (the "**Application**") of the Award rendered on 5 November 2021 in the arbitration proceedings between Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft, and the Argentine Republic (ICSID Case No. ARB/14/32) (the "**Award**") rendered by a Tribunal composed of Prof. Dr. Hans van Houtte, Prof. Dr. Stephan W. Schill, and Dr. Santiago Torres Bernárdez. The Award incorporated and attached a Decision on Jurisdiction dated 29 June 2018.[1]

2. The Award addressed a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Republic of Austria and the Argentine Republic for the Promotion and Protection of Investments, which was signed on 7 August 1992 and entered into force on 1 January 1995 (the "**BIT**" or the "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the "**ICSID Convention**").

3. In the Award, the Tribunal found that the Republic of Argentina had breached certain provisions of the BIT. In particular, the Tribunal decided as follows:

> (1) Respondent has breached Article 4(1) and (2) of the Argentina-Austria BIT by subjecting Claimants to an unlawful expropriation.
>
> (2) The Tribunal makes no findings as to the claimed breaches by Respondent of Articles 4(3) and 2(1) of the Argentina-Austria BIT, as any such breaches would be subsumed by the finding under (1).
>
> (3) Respondent is liable to pay compensation to Claimants in the amount of USD 21,660,000 plus interest at a rate of 4% per annum compounded annually from 13 August 2013 until full payment thereof.

[1] Award, paras 25 and 26.

(4) Respondent shall pay to Claimants for the costs incurred in connection with the proceedings, the fees and expenses of the members of the Tribunal, and the charges for the use of the facilities of the Centre (i) USD 1,736,131.62 and (ii) EUR 3,725,134.37, plus interest at a rate of 4% per annum compounded annually on both (i) and (ii) from the date of the Award until full payment thereof.

(5) The Tribunal rejects all other claims.

4. The Argentine Republic has applied for annulment of the Award on the basis of Article 52 of the ICSID Convention, identifying three grounds for annulment: (i) manifest excess of powers (Article 52(1)(b)); (ii) serious departure from a fundamental rule of procedure (Article 52(1)(d)); and (iii) failure to state reasons (Article 52(1)(e)).

5. *Structure of this Decision:* This Decision is structured as follows:

- **Section II** outlines the procedural history of these proceedings to date.
- **Section III** comprises a brief outline of the relevant underlying facts.
- **Section IV** addresses Argentina's first ground for annulment: manifest excess of powers (Article 52(1)(b) of the ICSID Convention).
- **Section V** addresses Argentina's second ground for annulment: serious departure from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention).
- **Section VI** addresses Argentina's third ground for annulment: failure to state reasons (Article 52(1)(e) of the ICSID Convention).
- **Section VII** addresses costs.
- **Section VIII** records the Committee's operative decision.

6. *Terminology:* For the sake of simplicity, this Decision continues to use the word "**Claimants**" or "**Casinos**" to refer to Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft, and the "**Respondent**" or "**Argentina**" to refer to the Argentine Republic, as in the original proceeding. The Claimants and the Respondent are collectively

referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

7. *Summaries of the Parties' Positions:* The Parties' positions on each ground for annulment and on costs issues are summarised briefly in each section below. Each such summary is not intended to be exhaustive, but rather to reflect the Parties' principal arguments. For the avoidance of doubt, the Committee has carefully considered the entirety of the Parties' written and oral submissions in arriving at its determinations, and the absence of reference to any particular matter should not be taken as an indication that the Committee has not considered it.

II. PROCEDURAL HISTORY

8. On 4 March 2022 Argentina filed its Application pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("**Arbitration Rules**"). The Application also contained a request under Article 52(5) of the ICSID Convention and Rule 54(1) of the Arbitration Rules for a stay of enforcement of the Award, pending the Committee's decision on the Application (the "**Stay Request**").

9. On 9 March 2022 the Secretary-General of ICSID registered the Application, noted that it contained a request for a stay of the enforcement of the Award, and informed the Parties that the enforcement of the Award was provisionally stayed in accordance with Article 52(5) of the ICSID Convention and Arbitration Rule 54(2).

10. The Committee was constituted, and the proceeding was deemed to have begun, on 17 May 2022, pursuant to Arbitration Rules 6 and 53. The Committee is composed of Mr. Toby Landau KC, a national of the United Kingdom, President of the Committee; Prof. Andrea Bjorklund, at the time a national of the United States and permanent resident of Canada, and now a citizen of Canada; and Mr. Felipe Bulnes Serrano, a national of Chile. Ms. Alicia Martín Blanco, ICSID Senior Legal Counsel, was designated to serve as Secretary of the Committee.

11. On 19 May 2022 the Committee wrote to the Parties proposing dates for the first session of the Committee and the preliminary procedural consultation with the Parties ("**First Session**"). The Committee further referred to the stay of enforcement request contained in the Application, and to the notice of registration, where the Secretary-General had informed the Parties that the enforcement of the Award was provisionally stayed. The Committee invited the Parties to confer and try to agree on a schedule for submissions on the stay of enforcement.

12. The Parties provided their responses on 26 May 2022. Not having been able to agree on a schedule of submissions on the stay of enforcement, Argentina proposed two consecutive rounds of submissions comprising a total of 270 days, and Casinos proposed one round of submissions and, if required by the Committee, an oral hearing, comprising a total of 42 days such that "*the proceedings on the stay of enforcement should be closed by mid-September 2022*."

13. On 31 May 2022 the Committee established a schedule of submissions on the stay of enforcement comprising one round of submissions as well as an oral hearing to be held at the same time as the (remote) First Session.

14. On 7 June 2022, the Parties agreed to extend the 60-day deadline for the First Session until 3 August 2022, as well as to have the hearing on the stay of enforcement on the same day (remotely).

15. On 14 June 2022, Argentina filed a Request for a Continued Stay of Enforcement of the Award, together with factual exhibits AA-1 to AA-56, and legal exhibits ALA-1 to ALA-61 (the "**Request**").

16. On 4 July 2022, Casinos filed a Reply to the Request for Continuation of the Stay of Enforcement, together with factual exhibits RA-1 to RA-15, and legal exhibits RLA-0 to RLA-40 (the "**Reply**").

17. On 12 July 2022, the Committee transmitted a draft Procedural Order No. 1 ("**PO1**") and invited the Parties to confer concerning the items addressed therein and to submit a joint proposal by 26 July 2022. The Parties were also invited to try to agree on the schedule for the hearing on the stay of enforcement by the same date.

18. On 25 July 2022, the Parties agreed with the Committee's proposal to have court reporting services in real time during both the stay of enforcement hearing ("**Hearing**") and the First Session.

19. On 26 July 2022, the Parties submitted their responses on draft PO1, indicating the items on which they agreed as well as their respective comments and proposals.

20. On 3 August 2022, the Committee held the Hearing and the First Session with the Parties by video conference. The following persons were in attendance:

For the Committee
Toby Landau KC, President of the Committee
Andrea Bjorklund, Member of the Committee
Felipe Bulnes Serrano, Member of the Committee

For the ICSID Secretariat
Luisa Fernanda Torres Arias, ICSID Legal Counsel

For the Applicant on Annulment
Mariana Lozza, *Procuración del Tesoro de la Nación*
María Alejandra Etchegorry, *Procuración del Tesoro de la Nación*
Cristian De Fazio, *Procuración del Tesoro de la Nación*
María Rosario Tejada, *Procuración del Tesoro de la Nación*
Ana Miño Foncuberta, *Procuración del Tesoro de la Nación*

For the Respondents on Annulment
Florian Haugeneder, KNOETZL HAUGENEDER NETAL Rechtsanwaelte GmbH
Natascha Tunkel, KNOETZL HAUGENEDER NETAL Rechtsanwaelte GmbH
Michael Czermak, Managing Director Legal Affairs Casinos Austria
Alexandra Baumberger, Head of Department Legal Affairs Casinos Austria International GmbH and Casinos Austria AG

21. On 9 August 2022, the Committee issued PO1, which recorded the Parties' agreements and the Committee's decisions on procedural matters. PO1 provided, *inter alia*, that the

applicable Arbitration Rules would be those in force as of 10 April 2006; that the procedural languages would be English and Spanish; and that the place of proceeding would be Washington, DC. PO1 also sets out the procedural calendar for the proceeding.

22. On 1 December 2022, Argentina filed its Memorial on Annulment, together with exhibits AA0001 to AA0057 and legal authorities AALA-0001 to AALA-0058 (in addition to documents from the underlying arbitration) ("**Argentina's Memorial**").

23. On 13 January 2023, the Committee issued its Decision on Stay of Enforcement. The Committee decided as follows:

> (1) The Request for a Continued Stay of Enforcement of the Award made by the Argentine Republic is refused.
>
> (2) The costs arising out of the Applicant's Request for a Continued Stay of Enforcement of the Award are reserved for a subsequent stage of the proceedings.

24. On 31 March 2023, Casinos filed their Counter-Memorial on Annulment, together with exhibits RA-0001 to RA-0006 and legal authorities RALA-0001 to RALA-0093 (in addition to documents from the underlying arbitration) ("**Casinos' Counter-Memorial**").

25. On 27 April 2023, after consulting with the Parties, the Committee decided that the Hearing on Annulment would be in person, in Washington D.C. The Committee made its decision in view of (a) the Claimants' desire for an in-person hearing; (b) the potential inequality of a hybrid hearing if only one side's counsel was present in person; and (c) the Parties' failure to agree on any other venue.

26. On 2 May 2023, Argentina filed its Reply on Annulment, together with exhibits AA-0058 to AA-0066 and legal authority AALA-0059 (in addition to documents from the underlying arbitration) ("**Argentina's Reply**").

27. On 1 June 2023, Casinos filed their Rejoinder on Annulment, together with exhibits RA-0007 to RA-0011 and legal authorities RALA-0094 to RALA-0109 (in addition to documents from the underlying arbitration) ("**Casinos' Rejoinder**").

28. A pre-Hearing organizational meeting was held on 14 July 2023 by videoconference.

29. On 25 July 2023, the Committee issued Procedural Order No. 2 on the organisation of the Hearing.

30. The Hearing on Annulment was held in Washington DC on September 11 and 13, 2023. The following persons were present at the Hearing:

Committee:	
Toby Landau KC	President
Andrea Bjorklund	Member of the Committee
Felipe Bulnes Serrano	Member of the Committee
ICSID Secretariat:	
Alicia Martín Blanco	Secretary of the Committee
For the Claimants:	
Florian Haugeneder	Legal Counsel for the Claimants
Natascha Tunkel	Legal Counsel for the Claimants
Sophie Wotschke	Legal Counsel for the Claimants
Fritz Pühringer	Chief Executive Officer Casinos Austria International
Michael Czermak	Managing Director Legal Affairs & Compliance
Alexandra Baumberger	Casinos Austria Aktiengesellschaft Head of Legal Affairs of Casinos Austria International and Casinos Austria Aktiengesellschaft
For the Respondent:	
Carlos Alberto Zannini	*Procuración del Tesoro de la Nación*
Sebastián Soler	*Procuración del Tesoro de la Nación*
Mariana Lozza	*Procuración del Tesoro de la Nación*
Soledad Romero Caporale	*Procuración del Tesoro de la Nación*
Annabella Sandri Fuentes	*Procuración del Tesoro de la Nación*
José Ryb	*Procuración del Tesoro de la Nación*
Matías Acacio	*Procuración del Tesoro de la Nación*

Valeria Etchechoury	*Procuración del Tesoro de la Nación*
Adriana Busto	*Procuración del Tesoro de la Nación*
Emiliano Leanza	*Procuración del Tesoro de la Nación*
Pablo Buccianti	*Procuración del Tesoro de la Nación*

Court Reporters:

Dawn Larson	English Court Reporter
Dante Rinaldi	Spanish Court Reporter

Interpreters:

Silvia Colla	Interpreter
Charlie Roberts	Interpreter
Daniel Giglio	Interpreter

31. In the course of the Hearing on Annulment, Argentina produced and relied on an Opening Statement dated 11 September 2023 ("**Argentina's Opening Statement**"), and a Closing Statement dated 13 September 2023 ("**Argentina's Closing Statement**"), both in the form of slide decks which were elaborated upon in oral submissions. Similarly, Casinos produced and relied on an Opening Statement dated 11 September 2023 ("**Casinos' Opening Statement**"), and a Closing Statement dated 13 September 2023 ("**Casinos' Closing Statement**"), both also in the form of slide decks which were elaborated upon in oral submissions.

32. On 21 September 2023, the Committee issued Procedural Order No. 3 on post-Hearing matters. Among other things, Procedural Order No. 3 recorded the Parties' agreement that there would be no Post-Hearing Briefs.

33. On 2 October 2023, the Parties filed agreed corrections to the English transcript. The Parties agreed that the Spanish transcript would remain part of the record, but would not be corrected.

34. On 11 October 2023, Casinos filed their submission on costs, together with Annexes A and B and legal authorities RALA-0110 to RALA-0115. On the same date, Argentina filed its submission on costs, together with one annex and legal authorities AALA-0060 to AALA-0078.

35. On 25 October 2023, Casinos submitted their comments on Argentina's costs submission together with updated versions of Annexes A and B, and exhibit RA-0012. On the same date, Argentina filed its comments on Casinos' costs submission.

36. The proceeding was closed on 18 August 2025.

III. RELEVANT FACTUAL BACKGROUND

37. The following account sets out a brief summary of the underlying facts in this case, simply by way of context for consideration of Argentina's grounds for annulment. It is not intended to be a comprehensive statement of relevant facts, or to depart from the findings of fact set out in the Award.

38. In September 1998, by Decree No. 2126/98, the Executive Branch of the Province of Salta in Argentina created Entretenimientos y Juegos de Azar S.A. ("**ENJASA**"), a company whose purpose was the management, commercialization and operation of games of chance in the Province of Salta.[2]

39. In December 1998, the Province of Salta enacted Law No. 7020,[3] which established a new regulatory framework for games of chance and lottery. This provided that the operation of games of chance in the Province was to be carried out through licenses granted by the Executive. It also created the Games of Chance Regulatory Agency, or *Ente Regulador del Juego de Azar* ("**ENREJA**"), which had police and regulatory powers, and was designated as enforcement authority, over all issues relating to the management and conduct of games of chance.[4]

[2] Argentina's Memorial, para 4; Decree No. 2126/98 (AA-0001).
[3] Law No. 7020 (AA-0002).
[4] Argentina's Memorial, para 5.

40. In September 1999, the Executive of the Province of Salta granted an exclusive license to ENJASA for the operation of games of chance throughout the Province for a term of 30 years (the "**License**").[5]

41. Casinos are worldwide operators of casinos and games of chance. Casinos Austria International GmbH ("**CAI**") is a subsidiary of Casinos Austria Aktiengesellschaft ("**CASAG**"). In early 2000, Casinos participated in a joint venture that won a bid to operate ENJASA.

42. According to Casinos, the winning bid contemplated extensive investments in the Province of Salta, including a yearly license fee of USD 2.5 million for the first three years and of USD 4.1 million for the next 27 years. Further, there were to be investments in a five-star hotel in Salta as well as a school of hotel trade and the creation of a foundation in support of tourism and cultural activities in the amount of USD 20.77 million.[6]

43. The operation of games of chance is a highly regulated sector.[7] As noted by Argentina:

> Games of chance are highly regulated, as they constitute an activity that can be easily used to commit different types of money laundering acts, which is compounded by the fact that the Province of Salta is a sensitive region as it has borders with three foreign countries and five Argentine provinces.[8]

44. To this end, Law No. 7020 (referred to, *inter alia*, in Article 5 of the License) forbade the hiring of third-party operators by ENJASA without ENREJA's authorization, and required the appointment in every gaming hall of an individual responsible for supervising and implementing anti-money laundering rules, as well as other measures. Any violations were punishable by ENREJA, including by the suspension and revocation of licenses.[9] Article

[5] Decree No. 3616/1999 (AA-0003).

[6] Casinos' Counter-Memorial, para 17; Award, para 180; Decision on Jurisdiction, paras 50 – 51 and 157-159.

[7] Casinos' Counter-Memorial, para 28.

[8] Argentina's Memorial, para 6.

[9] Argentina's Memorial, para 7; Casinos' Counter-Memorial, para 22; Law No. 7020, Article 5 (AA-0002); Decree No. 3616/1999, Annex I, Article 5.1 (AA-0003).

13 of Law No. 7020 provided (in part) that: "*The penalties above shall be applied taking into consideration due proportionality between the penalties and the violation, notwithstanding the criminal liability and misdemeanor liability*."[10]

45. Purportedly in the exercise of its functions, ENREJA conducted regular checks and investigations, and imposed various sanctions on ENJASA. In particular, ENREJA pursued a number of administrative enquiries as a consequence of three types of alleged violation, namely: (i) the irregular and undue hiring of other game operators; (ii) the failure to identify live game players; and (iii) the failure to identify "*Tómbola*" lottery game players.[11]

46. On 13 August 2013, Resolution No. 240/13 was issued by which ENREJA revoked ENJASA's License.[12] This revocation was based on a joint determination based on the three earlier investigations (as reflected in Resolutions No. 381/12, No. 380/12 and No. 384/12, each of which referred to different alleged administrative breaches by ENJASA).[13] Each of the alleged breaches was the subject of contention between the Parties.[14]

47. At the time of its revocation, the License still had an open term of 17.5 years.[15]

48. Argentina refers to the administrative enquiries listed above having been added to other investigations and enquiries that were already being conducted as a result of previous breaches and violations, totalling more than 20 investigations and enquiries which were mentioned in Resolution No. 240/13.[16] Casinos notes that, taking into consideration the size of operations (which included the operation of four casinos; 15 slot machine halls and 14 lottery games; and in total 1,376 slot machines and 46 gaming tables), the Tribunal

[10] Casinos' Counter-Memorial, para 23; Award, paras 358 and 371, referencing Decree No. 3.616/1999 (AA-003).

[11] Argentina's Memorial, para 11.

[12] Argentina's Memorial, para 10; Resolution No. 240/2013 (AA-0004).

[13] Award, para 116.

[14] Award, paras 379-394.

[15] Award, para 354.

[16] Argentina's Memorial, para 10; List of 20 previous sanctions imposed by ENREJA on ENJASA, (AA-0005); Resolution No. 240/13, pp. 27-29 (AA-0004).

found that ENJASA had not systematically disregarded the applicable administrative rules.[17]

49. At the time when the License was revoked, Casinos' participation in ENJASA had increased, such that it indirectly held 60% of ENJASA's chare capital.[18] Further, ENJASA's business had grown, such that it involved extensive operations and a large number of staff.[19]

50. According to Casinos, the revocation of the License deprived ENJASA of the legal basis for its business operations, and thereby destroyed the economic basis of Casinos' investment.[20]

51. ENJASA filed a motion for reconsideration of Resolution No. 240/13, and a request in court for the issuance of precautionary measure to stay the revocation (which was granted pending a decision by the administrative authorities on the motion for reconsideration).[21]

52. On 19 November 2013, ENREJA rejected the motion for reconsideration.[22]

53. On 5 February 2014, ENJASA filed a lawsuit in the Province of Salta for annulment of the revocation.[23]

54. Before this was resolved, Casinos notified Argentina of its claim under the BIT, and on 4 December 2014, it filed a Request for Arbitration. This was registered by ICSID on 18 December 2014.[24]

[17] Casinos' Counter-Memorial, para 29; Award, para 405.

[18] Casinos' Counter-Memorial, para 18; Award, para 78.

[19] Casinos' Counter-Memorial, para 19; Award, para 80.

[20] Casinos' Counter-Memorial, para 36.

[21] Argentina's Memorial, para 15; Casinos' Counter-Memorial, para 42; Award on Jurisdiction, para 306.

[22] Argentina's Memorial, para 15; Casinos' Counter-Memorial, para 42; Award, para 305; ENREJA's Resolution No. 315/13 (RA-0006).

[23] Decision on Jurisdiction, para 306.

[24] Argentina's Memorial, para 17; Casinos' Counter-Memorial, para 43.

55. By way of broad summary, Casinos claimed that the revocation of ENJASA's License did not take place in the normal exercise of ENREJA's regulatory powers, and specifically that Argentina: (1) had breached Articles 4(1) and (2) of the BIT by unlawfully expropriating Casinos' investment; (2) had breached Article 4(3) of the BIT by unlawfully expropriating the License and the gaming operations of ENJASA;(3) had breached Article 2(1) of the BIT by failing to accord fair and equitable treatment. By reason of these alleged breaches, Casinos claimed that Argentina was liable to pay it compensation.[25]

56. The Tribunal was constituted on 6 April 2015. Argentina raised three objections to the Tribunal's jurisdiction, namely: (1) that Casinos had failed to demonstrate a *prima facie* violation of the BIT; (2) that Casinos had not accepted the offer to submit the dispute to arbitration contained in Article 8 of the BIT; and (3) that the Tribunal lacked jurisdiction *ratione materiae.*

57. Following exchanges between the Parties, the Tribunal directed that the arbitration proceedings would be bifurcated so that Argentina's jurisdictional objections could be considered as a preliminary issue.[26]

58. On 29 June 2018, the Decision on Jurisdiction was issued, by which a Majority (the "**Majority**") held that (i) the Tribunal had jurisdiction over Casinos' claims based on the alleged breach of Articles 2(1), 4(1) and 4(3) of the BIT, and (ii) the Tribunal did not have jurisdiction over the claims based on the alleged breach of Article 3(1) of the BIT. Prof. Torres Bernárdez included a Dissenting Opinion on Argentina's Second Preliminary Objection and Declaration of Dissent concerning its First and Third Preliminary Objections (the "**Dissenting Opinion on Jurisdiction**").

59. On 5 November 2021, the Award was issued, by which the Majority found in favour of Casinos on their claim for indirect expropriation (on the basis of Article 4(1) and (2) of the

[25] Casinos' Counter-Memorial, para 51, citing Casinos' Memorial on the Merits in the arbitration, para 491.
[26] Procedural Order No. 3 of 21 September 2023.

BIT). The Award was accompanied by a Dissenting Opinion on the Merits by Prof. Torres Bernárdez (the "**Dissenting Opinion on the Merits**").

60. As summarised by Casinos, the Majority found that Casinos had not proven any ill intentions behind the revocation of the License, and found that ENREJA had not violated due process. The focus, therefore, of the Majority's analysis was whether the revocation of the License was a sanction proportional to the gravity of the administrative breaches that were relied upon to justify the revocation.[27]

61. By reason of the breaches of Articles 4(1) and (2) of the BIT, the Majority ordered the payment of compensation in the amount of USD 21,660,000, plus interest at a rate of 4% per annum compounded annually from 13 August 2013 until full payment, and the costs Casinos had incurred in connection with the arbitral proceedings.[28]

62. The Majority did not formally decide upon Casinos' other claims, in particular its claim for violation of Article 4(1)(2) of the BIT and Article 2(1) of the BIT, given that Casinos had not requested any additional compensation under these provisions.[29]

IV. GROUND 1: MANIFEST EXCESS OF POWERS - ART 52(1)(B)

A. THE PARTIES' POSITIONS

(1) Argentina

a. The Standard

63. In terms of general approach (applicable to all grounds of annulment), Argentina emphasizes that the application for annulment provided for under Article 52 of the ICSID Convention should be interpreted neither restrictively nor extensively, nor in favour of the

[27] Casinos' Counter-Memorial, para 56; Award, paras 368, 426.
[28] Award, para 439.
[29] Casinos' Counter-Memorial, para 58; Argentina's Memorial, para 36; Award, paras 436 and 438.

validity of the award, but rather in accordance with accepted (customary international law) principles of treaty interpretation.[30]

64. Argentina approaches Article 52(1)(b) of the ICSID Convention from the basic proposition that an arbitral tribunal derives its powers from the consent of the parties, such that "*an excess of powers occurs every time the powers exercised by the arbitrators are not those which have been granted to them*."[31]

65. Two steps, according to Argentina, are required: first, the Committee must analyze whether there has been an excess of powers and, second, it must assess whether the excess is manifest in nature.[32]

66. According to the *ad hoc* committee in *Soufraki v UAE*, "*a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious*."[33] In particular, so Argentina contends, the manifest nature of the excess has to do with "*its conspicuousness, not with its gravity*." In other words, the key factor is how readily apparent the excess is. "*Manifest*" means "*'clear', 'plain', 'obvious' or 'evident.'*"[34] According to Argentina, there is no grading of the gravity or seriousness of the excess.[35]

67. As to the level of enquiry by the Committee, Argentina submits that the "*manifest*" nature required does not mean that the Committee should not conduct a detailed analysis of the

[30] Argentina's Reply, para 13, citing *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, ¶¶ 21-22 (AALA-0002).

[31] Argentina's Memorial, para 49, quoting from *Tza Yap Shum v. the Republic of Peru,* (ICSID Case No. ARB/07/6), Decision on Annulment of 12 February 2015, para 76 (AALA-0019); Argentina's Reply, para 17.

[32] Argentina's Memorial para 51, citing *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), Decision on Annulment of 10 June 2022, para 421 (AALA-0021); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23), Decision on Annulment of 28 December 2018, para 72 (AALA-0022).

[33] Argentina's Memorial, para 51; *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 40 (AALA-0002).

[34] Argentina's Memorial, para 51, citing *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 39 (AALA-0002).

[35] Argentina's Reply, paras 19-20.

reasoning of the Majority. In the words of the *ad hoc* committee in *EDF v Argentine Republic:*

> While the Committee agrees that an excess of powers will be manifest only if it can readily be discerned, it considers that this does not mean that the excess must, as it were, leap out of the page on a first reading of the Award. The reasoning in a case may be so complex that a degree of inquiry and analysis is required before it is clear precisely what the tribunal has decided. In such a case, the need for such inquiry and analysis will not prevent an excess of powers from being "manifest." […][36]

68. As to types of excess of powers, Argentina submits that:

> a tribunal exceeds its powers when it exceeds the exercise of the jurisdiction conferred upon it by the parties to a dispute. This includes the jurisdictional parameters, the applicable law and the issues raised by the parties. This ground for annulment is present both where a tribunal assumes powers it does not have, and where it fails to exercise the powers it does have.[37]

69. In order to analyse whether a tribunal has failed to apply the applicable law, Argentina argues that the Committee must identify the law applicable to the dispute, the law actually applied by the tribunal, and whether there are reasons to conclude that the Majority's decision entailed a manifest departure from the applicable law. If a tribunal plainly ignores the applicable law or bases its conclusions on a law other than that applicable in pursuance of Article 42 of the ICSID Convention, then it manifestly exceeds the mandate given and

[36] Argentina's Memorial, para 52; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, para 193 (AALA-0023).

[37] Argentina's Memorial, para 53, citing *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment of 26 February 2016, para 126 (AALA-0024); *Duke Energy International Peru Investments No. 1, Limited. v. Republic of Peru* (ICSID Case No. ARB/03/28), Decision on Annulment of 1 March 2011, para 97 (AALA-0025).

its award should be annulled.[38] Further, as stated by the *ad hoc* committee in *SolEs Badajoz v Spain*:

> (…) there is also the special case of the non-application of the applicable law due to a legal error of such a nature or flagrancy as to render that application ineffective. This is a qualified failure as it would require the finding of an erroneous interpretation or misapplication of the law "*so gross or egregious as substantially to amount to failure to apply the proper law.*"[39]

70. Argentina contends that Casinos is incorrect in stating that "*committees have repeatedly held that an excess of powers for a failure to apply the applicable law may arise only when the tribunal completely failed to apply the applicable law and decided the dispute on some other basis.*"[40] According to Argentina, a complete failure to apply the applicable law is only one instance in which there may be a manifest excess of powers. *Ad hoc* Committees have also annulled awards in circumstances where fundamental provisions of the applicable law have not been applied by the tribunal.[41]

71. As to the failure to address issues raised by the parties, Argentina submits that an excess of powers occurs where a tribunal "*avoid[s] referring to matters that are crucial or decisive to the decision.*"[42]

72. Further, Argentina contends that a manifest excess of powers also includes cases where:

> a tribunal substitutes its own interpretation for the interpretation of local competent authorities. As the ICJ established in the Diallo case: "*[I]t is*

[38] Argentina's Memorial, para 56, citing *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment of 21 March 2007, para 59 (AALA-0030), and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Annulment of 2 November 2015, para 54 (AALA-0028).

[39] Argentina's Memorial, para 57, citing *SolEs Badajoz GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/38), Decision on Annulment of 16 March 2022, para 67 (AALA-0031).

[40] Argentina's Reply, para 18, citing Casinos' Counter-Memorial, para 85.

[41] Argentina's Reply, para 18, citing *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 16 May 1986, para 98 (AALA-0043). Also, Argentina's Reply, paras 62-63.

[42] Argentina's Memorial, para 58, citing *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo* (ICSID Case No. ARB/06/07), Decision on Annulment of 6 September 2011, para 57 (AALA-0032).

> *certainly not for the Court to adopt a different interpretation of Congolese domestic law for the purposes of the decision of this case*."[43]

b. Challenges

73. It is Argentina's case that the Majority manifestly exceeded its powers in two respects: (1) in its exercise of jurisdiction;[44] and (2) in its failure to apply the law applicable to the dispute.[45]

1. Exercise of Jurisdiction

74. Argentina submits that the Majority exceeded its jurisdiction in four ways, as follows:[46]

(i) The Majority took on the role of an appellate court as it reviewed *de novo* matters previously addressed by the local authorities.

(ii) The Majority exerted jurisdiction over a dispute that did not comply with the terms of Argentina's offer to arbitrate as included in Article 8 of the BIT.

(iii) The Majority turned a domestic contract dispute that had been closed under the domestic law into a claim under the BIT.

(iv) The Majority neither heard nor analyzed Argentina's defence that the revocation of ENJASA's License was part of ENREJA's regular exercise of the regulatory and supervisory or police powers of the State as recognized by international customary law.

75. Each point is summarised in turn below.

[43] Argentina's Memorial, para 59, citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment of 30 November 2010, I.C.J. Reports 2010, p. 665, para 71 (emphasis added) (AALA-0033).

[44] Argentina's Memorial, paras 61-93.

[45] Argentina's Memorial, paras 94-117.

[46] Argentina's Memorial, para 61.

(i) Taking on the role of an appellate court

76. Argentina submits that by reviewing *de novo* issues that fell within the scope of the jurisdiction of Argentina's local regulatory authorities, which had already exercised jurisdiction, the Majority in effect assumed the functions of an appellate court, replacing the decisions of the competent authorities by its own determinations.[47] Argentina notes that the Majority itself ruled that it could not assume the functions of a domestic administrative or appellate court:[48]

> [T]he Tribunal is conscious of the fact that it has to leave the host State's authorities room for appreciation and thus exercise an appropriate degree of deference. After all, the Tribunal's mandate in the present proceeding is not to second-guess the host State's determinations under domestic law and review them *de novo*, as if it was the primary decision-maker or a domestic (first-instance, appellate, or supreme) court in the host State.[49]
>
> […] an investment treaty tribunal will regularly not be able to review compliance of the host State with its own domestic law *de novo*, but will have to limit itself to verifying whether the host State's application of the domestic regulatory framework, whether lawful or not under domestic law, resulted in breaches of the international law limitations that fall on the host State under the BIT.[50]
>
> However, an investment treaty tribunal, which is not assuming the function of a domestic administrative court, but is reviewing the international legality of the administrative conduct in question, will not engage in reviewing the application of domestic law *de novo.*[51]

77. Further, the Majority defined its task as follows:

> What the Tribunal has to examine, however, is how the regulatory framework in place was applied in the present case, and more specifically, whether ENREJA has properly exercised its regulatory powers under that framework in revoking ENJASA's license. As set out in more detail above,

[47] Argentina's Memorial, para 62; Argentina's Reply, paras 22-27.

[48] Argentina's Memorial, para 63; Argentina's Reply, paras 2-5.

[49] Award, para 340.

[50] Award, para 342.

[51] Award, para 377.

> the Tribunal's task is not to review the legality of the revocation of ENJASA's license under domestic law in the same way the host State's administrative courts would. Instead, the Tribunal is limited to reviewing the legality under international law of ENREJA's exercise of its regulatory and supervisory powers, including in particular whether the revocation of ENJASA's license complied with the principle of good faith, the prohibition of arbitrariness, the principle of proportionality, and due process under international law.[52]

78. In the event, the Majority did not respect these guidelines. This is evident, in particular, in the Majority's review of the assessment of the evidence and the interpretation of the applicable regulations made by ENREJA with regard to ENJASA's behaviour in the various investigations and proceedings, culminating in the revocation of the License.[53] Argentina quotes the following as a "*textbook example*" of the excess:[54]

> In respect of Resolution No. 380/12, in which ENREJA had charged ENJASA with having breached anti-money laundering rules in its lottery operations and by making a payment in respect of a prize won in a slot machine game, the Tribunal is unable to see how ENREJA could plausibly conclude that the rules on anti-money laundering in Resolution No. 26/00 (registration of the payment and of the identity of the winner in the anti-money laundering book) were seriously breached when the payment and registration of a prize of ARS 11,080 were delayed by some six weeks, justifying in combination with other infractions the revocation of ENJASA's license. Similarly, the Tribunal is unable to see how ENREJA could plausibly consider that the same rules on anti-money laundering were seriously breached when a prize of ARS 11,480 won on a slot machine on 14 May 2012, which had not yet been paid out, was only registered in the anti-money laundering book in full on 17 May 2012, after an inspection conducted by ENREJA on 16 May 2012, justifying in combination with other infractions the revocation of the License. In both cases, the Tribunal concludes that ENREJA's finding that ENJASA had breached the regulatory framework on anti-money laundering in respect of these two prizes appears manifestly unsupported in fact and law and must be considered to be arbitrary from the perspective of international law.[55]

[52] Argentina's Memorial, para 64; Award, para 359.

[53] Argentina's Memorial, para 67, citing Award, paras 379 - 394.

[54] Argentina's Memorial, para 67.

[55] Award, para 379.

79. Argentina cites a number of other such examples, including (amongst others):

(i) the Majority's replacement of the manner in which the term "*operator*" was interpreted by ENREJA in the course of its analysis of the application of Article 5(1) of Law No. 7020;[56]

(ii) the Majority's review and replacement of ENREJA's analysis and findings in relation to "*issues with the registration of payments of prizes*" (in particular in the case of Resolution No. 380/12).[57]

80. In Argentina's submission, the analysis of the Majority went far beyond considering the appropriateness of the sanction under international law, and failed to accord any degree of deference to the domestic authorities. In effect, the Majority stepped into the shoes of the competent authority.[58]

81. Further, Argentina contends that the Majority's *de novo* review of the interpretation and analysis of the evidence and the regulatory framework, as well as the conclusions reached by the provincial authorities in the face of ENJASA's repeated breaches of the regulatory framework, was carried out both by reviewing the proceeding that led to the issuance of Resolution No. 240/13, establishing the revocation of ENJASA's License, and by reviewing all of the proceedings that served as precedents for the adoption of that Resolution, even though Casinos had made no claim in relation to them under the BIT.[59]

82. Argentina argues that the Majority's excess of powers is "*manifest*" because:

> […] oddly enough, after an analysis of the conclusion reached by the majority of the Tribunal, it is clear that it is not consistent with the *ELSI* standard, which, according to the majority, is purportedly the standard of analysis. The majority of the Tribunal merely concluded that there was

[56] Argentina's Memorial, para 68, citing Award, paras 388-389; Argentina's Reply, paras 23-24, 30.
[57] Argentina's Memorial, paras 69-70, citing Award, paras 379, 382-383, 396; Argentina's Reply, paras 25, 28.
[58] Argentina's Memorial, para 71; Argentina's Reply, paras 42-44.
[59] Argentina's Reply, para 7.

> arbitrariness because of the existence of manifest errors. The fact that the majority of the Tribunal considers that ENREJA's findings were manifestly unsupported can hardly be deemed as a wilful disregard of due process of law.[60]

83. Argentina notes that the Majority reached what it terms an "*unprecedented, serious and biased conclusion*"[61] that it was (in the Majority's words) "*appropriate to focus on the manifest character of errors as an indicator for the lack of good faith and arbitrariness*."[62] This, Argentina argues, is all the more stark when considered alongside the Majority's finding on the due process of law (breach of due process being a requirement of the *ELSI* standard):[63]

> Although the Tribunal has not found a breach of due process, its findings on arbitrariness and the lack of proportionality are sufficient to conclude that ENREJA did not properly use its regulatory, supervisory, and police powers when it decided, in Resolution No. 240/13, to revoke ENJASA's exclusive license and when it upheld that revocation in Resolution No. 315/13.[64]

84. Similarly, Argentina notes the Majority's conclusions that Casinos' argument as to mounting harassment of ENJASA with the purpose of ousting them from the gaming sector following the December 2007 change in political power in the Province of Salta, and Casinos' allegation that the License revocation was a political plot to harm Mr Garamon (a political rival), were both unproven.[65]

85. Further, the Majority used its own conclusions (replacing those of the local authorities) to determine that the revocation provided for in Resolution No. 240 was disproportionate, and

[60] Argentina's Memorial, para 73.
[61] Argentina's Memorial, para 74.
[62] Award, para 350.
[63] Argentina's Memorial, paras 75-76; Argentina's Reply, para 4.
[64] Award, para 427.
[65] Argentina's Memorial, para 74, fn 100.

to "*detract*" [remove from consideration] breaches that had been verified by the local authorities.[66]

86. Argentina then points to the conclusion of the Majority that it:

> […] admits that these breaches could have been a valid ground for sanctions under the regulatory framework. They do not, however, in the Tribunal's view, indicate any systematic disregard by ENJASA of the regulatory framework, including the rules on the prohibition and prevention of money laundering.[67]

For Argentina, the reference to "*systematic disregard*" is an approach created by the Majority "*so that it could justify a conclusion it had already reached by itself*." This, so Argentina argues, is "*contradictory reasoning and a serious departure from the applicable law*."[68]

87. Further, Argentina claims that the Majority replaced the criterion followed by the local authorities with respect to the time bar. In so doing, the Majority failed to refer to Resolution No. 240/13, which contained a four-page analysis of the time bar defence and concluded that the time bar period sought by ENJASA was not applicable.[69]

(ii) Non-compliance with the terms of Argentina's offer to arbitrate

88. Argentina argues that the Majority manifestly exceeded its powers by asserting jurisdiction over a dispute that had not previously been submitted to the competent administrative or judicial authorities of the host State during a term of 18 months, as required by the terms of Argentina's offer to arbitrate included in Article 8 of the BIT.[70]

[66] Argentina's Memorial, paras 78-79; Award, paras 400-401.
[67] Award, para 402.
[68] Argentina's Memorial, para 81.
[69] Argentina's Memorial, para 83, citing Resolution No. 240/13, 13 August 2013, pp. 22-25 (AA-0004).
[70] Argentina's Memorial, para 85; Argentina's Reply, paras 52-54.

89. The Majority concluded as follows:[71]

> Be that as it may, in the Tribunal's view, requiring that 18 months must have passed before international arbitration is initiated is overly formalistic and not in line with the object and purpose of a domestic-remedies-first requirement.[72]
> […]
>
> [B]ecause its jurisdictional basis is not a contract, an investment treaty tribunal should not ask whether Respondent's offer to arbitrate in the BIT was matched by Claimants' acceptance, including compliance with any strict pre-arbitration requirement, so as to result in a contractual "arbitration agreement."[73]
> […]
>
> [U]nless pre-arbitration requirements are formulated clearly and unmistakably as strict conditions to the validity of seisin, in investment treaty arbitration a more flexible and less formalistic approach is warranted. Such less formalistic approach is more in line with the object and purpose of investment treaties to promote and protect foreign investment for the development of economic cooperation between States. Moreover, investors – who are, unlike States, not subjects of public international law – cannot be expected to be accustomed to the formalities of inter-State communication and inter-State dispute settlement. Consequently, absent a clear and unmistakable formulation to the contrary, investors should not be held to the formalities of public international law dispute settlement with the same strictness as States.[74]
>
> [U]nless the pre-arbitration requirements are formulated clearly and unmistakably to require the same formalistic approach in assessing compliance with them – an investment treaty tribunal should accord greater flexibility to the disputing parties than the ICJ accords to conditions of seisin under compromissory clauses. It is against this background that the Tribunal proceeds to analyzing Article 8 of the [BIT].[75]

[71] Argentina's Memorial, paras 85-86.
[72] Decision on Jurisdiction, para 318.
[73] Decision on Jurisdiction, para 274.
[74] Decision on Jurisdiction, para 275.
[75] Decision on Jurisdiction, para 276.

90. According to Argentina, the Majority thereby disregarded the express limits on its jurisdiction as established in the BIT by the State Parties.[76]

(iii) Turning a domestic contract dispute into a claim under the BIT

91. Argentina argues that the Majority also manifestly exceeded its powers by assuming the power to turn a closed domestic contract dispute under domestic law (over which it had no jurisdiction) into a claim under the BIT. In particular, the Majority overlooked ENJASA's voluntary withdrawal of the contract claim before the local courts of the province of Salta, which was an "*inescapable legal act under Argentine law*," and the fact that ENREJA's decisions on the revocation of the License had become final under Argentina's domestic law. In the absence of a finding of a violation of due process, the Majority manifestly exceeded its powers in exercising jurisdiction over this dispute.[77]

(iv) Failure to hear or analyze Argentina's defence regarding the License revocation

92. Finally, Argentina argues that the Majority failed to analyze its defence that the claim for compensation should not be granted because the revocation of the License amounted to a regular exercise by ENREJA of the regulatory and supervisory or police powers of the State under international law. As a result, the Award is *infra petita*, having failed to settle an issue that was decisive to the case.[78]

93. Relatedly, the Majority failed to apply the applicable law in that it should have addressed the defence relating to the exercise of police powers under customary law and not, as it did, "*analyze matters of good faith, arbitrariness and proportionality*."[79]

[76] Argentina's Memorial, para 88.
[77] Argentina's Memorial, paras 89-90; Argentina's Reply, paras 55-57.
[78] Argentina's Memorial, para 91.
[79] Argentina's Memorial, paras 92-93.

2. Failure to Apply the Law Applicable to the Dispute

94. Argentina identifies seven key propositions in submitting that the Majority manifestly exceeded its powers in failing to apply the law applicable to the dispute.

95. *First*, Argentina submits that the Majority failed to apply Argentine law. In analyzing the difference between compensable and non-compensable indirect expropriation, the Majority relied on the "*sole effects*" doctrine, and left out any analysis as to the reasons and purposes which led Argentina to adopt the measure concerned. The domestic law of Argentina was thereby ignored, since the focus was exclusively on the adverse effects of the revocation.[80]

96. Further, the Majority failed to consider that the License was not owned by ENJASA, as set out in its Article 1, but was merely an authorization to operate in accordance with its terms, such that interpreting the revocation on the basis of the "*sole effects*" doctrine was inapposite. As such, the Majority resorted to an exercise "*which falls outside the scope of its authority and is not based on the applicable law, thus manifestly exceeding its powers by analyzing 'a number of errors ENREJA [allegedly] committed in the three investigations'*[…]."[81]

97. *Second,* the Majority failed to apply Argentine law on the powers conferred upon ENREJA. Article 32(d) of Law No. 7020 (to which the License expressly referred) grants ENREJA the power to "*[e]xercise police powers in all matters related to the management and operation of games of chance […] imposing any applicable sanctions.*" Argentina argues that the 21 sanctions imposed upon ENJASA were "*well-founded and gradual in nature*," but from the moment the Majority "*stepped into ENREJA's shoes*," it closed its eyes to the applicable law.[82]

98. *Third,* the Majority replaced Argentine law with the standard of "*systematic disregard*," thereby arrogating to itself powers conferred onto the local authority. In this regard, the

[80] Argentina's Memorial, paras 95-98, citing Award, paras 334, 335, 427, 428; Argentina's Reply, paras 64-70.
[81] Argentina's Memorial, paras 99-100, citing Award, para 378.
[82] Argentina's Memorial, paras 101-102, citing Award, para 403; Argentina's Reply, paras 71-76.

Majority further disregarded Argentine law in concluding that even if Argentine law had been complied with:

> […] a revocation of ENJASA's license under the circumstances of the case to be a sanction that is disproportionate from the perspective of international law. This is so because ENREJA, in a manifestly erroneous manner, has failed to consider whether other equally effective measures had been available to prevent money laundering in the gaming sector short of revoking ENJASA's license […].[83]

99. *Fourth,* despite recognizing that ENREJA respected due process in revoking the License and that ENJASA's breaches could have been a valid ground for that sanction to be imposed under the regulatory framework, the Majority applied a standard of "*systematic disregard*" of the regulatory framework as the test to assess ENJASA's conduct, which is not found in either Argentine or international law.[84]

100. *Fifth,* in concluding that Argentina has engaged in indirect expropriation due to the adverse effect on Casinos of the revocation, the Majority disregarded the fact that such legal sanction was imposed due to ENJASA's serious and repeated violations of Article 5 of Law No 7020. Further, it did not analyze "*the potential adverse effect of the Sheraton Salta Hotel or the fact that ENJASA failed to participate in any new bidding processes*." Further, it did not consider the purpose of the law, namely to prevent money laundering. Additionally, the Majority ruled out the application of other rules of Argentine law, such as those relating to the revocable nature of the License (*e.g*. Article 13 of Law No. 7020).[85]

101. The failure to apply the applicable law in the cases stated above, according to Argentina, amounts to a failure to apply Article 8(6) of the BIT, which provides that the tribunal "shall decide on the basis of the Law of the Contracting Party which is a party to the dispute including the rules of Private International Law, on the basis of the provisions of this

[83] Argentina's Memorial, paras 103-104, citing Award, para 403; Argentina's Reply, paras 77-80.

[84] Argentina's Memorial, paras 105-106, citing Award, para 402.

[85] Argentina's Memorial, paras 107-108, citing Award, para 356; Decision on Jurisdiction, para 230; Dissenting Opinion on the Merits, para 319.

Agreement and the terms of any specific agreement concluded in relation to the investment as well as the principles of international law."[86]

102. *Sixth*, the Majority did not apply international law because it failed to analyze Casinos' contribution to the injury allegedly sustained by them. International law requires that reparation be reduced by the wilful or negligent action of the injured party, and here there were repeated violations of domestic law.[87]

103. *Seventh*, the Majority failed to apply the applicable rules of customary international law governing the regulatory and police powers of sovereign States. Pursuant to this, for a given sanction adopted by the competent State body in the exercise of its powers and functions to qualify as "*unreasonable*," "*the unreasonableness of the measure must be of a superlative degree or level*" – i.e. "*egregious*" or "*shocking*."[88] Here, the Majority did not apply this standard, as evident, for example, in its conclusion that:

> In examining the infractions ENREJA claimed ENJASA had committed in Resolutions Nos. 380/12, 381/12, and 384/12, the Tribunal concludes that ENREJA's findings on these infractions in Resolution No. 240/13 were, to a predominant extent, based on manifestly arbitrary determinations of fact and law.[89]

104. Further, the Majority's determination of the "*arbitrary*" nature of the measures results, according to Argentina, from the manifest excess of powers (described above) by which the applicable *ELSI* standard was replaced by a different standard.[90] For example, Argentina focuses on the Majority's statement that its:

> examination is limited to the issue of whether the decisions in question appear so manifestly incorrect that they must be deemed to constitute an

[86] Argentina's Memorial, paras 107-109, citing Award, para 356; Decision on Jurisdiction, para 230.

[87] Argentina's Memorial, para 110, citing *ILC's Articles on State Responsibility: Responsibility of States for Internationally Wrongful Acts*, OFFICIAL RECORDS OF THE GENERAL ASSEMBLY, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10, Article 39 (AALA-0054); Award, para 402; Argentina's Reply, paras 81-84.

[88] Argentina's Memorial, para 111, citing *Glamis Gold, Ltd. v. United States of America*, UNCITRAL Arbitration, Award of 8 June 2009, para 778 (emphasis added) (AALA-0036).

[89] Award, para 395.

[90] Argentina's Memorial, paras 111-113.

> abuse of power and thus constitute arbitrary conduct from the perspective of international law. [91]

105. Further, the Majority added requirements for the legitimate exercise of police powers, and disregarded not only the applicable provisions of domestic law in this regard, but also the surrounding activity conducted by ENJASA and the recommendations made by the Financial Action Task Force ("**FATF**"),[92] which provided that designated non-financial businesses and professions (including casinos) should be subject to regulatory and supervisory measures (consistent with the purposes of Law No. 7020 and, ultimately, with the revocation of ENJASA's License).[93]

(2) Casinos

a. The Standard

106. Casinos, like Argentina, notes that Article 52(1)(b) of the ICSID Convention requires (i) an "*excess of powers*" which is (ii) "*manifest*."[94]

107. As to the first requirement, Casinos states that an "*excess of powers*" may arise in cases of awards "*ultra, extra or infra petita*."[95] In particular, it will occur when a tribunal decides an issue that is not covered by the parties' consent to arbitration, or if an issue decided by the tribunal was not submitted for decision, or if a tribunal fails to give effect to the parties' agreement by "*completely disregarding the applicable law*."[96]

[91] Award, para 377.

[92] The FATF Recommendations, February 2012, Recommendation 28 (AA-0055); The FATF Recommendations, February 2012, Recommendation 24 (AA-0056).

[93] Argentina's Memorial, paras 114-117; Award, para 333, 343, 378.

[94] Casinos' Counter-Memorial, para 81; Casinos' Rejoinder, paras 7, 12.

[95] Casinos' Counter-Memorial, para 82.

[96] Casinos' Counter-Memorial, para 83, citing (*inter alia*) *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para 77 (AALA-0049); Casinos' Rejoinder, para 14.

108. As to the second requirement, Casinos defines "*manifest*" as "*plain*," "*clear*," "*obvious*," "*evident*" – or "*something that can be immediately understood or recognized by the mind*." In other words, a requirement as to the ease with which the excess is perceived.[97]

109. However, Casinos also submits that "*manifest*" has a substantive connotation, implying "*significant*," or "*serious*."[98]

110. Contrary to Argentina's case, Casinos contends that the Committee cannot conduct a detailed analysis, including reconsidering the underlying evidence, in assessing whether an excess of powers has occurred.[99]

b. Challenges

1. Exercise of Jurisdiction

(i) Taking on the role of an appellate court

111. Casinos submits that Argentina's complaint that the Majority assumed the function of an appellate court is misplaced, because it fails to grasp the role of international tribunals in assessing the actions of domestic authorities in the context of investor-State disputes. The Majority was entitled to review the measures taken by ENREJA in order to assess whether the protection standards of international law had been observed. Scrutiny under domestic law and regulations is inherently different from a review under international law.[100] As the *ad hoc* committee in *Vivendi I* held:

> […] whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law […].[101]

[97] Casinos' Counter-Memorial, para 88.

[98] Casinos' Counter-Memorial, para 90; Casinos' Rejoinder, paras 7, 16.

[99] Casinos' Counter-Memorial, para 89, citing *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment of 5 February 2002, para 25 (AALA-0042).

[100] Casinos' Counter-Memorial, paras 98-102.

[101] Casinos' Counter-Memorial, para 102, citing *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of July 3, 2002, para 96 (RALA-0029); Casinos' Rejoinder, paras 23-34.

112. As to the four specific areas where Argentina claims that the Majority exceeded its powers, Casinos submits that all must be rejected.

(a) The assessment of the actions of ENREJA under international law

113. Contrary to Argentina's case, the application of international law to State conduct includes all aspects of State conduct, including the domestic law framework in which State organs operate. This is necessary as State organs do not act in a legal vacuum. Thus, Argentina cannot exclude conduct of its domestic organs from scrutiny under international law by portraying this conduct as "*domestic*."[102]

114. None of the four areas where the Majority interpreted domestic law, as relied upon by Argentina, constitute an excess of powers.[103]

115. As to the Majority's assessment of the legal framework of the revocation, the Majority applied the international law standard of "*arbitrariness*," and in this regard assessed whether Resolutions No. 380/12, No. 381/12 and No. 384/12 provided a basis justifying the revocation of the License. This necessarily entailed examining the legal and factual matrix on which each Resolution was based.[104]

116. This did not mean that the Majority was acting as an appellate court. As the tribunal in *Belokon v. Kyrgyzstan* stated:

> Tribunal is charged with evaluating the facts invoked by the Respondent to justify the measures it took when they were taken, and what evidence was presented during the proceedings.[105]

[102] Casinos' Counter-Memorial, paras 103-105.

[103] Casinos' Counter-Memorial, para 109.

[104] Casinos' Counter-Memorial, para 110.

[105] Casinos' Counter-Memorial, para 115, citing *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award of 24 October 2014, para 197 (RALA-0042).

117. And as the *Quiborax v. Bolivia* tribunal confirmed in assessing the nature of the cancellation of a concession:

> [T]he Tribunal must thus consider whether, in light of all the circumstances, the Revocation Decree was a legitimate cancellation of the Claimants' concessions in the exercise of Bolivia's sovereign power to sanction violations of Bolivian law […]. This will depend on whether (i) the Revocation Decree is based on actual violations of Bolivian law by the Claimants[.] [106]

118. Further, the Majority's application of "*arbitrariness*" was consistent with the standard applied by numerous international tribunals. In particular, this was not a departure from *ELSI*.[107] For instance, the tribunal in *Joshua Dean Nelson v Mexico* held:

> The implication of the ELSI standard is that arbitrariness requires more than a showing of illegality under domestic law. Besides illegality, arbitrariness also demands a showing that the challenged State measure 'manifest[ly] lack[s] of reasons' or seeks an 'ulterior motive.' Thus, the arbitrariness analysis consists in reviewing the stated purposes of a certain measure and whether the measure effectively addresses the stated purposes.[108]

119. In line with these authorities, the Majority did not limit the concept of arbitrariness to procedural questions and thus also looked – as it was entitled to do– at the merits of the decision of ENREJA.[109]

120. Similarly, the Majority's application of the doctrine of "*proportionality*" was not open to challenge. This is a well-established requirement that has been applied by numerous tribunals in analysing the lawfulness of State conduct, and in particular "*arbitrariness*."[110]

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[106] Casinos' Counter-Memorial, para 116, citing *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award of 16 September 2015, para 207 (RALA-0067).

[107] Casinos' Counter-Memorial, paras 120-126.

[108] Casinos' Counter-Memorial, para 123, citing *Joshua Dean Nelson* v. *United Mexican States* (ICSID Case No. UNCT/17/1), Award of 5 June 2020, para 325 (RALA-0036).

[109] Casinos' Counter-Memorial, para 125.

[110] Casinos' Counter-Memorial, paras 127-136.

121. As the tribunal in *Belokon v. Kyrgyzstan* held:

> The Tribunal considers that unreasonable and arbitrary measures may well be taken pursuant to legislation and regulatory actions when there is a lack of a rational basis between the authority of the state to do something and the facts supporting the use of that authority. It is not enough for the Respondent to identify a source of local legal authority to justify an action, but it must also overcome the Claimant's contention that the authority was exercised in an unreasonable and arbitrary fashion.[111]

(b) The Tribunal's conclusion on jurisdiction

122. Casinos argues that the Majority correctly established its jurisdiction, and that Argentina's criticisms of the Decision on Jurisdiction are misplaced.[112]

123. Casinos notes that Article 41(1) of the ICSID Convention explicitly provides that "*the Tribunal shall be the judge of its own competence*." And the Decision on Jurisdiction comprises a thorough analysis of all factors relevant to the Tribunal's jurisdiction and comprehensively addresses all objections raised by Argentina in relation to Article 8 of the BIT.[113]

124. Casinos then track what they term are the "*cornerstones*" of the analysis of the Majority, including the determinations that:

(i) the 18-month requirement is a provision of a procedural nature only, which does not precondition the consent to arbitration given by Argentina under the BIT; [114]

(ii) the 18-month requirement did not have to be fulfilled before the initiation of arbitration;[115]

[111] Casinos' Counter-Memorial, para 130, citing *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award of 24 October 2014, para 260 (RALA-0042).

[112] Casinos' Counter-Memorial, paras 142-154; Casinos' Rejoinder, paras 58-64.

[113] Casinos' Counter-Memorial, paras 145-146.

[114] Casinos' Counter-Memorial, para 148.

[115] Casinos' Counter-Memorial, para 149.

(iii) the 18-month requirement could be fulfilled after the initiation of arbitration.[116]

125. For each determination, the Majority conducted a proper analysis of the text and context of Article 8 of the BIT, in line with the Vienna Convention on the Law of Treaties ("**VCLT**"). And its decision is in conformity with numerous other decisions from international tribunals who reached the same conclusion on similar requirements.[117]

126. Further, even if the determinations of the Majority were open to challenge, Casinos submits that this would not automatically entail the necessity to annul the Award, because in deciding whether to annul an award, a committee must take into account the broader consequences of its decision and consider whether annulment is truly needed or would instead "*unwarrantably erode the binding force and finality of ICSID Awards*." In this case, the defect in question relates to the passing of a period of 18 months that had not fully elapsed at the time of filing of the arbitration, but had lapsed at the time of the Decision on Jurisdiction. The Argentine authorities had the opportunity to decide on the matter for far more than 18 months, but failed to do so. Further still, Casinos argues that extinguishing the result of arbitral proceedings that lasted over eight years would simply result in new arbitral proceedings – all on the basis of a defect that no longer existed at the time of the decision on annulment or at the time of the Decision on Jurisdiction. This, it is submitted, would undermine trust in the effectiveness of the dispute resolution mechanism provided under the ICSID regime.[118]

[116] Casinos' Counter-Memorial, para 150.

[117] Casinos' Counter-Memorial, paras 151-152, citing (*inter alia*) *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Decision on Jurisdiction of 2 July 2013, paras 144-149 (RALA-0080); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction of 21 December 2012, para 135 (RALA-0081); *TSA Spectrum de Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), Award of 19 December 2008, para 112 (RALA-0082).

[118] Casinos' Counter-Memorial, paras 153-154.

(c) The treatment of Argentina's claims as treaty claims under the BIT

127. Casinos observes that Argentina's complaint under this head has already been the subject of detailed analysis by the Majority both in the Decision on Jurisdiction and in the Award.[119] In both determinations, the Majority held correctly that Casinos' claim is a treaty claim, not a contract claim. In particular, it is a claim that the revocation of the License by ENREJA involved an irregular exercise of regulatory powers, in violation of the BIT. The claim did not concern the exercise of any contractual right, nor did ENREJA purport to be exercising any contractual right when it acted as it did. On the contrary, ENREJA itself qualified the revocation of ENJASA's License as a sanction in the sense of Article 13 of Law No. 7020 for alleged breaches of ENJASA's legal obligations under Article 5 of Law No. 7020 concerning anti-money laundering provisions and the hiring of operators without ENREJA's authorization. As such the revocation was imposed in the exercise of public authority, not as a matter of any contractual authorization. [120]

128. Thus, the Majority concluded correctly that Casinos' claim was a treaty claim not a contract claim in nature, and the qualification of the License under Argentine law was irrelevant. This, according to Casinos, was in complete accordance with well-established jurisprudence on the distinction between contract claims and treaty claims and is fatal to Argentina's complaint.[121]

(d) Police powers

129. Argentina's case on the Majority's consideration of ENREJA's exercise of police powers must fail, according to Casinos, because the Majority subjected this issue to an extensive assessment, in line with the approach of past awards.[122]

[119] Casinos' Counter-Memorial, paras 155-163.
[120] Casinos' Counter-Memorial, para 160.
[121] Casinos' Counter-Memorial, paras 162-163; Casinos' Rejoinder, paras 65-69.
[122] Casinos' Counter-Memorial, paras 164-172.

130. As stated by the tribunal in *Bank Melli v Bahrain*, in order to determine whether the host State's measures are covered by its police powers, a tribunal must assess "*if the administration and liquidation of Future Bank were a bona fide, non-discriminatory and proportionate answer to Future Bank's unlawful activities*." These were the specific factors that the Majority considered here.[123]

131. Further, the Majority addressed specifically the limitations to police powers of a host State, concluding that, on the facts here, the revocation of ENJASA's License could not be considered as covered under Argentina's / ENREJA's police powers.[124]

132. Thus, even if one were to disagree with the findings of the Majority, they cannot be considered as a manifest excess of powers under Article 52(1)(d) of the ICSID Convention.[125]

2. Failure to Apply the Law Applicable to the Dispute

133. As to Argentina's objection that the Majority failed to apply the law applicable to the dispute, Casinos emphasises that the threshold for this form of excess of powers is high, and only triggered in cases of "*obvious, serious and complete disregard of the applicable law*."[126]

134. According to Casinos, none of the instances identified by Argentina meet this threshold. Each, on the contrary, is no more than an allegation that the law was incorrectly applied – which is insufficient for the purposes of Article 52(1)(b) of the ICSID Convention.[127]

[123] Casinos' Counter-Memorial, paras 168-169, citing *Bank Melli (Iran) and Bank Saderat (Iran) v Kingdom of Bahrain* (PCA Case No. 2017-25), Final Award of 9 November 2021, para 631 (RALA-0089); Award, paras 332, 334-336.

[124] Casinos' Counter-Memorial, para 170, citing Award, para 427.

[125] Casinos' Counter-Memorial, para 172.

[126] Casinos' Counter-Memorial, para 174.

[127] Casinos' Counter-Memorial, paras 176-177.

Further, in a number of instances Argentina's criticisms of the Award are incorrect as a matter of fact.[128]

135. As to the application of the "*sole effects doctrine*," Casinos argues that it is clear from the Award that, contrary to Argentina's case, the Majority examined whether ENREJA's revocation of the License fell within the scope of its police or regulatory powers by reference to both the intensity of the interference of the measure and the legal framework, including the purpose and the public interest based on which the measure was imposed. This was in line with numerous authorities.[129] In any event, an incorrect consideration of the standards applicable to determine whether indirect expropriation was compensable or non-compensable cannot be qualified as a "*complete disregard*" of the applicable law in any event and thus cannot ground a manifest excess of powers.[130]

136. As regards the Majority's application of the legal standards regarding indirect expropriation, the key focus was whether the revocation of the License was "*arbitrary*" as a matter of international law, and in this regard there can be no complaint about the test deployed by the Majority. The test was in line with authority, including the *ELSI* case. Specifically, the test relevant to arbitrariness in the *ELSI* decision must be read in its entirety: "*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law.* […] *It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.*" The standard, even in the *ELSI* case relied upon by Argentina, is thus broader than the one advocated by it.[131]

[128] Casinos' Counter-Memorial, para 178.

[129] Casinos' Counter-Memorial, paras 181-183, citing *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22), Award of 27 September 2016, paras 284 *et seq* (RALA-0015); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award of 8 July 2016, paras 286 *et seq* (RALA-0065); *RENERGY S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/14/18), Award of 6 May 2022, para 989 (RALA-0088); *Bank Melli (Iran) and Bank Saderat (Iran) v Kingdom of Bahrain* (PCA Case No. 2017-25) Final Award of 9 November 2021, para 631 (RALA-0089).

[130] Casinos' Counter-Memorial, para 184; Casinos' Rejoinder, paras 40-44.

[131] Casinos' Counter-Memorial, paras 187-189, citing *Elettronica Sicula S.p.A. (ELSI)* (*United States of America v. Italy*), Judgment of 20 July 1989, ICJ Reports 15, 76, para 128 (AALA-0035); Casinos' Rejoinder, paras 35-39.

137. Having canvassed a number of different tests, the Majority settled on its own formulation, and in so doing applied the law.[132]

138. Further, again contrary to Argentina's case, the Majority did not broaden the criteria to determine the legitimate use of a State's regulatory and police powers. Rather, its decision is in conformity with international jurisprudence. While the international law on expropriation does not allow a *de novo* review of domestic decisions, it sets certain limitations to the host State's implementation of its domestic regulatory framework. The limitations to the State's police powers applied by the Majority – due process, absence of arbitrariness, and proportionality – are in line with the established jurisprudence in each respect.[133]

139. As to the factual findings made by ENREJA, Casinos argues that there was no manifest excess of powers in the Majority's own assessment of the factual basis for the revocation. International law requires such an assessment of the facts independent from their qualification under domestic law. As set out in Article 3 of the ILC Articles and in the *Vivendi I* Annulment decision, as well as in numerous other decisions of international tribunals, a State may breach a treaty without breaching domestic law, and *vice versa*. An international tribunal is not bound in its conclusions under international law by decisions of domestic authorities applying domestic law. This means that in applying international law, an international tribunal may have to assess the legal and factual matrix in which the conduct of the authorities is embedded.[134]

[132] Casinos' Counter-Memorial, paras 190-192.

[133] Casinos' Counter-Memorial, para 196, citing (*e.g.*) *Bank Melli (Iran) and Bank Saderat (Iran) v Kingdom of Bahrain* (PCA Case No. 2017-25), Final Award of 9 November 2021, para 631 (RALA-0089); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award of 8 July 2016, paras 290-301 (RALA-0065); *David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No. ARB (AF)/10/1), Award of 16 May 2014, para 171 (RALA-0059); *Saluka Investments B.V. (the Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para 255 (RALA-0068); *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary* (ICSID Case No. ARB/17/27), Award of the Tribunal of 13 November 2019, para 364 (RALA-0064).

[134] Casinos' Counter-Memorial, paras 198-200, citing *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para 95 (RALA-0029).

140. Overall, Casinos submits that Argentina has been unable to point to a single instance in which the Majority exceeded its powers, let alone manifestly.[135]

B. THE COMMITTEE'S ANALYSIS

(1) The Standard

141. *General:* By way of general introduction, the Committee considers it important to recall three general propositions with regard to the nature of the ICSID annulment process. These propositions apply equally to each of the grounds in Article 52(1) upon which Argentina relies for this Application.

142. First, annulment proceedings pursuant to Article 52(1) do not constitute an appeal mechanism.[136] In the words of Professor Schreuer:

> In every published annulment decision to date, ad hoc committees have stressed this distinction. They have stated repeatedly that their functions are limited and that they do not have the powers of a court of appeal.[137]

143. Hence, as Casinos has emphasised correctly,[138] Article 53(1) of the ICSID Convention expressly precludes any appeal of ICSID awards and limits the remedy of annulment to five narrowly circumscribed grounds. Each ground concerns what has been described as the fundamental integrity of the underlying arbitral proceedings and the legitimacy of the decision-making process. So it is that only the most serious violation of the integrity of the proceedings will justify annulment.[139]

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[135] Casinos' Counter-Memorial, pars 206-209.

[136] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, paras 72-75 (AALA-0009).

[137] Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 52, para 13 (AALA-0046). See *e.g. MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment of 21 March 2007, para 52 (AALA-0030).

[138] Casinos' Counter-Memorial, para 65; Casinos' Rejoinder, paras 3, 5.

[139] Casinos' Counter-Memorial, para 66, citing *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 20 (AALA-0002); *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment of 10 July 2014, para 32 (RALA-0002); *Tulip Real Estate and*

144. Second, and relatedly, the annulment mechanism safeguards the integrity of the underlying arbitration, not its substantive outcome.[140] In Casinos' words, annulment does not allow for "*révision au fond*."[141] An annulment committee must, in general, conduct its review on the basis of the factual and legal findings of the underlying award, and not permit the underlying dispute to be re-argued, or the underlying tribunal's findings to be second-guessed – no matter the alleged errors of fact or law invoked.[142] In the words of the *ad hoc* committee in *Amco II* (as cited by Casinos):[143]

> [I]t is incumbent upon Ad Hoc Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards.[144]

145. Third, as *ad hoc* committees have emphasised repeatedly, each of the five grounds in Article 52(1) entails a high threshold.[145] In the words of Professor Schreuer, annulment is:

> emergency relief for egregious violations of a few basic principles.[146]

Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 41 (AALA-0048); *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador* (ICSID Case No. ARB/03/6), Decision on Annulment of 19 October 2009, para 24 (RALA-0003); *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment of 11 June 2020, para 175 (AALA-0001); *CDC Group plc v. Republic ofSeychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 34 (AALA-0018).

[140] See *e.g*. *Adem Dogan v. Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment of 15 January 2016, para 28 (RALA-0005).

[141] Casinos' Counter-Memorial, paras 67-69.

[142] Casinos' Counter-Memorial, para 69, citing (*inter alia*) Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 54, para 13 (AALA-0046); *CDC Group plc v. Republic ofSeychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 35 (AALA- 0018); *Total S.A. v Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Annulment of 1 February 2016, para 179 (RALA-0008); ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, paras 72-75 (AALA-0009); Casinos' Rejoinder, para 8.

[143] Casinos' Counter-Memorial, para 69.

[144] *Amco Asia Corporation et al. v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of the Award and the Supplemental Award (17 December 1992), para 1.18 (AALA-0058).

[145] See *e.g. OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on the Application for Annulment of 6 December 2018, para 320 (RALA-0001) ("[A]*s in the case of the other annulment grounds, the scope of review under Article 52(1)(e) is strict and the threshold for annulment is high*."); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment of 27 December 2016, para 124 (AALA- 0017) ("*Article 52 limits the finality of the Award to five exceptional reasons.*").

[146] Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 54, para 15 (AALA-0046).

146. Further, this high threshold is not met by an accumulation of less serious complaints. Each complaint, in its own right, must meet the high threshold. Again as noted by Professor Schreuer:

> a series of errors is no more necessarily a ground for annulment than a single error.[147]

147. *Article 52(1)(b):* There is much common ground between the Parties as to the standard with respect to "*manifest excess of powers*," and the two elements: (i) "*excess of powers*;" and (ii) "*manifest*."

148. As stated in the ICSID Secretariat's *Updated Background Paper on Annulment for the Administrative Council of ICSID* (5 May 2016) ("**ICSID Background Paper 2016**")[148] *ad hoc* Committees have identified two methodological approaches to determine whether there is an annullable error on this ground: (1) a two-step analysis by which the first enquiry is whether there was an excess of powers and, if so, the next enquiry is whether the excess was "*manifest*;" and (2) a *prima facie* test, consisting of a summary examination to determine whether any of the alleged excesses of power could be viewed as "*manifest*." In this case, both Parties have proceeded in accordance with the first approach.

149. As to the first element of the two-step analysis, the award must be tested against three delimitations on the tribunal's jurisdiction: (i) the scope of the issues covered by the parties' consent to arbitration; (ii) the scope of the issues submitted for decision; and (iii) the parties' agreement as to the applicable law. In the words of the *ad hoc* committee in *Hussein Nuaman Soufraki v. United Arab Emirates*:

[147] Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 52, para 116 (AALA-0046); Casinos' Counter-Memorial, para 71, citing *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment of 21 March 2007, para 55 (AALA-0030); *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 36 (AALA-0002).

[148] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 82 (AALA-0009). Note that this document was updated by ICSID in March 2024 ("**ICSID Updated Background Paper 2024**"), but the latest version has not been included in the record of this proceeding. The paragraph in question remains substantively the same in the 2024 version of the paper (para 88).

> […] the structure within which an ICSID tribunal has to remain is defined by three elements: the imperative jurisdictional requirements, the rules on applicable law, and the issues submitted to the arbitral tribunal.[149]

150. Importantly, as Casinos has noted,[150] an "*excess of powers*" does not arise when a tribunal decides matters within its powers, but in such a way that a party submits is incorrect. This is of particular importance with respect to the third delimitation: the parties' agreement as to the applicable law. As noted by Professor Schreuer:

> [a]n error in the application of the proper law, even if it leads to a manifestly incorrect application of the law, is not a ground for annulment.[151]

151. This follows from the rejection by the drafters of the ICSID Convention of proposals to add a ground for annulment based on "*serious misapplication of the law*" or "*manifestly incorrect application of the law*."[152] Thus, an "*excess of powers*" will only exist by reason of a failure to apply the applicable law when there has been a complete failure to identify and apply the applicable law, as distinct from an identification and application of the applicable law that is open to question or said to be incorrect. As this was put by the *ad hoc* committee in *Daimler Financial Services v Argentina*:

> [W]hat the Committee can do is to determine whether the Tribunal correctly identified the applicable law and endeavoured to apply it. As to the latter, there is a distinction between endeavouring to apply the correct law and correctly applying the law. While the former may provide a ground for annulment the latter is outside the scope of authority of an ad hoc annulment committee.[153]

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[149] *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 37 (AALA-0002).

[150] Casinos' Counter-Memorial, paras 84-86; Casinos' Rejoinder, paras 14-15.

[151] Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 52, para 195 (AALA-0046).

[152] ICSID, History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Vol. II-1 (1968), p. 423 (RALA-0017).

[153] *Daimler Financial Services A.G. v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment of 7 January 2015, para 191 (RALA-0024).

152. This statement reflects what is now well-established jurisprudence on this issue.[154] To this end, the Committee does not accept Argentina's submission that annulment is possible in circumstances short of a complete failure to identify and apply the applicable law (such as a failure by the tribunal to apply certain provisions of an identified applicable law).[155] As Professor Schreuer has stated, "'[p]artial non-application and erroneous application are indistinguishable" [156] and neither of them is a ground for annulment.

153. As to the second element, both Parties submit that "*manifest*" means "*plain*," "*clear*," "*obvious*" or "*evident*," or a qualification that concerns the ease with which the excess of powers can be perceived. This is consistent with authority.[157]

154. As to the impact of this second requirement on the level of enquiry at the annulment stage, the Committee notes the words of the *ad hoc* committee in *WENA v Egypt*:

> The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other. When the latter happens the excess of power is no longer manifest.[158]

155. The Committee, however, considers that the degree of argument or analysis required cannot be answered in the abstract but only by taking into account the circumstances of the case.

[154] *See, e.g.*, *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on the Application for Annulment of 6 December 2018, para 185 (RALA-0001); *CDC Group plc v. TRepublic ofSeychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 45 (AALA-0018); *Gambrinus, Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31), Decision on Annulment of 3 October 2017, para 165.

[155] Argentina's Reply, para 18.

[156] Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 52, para 226 (AALA-0046).

[157] See *e.g.* Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 54, para 125 (AALA-0046).

[158] *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment of 5 February 2002, para 25 (AALA-0042).

(2) Challenges

156. In **Section IV(A)(1)** above, the Committee distilled Argentina's complaints under Article 52(1)(b) into a series of points. The analysis below is structured according to the same scheme.

1. Exercise of Jurisdiction

(i) Taking on the role of an appellate court

157. At the core of Argentina's complaint under this first ground, as reflected in the Dissenting Opinion on the Merits,[159] is the assertion that, in the course of its enquiry, the Majority assessed (*de novo*) both the underlying factual matrix of ENREJA's decision to revoke ENJASA's License, as well as the applicable standards under domestic law. According to Argentina, as summarised above, the Majority thereby manifestly exceeded its powers because it assumed the function of an appellate court, reviewing the decisions of a competent local authority, and ultimately replacing those decisions with its own.

158. The Committee considers that this complaint is ill founded. It is based on a mistaken view as to the mandate of the Tribunal in an investor-State arbitration under the BIT. In such proceedings, the Tribunal was required to consider whether the conduct of Argentina (through the conduct, *inter alia*, of ENREJA) complied with relevant standards of international law. This, in turn, necessarily entailed consideration of the measures taken by ENREJA, including the relevant facts; its appreciation of those facts; and the regulatory regime that it applied. But this is a consideration that is analytically distinct from applying domestic law as a domestic institution. Indeed, the very different nature of the task was made clear by the Majority itself, as follows:

> What the Tribunal has to examine, however, is how the regulatory framework in place was applied in the present case, and more specifically, whether ENREJA has properly exercised its regulatory powers under that framework in revoking ENJASA's license. As set out in more detail above, the Tribunal's task is not to review the legality of the revocation of

[159] Dissenting Opinion on the Merits, para 450.

> ENJASA's license under domestic law in the same way the host State's administrative courts would. Instead, the Tribunal is limited to reviewing the legality under international law of ENREJA's exercise of its regulatory and supervisory powers, including in particular whether the revocation of ENJASA's license complied with the principle of good faith, the prohibition of arbitrariness, the principle of proportionality, and due process under international law.[160]

159. As Casinos has noted,[161] this approach is standard in the practice of international law, and in the assessment of the international responsibility of a State. And it follows from these fundamental principles (a) that in assessing the legality of a measure under international law, reference must obviously be made to domestic law being the context in which the measure was taken; and (b) that a determination of conduct as lawful under domestic law will not dictate whether the same conduct complies with international law.

160. Proposition (b) above is stated in explicit terms in Article 3 of the ILC Articles on State Responsibility ("**ILC Articles**"):

> The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful under national law.[162]

161. As noted by the ICJ in *ELSI*:

> Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even had the Prefect held the requisition to be entirely justified in Italian law, this would not exclude the possibility that it was a violation of the FCN Treaty.[163]

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[160] Award, para 359.

[161] Casinos' Counter-Memorial, para 101; Casinos' Rejoinder, paras 24-26.

[162] International Law Commission Articles on State Responsibility, Article 3. *Crawford*, The International Law Commission's Articles on State Responsibility; Introduction, Text and Commentaries (2002) Article 3, paras 5-8 (RALA-0023).

[163] *Elettronica Sicula S.p.A. (ELSI), USA v. Italy* (ICJ), Judgment of 20 July 1989, ICJ Reports 1989, para 73 (AALA-0035).

162. Because the Tribunal's task is to determine whether a State has complied with its international responsibility, this exercise cannot be characterised as assuming the role of a domestic court of appeal.

163. As to the scope of the enquiry, this naturally required the Tribunal to consider ENREJA's conduct in the context of the relevant domestic legal framework. This is a commonplace task for investor-State tribunals.[164] However, the ultimate standards that are to be applied to the conduct in question will be international, not domestic, law.

164. As summarised above, Argentina has identified a number of specific issues under this head on which it submits the Tribunal exceeded its powers.[165] Each is addressed in turn below.

(a) The assessment of ENREJA's actions

165. Argentina points to the fact that in its assessment of whether the revocation of the License was arbitrary, the Majority considered for itself whether Resolutions No. 380/12, 381/12 and 384/12 provided a basis to justify the revocation. This entailed an examination of the factual and legal circumstances which ENREJA had invoked for its decisions, including the assessment of the evidence and the interpretation of the applicable regulations. And according to Argentina, this assessment constituted a manifest excess of the Tribunal's powers.[166]

166. As an initial point, noted by Casinos,[167] Argentina's complaint that the Majority reviewed evidence that had been adduced and considered in domestic proceedings, and interpreted domestic regulations, could not ground an annulment in any event because the Majority

[164] As noted by Casinos – *see* Casinos' Counter-Memorial, paras 104, 115, 116, and Casinos' Rejoinder, paras 26-28, citing (*inter alia*) *Bilcon of Delaware et al v. Government of Canada* (PCA Case No. 2009/04), Award on Jurisdiction and Liability of 17 March 2015, para 591 (RALA-0055); *Duke Energy International Peru Investments No. 1, Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28), Award of 18 August 2008, paras 160 *et seq*. (RALA-0028); *Valeri Belokon v. Kyrgyz Republic* (UNCITRAL), Award of 24 October 2014, para 197 (RALA-0042); *Quiborax S.A. and NonMetallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award of 16 September 2015, para 207 (RALA-0067).

[165] *See* paras 76-87 above.

[166] Argentina's Memorial, para 67; Argentina's Reply, paras 22-35.

[167] Casinos' Counter-Memorial, para 113.

made clear that even if it had not looked at and analysed the factual allegations that led to the revocation of the License, but had accepted all alleged breaches of domestic law as fact, it would have come to the same conclusion:

> It is against this background that the Tribunal concludes that even if the allegations underlying Resolutions Nos. 380/12, 381/12, and 384/12 had been true, and their legal evaluation under domestic law accurate, a revocation of ENJASA's license would not have been proportionate under international law and would not have constituted a regular exercise of ENREJA's regulatory powers […].[168]

167. Putting this initial hurdle aside, Argentina singles out three specific examples where, on its case, the Majority exceeded its powers by substituting its own view for that of the competent local authority: **(1)** the recording of payments; **(2)** the applicable administrative law relating to the authorisation of third-party operators; and **(3)** the requirement to pay prizes by cheque under Law No. 7020.[169] Each of these points was a core issue underlying Resolutions No. 380/12, No. 381/12 and No. 384/12, on which ENREJA based its revocation of the License. And on each issue, the Committee considers that the Majority properly considered the relevant facts and regulatory regime in order to form a view as to the nature of ENREJA's conduct as a matter of international law.

168. As to **(1)**, the recording of payments (Resolution No. 380/12), ENREJA had charged ENJASA with having breached anti-money laundering rules in its lottery operations by making certain payments in respect of a prize won in a slot machine game. The Majority concluded that it was unable to see how ENREJA could plausibly have concluded that the rules on anti-money laundering in Resolution No 26/00 were seriously breached when payment and registration of a prize of ARS 11,080 were delayed by some six weeks. Similarly, the Majority was unable to see how ENREJA could plausibly have considered that the same rules had been breached when a prize of ARS 11,480 won on a slot machine on 14 May 2012, which had not yet been paid out, was only registered in the anti-money

[168] Award, para 417.

[169] As developed at Argentina's Reply, paras 28-30 (and paras 59-61).

laundering book in full on 17 May 2012, after an inspection by ENREJA on 16 May 2012.[170] Accordingly, the Majority concluded that:

> […] ENREJA's finding that ENJASA had breached the regulatory framework on anti-money laundering in respect of these two prizes appears manifestly unsupported in fact and law and must be considered to be arbitrary from the perspective of international law.[171]

169. As to **(2)**, alleged sub-contracting to third-party gaming operators (Resolution No.384/12), ENREJA had charged ENJASA with hiring third-party operators without ENREJA's authorization, in breach of Article 5(1) of Law No. 7020. The Majority concluded that ENREJA had:

> […] acted arbitrarily from the perspective of international law by basing its findings on either a manifestly incomprehensible interpretation of the concept of 'operator' in the sense of Article 5 of Law No. 7020, a manifestly incorrect investigation into the facts, or a combination of both types of error.[172]

170. In particular, the Majority concluded that ENREJA had – in a "*manifestly arbitrary manner*" – considered certain entities as "*operators*" of games of chance in the sense of Article 5 of Law No. 7020 (specifically, Emsenor, Prodec, DEK, and Video Drome). The Majority noted that both sides' experts had agreed that to qualify as an "*operator*" in this context, requires responsibility for, control over, and the exploitation of games of chance. Contrary to the findings of Resolution No. 384/12, the persons in question were plainly not operators of games of chance. Emsenor was no more than a landlord; Prodec and its predecessor DEK simply supplied hardware and software to ENJASA for jackpot systems and poker gaming tables; and Video Drome simply provided ENJASA with slot machines for several slot machine halls for a fee based on income generated from these machines.[173]

[170] Award, paras 379-380, 401.
[171] Award, para 379.
[172] Award, para 388.
[173] Award, paras 388-389.

171. Similarly, the Majority concluded that ENREJA "*in a manifestly arbitrary manner*" qualified Mr Navarrete, New Star and Mr Colloricchio as unauthorized "*operators*," in circumstances where ENREJA was aware of and did not protest about the continued conduct of these individuals (who had been authorised by ENJASA's predecessors BPAS).[174]

172. As to **(3)**, payment of prizes by cheque (Resolution No. 381/12), ENREJA had found ENJASA to be in breach of Regulation No. 90/12, according to which, prizes over ARS 10,000 had to be paid by cheque. However, ENREJA sanctioned conduct that occurred before Regulation No. 90/12 had even taken effect (1 May 2012). Resolution No. 381/12 thus violated the basic principle of "*nullum crimen sine lege*."[175]

173. Further, the Majority held that ENREJA manifestly disregarded the explicit one-year time-bar contained in Article 49 of Law No. 7020, as all alleged infractions investigated under Resolution No. 381 had been committed more than one year before the investigation started.[176]

174. Accordingly, the Majority concluded that:

> […] ENREJA has based its findings on ENJASA's breaches on manifestly incorrect interpretations of [the] rules.[177]

175. Based on all these findings, the Majority concluded, as a matter of international law, as follows:

> [T]he Tribunal finds a number of errors ENREJA has committed in the three investigations in Resolutions No. 380/12, 381/12, and 384/12, and which were subsequently used to justify the revocation of ENJASA's license in Resolution No. 240/13, that are so manifest that they must be

[174] Award, paras 390-392.
[175] Award, paras 381-383.
[176] Award, paras 385-387.
[177] Award, para 381.

> considered to constitute an abuse of power and arbitrariness under international law.[178]

176. As noted, Argentina criticises the Majority's conclusions on each of these points from the perspective of its application of domestic Argentine law. It asserts, for example, that the Majority incorrectly applied the domestic law standards; or added requirements or considerations that form no part of domestic law.[179] Importantly, however, by its findings, the Majority was not placing itself in the position of a domestic authority ruling on domestic law. Rather, consistent with its mandate, the Majority made its own enquiry into the domestic position, in order to apply international law (and specifically the international law standard of "*arbitrariness*").[180]

177. By way of one specific example (which is the subject of a specific complaint by Argentina[181]), in applying the international law standard of "*arbitrariness*" the Majority formed its own view as to the interpretation and application of the one-year time-bar in Article 49 of Law No. 7020. Whilst Argentina argues that the Majority should have applied "*the criterion followed by the local authorities with respect to the time bar*,"[182] this is simply not so, given that a domestic law characterisation will not dictate the position under international law. Hence both Parties presented legal experts before the Tribunal who testified on this issue.[183]

178. Given the principles outlined above,[184] the Committee can see nothing in this approach that constitutes an excess of the Tribunal's powers.

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[178] Award, para 378.

[179] Argentina's Reply, paras 28-32.

[180] Argentina also contends (Argentina's Reply, paras 31-32) that because the Majority noted (Award, para 305) that Casinos made no claim that the conduct of the Province of Salta prior to the revocation of the License amounted to an independent breach of the BIT, the Majority had no basis to review any of Resolutions 380/12, 381/12, and 384/12. This is wrong. As the Majority itself observed (Award, para 305), consideration of each of these Resolutions was required as context to understand and assess ENREJA's conduct.

[181] Argentina's Memorial, para 83.

[182] Argentina's Memorial, para 83.

[183] *See* the analysis of this expert evidence in the Award at paras 385-386.

[184] *See* paras 141-155 above.

179. Argentina then questions the international law standard that the Majority applied to this issue, namely "*arbitrariness*" and "*proportionality*," in particular in light of the Majority's finding that ENREJA had not breached due process.[185]

180. As is clear from the paragraphs that follow, this, in substance, is a complaint about alleged substantive errors by the Majority in its interpretation and application of international law. As such, it cannot qualify as a ground for annulment under Article 52(1)(b) – or indeed any other provision of Article 52(1).

181. Putting this fundamental point aside, and for the sake of completeness, each of the standards is addressed in turn below.

182. *Arbitrariness:* In applying a standard of "*arbitrariness*," the Majority referred to a number of decisions and commentaries, including *ELSI*;[186] a commentary by Reinisch and Schreuer;[187] *Plama v Bulgaria*;[188] and *EDF (Services) Limited v. Romania*;[189] amongst others.[190] In particular, the Majority cited *EDF (Services) Limited v. Romania* for its elaboration on the standard of "*arbitrariness*" as follows:

> a. a measure that inflicts damage on the investor without serving any apparent legitimate purpose;
> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
> c. a measure taken for reasons that are different from those put forward by the decision maker;

[185] Argentina's Memorial, paras 72-77; Argentina's Reply, paras 35-41.

[186] *Elettronica Sicula S.p.A. (ELSI), USA v. Italy* (ICJ) Judgment of 20 July 1989, ICJ Reports 1989, para 128 (AALA-0035).

[187] August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 439-441.

[188] *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, para 184 (AALA-0051) (referring to *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award of 3 September 2001, paras 221, 222, 232 and Christoph H. Schreuer, 'Fair and Equitable Treatment (FET): Interactions with Other Standards' (2007) 4(5) Transnational Dispute Management 8-9).

[189] *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para 303 (RALA-0043).

[190] Award, paras 346-351.

d. a measure taken in wilful disregard of due process and proper procedure.[191]

183. As Casinos observes,[192] this standard has been applied by numerous international tribunals. In so far as the Majority applied this standard to the merits of ENREJA's decision,[193] this was entirely in line with the consistent practice of other international tribunals.

184. *Proportionality:* In the course of its analysis on the standard of "*arbitrariness*," the Majority considered whether the revocation sanction imposed by ENREJA was proportionate to the gravity of the alleged breaches by ENJASA. Specifically, the Majority analysed the factual basis on which ENREJA relied for the revocation (i.e. as set out in Resolutions Nos. 380/12; 381/12 and 384/12); concluded that only two breaches had actually occurred and that they were minor, and therefore concluded that the revocation of the License was not proportionate.[194]

185. Once again, the Committee can find no manifest excess of powers in this exercise.

186. As Casinos has observed,[195] the requirement of proportionality is commonly applied by international tribunals in assessing the lawfulness of a State's actions. As stated (for example) in *Ampal-American and others v. Egypt*:

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[191] Award, para 347, citing *EDF (Services) Limited v. Romania*, (ICSID Case No. ARB/05/13), Award of 8 October 2009, para 303 (RALA-0043).

[192] Casinos' Counter-Memorial, paras 123-124; Casinos' Rejoinder, paras 35-39, citing (*e.g.*) *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia* (ICSID Case No. ARB/16/6), Award of 27 August 2019, para 1448 (RALA-0074); *Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina Socedad Anónima. v. Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability of 10 April 2013, para 873 (RALA-0075); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008, para 378 (RALA-0076); *Noble Ventures, Inc.* v. *Romania* (ICSID Case No. ARB/01/11), Award of 12 October 2005, para 176 (RALA-0034); *Azurix Corp.* v. *Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006, para 391 (RALA-0035); *Joshua Dean Nelson*v. *United Mexican States* (ICSID Case No. UNCT/17/1), Final Award of the Tribunal of 5 June 2020, para 325 (RALA-0036).

[193] Award, paras 346 *et seq.*

[194] Award, paras 377-396.

[195] Casinos' Counter-Memorial, paras 128-130; Casinos' Rejoinder, paras 29-32, citing (*inter alia*) *Ampal-American Israel Corp. and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of

> The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals and other international tribunals, including the ECtHR. The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.[196]

187. In so far as Argentina's complaint is that the Majority relied upon its own evaluations instead of those of ENREJA,[197] the Committee refers once again to the nature of the Tribunal's mandate[198] – namely to assess the conduct in question under international law, regardless of its characterisation under domestic law. To this end, the Committee is unpersuaded by Argentina's assertion that "*the Majority not only exceeded its powers by conducting a de novo review of the decisions of the local authority, but also disregarded what an analysis under international law requires and allows an arbitral tribunal to do*."[199] Argentina summarizes the reasoning of the Majority in this regard as follows:

> […] what the majority of the Tribunal did was much broader in scope than merely considering the revocation imposed by ENREJA as a simple legal act in order to find whether the BIT had been breached. Such exercise consisted in acting as a domestic court of appeals, disagreeing with the interpretation of the facts and the manner in which the domestic law was applied to them, and—on the basis of that reconsideration of ENREJA's decision—concluding that the Argentine Republic had incurred international responsibility.[200]

Loss of 21 February 2017, para 346 (RALA-0038); *Bear Creek Mining Corporation v. Republic of Peru* (ICSID Case No. ARB/14/21), Award of 30 November 2017, para 347 (RALA-0039); *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic ofHungary* (ICSID Case No. ARB/07/22,), Award of 23 September 2010, para 10.3.0 (RALA-0040); *Técnicas Medioambientales Tecmed S.A. v The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003, para 122 (RALA-0063); *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and others v. The Republic of Cyprus* (ICSID Case No. ARB/13/27), Award, redacted Version of 26 July 2018, para 829 (RALA-0078).

[196] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss of 21 February 2017, para 346 (RALA-0038).

[197] Argentina's Memorial, para 78; Argentina's Reply, paras 36-41.

[198] See para 158 above.

[199] Argentina's Reply, para 38.

[200] Argentina's Reply, paras 35-41.

188. This, however, is an inaccurate summary of the reasoning in question. As Casinos has pointed out,[201] the Majority did not base its conclusion that the revocation of the License was arbitrary solely on the fact that the revocation was (upon its analysis) unlawful under domestic law. Rather, it found that (a) ENREJA's findings were based on "*manifestly arbitrary determinations of fact and law*"[202]; (b) ENREJA's failure to consider "*whether a milder sanction could have been equally effective to ensure ENJASA's compliance with the regulatory framework*" was a "*further indication that ENREJA misused its discretion*"[203]; and (c) "*ENREJA's complete disregard of ENJASA's interest in continuing the exploitation, and of the impact of a revocation on the company's future business as well as on its past investments, indicates,* […] *that ENREJA abused its discretion*."[204]

189. These were all conclusions as a matter of international law, at which the Tribunal was entitled to arrive within the scope of its powers as provided for by the BIT.

190. In so far as Argentina's complaint concerns the Majority's use of a test of "*systematic disregard*"[205], as pointed out by Casinos,[206] this was a test that was actually applied by Mr Mendoza of ENREJA, in seeking to justify the revocation of the License. Mr Mendoza alleged that ENJASA had breached the administrative regulations in a "*systematic manner*."[207] This remains relevant, despite Argentina's argument that the Majority did not refer to the statements of Mr Mendoza.[208] Casinos notes that the standard in question is a reference to Article 48 of Law No. 7020 by which the "*infringer's record of relapses*" is relevant in order to determine a fine.[209] Hence, in response to the test that had actually

[201] Casinos' Rejoinder, para 37.
[202] Award, para 395.
[203] Award, para 404.
[204] Award, para 404.
[205] Argentina's Memorial, para 81; Argentina's Reply, paras 48-51, and 77-80.
[206] Casinos' Counter-Memorial, para 134; Casinos' Rejoinder, paras 45-51.
[207] Award, para 117, quoting exhibit C-169, page 1.
[208] Argentina's Reply, para 172.
[209] Casinos' Counter-Memorial, para 134.

been applied by ENREJA in the course of its revocation of the License, the Majority concluded that the two minor administrative breaches that had occurred could not qualify as "*systematic disregard*."[210]

191. Argentina counters this by contending that Casinos' "*apologetic interpretation*" is nowhere to be found in the Award, and (in the context of its submissions on an alleged failure to apply the law) that the Majority in fact created a standard by which, in effect, it substituted "*equity standards for the rules of law*."[211]

192. The Committee disagrees. The Majority did not refer to "*systematic disregard*" as a test in international law, but (as noted above) in the context of its analysis of domestic Argentine law (Article 48 Law No. 7020), according to which the infringer's record of relapses was relevant.[212] Nor did the Majority apply "*equity standards*." It applied an established test of proportionality and in so doing assessed the gravity of ENJASA's two infringements, as compared to the severity of the imposed sanction.

193. To this end, even if this kind of complaint could constitute a manifest excess of powers (which the Committee considers it cannot, being no more than a merits complaint), there is no basis to challenge the Majority's approach in terms of the scope of its powers.

(b) The Tribunal's conclusion on jurisdiction

194. Amongst other objections, Argentina submitted that the Tribunal lacked jurisdiction because Casinos commenced arbitration before 18 months had passed following referral of the dispute to the competent domestic authority, contrary to the requirement in Article 8(3)(a) of the BIT. In particular, ENJASA had submitted its Action for Annulment of Resolutions Nos. 240/13 and 315/13 to the First Instance Court of Salta on 5 February 2014, and Casinos initiated the arbitration on 4 December 2014, less than 18 months later.

[210] Award, para 402.
[211] Argentina's Reply, paras 48-51, and 77-80.
[212] Award, para 399.

195. This objection was addressed –and rejected– by the Tribunal in the Decision on Jurisdiction.[213] Argentina now raises the same argument again as a ground for annulment, contending that the Majority manifestly exceeded its powers by accepting jurisdiction.[214]

196. The Committee is unpersuaded by Argentina's criticisms of the approach of the Majority.[215]

197. *Standard of Review:* It is well established, and frequently restated by *ad hoc* Committees, that an ICSID tribunal is the judge of its own competence. As noted in the ICSID Background Paper 2016:

> 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."[216]

198. The guidance of the *ad hoc* Committee in *MTD v Chile* therefore remains pertinent:

> No doubt annulment committees have a role to perform within the ICSID system in ensuring "the fundamental justice of the arbitral process." It is true also that the grounds for annulment do not distinguish formally (as, say, the UNCITRAL Model Law does) between jurisdictional errors and errors concerning the merits of the dispute and that a manifest excess of powers could well occur on a question of merits. At the same time the role of an *ad hoc* committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a res judicata but on a question of merits it cannot create a new

[213] Decision on Jurisdiction, paras 314-328.

[214] Argentina's Memorial, paras 85 *et seq*; Argentina's Reply, paras 52-54.

[215] The criticisms are summarised at paras 88-90 above.

[216] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 88 (AALA-0009) (citing extensive authority). Also, ICSID Updated Background Paper 2024, para 94 (in substantively the same terms).

> one. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in *Klöckner* and *AMCO*. Given that (after an uncertain start) successive decisions of *ad hoc* committees have established with reasonable clarity the extent and limits of the grounds for annulment under Article 52, the Committee believes that "the fundamental justice of the arbitral process" under the Convention is best served by adhering to the established approach. It is reinforced in this view by two considerations, one general and one specific. The general consideration is that Article 52(1) as interpreted by successive committees does give scope for quality control.[217]

199. With reference to jurisdictional objections in particular, the *ad hoc* committee in *Soufraki v. UAE* stated as follows:

> The *ad hoc* Committee sees no reason why the rule that an excess of power must be manifest in order to be annullable should be disregarded when the question under discussion is a jurisdictional one. Article 52(1)(b) of the Convention does not distinguish between findings on jurisdiction and findings on the merits. As noted by the *ad hoc* committee in *MTD Chile*:
>
> > "… the grounds for annulment do not distinguish formally … between jurisdictional errors and errors concerning the merits of the dispute and … manifest excess of powers could well occur on a question of merits."
>
> It follows that the requirement that an excess of power must be "manifest" applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of power. Only if an ICSID tribunal commits a manifest excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.[218]

200. It follows that the Committee must consider whether the Majority's assertion of jurisdiction despite Argentina's objection constituted a "*manifest*" excess of powers. The Committee concludes that it did not.

[217] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment of 21 March 2007, para 54 (AALA-0030).
[218] *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, paras 118 and 119 (AALA-0002).

201. *The Decision on Jurisdiction:* The Majority began its analysis of this jurisdictional objection by considering the source and existence of Argentina's consent and the nature of all the pre-arbitral requirements contained in Article 8 of the BIT.[219]

202. The Majority recognised that consent is the cornerstone of, and *conditio sine qua non* for, the jurisdiction of an arbitral tribunal under the ICSID Convention, and that in this case the existence of consent as between the Parties rested on the interpretation of Article 8 of the BIT pursuant to the rules on treaty interpretation in the VCLT.[220]

203. The Majority then noted that for the purposes of Article 25(1) of the ICSID Convention, and unlike contract-based arbitration, parties could express their consent "*in the absence of privity*," for example when (as in the BIT) the host State consents in advance and in relation to a generally defined class of potential claimants, and the claimant investor consents by bringing a claim for breach of the treaty. Similarly, unlike contract-based arbitration, in the mechanism it affords for the review of legality under public international law of the host State's conduct, investment treaty arbitration serves a function akin to systems of judicial review found domestically in administrative or constitutional courts or internationally in human rights courts.[221]

204. According to the Majority, these distinguishing characteristics of investment treaty arbitration affect how pre-arbitration requirements contained in investor-State dispute settlement provisions of BITs should be analyzed.[222] Specifically, because consent as between the host State and an investor is not consummated by a contractual offer being matched by a contractual acceptance, an investment treaty tribunal should not ask whether the host State's offer to arbitrate as set out in a treaty was matched by the investor's acceptance, including compliance with any strict pre-arbitration requirements, so as to result in a contractual "*arbitration agreement*." Instead, as is the case with dispute

[219] Decision on Jurisdiction, para 270.
[220] Decision on Jurisdiction, para 271.
[221] Decision on Jurisdiction, paras 272-273.
[222] Decision on Jurisdiction, para 274.

settlement under public international law, "*compliance with pre-arbitration requirements in a BIT should be analyzed as a question concerning the validity of the seisin of the Tribunal*."[223]

205. Unlike inter-State dispute settlement, however, where the ICJ has insisted in certain cases on strict compliance with conditions of seisin under compromissory clauses,[224] the Majority then concluded that unless pre-arbitration requirements in an investment treaty are formulated "*clearly and unmistakably as strict conditions to the validity of seisin*," a more flexible and less formalistic approach is warranted. This was justified as being more in line with the object and purpose of investment treaties to promote and protect foreign investment for the development of economic cooperation between States, and to account for the fact that investors, not being subjects of public international law, "*cannot be expected to be accustomed to the formalities of inter-State communication and inter-State dispute settlement*."[225]

206. Specifically, here, the Majority considered that since Article 8 of the BIT is the dispute settlement provision of a treaty whose object and purpose is to promote and protect foreign investment, and hence it is addressed to investors who are entitled to protection, it must be interpreted in that light. To this end, pre-arbitration requirements remain, in principle, mandatory requirements. However, unless they are formulated clearly and unmistakably to require a formalistic approach in assessing compliance with them, greater flexibility should be accorded to the disputing parties than the ICJ accords to conditions of seisin under compromissory clauses.[226]

[223] Decision on Jurisdiction, para 274, citing for this conceptual approach: *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, pp. 70, 121 *et seq.*, paras 122 *et seq*.

[224] Decision on Jurisdiction, para 275, citing *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment of 3 February 2006, ICJ Reports 2006, pp. 6, 39-40, para 88; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment of 1 April 2011, ICJ Reports 2011, pp. 70, 125 *et seq.*, paras 132 *et seq.*

[225] Decision on Jurisdiction, para 275.

[226] Decision on Jurisdiction, para 276.

207. Against this context, the Majority then interpreted the language of Article 8 of the BIT, concluding that Argentina's consent to arbitrate disputes is contained in the first sentence of Article 8(4) which provides, as per the English translation agreed to by the Parties, that "*under the terms of this Agreement, each Contracting Party irrevocably consents in advance to the submission of any dispute to arbitration*." This, it was noted, is:

> a clear, certain and unequivocal manifestation of the consent of both Argentina and Austria to arbitrations initiated by investors of the other Contracting State. As stated in Article 8(4) of the BIT, this consent has been given "*irrevocably*" and "*in advance*" at the time the treaty entered into force.[227]

208. Importantly, on the basis of this wording, the Majority concluded that:

> the consent of the two Contracting Parties to the BIT, therefore, does not only come into existence after any pre-arbitral requirements contained in Article 8 of the BIT have been fulfilled by the investor prior to her submission of the dispute to ICSID arbitration; instead, the two States' consent to arbitrate has existed all along since the time the Argentina-Austria BIT has entered into force. In light of the clear wording of Article 8(4) of the BIT, there is no room here for the conclusion other tribunals have reached on the basis of differently worded Argentine BITs, notably in *ICS v. Argentina*, that prior to the fulfillment of pre-arbitral requirements contained in a BIT's investor-State dispute settlement clause, "*[c]onsent is nonetheless not yet present*." [228]

209. This, it was held, affects the legal nature of the requirements contained in Article 8 of the BIT. In particular, the need for prior recourse to domestic remedies in Article 8(3) cannot be viewed as constituting a condition precedent to Argentina's consent, non-compliance with which prior to initiating the present arbitration would automatically and necessarily exclude the Tribunal's jurisdiction (as other tribunals interpreting differently worded BITs

[227] Decision on Jurisdiction, para 277.

[228] Decision on Jurisdiction, para 278, citing *ICS Inspection and Control Services Limited v. Argentine Republic*, PCA Case No. 2010-9, Award in Jurisdiction of 10 February 2012, para 262.

have held).[229] Rather, this (and the other pre-arbitration requirements) establishes a procedure the investor has to follow before the Tribunal can exercise jurisdiction over the merits. In the words of the Majority, this procedure "*concerns the 'how' and 'when' of the Tribunal's exercise of jurisdiction, not its 'whether.'*" [230]

210. As the Majority noted, this conclusion is supported by the specific wording of Article 8(4) itself:

> While the Spanish version of that provision uses the term "*condiciones*", a term that could lend itself to the view that the requirements in Article 8 conditioned [Argentina's] consent, the German version simply speaks of "*Bestimmungen*" (i.e., provisions), not "*Bedingungen*" (i.e., conditions), under which [Argentina] has given its consent. As the more differentiated use of words in the German version thus makes clear, the Contracting States to the BIT did not establish the pre-arbitral requirements in Article 8 of the BIT as conditions precedent to the existence of the host State's consent to investor-State arbitration, but rather as mandatory procedural steps investors have to take before a claim can be decided by an international arbitral tribunal on the merits.[231]

211. As such, the Majority concluded that whilst the requirements in Article 8(3) have to be complied with before the Tribunal is able to proceed to address the merits, because they are not formulated clearly as conditions precedent for Argentina's consent to arbitration, they do not all necessarily need to be complied with prior to the initiation of the arbitration proceedings.[232]

[229] *E.g. Daimler Financial Services A.G. v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment of 7 January 2015, para 183 (RALA-0024); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award of 21 June 2011, para 94 (AL RA 46-0050); *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award (8 December 2008), para 160(2) (AL RA 38).

[230] Decision on Jurisdiction, para 279.

[231] Decision on Jurisdiction, para 281.

[232] Decision on Jurisdiction, para 280.

212. The Majority then turned its attention to each of Argentina's objections based upon the various pre-arbitral requirements in Articles 8(1), (2) and (3) of the BIT – including the objection focused on Article 8(3)(a) of the BIT.[233]

213. Article 8(3)(a) of the BIT provides as follows (adopting the combined translation used by the Tribunal):

> (3) The dispute may be submitted to an arbitral tribunal in the following cases:
>
> a) where, after a period of eighteen months has elapsed from the date of notification of the initiation of the proceeding before the afore-mentioned jurisdiction [Argentina] / authorities [Casinos], no decision was rendered on the merits;[234]

214. As summarised by the Majority, this provision means that before Casinos was able to proceed to ICSID arbitration, it needed to have obtained either a decision on the merits by a domestic judicial or administrative jurisdiction or waited for such a decision for 18 months.[235]

215. The Majority then concluded that, given its decision that this pre-arbitral requirement is not a condition precedent to Argentina's consent, the wording of Article 8(3)(a) does not mandate that the 18 months necessarily must have passed prior to the investor's recourse to international arbitration. The provision merely states that the dispute may be "*submitted to an arbitral tribunal*" under the circumstance mentioned. "*Submission*," however, does not necessarily have to refer to the time of the actual seisin of the arbitral tribunal - it can equally be understood to refer to the time when the tribunal can actually exercise jurisdiction over the claim and proceed to the merits.[236]

[233] Decision on Jurisdiction, para 314.
[234] Decision on Jurisdiction, para 293.
[235] Decision on Jurisdiction, para 294.
[236] Decision on Jurisdiction, para 315.

216. The Majority further noted that in none of the decision frequently cited on this issue (such as *Wintershall v. Argentina*; *Daimler v. Argentina*; *Impregilo v. Argentina*; and *ICS v. Argentina*) was subsequent compliance with the domestic-remedies-first requirement ever considered (because no domestic recourse had been initiated at all in those cases).[237]

217. Requiring that 18 months must have passed before international arbitration is initiated, for the Majority, was accordingly overly formalistic, and out of line with the object and purpose of this kind of provision (*i.e.* to give the courts of the host State an opportunity, for a certain time, to remedy the alleged grievance before an international tribunal assumes jurisdiction).[238]

218. In light of all these points, the Majority concluded that since recourse in ENJASA's Action for Annulment of Resolutions Nos. 240/13 and 315/13 to the First Instance Court of Salta had been pending for more than 18 months without a decision on the merits, the Tribunal could exercise its jurisdiction in the present case and proceed to the merits.[239]

219. *No Manifest Excess of Powers:* The Committee has set out the reasoning of the Majority at length because (a) the account that has been provided by Argentina in its submissions on annulment is materially incomplete; (b) the task of the Committee, as stated earlier, is to assess whether there has been a manifest excess of powers, and not to decide *de novo* the jurisdiction issue itself or to substitute its determination for that of the Tribunal; and (c) when considered in its totality, the reasoning of the Majority follows an entirely logical path in accordance with both principle and established jurisprudence.

220. In particular, in its submissions on annulment, Argentina has singled out the portions of the reasoning of the Majority that addressed the differences in nature between contract and

[237] Decision on Jurisdiction, para 317, citing *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1), Award of 22 August 2012 (AL RA 96); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award of21 June 2011 (AL RA 46); *Wintershall Aktiengesellschaft v. Argentine Republic* (ICSID Case No. ARB/04/14), Award of 8 December 2008 (AL RA 38); *ICS Inspection and Control Services Limited v. The Argentine Republic* (PCA Case No. 2010-9), Award on Jurisdiction of 10 February 2012 (AL RA 40).

[238] Decision on Jurisdiction, paras 318-319.

[239] Decision on Jurisdiction, para 328.

treaty arbitration, and the need to take a flexible approach to pre-arbitration requirements in the latter.[240] Hence its allegations that the Majority:

> [w]ithout any further explanation or reason, … drew a distinction between consent in contract arbitration and in investment treaty arbitration. [241]

and had:

> rewritten the BIT based on its own opinions on 'formalism' and applying 'flexibility' even though it lacked the power to do so.[242]

221. But this is to focus on only two elements of a wider integrated analysis that, critically, included a focus on the first sentence of Article 8(4) of the BIT, which (applying conventional rules on interpretation) the Majority interpreted as irrevocable consent to arbitration in advance of any submission to arbitration, regardless of the pre-arbitration conditions in question. Hence the Majority concluded that the requirements in question were not jurisdictional in nature. Regardless of how persuasive this reasoning may be, the Committee can see no basis to question its legitimacy. There was no departure from customary rules on the interpretation of treaties as set out in the VCLT. In particular, the Majority conducted a thorough analysis of the text of Article 8 of the BIT, including its German, English and Spanish versions, and did so in light of relevant objects and purposes.

222. Further, as Casinos has pointed out,[243] the conclusion of the Majority that the 18-month requirement did not prevent the Tribunal from exercising jurisdiction is consistent with

[240] Argentina's Memorial, paras 85-88, citing from the Decision on Jurisdiction, paras 274, 275, 276, 318. *See* the summary of Argentina's case at paras 88-90 above.

[241] Argentina's Memorial, para 86.

[242] Argentina's Memorial, para 87.

[243] Casinos' Counter-Memorial, para 152; Casinos' Rejoinder, paras 60-64.

numerous other decisions, such as (for example) *Urbaser v Argentine Republic*[244] and *Abaclat v Argentine Republic*.[245]

223. Further still, the Majority's conclusion that 18 months had elapsed in any event in this case (albeit after the initiation of the arbitration) such that Article 8(3)(a) had been satisfied, is consonant with prior jurisprudence in this field, including (as the Majority noted) decisions in which the pre-arbitration requirements in question have been held to be jurisdictional: for example, *TSA Spectrum v. Argentina*; [246] *Teinver v. Argentina*;[247] *Philip Morris v. Uruguay*.[248] As also noted by the Majority, its analysis is consistent with the approach both of the Permanent Court of International Justice and the ICJ in a number of cases in which conditions to the Court's jurisdiction were considered fulfilled after the Court had been seized, such as the *Mavrommatis* case;[249] and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).*[250]

224. The Committee being unable to find fault with the approach and reasoning of the Majority, it follows that there has been no excess of powers in this regard and this ground for Argentina's application must be rejected.

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[244] *Urbaser S.A. et al. v. The Argentine Republic* (ICSID Case No. ARB/07/26), Decision on Jurisdiction of 19 December 2012, para 192 (RALA-0084).

[245] *Abaclat and Others v. The Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility of 4 August 2011, paras 582-583 (RALA-0085).

[246] Decision on Jurisdiction, para 321; *TSA Spectrum de Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), Award of 19 December 2008, para 112 (RALA-0082).

[247] Decision on Jurisdiction, para 322; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Jurisdiction of 21 December 2012, para 135 (RALA-0081).

[248] Decision on Jurisdiction, paras 323-4; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Decision on Jurisdiction of 2 July 2013, paras 144-149 (RALA-0080).

[249] Decision on Jurisdiction, paras 325; *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Objection to the Jurisdiction of the Court, Judgment No. 2 of 30 August 1924, PCIJ Series A, No. 2, p. 34 (AL RA 162).

[250] Decision on Jurisdiction, paras 326; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment of 18 November 2008, ICJ Reports 2008, pp. 412, 441, para 85.

(c) The treatment of Argentina's claims as treaty claims under the BIT

225. As summarised earlier, it is Argentina's case that the Majority manifestly exceeded its powers by assuming the power to turn what Argentina characterizes as a "*closed domestic contract dispute under domestic law*" (over which, it is said, the Tribunal had no jurisdiction) into a claim under the BIT.[251]

226. The Committee is unpersuaded by this complaint.

227. Argentina argues that ENJASA's voluntary withdrawal of the contract claim which had been brought before the local courts of the Province of Salta constituted an "*inescapable legal act under Argentine law*," by which ENREJA's decisions on the revocation of the License became final under Argentina's domestic law. And in the absence of a finding of a violation of due process, this precluded the Tribunal from jurisdiction over this dispute.[252]

228. The Committee notes that, in substantial part, this is the same complaint that was raised before the Tribunal as a jurisdictional objection, and that was rejected by the Majority.[253]

229. Argentina had argued before the Tribunal that whilst Casinos labelled their claims as treaty claims, the "*essential basis*" of those claims related to a breach of contract. Specifically, the License conferred on ENJASA was a contractual arrangement, and it followed that the revocation of the License was a contractual matter, beyond the Tribunal's jurisdiction.[254] The Majority disagreed, holding that Casinos' claim was not for breach of a contract with the Province of Salta (such as the Transfer Agreement or the contractual or quasi-contractual arrangements to implement the privatization of the gaming and lottery sector in Salta). Nor was Casinos' claim an action under domestic law for the breach of ENJASA's License. And nor was it a claim brought on behalf of ENJASA. Rather, Casinos' claim was that the revocation of ENJASA's license and subsequent events

[251] *See* para 91 above.
[252] Argentina's Memorial, paras 89-90.
[253] Decision on Jurisdiction, paras 214-222.
[254] Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits, paras 28-39.

violated their own rights as (indirect) investors in ENJASA under the BIT. In particular, Casinos claimed that the revocation of the License did not take place in the normal exercise of ENREJA's regulatory powers. It followed that this was a treaty claim, distinct in nature from a domestic law contract claim. Whether or not the revocation of ENJASA's License was lawful under domestic law was therefore not determinative of the claim.[255]

230. Further, when addressing the merits in the Award, the Majority considered the legal basis invoked by ENREJA in revoking the License and concluded that this did not entail the exercise of a contractual right (namely the contractual termination clause in Article 6 of the Transfer Agreement). Rather, the revocation was based on the authority conferred on ENREJA under Law No. 7020. Resolution No. 240/13 made it clear that the revocation entailed:

> a police activity of the government, understood as an "administrative" function which is intended to protect the security, morality or public health […], which, in the case under analysis, seeks to secure the proper provision of a licensed activity.
> …
>
> [T]he revocation of the license as a penalty shall not be confused with the right to declare, automatically and by operation of law, the extinction and/or cancellation of the license, provided for in Article 6 of Decree No. 3616/99, which power is vested in the Executive Branch in six events: expiration of the license, breach of the payment of the royalty, violation of the obligations imposed by Article 5 of Law No. 7020, exploitation of any game of chance without ENREJA's prior authorization and the total or partial assignment and transfer of the powers granted in the license without prior authorization of the Executive Branch.[256]

[255] Decision on Jurisdiction, paras 216-217.

[256] Award, para 218, citing ENREJA's Resolution No. 240/2013 (AA-0004); Casinos' Counter-Memorial, paras 158-159.

231. Further, the Majority noted that even if the revocation of the License could be analysed as a contractual matter, it would still be open to assessment by the Tribunal under the BIT as an act of "*puissance publique*."[257]

232. The Committee can find no fault with this analysis. Importantly for present purposes, the analysis is unaffected by the fact that (as contended by Argentina) ENREJA's decision on the revocation of the License was rendered final as a matter of Argentina's domestic law by virtue of ENJASA's voluntary withdrawal of its contract claim before the local courts of Salta.[258] Whatever the consequence as a matter of domestic law of the voluntary withdrawal of a contract claim before a local court, this cannot place the treaty claim beyond the jurisdiction of the Tribunal, or bar the prosecution of that claim.

233. It follows that the Majority's consideration of Casinos' claim that the revocation of the License constituted a breach of the BIT did not constitute a manifest excess of powers for the purposes of Article 52(1)(d) of the ICSID Convention.

(d) Police powers

234. Argentina's final complaint under this head is that the Majority failed to analyze its defence that the claim for compensation should not be granted because the revocation of the License amounted to a regular exercise by ENREJA of the regulatory and supervisory or police powers of the State under international law. As a result, (a) the Award is *infra petita*, having failed to settle an issue that was decisive to the case; and (b) the Majority failed to apply the applicable law in that it should have addressed the defence relating to the exercise of police powers under customary law and not, as it did, "*analyze matters of good faith, arbitrariness and proportionality*."[259]

[257] Decision on Jurisdiction, para 221, citing (*inter alia*): *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, para 299 (RALA-0086); *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction of 22 April 2005, para 281 (RALA-0087).

[258] Argentina's Memorial, paras 89-90; Argentina's Reply, paras 55-57.

[259] Argentina's Memorial, paras 91-93.

235. The assertion that the Majority failed to analyze Argentina's case that ENREJA's revocation of the License constituted the legitimate exercise of regulatory and supervisory or police powers of the State under international law is simply incorrect as a matter of fact. In Section VI.B. of the Award, the Majority addressed this issue in terms, and in considerable detail, in the context of its assessment of Casinos' claims that Articles 4(1) and 4(2) of the BIT had been breached. In particular, the Majority analysed whether ENREJA's revocation of the License was a compensable indirect expropriation, or a non-compensable exercise of regulatory and police powers, and the precise limits that apply to a State's exercise of such powers.[260]

236. The Majority first reviewed the tests that previous tribunals have deployed to determine whether a governmental measure qualifies as an indirect expropriation, concluding that regard must be had not only to the impact on the investment of the measure in question, but also whether the host State took the measure:

> in the exercise of its police powers or its right to regulate, which are, as numerous tribunals have emphasized, a recognized component of State sovereignty, safeguarded under both customary international law and the law of investment treaties. As stated, for example, by the tribunal in *Saluka v Czech Republic*, "[i]t is now established in international law that States are not liable to pay compensation to a foreign investment when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[261]

237. Indeed, the Majority emphasized that police powers and the right to regulate, being recognized components of a State's sovereignty and firmly grounded in customary international law, are not abrogated merely because a State has entered into treaty

[260] Award, paras 323 *et seq*.

[261] Award, para 331, citing (*e.g.*) *Methanex Corporation v United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, Part IV, Chapter D, para 7 (RALA-0014); *Saluka Investments B.V. (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award of 17 March 2006, paras 255, 262 (RALA-0068); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, (ICSID Case No. ARB/10/7), Award of 8 July 2016, paras 295-301 (RALA-0065); August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 85-111.

commitments that restrict its right to expropriate covered investors and their investment and subject expropriations to certain conditions. Rather, these powers constitute "*relevant rules of international law applicable in the relations between the parties*" in the sense of Article 31(3)(c) of the VCLT, and so have to be taken into account in interpreting the provisions in a BIT on expropriation.[262]

238. According to the Majority, two elements must be fulfilled for a governmental measure to qualify as an indirect expropriation. First, the measure in question must entail a certain severity of interference and permanence. Second, the measure in question must not be covered by the host State's right to exercise its regulatory and police powers, taking into account both the legal framework in place in the host State when the investment was made and the host State's power to regulate and change this legal framework for the protection of public interests.[263]

239. The Majority then examined in detail the limitations on a host state's exercise of its police powers, by reference to extensive citation of authorities.[264] In this regard, the Majority considered (*inter alia*) the guidance set out by the tribunal in *Quiborax v Bolivia*,[265] and then articulated a number of refinements to the appropriate test.[266]

240. First, the Majority focused on the degree of deference that it should afford to determinations made by local bodies within the host State as to the lawfulness of the State's exercise of its police or regulatory powers, recognizing that its mandate was not to "*second-guess the host State's determinations under domestic law and review them* de novo*, as if it was the*

[262] Award, para 332.
[263] Award, paras 334-337.
[264] Award, Section VI.B(3), paras 338-351.
[265] *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award of 16 September 2015, para 207 (RALA-0067).
[266] Award, paras 338-340.

primary decision-maker or a domestic (first-instance, appellate, or supreme) court in the host State."[267]

241. Second, the Majority held that international law limitations on the host State's exercise of its regulatory and police powers are not limited to due process violations, which were mentioned expressly by the *Quiborax* tribunal. Rather, in addition to due process, international law requires that the host State's implementation of its police powers / regulatory framework comply with the principle of good faith; be neither arbitrary nor discriminatory; and be otherwise proportionate. Each of these considerations was then analyzed in turn in the Award.[268]

242. Thereafter, the Majority applied this legal framework to the facts of the case, and particularly to Casinos' case with respect to Articles 4(1) and 4(2) of the BIT. In so doing, it addressed specifically (1) whether the termination of ENJASA's License reached the threshold of a substantial and permanent deprivation of Casinos' shareholdings in L&E and/or ENJASA; and (2) whether, in the present case, the measures imposed by Argentina qualified as a regular exercise of its regulatory and supervisory powers that fell outside the concept of (indirect) expropriation.[269] Issue (2) – being the particular issue that Argentina now contends the Majority failed to address – occupied no fewer than 72 paragraphs, and 26 pages, of the Award.[270] This was a thorough analysis of the exercise of ENREJA's police powers, that canvassed all submissions on this issue, and culminated in the following conclusion:

> Although the Tribunal has not found a breach of due process, its findings on arbitrariness and the lack of proportionality are sufficient to conclude that ENREJA did not properly use its regulatory, supervisory, and police powers when it decided, in Resolution No. 240/13, to revoke ENJASA's exclusive license and when it upheld that revocation in Resolution No. 315/13. The revocation of ENJASA's license, which inappropriately under

[267] Award, paras 340-342.
[268] Award, paras 343-351.
[269] Award, paras 352-429.
[270] Award, paras 357-429.

> international law ended what was left of ENJASA's 30-year exclusive gaming license, destroying both ENJASA's business operations and Claimants' investment in ENJASA and L&E, cannot be considered as a regular exercise of ENREJA's regulatory and supervisory powers that would carve out Respondent's conduct from the concept of indirect expropriation under Article 4(1) and (2) of the BIT. Consequently, the revocation and the subsequent transfer of its operation to third operators qualify as an indirect expropriation of Claimants' shareholding in L&E and its indirect shareholding in ENJASA.
> […]
>
> The Tribunal further finds that this indirect expropriation was unlawful as the revocation of ENJASA's license did not comply with the requirements international law sets for an internationally lawful exercise of the host State's police power. Such a measure does not fulfil the criteria Article 4(2) of the BIT sets up for a lawful expropriation, that is, the existence of a public purpose, the implementation of an expropriation in accordance with due process of law, and the payment of compensation.[271]

243. The Committee can find no fault with this analysis. As Casinos has submitted, there is no single comprehensive or standard test to distinguish acts covered by police powers from those that constitute an excess of such powers, but the approach of the Majority corresponds to that of many other tribunals.[272] But more importantly, whether or not the approach of the Majority is open to criticism, there is simply no basis for Argentina's assertion that the Majority failed to address its case on police powers. To the contrary, a significant portion of the Award was devoted to this issue.

244. It follows that there has been no manifest excess of powers in this regard.

[271] Award, paras 427-428.

[272] Casinos' Counter-Memorial, para 167, citing *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award of 8 July 2016, paras 290-301 (RALA-0065); *David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No. ARB (AF)/10/1), Award of 16 May 2014, para 171 (RALA-0059); *Saluka Investments B.V. (The Netherlands) v. Czech Republic* (UNCITRAL), Partial Award of 17 March 2006, para 255 (RALA-0068).

2. Failure to Apply the Law Applicable to the Dispute

245. As summarised above,[273] Argentina has identified seven propositions in submitting that the Majority manifestly exceeded its powers in failing to apply the law applicable to the dispute.

246. The Committee recalls the standard to be applied to a challenge that a tribunal failed to apply the law applicable to the dispute, as set out in **Section IV(B)(1)** of this Decision. With this in mind, each proposition is considered in turn below. But as will be seen, given the high threshold that must be satisfied for a complaint under this head (*i.e.* a complete failure to identify and apply the applicable law, as distinct from an identification and application of the applicable law that is open to question or said to be incorrect), each proposition can be addressed briefly.

(i) Failure to apply Argentine law by relying on the "sole effects" doctrine

247. As summarised earlier, Argentina submits that in distinguishing between compensable and non-compensable indirect expropriation, the Majority invoked the "*sole effects*" doctrine, thereby ignoring the domestic law of Argentina which explained the reasons and purposes which led to the adoption of the measure in question.[274]

248. The crux of this complaint is that the "*sole effects*" doctrine focuses on whether the measure in question entailed a certain degree of interference and permanence, but not on the reasons for and purpose of the measure (being a matter that concerns Argentine law).[275]

249. The Committee considers that this is a complaint without foundation. In assessing whether or not ENREJA's revocation of ENJASA's License constituted a breach of the BIT, the Majority identified the applicable law as international law, and then – with evident care – analysed the nature of the test as a matter of international law, before applying this to the

[273] *See* paras 94-105 above.
[274] Argentina's Memorial, paras 95-98, citing Award, paras 334, 335, 427, 428; Argentina's Reply, paras 64-70.
[275] Argentina's Memorial, paras 95-96.

facts of the case. This, alone is sufficient to dismiss Argentina's objection under Article 52(1)(b) of the ICSID Convention, since it cannot be said that the Majority failed to identify and apply the applicable law. Argentina's complaint, in substance, is that the applicable law was applied incorrectly, which is not a ground for annulment.

250. But even beyond this short conclusion, it is simply not the case that the Majority considered ENREJA's revocation of the License exclusively in terms of the level of interference and permanence of the measure. On the contrary, as set out above in the context of Argentina's challenge with respect to the exercise of police powers,[276] in the course its analysis the Majority considered at length the domestic legal framework within which the measure was promulgated; the purpose of the measure; and the public interest behind it. Indeed, as Casinos has pointed out,[277] Argentina's complaint was also made in the Dissenting Opinion on Merits, which was itself addressed in terms by the Majority in a footnote in the Award as follows:

> The Dissent (i.a. paras. 92-93, 116-117, 120-124, 180-181, 234, 365-366, 375, 384, 387, 449) incorrectly claims that the Tribunal's majority "absurdly" only focuses on the "sole effect" of the revocation, without taking into account the regulatory powers of ENREJA to lawfully revoke the License. However, as the Tribunal explains in the present section, it does not consider the effects of the revocation of the License to be the sole criterion for the existence of an indirect expropriation, but also requires to factor in an assessment of whether this revocation has been brought about as a lawful exercise of ENREJA's regulatory and police powers. If that had been the case, no indirect expropriation would have been occasioned, and no compensation would be due, under Article 4 of the BIT.[278]

251. The Committee does not agree with Argentina's criticism of this footnote in the Award.[279] It is, indeed, readily apparent from the Award that the Majority did engage in a detailed and lengthy assessment of whether the revocation constituted a lawful exercise of

[276] *See* paras 234-244- above.

[277] Casinos' Counter-Memorial, para 182.

[278] Award, fn 412.

[279] Argentina's Reply, para 64.

ENREJA's regulatory and police powers under Argentine (as well as international) law.[280] This assessment began with the following introductory paragraph:

> However, looking only at the effect of a measure on the investment in question is too limited. As confirmed by a large number of investment treaty tribunals, not only the impact on the investment of the measures in question has to be examined, but also whether the host State took those measures in the exercise of its police powers or its right to regulate, which are, as numerous tribunals have emphasized, a recognized component of State sovereignty, safeguarded under both customary international law and the law of investment treaties. As stated, for example, by the tribunal in *Saluka v Czech Republic*, "[i]t is now established in international law that States are not liable to pay compensation to a foreign investment when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare."[281]

252. This is a short and complete answer to Argentina's objection.

253. Argentina also contends under this head that the Majority failed to consider that the License was not owned by ENJASA, as set out in its Article 1, such that reliance on the "*sole effects*" doctrine was inapposite in any event.[282]

254. Once again, this is not a complaint that the applicable law was disregarded. Rather, it is a straightforward objection to the way in which the applicable law was applied. This is impermissible as a ground for annulment under Article 52(1)(b).

255. It follows that this first category of complaint must fail.

[280] *See* paras 235-244 above.

[281] Award, para 331, citing *Saluka Investments B.V. (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award of 17 March 2006, para 255 (RALA-0068), as well as *Methanex Corporation v United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005, Part IV, Chapter D, para 7 (RALA-0014); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7), Award of 8 July 2016, paras 295-301 (RALA-0065); August Reinisch and Christoph Schreuer, *International Protection of Investments – The Substantive Standards* (Cambridge University Press 2020) 85-111.

[282] Argentina's Memorial, paras 99-100, citing Award, para 378.

(ii) Failure to apply Argentine law on the powers conferred upon ENREJA

256. Argentina next contends that the Majority failed to apply Argentine law on the powers conferred upon ENREJA. Argentina points to Article 32(d) of Law No. 7020 which granted ENREJA the power to "*[e]xercise police powers in all matters related to the management and operation of games of chance […] imposing any applicable sanctions.*" Argentina submits that the 21 sanctions imposed upon ENJASA were "*well-founded and gradual in nature*" as a matter of Argentine law, and – as the crux of its complaint – that the Majority was wrong to conclude differently. In particular, Argentina states that from the moment the Majority "*stepped into ENREJA's shoes*," it closed its eyes to the applicable law.[283]

257. The objection covers very similar ground to Argentina's first ground of challenge (addressed in **Section IV(B)(2)(1)(i)** above) that the Majority wrongly acted as an appellate court by stepping into ENREJA's shoes and assessing *de novo* the exercise of its discretion.[284] Just as was the case with that objection, the conduct of the Majority in assessing whether the revocation of the License constituted an actionable expropriation cannot be characterised as a failure to apply the proper law resulting in a manifest excess of powers.

258. As recalled earlier in this Decision,[285] the Majority identified and articulated the appropriate test to distinguish an indirect expropriation from a legitimate exercise of regulatory or police powers. In so doing, the Majority elaborated on the international law test and made specific reference to the extent to which that test directed attention to domestic law. In that context, the Majority then considered in terms ENREJA's use of the regulatory powers available to it as a matter of Argentine law, including Law No. 7020.[286]

[283] Argentina's Memorial, paras 101-102, citing Award, para 403.
[284] *See* paras 157-164 above.
[285] *See* paras 236-241 above.
[286] Award, paras 357-429.

259. Argentina takes issue with the Majority's assessment of ENREJA's exercise of its discretion against the guiding principles of Argentine law. Once again, properly characterized, this is a complaint as to the manner in which the Majority applied the applicable law. It is not a complaint that the Majority failed to apply, or completely disregarded, the applicable law itself. Indeed, it could not be so given the length at which, and care with which, the Majority identified and explained the applicable law.

260. It follows that this objection must fail as a ground for annulment under Article 52(1)(b) of the ICSID Convention.

(iii) Replacement of Argentine law with the standard of "systematic disregard"

(iv) Applying a test of "systematic disregard" found in neither Argentine nor international law

261. The next two objections may be addressed together. Argentina complains that the Majority replaced Argentine law with the standard of "*systematic disregard*," thereby arrogating to itself powers conferred onto the local authority, and disregarding Argentine law in its conclusion that even if Argentine law had been complied with, there was a lack of proportionality as a matter of international law.[287] Next, Argentina complains that despite recognizing that ENREJA respected due process in revoking the License and that ENJASA's breaches could have been a valid ground for that sanction under the regulatory framework, the Majority deployed the standard of "*systematic disregard*" of the regulatory framework as the test to assess ENJASA's conduct, which is not found in either Argentine or International law.[288]

262. Once again, these are objections that cover similar ground to other heads of complaint that have already been addressed – and dismissed – earlier in this Decision, including the complaint that the Majority wrongly acted as an appellate court by stepping into ENREJA's

[287] Argentina's Memorial, paras 103-104, citing the Award, para 403; Argentina's Reply, paras 77-80.
[288] Argentina's Memorial, paras 105-106, citing the Award, para 402; Argentina's Reply, paras 77-80.

shoes and assessing *de novo* the exercise of its discretion,[289] and the first two complaints under this head.[290]

263. The Committee considers that these complaints fare no better when re-packaged as a failure to apply the applicable law.

264. The Committee recalls paragraph 190 above, in which it noted that the reference by the Majority to "*systematic disregard*" was actually a reference to the test applied by Mr Mendoza of ENREJA in seeking to justify the revocation of the License. As noted earlier, Mr Mendoza alleged that ENJASA had breached the administrative regulations in a "*systematic manner*."[291] Hence, in response to the test that had actually been applied by ENREJA in the course of the measure it imposed, the Majority concluded that the two minor administrative breaches that had occurred could not qualify as "*systematic disregard*."[292]

265. Beyond this, however, both objections – once again – concern the substance of the determinations at which the Majority arrived in the application of international and domestic Argentine law. Argentina's case is that focusing upon "*systematic disregard*" is an incorrect application of international law, and that the way in which Argentine domestic law was applied is open to objection. Neither point can be characterized as a failure by the Majority to identify and apply the applicable law at all. To this end, both objections must fail as grounds for annulment under Article 52(1)(b) of the ICSID Convention.

(v) Failure to apply Article 8(6) of the BIT

266. Argentina's fifth objection under this head is that the Majority (a) disregarded the fact that ENREJA's revocation of the License was imposed due to ENJASA's serious and repeated violations of Article 5 of Law No 7020; (b) failed to analyze "*the potential adverse effect*

[289] *See* paras 157-164 above.

[290] *See* paras 247-260 above.

[291] Award, para 117, quoting exhibit C-169, page 1 - a reference to the standard under Article 48 of Law No. 7020 by which the "*infringer's record of relapses*" is relevant in order to determine a fine.

[292] Award, para 402.

of the Sheraton Salta Hotel or the fact that ENJASA failed to participate in any new bidding processes;" (c) failed to consider the purpose of the law, namely to prevent money laundering; and (d) incorrectly excluded the application of other rules of Argentine law, such as those relating to the revocable nature of the License (e.g. Article 13 of Law No.7020),[293] and, thereby, failed to apply the proper law, which was Article 8(6) of the BIT.

267. Once again, each alleged failure by the Majority is a complaint as to the substance of their determinations, rather than a failure to identify and apply the applicable law at all.

268. Framing these objections as a "*failure to apply Article 8(6) of the BIT*" takes matters no further, as Article 8(6) of the BIT simply provides that the Tribunal must apply applicable laws:

> The arbitral tribunal shall decide the dispute with reference to the laws of the Contracting Party involved in the dispute, including private international law rules, the provisions of this Agreement and the terms of any specific agreements concluded in relation to such an investment, if any, as well as the applicable principles of international law.[294]

269. This fifth objection, therefore, fails as a ground for annulment under Article 52(1)(b) of the ICSID Convention.

(vi) Failure to apply international law in failing to analyze Casinos' contribution to the injury

(vii) Failure to apply applicable rules of customary international law governing the regulatory and police powers of sovereign States

270. Argentina's sixth and seventh objections may be taken together. Both concern the allegation that the Majority failed to apply international law. Specifically, Argentina contends that the Majority (a) failed to analyze Casinos' contribution to the injury allegedly

[293] Argentina's Memorial, paras 107-109, citing Award, para 356; Decision on Jurisdiction, para 230.
[294] According to the translation provided by Casinos (RA-0001).

sustained by them;[295] (b) failed to apply the applicable rules of customary international law governing the regulatory and police powers of sovereign States (in particular the thresholds of "*egregious*" or "*shocking*");[296] (c) failed to apply the *ELSI* standard when arriving at its determination on the "*arbitrary*" nature of the measures results;[297] and (d) wrongly added requirements for the legitimate exercise of police powers, disregarding both domestic law and also the surrounding activity conducted by ENJASA and the recommendations made by the FATF.[298]

271. The crux of all of these complaints is the central allegation by Argentina that the Majority set the "*arbitrariness*" standard too low in assessing whether ENREJA's revocation of the License breached the BIT. As to this, the Committee can find no manifest excess of powers, or failure to apply applicable law. On the contrary, the Majority cited and considered extensive authority in articulating the international law test, including the *ELSI* case.[299] It also considered alternative definitions of "*arbitrariness*" (*e.g.* as found in the *EDF* decision, where the standard was said to encompass measures not based on legal standards or taken for reasons that are different from those put forward by the decision maker, as well as measures that are taken in wilful disregard of due process,[300] and the test stated in *Plama v Bulgaria*, which looked to measures "*which are not founded in reason or fact but on caprice, prejudice or personal preference*").[301] The Majority then formulated the following approach:

> As the above definitions show, not every violation of domestic law will *ipso facto* constitute arbitrary conduct under international law. Rather, arbitrariness requires a qualitatively significant breach, an abuse of power, that imposes harm on a foreign investor contrary to the rule of law.

[295] Argentina's Memorial, para 110; Argentina's Reply, paras 81-84.

[296] Argentina's Memorial, para 111.

[297] Argentina's Memorial, paras 111-113.

[298] Argentina's Memorial, paras 114-117.

[299] See *e.g.* Award, paras 346-351.

[300] Award, paras 347-348, citing *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para 303 (RALA-0043).

[301] Award, para 347, citing *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Award of 27 August 2008, para 184 (AALA-0051).

> Indicators for arbitrariness in this sense can be, for example, a manifest lack of competence of the host State's authority for taking the measure in question, bad faith applications of domestic law, or decisions that appear so manifestly incorrect that they must be deemed to constitute an abuse of power.[302]

272. This, on any view, was an identification of international law as applicable to the issue, and the application of that law. Whether it was correct or not is beside the point.

273. Each of the constituent complaints under this head suffers from the same flaw as each of the preceding objections. Each is a complaint about the substance of the Majority's determinations, rather than a complaint that the Majority failed to identify and apply international law at all. To this end, each must fail as a ground for annulment for the same reasons as elaborated above.

274. Further still, Argentina's allegations as to the rejection by the Majority of the "*context surrounding the activity conducted by ENJASA*" are unfounded as matter of fact. As noted earlier in this Decision, the Majority took care in assessing the regulatory and factual context in Argentina against which ENREJA acted as it did.[303] By way of example, contrary to Argentina's complaint, specific consideration was given to the recommendations of the FATF:

> […] considering that the regulation and supervision of gambling operators is demanded by FATF recommendations in order to combat money laundering. Consequently, the administration of such regulations, including the imposition of sanctions, even if resulting in the loss of an operating license, does not qualify as (indirect) expropriations under provisions in international investment treaties, such as Article 4 of the BIT, provided it is lawful also under international law, that is, made in good faith, is not arbitrary or disproportionate, and respects due process.[304]

[302] Award, para 348, as cited in Casinos' Counter-Memorial, para 191.

[303] *See* para 242 above (on police powers).

[304] Award, para 357; Casinos' Counter-Memorial, para 204.

275. It is to be noted that in its Reply, Argentina developed its case under this head into an argument that the Majority, in failing to apply the rules on contribution to the injury and mitigation, ruled *infra petita*.[305] Specifically, in addition to the points on contribution noted above, Argentina contends that the Majority failed to address its argument that Casinos had not suffered any substantial deprivation and should have reapplied for a license in order to mitigate damages. The short answer to this, however, is that the Majority addressed both issues of contribution and mitigation in the Award. At paragraph 354, the Majority ruled as follows:

> For the Tribunal, this aspect does not affect the conclusion that Claimants have been permanently and substantially deprived of their investment in L&E and/or ENJASA, as ENJASA's exclusive license for the remaining 17.5 years could not simply be replaced by new and less favorable licenses that were still to be negotiated and did not have the same scope as ENJASA's operation and were not exclusive. The fact, therefore, that Claimants did not apply for new licenses and refused to accept a possible offer to operate Casino Salta does not affect the Tribunal's conclusion that the revocation of ENJASA's license permanently and substantially deprived Claimants of their investment in L&E and indirectly in ENJASA. If the License was unlawfully revoked, Claimants were not obliged to apply for new licenses under less favorable conditions or continue to operate Casino Salta, while relinquishing all the other operations that formed part of ENJASA's exclusivity.[306]

276. Further, at Footnote 521 of the Award, the Majority ruled as follows:

> Contrary to the Dissent, paras. 31-32, 304, 380(6), 439-446, the Tribunal's majority fails to see any indications for Claimants' contribution to injury pursuant to Article 39 of the ILC Articles, either in the form of contributory fault to Respondent's internationally wrongful conduct because ENJASA's prior breaches of the regulatory framework may have contributed to the revocation of its License, or as a violation of a duty to mitigate damages after the revocation has taken place because Claimants did not accept the offer to continue operating Casino Salta and did not participate in the process for applying for new operating licenses. As

[305] Argentina's Reply, paras 81-84.

[306] Award, para 354.

> already stated above (see supra para 354), after ENJASA's license was revoked, Claimants were not obliged to apply for new licenses under less favorable conditions or continue to operate Casino Salta, while relinquishing all other operations that formed part of ENJASA's former exclusivity.

277. For all these reasons, Argentina's sixth and seventh complaints under this head must fail as grounds for annulment under Article 52(1)(b) of the ICSID Convention.

278. It follows that Ground 1 of Argentina's application to annul the Award must be rejected in its entirety, there having been no manifest excess of powers by the Majority.

V. GROUND 2: SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE - ART 52(1)(D)

A. THE PARTIES' POSITIONS

(1) Argentina

a. The Standard

279. Argentina submits that Article 52(1)(d) is a safeguard with respect to the basic fairness and integrity of the arbitration process. Importantly, the rules of procedure to which Article 52(1)(d) refers are not limited to the Arbitration Rules, but comprise the rules of natural justice and procedural rules that are essential to the integrity of the arbitral process (including, among others, due process; the right of defence; the right of both parties to be heard; equality between the parties; the treatment of evidence; the burden of proof; the rules on legal standing; and the duty of a tribunal to consider the issues submitted to it for decision).[307]

[307] Argentina's Memorial, paras 120-123; Argentina's Reply, para 85, citing (*inter alia*) ICSID Background Paper 2016, para 98 (AALA-0009); Wang Dong, UNCTAD Course on Dispute Settlement - Module 2.8. International Centre for Settlement of Investment Disputes: Post-Award Remedies and Procedures, 2003, U.N. Doc. UNCTAD/EDM/Misc.232/Add.7, p. 22 (AALA-0037); Aron Broches, "Observations on the Finality of ICSID Awards," *ICSID Review - Foreign Investment Law Journal*, 1991, vol. 6(2), p. 330 (AALA-0038); *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 49 (AALA-0018); *Fraport* AG *Frankfurt Airport Services Worldwide v. Republic of the Philippines* (ICSID Case No.

280. With regard to treatment of evidence and burden of proof, Argentina points to the following statement of the *ad hoc* committee in *Iberdrola v. Guatemala*:

> This Committee understands that a fundamental rule of procedure is one that establishes a minimum procedural standard that must be respected in accordance with international law, as defined in *Wena Hotels v. Egypt*. In general, the following hypotheses have been recognized as a violation of fundamental rules: (i) the lack of impartiality and unequal treatment of the parties, (ii) *the violation of the right to be heard*, (iii) the absence or abuse of deliberation by the arbitrators; (iv) *the violation of the rules of proof* and (v) the violation of the rules of legal standing.[308]

281. With regard to the burden of proof, Argentina disagrees with Casinos that only "*a complete reversal*" of the burden of proof would qualify, citing the comments of the *ad hoc* committee in *Tulip v Turkey* for the proposition that a reversal of the burden of proof is simply one example:

> […] A clear violation of a rule of evidence, such as the reversal of the burden of proof, may amount to a serious violation of a fundamental rule of procedure.[309]

ARB/03/25), Decision on Annulment of 23 December 2010, paras 186-187 (AALA-0039); *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on Annulment of 21 March 2007, para 49 (AALA-0030); *Victor Pey Casado and President Allende Foundation v. Chile* (ICSID Case No. ARB/98/2), Decision on Annulment of 18 December 2012, para 73 (AALA-0040); *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Decision on Annulment of 27 December 2016, para 149 (AALA-0017); *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment of 13 January 2015, para 105 (AALA-0041); *Wena Hotels LTD. v. the Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of 5 February 2002, para 57 (AALA-0042); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of the Award and the Supplemental Award of 3 December 1992, para 9.08 (AALA-0058); *Maritme International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Partial Annulment of 22 December 1989, para 5.06 (AALA-0013); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, paras 84, 92, 95 (AALA-0012); *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, ICJ, Advisory Opinion of 12 July 1973, para 92 (AALA-0044); Carlo Santulli, *Droit du Contentieux International*, 2005, pp. 376-377 (AALA-0045); Christoph Schreuer and others, *The ICSID Convention: A Commentary*, 2009, pp. 983-994 (AALA-0046).

[308] Argentina's Memorial, para 125 (emphasis added by Argentina).

[309] Argentina's Reply, paras 86-87, citing *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 84 (AALA-0048).

282. Whilst Argentina accepts that the outcome of a tribunal's discretionary power to assess evidence cannot be reviewed by annulment committees where that discretionary power is exercised in a reasonable and reasoned manner, where an annulment committee is faced with a dismissal of evidence which is unreasonable and unfounded, that decision is subject to examination.[310]

283. As to the interpretation of "*serious*," Argentina submits that the applicant is not required to show that the result would have been different, but only to demonstrate "*the impact that the issue may have had on the award*."[311] As stated by the *ad hoc* committee in *TECO v Guatemala*:

> Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.[312]

b. Challenges

284. It is Argentina's case that the Majority seriously departed from fundamental rules of procedure for the purposes of Article 52(1)(d) in relation to the following two issues:

[310] Argentina's Reply, paras 88-89.

[311] Argentina's Memorial, para 126; Argentina's Reply, paras 91-94, citing (*inter alia*) *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment of 18 December 2012, para 78 (AALA-0040); *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para 85 (AALA-0049); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 78 (AALA-0048); *Iberdrola Energía S.A. v. Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment of 13 January 2015, para 104 (AALA-0041); *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment of 21 February 2014, para 99 (AALA-0047).

[312] Argentina's Memorial, para 127, citing *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para 85 (AALA-0049).

(i) It shifted the burden of proof, thus violating the principle that he who alleges a fact must prove his arguments, and the principle of defence;[313] and

(ii) It disregarded crucial evidence, which could have modified the outcome had it been considered.[314]

1. Burden of Proof

285. Argentina submits that on at least three occasions, the Majority shifted the burden of proof:

(i) in failing to require Casinos to prove its argument on their obligations under the regulatory framework and the consequences of breaching them;

(ii) as regards the sanction arising from ENJASA's failure to apply for an authorization to hire third operators of games of chance, in ignoring the well-established fact that ENJASA had not requested any authorization from ENREJA and in relying on the fact that Argentina had not proved that ENREJA was not aware of that situation;

(iii) in finding that the revocation of the License amounted to a violation of the BIT, despite failing to require Casinos to prove the connection between the alleged damage and the revocation, and in ignoring the evidence that showed the existence of sufficient proof to justify the revocation under the applicable law.[315]

286. *As to (i):* Argentina contends that Casinos was released from its duty to prove its argument that there was neither a legal nor factual basis for ENREJA's administrative inquiries and findings of breach with respect to ENJASA, and its case that ENJASA had complied with the applicable legal framework. Further, the Majority found that Argentina had provided no evidence that the breaches warranted the revocation of the License.[316] Indeed, on

[313] Argentina's Memorial, Section II.B.1; Argentina's Reply, Section II.B.1.
[314] Argentina's Memorial, Section II.B.2; Argentina's Reply, Section II.B.2.
[315] Argentina's Memorial, para 129.
[316] Argentina's Memorial, para 130; Argentina's Reply, para 96.

Argentina's case, it was "*reprimanded*" for failing to prove that it did not incur responsibility.[317]

287. Argentina notes that the Majority found that ENREJA was competent to impose sanctions and found no breach of due process. But despite these findings, and contrary to the burden of proof, Casinos was not required to demonstrate that it had complied with the regulatory framework, or explain what the consequences of ENJASA's breaches were. This, according to Argentina, was all the more egregious given the evidence that was on record proving the breaches and (in particular) the basis for the sanctions, including anti-money laundering provisions.[318]

288. At the Hearing on the Merits, Argentina referred to certain arguments advanced by Casinos which were not supported by any expert reports, witness statements or other documents (i.e. where Casinos was not meeting its burden of proof). And in its closing arguments, Argentina drew attention to Casinos' attempt to reverse the burden of proof. Further, the evidence on record showed that the sanctions were applied in accordance with the regulatory framework in terms of procedure, competence and substance.[319]

289. Argentina posits by way of example, with regard to Resolution No. 380/12, that the Majority did not explain the standard used in finding that some sort of sanction appeared manifestly unsupported in fact and law, whereas others did not. This shows that the Majority could not rely on any evidence presented by Casinos.[320] Similarly, with regard to Resolution No. 381/12, from Resolution Nos. 26/00 to 240/13, the payment by "*not to order*" cheques of prizes exceeding a certain amount of money was the usual practice based on a mutual understanding between ENJASA and ENREJA on the application of Article 5 paragraph 3 of Law No. 7020, in accordance with international, national and local

[317] Argentina's Reply, para 96.
[318] Argentina's Memorial, para 133.
[319] Argentina's Memorial, paras 134-135.
[320] Argentina's Memorial, para 136.

regulations for the prevention of money laundering. But the Majority released Casinos from its duty to demonstrate that it had complied with these regulations.[321]

290. *As to (ii):* Argentina argues that the Majority reversed the burden of proof in finding that the sanction imposed by ENREJA on ENJASA due to the breach of its obligation to request an authorization to hire third parties to operate games of chance was "*manifest*," despite the fact that Casinos was unable to prove that ENJASA had requested such authorization. This was aggravated by the fact that the Majority considered that it was for Argentina to prove that ENREJA was unaware of the situation in this regard.[322]

291. *As to (iii):* Argentina contends that the Majority shifted the burden of proof by releasing Casinos from its duty to demonstrate the link between the damage allegedly sustained and the revocation, and "*by closing its eyes to the evidence that showed the existence of sufficient proof in support of the revocation under the applicable regulations*" as it found that the revocation of the License was in breach of the BIT. The Majority focused on what ENREJA had demonstrated, or failed to demonstrate, in the local proceedings in which it was the plaintiff, instead of "*zeroing in on what Casinos proved or failed to prove, as the claimant, in this arbitration*."[323]

2. Failure to Consider Evidence

292. Argentina submits that on at least three occasions, the Majority committed serious violations of key procedural rules by failing to consider evidence that had the potential to alter the conclusions at which they arrived:

(i) they failed to consider relevant evidence relating to the breaches of the applicable regulations by ENJASA;

[321] Argentina's Memorial, para 137; Argentina's Reply, para 99.
[322] Argentina's Memorial, paras 138-140; Argentina's Reply, paras 100-103.
[323] Argentina's Memorial, paras 141-143; Argentina's Reply, paras 104-107.

(ii) they failed to consider material evidence concerning the anti-money laundering rules;

(iii) they failed to consider key evidence submitted by Argentina, and also acknowledgements made by Casinos, regarding ENJASA's breaches of the applicable regulations.[324]

293. *As to (i) and (iii):* Argentina recalls that the Majority stated that, with regard to Resolution No. 380/12, it was "*unable to see*" how ENREJA could conclude that the rules on anti-money laundering had been seriously breached with respect to one of the instances investigated concerning two prizes whose registration was delayed and, as a consequence, held that the sanction "*appears manifestly unsupported in fact and law and must be considered to be arbitrary from the perspective of international law*."[325] This "*belittles the proven fact*" that ENJASA had breached the regulations. Further, the Majority provided its own justification for ENJASA's breaches, and failed to explain from where the requirement arises that the breach must be serious to be considered a violation of the regulations when such regulations state nothing to that effect. Argentina proved that the charge was late registration of payment due to breaches of the anti-money laundering rules, and Casinos did not question this. But these factors were not taken into account by the Majority.[326]

294. With regard to Resolution No. 381/12, the Majority concluded that ENREJA's sanction regarding the live games was based on "*manifestly incorrect interpretations*" of the anti-money laundering rules, in relation to both the method of payment and the statute of limitations. During the Hearing on the Merits, it was demonstrated that the registration measures adopted and the requirement to pay prizes by non-transferrable cheques set out in Resolution No. 26/00 were aimed at preventing the money-laundering technique called

[324] Argentina's Memorial, para 144; Argentina's Reply, paras 110 *et seq.*

[325] Award, para 379.

[326] Argentina's Memorial, paras 146-148.

"*smurfing*," which is typical in gaming activities. But this evidence was not considered by the Majority.[327]

295. With regard to Resolution No. 384/12, the Majority held that ENREJA acted arbitrarily from the perspective of international law by basing its findings on a manifestly incompatible interpretation of the concept of "*operator*" under Article 5 of Law No. 7020. During the Hearing on the Merits, expert Mr. Biagosch had demonstrated the importance of identifying the "*final beneficiary*," pursuant to FATF Recommendation 28 for Casinos.[328] However, this evidence was disregarded, along with evidence that the outsourcing of final beneficiaries was the regular practice of ENJASA.[329]

296. *As to (ii):* Argentina submits that the Majority disregarded evidence on the international anti-money laundering rules. It referred only once, in general terms, to the FATF, and made no reference to the Financial Action Task Force of Latin America ("**GAFILAT**") or to the Financial Information Unit ("**UIF**"). Although, during the Hearing on the Merits, the President of the Tribunal asked about the scope of the terms of the FATF recommendations, and expert Mr Biagosch testified that since 1989 the FATF had developed assessment, accuracy and audit mechanisms of their application, none of this evidence was included in the Award, which makes no reference, either, to the expert evidence on money laundering prevention that was presented by Mr. Marteau and Mr. Biagosch.[330]

297. In contrast, documents submitted by Casinos' experts, Mr. Bourgeois and Mr. Kusa, were referred to and analyzed in the Award when the statistical number of sanctions that led to the revocation of licenses in other gaming jurisdictions was addressed.

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[327] Argentina's Memorial, para 149, citing Award, paras 381, 382, 384; Argentina's Reply, para 118.

[328] Hearing on the Merits, Tr. Day 6, Biagosch, 174:12-176:1 (English version); Biagosch Report, "Expert Report on Prevention of Money Laundering and Terrorist Financing," para 20.

[329] Argentina's Memorial, paras 150-152, citing Award, paras 389, 393.

[330] Argentina's Memorial, paras 153-154, citing Hearing on the Merits, Tr. Day 6, Biagosch, 176:10–178:14 (English version), and the Biagosch Report, "Expert Report on Prevention of Money Laundering and Terrorist Financing," §§ III-IV; Legal Opinion – Juan Félix Marteau, §§ D-G; Argentina's Reply, paras 114-115.

298. The Majority thus disregarded evidence submitted by Argentina that proves that each regulatory agency has the power and is mandated to impose the sanctions established by each regulatory framework, and that not all regulatory frameworks provide for revocation as a possible sanction.[331]

299. The fact of having ignored or disregarded the international anti-money laundering regulations "*affects the finding made by the majority of the Tribunal beyond a tolerable margin of error*."[332] Argentina records in this regard that the Majority: (a) dismissed the evidence in relation to the standard established by the FATF recommendations for games of chance; (b) "*deliberately*" dismissed the evidence in relation to the domestic regulations of the UIF providing for a risk analysis and management record, the implementation of a record of prizes and exchange of chips, the detection of the splitting of payments for evasion purposes and the duty of due diligence of the gaming operators; and (c) dismissed the evidence proving that ENREJA issued repeated warnings regarding the ENJASA's gross negligence. And these decisions were made despite (a) the evidence of Casinos' expert Mr Kusa as to the relevance of these standards, and the fact that the Province of Salta is in a risk area; and (b) the expert evidence of Mr. Biagosch that the FATF established guidance called a *Risk Based Approach*, which required that the State adopt risk assessment policies that include an analysis of the gaming operator's client list, its product, its distribution channel and its geographical area.[333]

(2) Casinos

a. The Standard

300. Casinos submits that the annulment ground of a serious departure from the fundamental procedural rules has a very narrow scope, as is evident from the dual requirements of "*serious*" and "*fundamental*."[334]

[331] Argentina's Memorial, para 155.
[332] Argentina's Memorial, para 156; Argentina's Reply, paras 115-116.
[333] Argentina's Memorial, paras 156-165.
[334] Casinos' Counter-Memorial, para 212; Casinos' Rejoinder, para 79.

301. Numerous annulment committees have confirmed that it is for the applicant to specify: (a) the rule that it considers was breached; (b) the alleged departure from that rule; (c) that the rule is fundamental; and (d) that the alleged departure was serious.[335]

302. "*Fundamental procedural rules*" are confined to rules that go to the very essence of arbitral proceedings, and are essential to a fair hearing. These include, amongst others, the right to be heard; the opportunity to present one's full case; the principle of equal treatment of the parties; and the independence and impartiality of the tribunal.[336]

303. Argentina's critique of the Majority pertains to the latter's assessment of the evidence. This is distinct from the observance of fundamental rules of procedure, and cannot ground a challenge.[337]

304. Equally, the general standard of allocation of the burden of proof can be considered as a fundamental procedural rule for the purposes of Article 52(1)(d) of the ICSID Convention, but only the complete reversal of the burden of proof could suffice to ground a challenge.[338]

305. To meet the standard of "*serious*" departure, the applicant must demonstrate that the outcome of the proceedings would have been materially different due to a specific violation of the fundamental procedural rule.[339]

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[335] Casinos' Counter-Memorial, paras 213-214; Casinos' Rejoinder, para 79.

[336] Casinos' Counter-Memorial, paras 215-218, citing (*inter alia*) *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Argentina's Application for Annulment of 29 May 2019, para 164 (RALA-0049); *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Partial Annulment of 22 December 1989, para 5.06 (AALA-0013); *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Annulment of 18 December 2012, para 73 (AALA-0040).

[337] Casinos' Counter-Memorial, paras 219-220; Casinos' Rejoinder, para 81.

[338] Casinos' Counter-Memorial, paras 221-224; Casinos' Rejoinder, para 80, citing *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 84 (AALA-0048); *Republic of Madagascar* v. *(DS)2 S.A., Peter de Sutter and Kristof de Sutter* (ICSID Case No. ARB/17/18), Decision on the Annulment Application of 14 October 2022, para 143 (RALA-0050).

[339] Casinos' Counter-Memorial, paras 230-233; Casinos' Rejoinder, paras 82-83, citing (*inter alia*) *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment of 5 February 2002, para 58 (AALA-0042); *OI European Group BV v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on the Application for Annulment of 6 December 2018, para 320 (RALA-0001); *CDC Group plc v. Republic*

b. Challenges

306. Casinos submits that both limbs of Argentina's complaint under this head (*i.e.* that the Majority inappropriately shifted the burden of proof to Argentina, and that the tribunal disregarded evidence that could have impacted its decision) are incorrect. And even if they were correct, they are insufficient to meet the high threshold of Article 52(1)(d) of the ICSID Convention.[340]

307. According to Casinos, the Majority conducted an extensive analysis of the factual and legal arguments advanced by both Parties and the evidence they presented. In its evaluation of the evidence, the Majority acted in full accordance with the authority granted to it by Arbitration Rule 34. There was no departure, let alone a serious departure, from fundamental procedural rules. Moreover, Argentina fails to show that the purported violations would, even in the abstract, have led to a substantially different result.[341]

1. Burden of Proof

308. Casinos states that in none of the three cases identified by Argentina did the Majority reverse the burden of proof.

309. *Proof of Administrative Breaches:* According to Casinos, this complaint rests on a mischaracterization of the analysis of the Majority. This proceeded in two stages, with a consideration first of the scope of ENREJA's powers, followed by an examination as to whether ENREJA's sanction of revocation was proportional, as a matter of international law. The key decision was at the second stage, where the Majority held that the revocation was disproportionate and thus arbitrary. In the course of this analysis, there was no reversal of the burden of proof.[342]

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of Seychelles (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 49, (AALA-0018); *Adem Dogan* v. *Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment of 15 January 2016, para 208 (RALA-0005).

[340] Casinos' Counter-Memorial, para 236.

[341] Casinos' Counter-Memorial, para 236.

[342] Casinos' Counter-Memorial, paras 239-245.

310. As to Argentina's claims in relation to Resolution No. 380/12, and in particular its allegation that Casinos was unable to prove that Law No. 7020 did not impose an obligation to record and subsequently pay by cheque all prizes exceeding a certain amount of money, Casinos argues that this does not relate to any departure from a fundamental rule of procedure, but is simply the reintroduction by Argentina of arguments that the Majority has already heard and dismissed.[343]

311. *ENJASA's Failure to Apply for an Authorization to Hire Third Party Operators:* Casinos posits that this complaint fails because it is no more than a criticism of the Majority's assessment of the evidence. As such, it is incapable of establishing the annulment ground of Article 52(1)(d) ICSID Convention. Argentina also misleadingly portrays the arguments of Casinos in the arbitration and the Majority's decision. Casinos in fact argued that they never had to apply for authorizations in the first place, and so it naturally followed that they did not submit such applications as evidence in the Arbitration.[344]

312. *Qualification of the Revocation of the License as a Breach of the BIT:* According to Casinos, it is plain from the formulation of this complaint that Argentina is simply criticising the factual and legal assessment of the Majority, rather than any fundamental rule of procedure. As such, the complaint cannot establish the annulment ground of Article 52(1)(d) ICSID Convention.[345]

313. Casinos argues that Argentina, in any event, misleadingly portrays the considerations of the Majority in assessing the evidence before it. The record shows that the allegations raised by Argentina have no factual and legal basis. International tribunals routinely apply the principles of the ILC Articles to determine the causation of damages. In order to establish causality, tribunals virtually unanimously apply the "*but-for test*." These principles cannot be seriously criticised. Their actual application to the specific facts of

[343] Casinos' Counter-Memorial, paras 242-243.
[344] Casinos' Counter-Memorial, paras 246-251.
[345] Casinos' Counter-Memorial, para 252.

the case is *per se* incapable of meeting the threshold of a serious departure from a fundamental rule of procedure.[346]

2. Failure to Consider Evidence

314. Casinos contends that in all instances raised by Argentina, the Majority carefully considered the evidence before it. The actual complaint of Argentina is the weight and value that the Majority attached to the evidence. However, the assessment of the admissibility and the probative value of evidence is one of the core functions of an international tribunal. It is a matter that lies in the discretion of a tribunal that has heard witnesses and experts first hand. Argentina's allegation is, therefore, incapable of rising to the threshold of a serious departure from a fundamental rule of procedure.[347]

315. In addition, Casinos argues that Argentina misrepresents the record of the proceedings and the content of the Award in any event.[348]

316. *Alleged Administrative Breaches:* Argentina alleges that the Majority "*belittles the proven fact that ENJASA had breached the regulations*" and even provided "*justification*" for these alleged breaches. However, according to Casinos, this description of the assessment undertaken by the Majority is incorrect and incomplete. Moreover, Argentina's formulation of the complaint shows that the heart of the matter is its dissatisfaction with the assessment of the evidence by the Majority. Argentina does not even allege that evidence was disregarded.[349]

317. Casinos posits that in the Arbitration, Argentina asserted that regulatory laws were breached on multiple occasions, whereas Casinos asserted that these breaches had actually never occurred and put forward evidence to support this position. Each of these allegations was examined in the Award, and the Majority's analysis was both detailed and careful. The

[346] Casinos' Counter-Memorial, paras 253-254.
[347] Casinos' Counter-Memorial, para 256.
[348] Casinos' Counter-Memorial, paras 256-279.
[349] Casinos' Counter-Memorial, para 257.

Majority did not make sweeping, blanket evaluations, nor did it disregard anything. Rather, it comprehensively considered the evidence before it. It is the legal assessment of the evidence that Argentina disagrees with. However, dissatisfaction of one party (which is inherent in nearly every arbitral award) with the factual and legal assessment of the tribunal is not a ground for the annulment of an award.[350]

318. *Acknowledgement of Breaches:* Argentina refers to the fact that in 2013, a fine had been imposed on ENJASA relating to a late registration of a payment of a prize, and ENJASA had not questioned its obligation to register payments *per se*, which was an "*acknowledgement*" by ENJASA of an obligation to register payments that was not taken into consideration by the Majority. But these assertions, Casinos argues, are neither comprehensible nor in line with the findings of the Award. As the record shows, the Majority did in fact consider Argentina's case on this issue.[351]

319. *The evidence of Mr Biagosch on Payment by Cheque:* Casinos asserts that Argentina's case here is advanced by means of "*reverse inference*" – that because the Majority did not come to the same conclusion as Mr. Biagosch (who is not a lawyer), the majority did not consider the testimony of Mr. Biagosch. However, the fact that the Majority did not come to the conclusion advocated by Argentina does not indicate in any way that it did not consider the evidence of Mr Biagosch on this point.[352]

320. Further and in any event, Argentina's case misstates the content of Mr. Biagosch's testimony.[353]

321. *Testimony on the Notion of "Operator:"* The interpretation of Law No. 7020 is a legal question. Counsel for Argentina made a point of emphasizing that Mr. Biagosch is not an

[350] Casinos' Counter-Memorial, paras 258-263.
[351] Casinos' Counter-Memorial, paras 264-267.
[352] Casinos' Counter-Memorial, para 269.
[353] Casinos' Counter-Memorial, para 270.

expert on the law. In any event, as the Award shows, the Majority relied on the testimony of the experts of both Parties.[354]

322. *Allegations on "Final Beneficiaries:"* According to Casinos, Argentina's case on this issue (that the Majority disregarded evidence showing that the unlawful outsourcing of "*final beneficiaries*" (*i.e.* operators) was a regular practice of ENJASA based on previous conduct) is belied by the record of the proceedings. In fact, the Majority took into consideration all alleged violations. Many of these were, however, time-barred – and therefore could not justify the imposition of the most severe sanction, the revocation of ENJASA's License.[355]

323. Casinos posits that, overall, in all instances where Argentina asserts that crucial evidence was disregarded, that evidence was actually considered by the Majority. The fact that the latter did not evaluate the evidence in the same way as Argentina requests does not meet the annulment standard of Article 52(2)(d) ICSID Convention.[356]

B. THE COMMITTEE'S ANALYSIS

(1) The Standard

324. The Committee recalls the three general propositions with regard to the nature of the ICSID annulment process that were set out earlier in the context of Article 52(1)(b).[357]

325. Article 52(1)(d) comprises two requirements: (a) a rule of procedure that is "*fundamental*;" and (b) a departure from such a rule that is "*serious*."

[354] Casinos' Counter-Memorial, paras 272-275.
[355] Casinos' Counter-Memorial, paras 276-278.
[356] Casinos' Counter-Memorial, para 279.
[357] *See* paras 141-146 above.

326. The inclusion of both requirements within the one provision denotes that this is a ground for annulment of narrow scope, reserved for exceptional cases.[358]

327. *Fundamental Rules of Procedure:* As noted in the ICSID Background Paper 2016, the phrase "*fundamental rules of procedure*" was explained by the drafters of the ICSID Convention as a reference to "*principles,*" including the principles of natural justice such as the right to be heard. The drafting history indicates that "*this ground is concerned with the integrity and fairness of the arbitral process*."[359] As explained by Professor Schreuer, the intention was to restrict annulment to violations of principles that are essential to a fair hearing.[360]

328. In *Micula v Romania*, it was noted that, in view of the importance of the finality of awards:

> the threshold for finding that a rule of procedure is fundamental is very high.[361]

329. Relevantly for present purposes, and as identified by previous *ad hoc* committees, these "*principles*" include (amongst others): (1) the treatment of evidence; and (2) the treatment of burden of proof.[362]

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[358] As recognised by previous *ad hoc* committees, *e.g. InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain* (ICSID Case No. ARB/14/12), Decision on Annulment of 10 June 2022, para 722 (AALA-0021).

[359] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, paras 23, 98-101 (AALA-0009). See similarly the ICSID Updated Background Paper 2024, paras 23-24, 104-107.

[360] As noted in Casinos' Counter-Memorial, para 217, citing Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 52, p. 980 (AALA-0046). See similarly *Daimler Financial Services A.G. v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment of 7 January 2015, para 265 (RALA-0024).

[361] *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment of 26 February 2016, para 134 (AALA-0024).

[362] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 99 (AALA-0009); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 16 May 1986, paras 90-91 (AALA-0043); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, para 6.80 (AALA-0012); *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment of 5 February 2002, para 59-61 (AALA-0042); *Iberdrola Energía, S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment of 13 January 2015, para 105 (AALA-0041); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on

330. As to (1) the rules of evidence, a key distinction must be drawn between (a) the tribunal's exercise of its discretion regarding the admission and assessment of evidence, and (b) the tribunal's observance of fundamental rules of procedure regarding evidence. An ICSID tribunal has a broad discretion under the ICSID Convention and the Arbitration Rules to determine the admissibility and the probative weight of evidence, in the context of determining whether a party has discharged its burden of proof. Arbitration Rule 34(1), in particular, provides that:

> [t]he Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

331. Article 52(1)(d) of the ICSID Convention does not provide a basis for an applicant to re-open or appeal the tribunal's exercise of its discretion in this regard. Rather it only permits an *ad hoc* committee to step in where a tribunal has exceeded the broad scope of its discretionary authority such as to undermine the integrity and basic fairness of the process. As suggested by Casinos, this might occur, for example, if there had been a complete and inexplicable disregard of an essential piece of evidence that should have been considered and that would have changed the tribunal's decision.[363] But this will be a rare occurrence, and will always be tempered by the well-established principles that a tribunal need not rule separately on each argument of law or point of fact,[364] and need not refer in its decision to every piece of evidence that was adduced before it.[365]

332. Similarly, as to (2) the allocation and determination of the burden of proof, this is a matter within the discretion of an ICSID tribunal, such that, as noted by Casinos, only the

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Annulment of 1 February 2016, paras 309, 314 (RALA-0008); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (II) (ICSID Case No. ARB/12/23), Decision on Annulment of 28 December 2018, para 88 (AALA-0022).

[363] Casinos' Counter-Memorial, paras 226, 229, citing *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3), Decision on Annulment of 13 April 2020, para 318 (RALA-0021); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 16 May 1986, para 88 (AALA-0043).

[364] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, para 346 (AALA-0023).

[365] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 149 (AALA-0048).

"*reversal of the burden of proof*"[366] (or something which can be said to lie beyond the tribunal's discretionary scope) could ground an annulment. The Committee does not accept, in this regard, Argentina's contention that an annulment committee has a broader scope to second-guess the discretion of a tribunal, including "*the dismissal of evidence* [which is] *unreasonable and unfounded*."[367] Importantly, a complete reversal of the burden of proof is very different to the exercise of preferring one side's evidence to that of the other, or determining that evidence is sufficient to discharge a burden of proof. In the words of the *ad hoc* committee in *De Sutter v Madagascar*:

> [T]here was no such reversal in the present case. By favouring the evidence emanating from Mr Rafanomezantsoa, the Tribunal effectively found that the Respondents had discharged their burden of proving their case. That is not a reversal of the burden of proof.[368]

333. *Serious Departure:* As noted in the ICSID Background Paper 2016:

> the task of determining whether an alleged fundamental rule of procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the Tribunal.[369]

334. Many annulment committees have interpreted "*serious*" in this context as requiring the applicant to have been deprived of the protection of the rule in question, by reason of which it can be shown that the tribunal reached a substantially different result.[370]

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[366] Casinos' Counter-Memorial, para 222; Casinos' Rejoinder, para 80, citing *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 84 (AALA-0048); *Republic of Madagascar* v. *(DS)2 S.A., Peter de Sutter and Kristof de Sutter* (ICSID Case No. ARB/17/18), Decision on the Annulment Application of 14 October 2022, para 143 (RALA-0050).

[367] Argentina's Reply, paras 86-89.

[368] *Republic of Madagascar* v. *(DS)2 S.A., Peter de Sutter and Kristof de Sutter* (ICSID Case No. ARB/17/18), Decision on the Annulment Application of 14 October 2022, para 143 (RALA-0050).

[369] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 100 (AALA-0009).

[370] As summarized at Casinos' Counter-Memorial, para 230, citing (*inter alia*) *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment of 11 June 2020, para 175 (AALA-0001); *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4),

335. Whilst Argentina contends that it is sufficient to demonstrate that a different application of the procedural rule in question "*may*" have had an impact on the award,[371] Casinos contends that this puts the test too low, and that the applicant must prove that "*the outcome of the proceedings would have been materially different*."[372]

336. Previous annulment committees have grappled with this issue. By way of example:

(i) In *TECO Guatemala Holdings LLC v. Guatemala*, the committee held that:

> Requiring an applicant to show that it would have won the case or that the result of the case would have been different if the rule of procedure had been respected is a highly speculative exercise. An annulment committee cannot determine with any degree of certainty whether any of these results would have occurred without placing itself in the shoes of a tribunal, something which is not within its powers to do. What a committee can determine however is whether the tribunal's compliance with a rule of procedure could potentially have affected the award.[373]

(ii) In *Tulip Real Estate and Development Netherlands B.V. v. Turkey*, the committee held that:

> This *ad hoc* Committee considers the approach adopted in *Pey Casado* reasonable. To require an applicant to prove that the award would actually have been different, had the rule of procedure been observed, may impose an unrealistically high burden of proof. Where a complex decision depends on a number of factors, it is almost impossible to prove with certainty whether the change of one parameter would have altered the outcome. Therefore, an applicant

Decision on Application for Annulment of 5 February 2002, para 58 (AALA-0042); *Adem Dogan* v. *Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment of 15 January 2016, para 208 (RALA-0005); *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision of the *ad hoc* Committee on the Application for Annulment of 24 January 2014, para 164 (RALA-0052); *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/01), Decision on Annulment of 1 February 2016, para 308 (RALA-0008); *Ioan Micula, Viorel Micula and others v. Romania* (ICSID Case No. ARB/05/20), Decision on Annulment of 26 February 2016, para 134 (AALA-0024).

[371] Argentina's Memorial, para 126; Argentina's Reply, paras 91-94.

[372] Casinos' Counter-Memorial, paras 230-233; Casinos' Rejoinder, paras 82-83.

[373] *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para 85 (AALA-0049).

> must demonstrate that the observance of the rule had the potential of causing the tribunal to render an award substantially different from what it actually decided.[374]

(iii) In *Iberdrola Energía S.A. v. Guatemala*, the committee held:

> [A] departure from a rule is serious if it is material in nature and is such that it deprives a party of the benefit that such rule is intended to offer. It has thus been found that a serious departure potentially entails a decision that is different from that which would have been adopted if the rule of procedure that was set aside had been observed.[375]

(iv) In *Caratube International Oil Company LLP v. Kazakhstan*, the committee held that:

> A departure is serious if the violation of the fundamental rule of procedure produced a material impact on the award. The applicant however is not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied. As the Wena committee stated, what the applicant must simply demonstrate is '*the impact that the issue may have had on the Award*'.[376]

337. The Committee considers that the correct position lies in between the extremes advanced by the Parties here. On the one hand, the threshold for which Argentina contends is too low. Proving only that the tribunal's decision "*might*" have been different would appear to allow for an open-ended range of even remote possibilities, and the re-opening and speculative second-guessing by an annulment committee of decisions taken in the

[374] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 78 (AALA-0048).

[375] Argentina's Reply, para 91, fn 141, citing (*inter alia*) *Iberdrola Energía S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Decision on Annulment of 13 January 2015, para 104 (AALA-0041).

[376] *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on Annulment of 21 February 2014, para 99 (AALA-0047).

arbitration.[377] On the other hand, it will rarely be possible, or indeed appropriate, for an annulment committee to find with absolute certainty what a tribunal would have held.

338. To this end, the Committee considers that an applicant must demonstrate with a high degree of likelihood that the outcome of the proceedings would have been different, and the difference itself must be material in all the circumstances.

(2) Challenges

339. The Committee has considered each of the points now advanced by Argentina in support of its case that the Award should be annulled pursuant to Article 52(1)(d) of the ICSID Convention. For the reasons set out below, the Committee is unable to find any basis to annul the Award under this provision.

340. The Award is clearly the product of careful and extensive analysis of all the evidence and submissions presented by both Parties, and entailed the exercise of discretion by the Majority within the scope of its mandate under the ICSID Convention and Arbitration Rules. In substance, each of Argentina's complaints is a challenge to the merits of the determinations made by the Majority – complaints that lie beyond the remit of the annulment process.

341. Each of Argentina's complaints is addressed in turn below.

1. Burden of Proof

342. As noted earlier,[378] as examples of its more general complaint that the Majority reversed the burden of proof in its overall approach, Argentina has identified three specific instances as follows:

[377] As per the criticism noted in *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on the Application for Annulment of 6 December 2018, para 320 (RALA-0001).

[378] *See* para 285 above.

(i) failing to require Casinos to prove their argument on their obligations under the regulatory framework and the consequences of breaching these obligations;

(ii) as regards the sanction arising from ENJASA's failure to apply for an authorization to hire third operators of games of chance, ignoring the well-established fact that ENJASA had not requested any authorization from ENREJA and in relying on the fact that Argentina had not proved that ENREJA was not aware of that situation;

(iii) finding that the revocation of the License amounted to a violation of the BIT, despite failing to require Casinos to prove the connection between the alleged damage and the revocation, and in ignoring the evidence that showed the existence of sufficient proof to justify the revocation under the applicable law.[379]

(i) The obligations of ENJASA under the regulatory framework and the consequences of a breach

343. Argentina contends that the Majority reversed the burden of proof by requiring Argentina to prove that ENJASA's breaches of the regulatory framework had occurred, as opposed to requiring Casinos to prove that the breaches had not occurred.[380]

344. The Committee considers that this misdescribes the Majority's enquiry. As Casinos has observed,[381] the Majority's analysis proceeded in two stages. First, it addressed ENREJA's scope of powers, and due process in the proceedings before it. Second, it examined whether the revocation sanction ENREJA imposed was proportionate, as a key element in the international standard of "*arbitrariness*."

345. In the first stage of the analysis, the Majority concluded that Argentina had demonstrated that ENREJA had the power to impose sanctions, including revocation of the License. In the second stage of the analysis, the Majority concluded that Casinos had demonstrated that the revocation of the License in the circumstances here was not proportionate, and was

[379] Argentina's Memorial, para 129.
[380] Argentina's Memorial, paras 130-133; Argentina's Reply, paras 95-99.
[381] Casinos' Counter-Memorial, paras 240-245.

therefore arbitrary.[382] The Committee can see no reversal of the burden of proof at either of these two stages.

346. None of Argentina's specific examples under this head change this conclusion. Argentina contends that in relation to Resolution No. 380/12, the Majority failed to explain the standard used in finding that certain sanctions were manifestly unsupported in fact and law, whereas others were not.[383] It contends that:

> In only two paragraphs of the Award, relating to Resolution No. 380/12, no explanation may be found as to why Casinos was relieved of proving its compliance with the anti–money laundering rules, in particular, the registration of payments of prizes for lottery games in the anti–money laundering book, which is what purportedly led to the conclusion that Resolution No. 380/12 was not reasonable.[384]

347. But this is no more than a complaint about the Majority's substantive conclusion, and its assessment of the evidence before it. It was not a conclusion that depended upon the reversal of the burden of proof.

348. Further, as Casinos has noted,[385] the fact that the Majority only devoted two paragraphs to its findings on this issue is no indication, in itself, of a reversal of the burden of proof.

349. Similarly, Argentina complains about the Majority's conclusions on Resolution No. 381/12.[386] But again the determination on this issue in the Award was premised on the rejection of Argentina's submissions rather than a reversal of the burden of proof. Indeed, many of the submissions that the Majority rejected are simply deployed once again by Argentina in support of its application to annul.

[382] Award, paras 358, 360-396.
[383] Argentina's Memorial, para 136; Argentina's Reply, paras 98-99.
[384] Argentina's Reply, para 99.
[385] Casinos' Rejoinder, para 89.
[386] Argentina's Memorial, para 137; Argentina's Reply, paras 100-101.

350. Specifically, as noted by Casinos,[387] the Majority found that Resolution No. 90/12 (providing for the duty to pay prizes over ARS 10,000 by cheque) only became effective as of 1 May 2012. Given that the breaches that were relied upon in Resolution No. 380/12 had taken place before this date, the Majority concluded that, in this regard, ENREJA had based its findings on manifestly incorrect interpretations of the rules (by reference to the basic principle in criminal matters: "*nullum crimen sine lege*").[388] This conclusion was not affected by the fact that ENREJA had imposed, on various occasions, sanctions on ENJASA for not paying prizes exceeding ARS 10,000 by cheque prior to the entry into force of Resolution No. 90/12. According to the Majority:

> subsequent administrative practice, even if accepted by the subjects of the law, cannot, in the Tribunal's view, result in the creation of a primary norm that would impose a legal obligation on ENJASA to the effect that future behaviour that is not forbidden by the letter of the law would turn into a breach of the law that could be enforced through sanctions, including through the revocation of ENJASA's operating license. Consequently, the charge in Resolution No. 381/12 that ENJASA had violated anti-money laundering rules by not paying prizes above ARS 10,000 by check in August and September 2011, lacks any justification in the applicable law and must be considered as arbitrary under international law.[389]

351. Similarly, the Majority concluded that ENREJA had manifestly disregarded the one-year time-bar contained in Article 49 of Law No. 7020, given that all alleged infractions investigated under Resolution No. 381/12 had been committed more than one year before the investigation started.[390] Contrary to Argentina's case, this was not a conclusion that rested upon the unwarranted imposition of the burden of proof upon Argentina. Rather, it was a determination that was consequential upon (*inter alia*) the fact that Article 49 of Law No. 7020 contained an explicit one-year time bar; a rejection of Argentina's legal expert Prof. Marcer's testimony that this explicit time-bar would not apply to a license revocation

[387] Casinos' Counter-Memorial, paras 242-244.
[388] Award, paras 381-387.
[389] Award, para 384.
[390] Award, para 385.

based on Article 13 of Law No.7020; and the acceptance instead of the testimony of Casinos' legal experts Prof. García Pullés and Prof. Bianchi, that under Argentine law, a shorter time bar, or statute of limitations, contained in a provincial statute prevails over similar provisions in a federal law.[391]

352. The nature of this reasoning, which is reflected throughout the Award, reveals a careful evaluation by the Majority of the entire evidentiary record before it. Once again, the Committee can detect no reversal of any burden of proof, nor any departure from any rule of procedure for the purposes of Article 52(1)(d) of the ICSID Convention.

(ii) The sanctions for ENJASA's failure to apply for an authorization to hire third party operators

353. As summarised earlier, Argentina contends the Majority reversed the burden of proof in finding that the sanction imposed by ENREJA on ENJASA due to the breach of its obligation to request an authorization to hire third parties to operate games of chance was "*manifest*," despite the fact that Casinos was unable to prove that ENJASA had requested such authorization. This was aggravated by the fact that the Majority considered that it was for Argentina to prove that ENREJA was unaware of the situation in this regard.[392]

354. Once again, the Committee is unable to accept Argentina's criticisms. In substance, Argentina is simply challenging the determination of the Majority on merits.

355. As noted by Casinos,[393] Argentina's complaint with respect to the treatment in the Award of Resolution No. 384/12 misstates the position taken by Casinos in the Arbitration on this issue. This was summarised in the Award by the Majority, in relevant part, as follows:

> In respect of Resolution No. 384/12, which charged ENJASA with having breached Article 5 of the Law No. 7020 by sub-licensing the operations of several slot machine halls in different locations to third operators without requesting ENREJA's approval, and involving

[391] Award, para 386.

[392] Argentina's Memorial, paras 138-140; Argentina's Reply, para 103.

[393] Casinos' Counter-Memorial, para 248; Casino's Rejoinder, paras 97-98.

> third operators in certain live games, [Casinos] […] reiterate the arguments that ENJASA had already made in answering to ENREJA's charges […] namely that some of the individuals and companies in question were operating slot machine halls under permits granted by the BPAS (Mr. Navarrete, Mr. Colloricchio, and New Star), while others were not operators of games of chance at all (Emsenor, Video Drome, Prodec, and DEK). [Casinos] moreover observe that ENREJA could see from the investment plans Mr. Navarrete and New Star had submitted to ENREJA after the revocation of ENJASA's license that both had been appointed as operators of slot machine halls by BPAS.[394]
>
> [Casinos] further submit that ENJASA, although it had been granted an exclusive license, had accepted, at the request of both the Province of Salta and ENREJA, who otherwise feared social and political problems, that operators authorized by BPAS could continue operating and that their status would not be altered due to the exclusivity of the license granted to ENJASA. Moreover, [Casinos] point out, ENREJA was aware of all contractual arrangements ENJASA had with these pre-existing operators concerning the operation of slot machines and had accepted that the fees from these operators would be paid to ENREJA through ENJASA. [Casinos] also maintain that ENREJA had, at all times, meticulously audited ENJASA's operations of slot machine halls and therefore had known about these arrangements all along.[395]
>
> [Casinos] also point out that Article 5 of Law No. 7020 forbids the licensee to appoint operators without ENREJA's authorisation, but does not provide a definition of what an "operator" is. [Casinos] argue that ENREJA made an unjustifiably broad interpretation of the term "operator" in Article 5 of Law No. 7020 if it included companies under that definition that merely rented property to ENJASA for the operation of a slot machine hall (Emsenor), that supplied hardware and software for games of chance to ENJASA (Prodec and DEK), or leased slot machines to ENJASA (Video Drome). In this context, Claimants further argue that one does not

[394] Award, para 170.

[395] Award, para 171.

> become an "operator" by the mere fact of sharing revenues and profits from gaming operations.[396]

356. Each of these submissions was the subject of analysis and evaluation by the Majority, which ultimately arrived at the conclusion that ENREJA had acted arbitrarily from the perspective of international law by basing its findings on:

> either a manifestly incomprehensible interpretation of the concept of "operator" in the sense of Article 5 of Law No. 7020, a manifestly incorrect investigation into the facts, or a combination of both types of errors.[397]

357. This conclusion was premised on a number of detailed findings, including in particular that:

(i) ENREJA acted in a manifestly arbitrary manner in considering Emsenor, Prodec and DEK as well as Video Drome as "*operators*" of games of chance for the purposes of Article 5 of Law No.7020, given that the experts of both Parties had agreed on the requirements that were relevant in this regard,[398] and the type of activities in which each entity had engaged could not plausibly be considered to qualify (Emsenor, Prodec, DEK and Video Drome merely rented property or slot machines to ENJASA or provided software or hardware, but did not operate games of chance).[399]

(ii) ENREJA acted in a manifestly arbitrary manner in qualifying Mr. Navarrete, New Star, and Mr. Colloricchio as unauthorized operators of games of chance, when each (and in the case of Mr. Colloricchio his two predecessors from whom he had

[396] Award, para 172. Further submissions made by Casinos on the allegations in Resolution No. 384/12 were recorded in the Award paras 173 and 174.

[397] Award, para 388.

[398] Hearing on the Merits, Tr., Day 5, 84:9 (García Pullés, stating that an operator is not the one "*supplying the ship*," but the one "*steering the ship*"); 113:7-9 (Bianchi, stating "*the operator is the one who is responsible for the business, who runs the business*"); 130:16-17, 197:6 (Marcer, stating that an operator is a person *"who carries out any of the activities of the license holder,*" whose function is "*to exploit,*" "*to operate*") (English version).

[399] Award, para 389.

taken over the slot machine halls), had been authorized to operate games of chance by BPAS, before ENJASA had been granted its exclusive license, and given that (so the Majority found) ENREJA was aware of the continued activities of previously existing operators, including Mr. Navarrete, Mr. Colloricchio, and New Star, and did not protest against their continued operation.[400]

(iii) In any event, it cannot be plausibly considered that ENJASA had seriously breached its obligation under Article 5 of Law No. 7020 by hiring these "*operators*" without ENREJA's authorization, given that between 1999 (when ENJASA became the exclusive license holder) and 2012 – *i.e.* for 13 years – Mr. Navarrete, Mr. Colloricchio, and New Star frequently had been controlled by ENREJA and their activities had been ratified by ENREJA.[401]

358. Accordingly, the Majority accepted Casinos' case that applications for authorizations were never required in the first place. Importantly, the nature of this case was such that Casinos was obviously not required to submit applications for authorizations as evidence.

359. To this end, Argentina's assertion that:

> Casinos was relieved of its duty to prove its compliance with the anti–money laundering framework in relation to the operation of the License by third parties, which allowed the Tribunal to conclude that the revocation was arbitrary.[402]

is without foundation.

360. With regard to Argentina's frequent criticism that the Majority failed to address specific matters that were put before it, the Committee recalls the well-established principle that a

[400] Award, para 390.
[401] Award, para 392.
[402] Argentina's Reply, para 103.

tribunal is not required to address or rule upon each item of evidence, or each argument, separately.[403]

361. Furthermore, none of the reasoning which Argentina impugns, in the Committee's view, reflects a reversal of any burden of proof, or any departure from any rule of procedure for the purposes of Article 52(1)(d) of the ICSID Convention.

(iii) ***The revocation of the License as a breach of the BIT***

362. As summarised earlier, Argentina contends that the Majority shifted the burden of proof by releasing Casinos from its duty to demonstrate the link between the damage allegedly sustained and the revocation, and "*by closing its eyes to the evidence that showed the existence of sufficient proof in support of the revocation under the applicable regulations*" as it found that the revocation of the License was in breach of the BIT.[404]

363. As with the other complaints under this head, the Committee is unable to accept Argentina's criticisms. Once again, in substance, Argentina is simply challenging the determination of the Majority on merits.

364. As recalled by Casinos,[405] it maintained in the Arbitration that:

(i) ENREJA's revocation of the License was an arbitrary act;[406] and

(ii) The damages it claimed were caused by ENREJA's revocation of the License.[407]

[403] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, para 346 (AALA-0023); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 149 (AALA-0048).

[404] Argentina's Memorial, paras 141-143; Argentina's Reply, paras 104-107.

[405] Casinos' Counter-Memorial, para 253.

[406] Award, paras 154-183.

[407] Award, paras 448-482.

365. As already elaborated earlier in this Decision, the nature of ENREJA's revocation as a matter of international law was the subject of detailed analysis by the Majority.[408] The latter concluded – as it was entitled to do – that ENJASA had not committed most of the breaches of which ENREJA had accused it, and that ENREJA's revocation of the License qualified as an indirect expropriation, and that, even if the breaches had occurred, revocation of the License was disproportionate and thus a violation of the BIT.

366. Importantly, in the course of its analysis, the Majority allocated to Casinos the burden of proof with regard to causation and the amount of damages:

> [Argentina's] duty to provide full reparation encompasses both compensation for the value of the expropriated investment, that is, [Casinos'] direct shareholding in L&E and its indirect shareholding in ENJASA, as well as any consequential damages that were caused as a result of the unlawful expropriation and that [Casinos] would not have incurred but for [Argentina's] unlawful conduct. In this context, the Tribunal observes that there must be a proximate causal link between the violation of international law and the injury caused to [Casinos]. Article 31(1) of the ILC Articles confirms that only "the injury caused by the internationally wrongful act" has to be fully repaired. By contrast, hypothetical, speculative as well as undetermined and remote damage cannot be compensated. Moreover, the burden of proof in respect of causation and the amount of damages lies with [Casinos].[409]

367. Indeed, in Footnote 520 of the Award, the Majority specifically noted its agreement with Argentina's position in this regard, citing Argentina's Counter-Memorial on the Merits, para 633, and Argentina's Rejoinder on the Merits, paras. 509-511, as well as *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Compensation)* Judgment (2 February 2018) [2018] ICJ Reports 15, 26, para 32.

368. As to damages, having assessed the extensive expert testimony adduced by both Parties, the Majority arrived at the conclusion that the revocation of the License had caused loss to

[408] Award, paras 357-416.
[409] Award, para 442.

Casinos, and duly assessed that loss on the basis of the international law obligation of full reparation.[410] Specifically on causation, on the basis of the evidence on the record, the Majority concluded as follows:

> ENJASA's exclusive license, which granted a monopoly for operating games of chance in the Province of Salta, was the heart of its entire business operation, the irreplaceable organ that ensured the functioning and survival of the entire body. Without it, ENJASA's operations in the gaming sector became impossible. What remained was an empty shell of assets, employees, and goodwill, a body that was left to decompose economically. The revocation of ENJASA's license, which was confirmed by Resolution No. 315/13, was permanent and was consolidated by the Province allowing new operators to step into ENJASA's shoes. Similarly, as [Casinos'] Expert Rosen showed in his Second Report, 98.8% of the value of L&E consisted of ENJASA's license. The revocation of ENJASA's license therefore permanently and substantially deprived [Casinos] of their indirect investment in ENJASA and their direct investment in L&E. Both companies were empty shells after the revocation of ENJASA's license.[411]

369. The Committee can find no fault with this approach. There has been no reversal of any burden of proof, whether in relation to the three instances on which Argentina has focused or more generally, and nor has there been any other departure from any rule of procedure for the purposes of Article 52(1)(d) of the ICSID Convention.

2. Failure to Consider Evidence

370. As summarised earlier, Argentina identifies a number of points where the Majority is said to have committed serious violations of key procedural rules by failing to consider evidence that had the potential to alter the conclusions at which they arrived:

[410] Award, Section VII ("Quantum").
[411] Award, para 353.

(i) a failure to consider relevant evidence relating to the breaches of the applicable regulations by ENJASA;

(ii) a failure to consider material evidence concerning the anti-money laundering rules;

(iii) a failure to consider key evidence submitted by Argentina, and also acknowledgements made by Casinos, regarding ENJASA's breaches of the applicable regulations.[412]

371. In its response, Casinos has broken down Argentina's case into five specific instances where it is alleged that evidence was disregarded by the Majority, as follows:[413]

(i) in regard to ENJASA's administrative breaches;

(ii) in regard to previous acknowledgement of breaches;

(iii) in regard to the evidence of Mr Biagosch regarding payment by cheque;

(iv) in regard to the testimony of the Parties' experts on the notion of "*operator*;"

(v) in regard to Argentina's allegations on "*final beneficiaries*."

372. It is helpful to consider each of these five instances in turn.

(i) ENJASA's administrative breaches

373. It is Argentina's case that the Majority did not pay any or sufficient regard to the "*proven fact*" that ENJASA breached the relevant regulations, and even went so far as to provide its own justification for some of the breaches in question.[414]

[412] Argentina's Memorial, para 144.
[413] Casinos' Counter-Memorial, paras 255-279.
[414] Argentina's Memorial, para 147.

374. The Committee is unpersuaded on this issue. Once again, the complaint, in essence, is on the merits of the Majority's determination.

375. As set out earlier in this Decision, Argentina advanced evidence and submissions on a number of alleged breaches of regulations by ENJASA[415] and, in turn, Casinos adduced evidence and submissions by way of response.[416] As is apparent from the Award, the Majority carefully considered the full record on these issues, and produced a detailed and careful analysis on each alleged breach underlying Resolution No. 240/13.[417]

376. The Majority summarised its determinations as follows:

> In examining the infractions ENREJA claimed ENJASA had committed in Resolutions Nos. 380/12, 381/12, and 384/12, the Tribunal concludes that ENREJA's findings on these infractions in Resolution No. 240/13 were, to a predominant extent, based on manifestly arbitrary determinations of fact and law. This included in particular ENREJA's interpretation of anti-money laundering rules, disregard for the applicable statute of limitations, the legal qualifications of certain facts, and/or disregard of its own long-time acceptance of certain facts. Taken together, these aspects show that ENREJA's overall findings on ENJASA's breaches of the regulatory framework made in Resolution No. 240/13 were arbitrary and not in accordance with the requirements of the rule of law under international law.
>
> ENREJA's findings of breach in Resolution No. 240/13 that the Tribunal does not find fault with are essentially limited to certain issues with the registration of payments of prizes addressed in Resolution No. 380/12, namely the failure to properly register the payment of a prize of ARS 12,000 won on 30 January 2012 and the erroneous registration of an expired prize of ARS 15,000 won on 2 March 2012. These breaches, however, hardly could have justified a sanction as severe as revoking ENJASA's exclusive operating license (even if prior sanctions against ENJASA legitimately could be taken into account as indications of ENJASA's recidivism). The

[415] As summarised in the Award, paras 243-252.

[416] As summarised in the Award, paras 155-179.

[417] Award, paras 377-396.

> conclusion the Tribunal therefore draws is that ENREJA's determinations on many of ENJASA's breaches of the regulatory framework, and the consequences ENREJA attached to these determinations, namely the revocation of ENJASA's license, were arbitrary under international law.[418]

377. This is not an analysis that reveals any failure to consider evidence. In substance, Argentina's complaint is really with the weight and probative value that has been attached by the Majority to the evidence and submissions on each issue. This, however, is a matter within the Tribunal's discretion, and beyond the scope of the grounds for annulment.

378. In so far as Argentina's complaint is that the Majority failed "*to consider the evidence in connection with the duty of due diligence to prevent money laundering in games of chance operated in bordering territories*" as it "*only made general reference to the anti–money laundering rules in its findings on ENREJA's behaviour in applying the regulatory framework*,"[419] the Committee recalls the well-established principle that a tribunal need not rule separately on each argument of law or point of fact,[420] and need not refer in its decision to every piece of evidence that was adduced before it.[421] As put by Casinos:

> The lack of reference to all the evidence presented by the parties is not an indication of an error of procedure. It is an instance of the exercise of the judicial function of a tribunal to choose which evidence it finds relevant and which it does not.[422]

379. As to Argentina's specific allegation that the Award contains only one reference to the FATF in the section relating to the powers to regulate, and that the Majority did not consider evidence on the record relating to standards for gaming regulations set by the FATF recommendations,[423] it remains the case that the Majority did make reference to the

[418] Award, paras 395-396.

[419] Argentina's Reply, paras 109 and 111.

[420] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, para 346 (AALA-0023).

[421] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 149 (AALA-0048).

[422] Casinos' Rejoinder, para 108.

[423] Argentina's Reply, paras 114-115.

FATF in the course of its analysis of the legal framework.[424] Precisely how the FATF was assessed is a matter beyond the scope of annulment proceedings.

380. Argentina also complains that the Award makes no reference to the UIF, and the domestic regulations issued by it with respect to risk management and registration duties.[425] As Casinos has summarised,[426] Argentina had initially referred to the UIF in the underlying proceedings as background information in the context of "*efforts in the field of money laundering*," and to support its claim that "*[t]he Argentine Republic made considerable progress in the prevention of money laundering*."[427] Thereafter, in its Post-Hearing Brief, Argentina relied on the expert testimony of Mr. Biagosch that ENREJA's sanction on ENJASA was justified, in view of the sanction that had been imposed on ENJASA by the UIF.[428] Casinos also relied on the UIF, contending that *"[as] the investigation of Argentina's Anti-Money Laundering Unit UIF confirmed, ENJASA had appropriate processes and controls in place to prevent money laundering*."[429]

381. The Majority made reference to Argentina's submissions on the UIF,[430] but reasoned that its task was to "*examine* [...] *how the regulatory framework in place was applied in the present case*."[431] Since ENREJA did not invoke the UIF (or the FATF) when revoking the License, there was no need to examine either. This is a conclusion that was well within the authority of the Tribunal.

[424] Award, para 357.
[425] Argentina's Reply, paras 113-115.
[426] Casinos' Rejoinder, paras 112-113.
[427] Argentina's Rejoinder, para 112.
[428] Respondent' Post-Hearing Brief (24 January 2020), para 184.
[429] Claimants' Post-Hearing Brief (24 January 2020), para 391.
[430] Award, para 183.
[431] Award, paras 358-359.

382. As noted earlier, Argentina also complains that the Award made no reference to the GAFILAT, and that the President of the Tribunal displayed a lack of knowledge about GAFILAT which was evident from the questions that he asked.[432]

383. Once again, the Committee can find in this complaint no departure (whether or not serious) from a fundamental procedural rule. As Casinos has noted,[433] the fact that the President asked a question about GAFILAT, if anything, indicates that this issue was considered by the Majority. Notably, ENREJA did not refer to or rely on GAFILAT when it revoked the License. As with the UIF, it therefore appears that GAFILAT was not central to the Majority's assessment. But, ultimately, whether or not it was relevant, and how, remain within the sole preserve of the Tribunal itself and cannot be second-guessed in the context of the annulment process.

(ii) Previous acknowledgement of breaches and previous warnings

384. Argentina argues that the Majority failed to consider previous occasions when ENJASA's breaches of regulations had been "*acknowledged*." In particular, in 2013 a fine had been imposed on ENJASA for late registration of a payment of a prize, in proceedings in which ENJASA had not questioned its obligation to register payments.[434]

385. This complaint is without basis, however, for the simple reason that the Majority did consider these previous acknowledgments. Indeed, it stated as follows:

> […] ENREJA had imposed, on various occasions, sanctions on ENJASA for not paying prizes exceeding ARS 10,000 by check prior to the entry into force of Resolution No. 90/12, and that ENJASA had not only chosen not to contest those fines, but even accepted – through statements of its legal counsel at the time – that it was required to make payments of prizes above ARS 10,000 by check or international money transfer.

[432] Argentina's Memorial, paras 153-154; Argentina's Reply, paras 114-115, 121.

[433] Casinos' Rejoinder, para 128.

[434] Argentina's Memorial, para 148.

> Such acceptances – and statements by ENJASA's then legal counsel – may have been made in light of the relative insignificance of the fines involved and may have been motivated by the desire not to cloud or burden the relations with ENREJA. Be that as it may, a subsequent administrative practice, even if accepted by the subjects of the law, cannot, in the Tribunal's view, result in the creation of a primary norm that would impose a legal obligation on ENJASA to the effect that future behaviour that is not forbidden by the letter of the law would turn into a breach of the law that could be enforced through sanctions, including through the revocation of ENJASA's operating license.[435]

386. Further, as Casinos has observed,[436] this issue could not have had any impact on the outcome of the Award in any event, given the finding of the Majority that even if all allegations concerning ENJASA's breaches of the regulatory framework had been correct, ENREJA's revocation of the License in the circumstances of the case was disproportionate as a sanction as a matter of international law.[437]

387. Further still, Argentina argues that there were "*repeated warnings*" issued by ENREJA to ENJASA which the Majority failed to consider.[438] But as Casinos has noted, these were all issued in 2010.[439] The Majority itself noted that there had been no warnings after 2010,[440] and that:

> The only references to revocation, mentioned by Ms. Courel, one of ENREJA's lawyers, dated from 2010 and were unrelated to the issues under investigation in Resolutions Nos. 380/12, 381/12, and 384/12.[441]

[435] Award, paras 383-384.

[436] To contest those fines, but even accepted – through statements of its legal counsel at the time – that it was required to make payments of prizes above ARS 10,000 by check or international money transfer, (see, Casinos' Counter-Memorial, paras 265-266).

[437] Award, para 403.

[438] Argentina's Reply, para 115.

[439] Casinos' Rejoinder, para 117, citing Memorial on Annulment, para 156; ENREJA's Resolution No. 039/10 (AA-0021), ENREJA's Resolution No. 104/10 (AA-0023), ENREJA's Resolution No. 161/10 (AA-0024).

[440] Award, paras 406-408.

[441] Award, para 409.

388. It is clear, therefore, that the Majority had the previous warnings in mind. What significance (if any) the Majority drew from these matters, however, is not an issue which can be re-opened on an annulment.

(iii) ***The evidence of Mr Biagosch regarding payment by cheque***

389. Argentina contends that the Majority failed to take into account the testimony of Argentina's expert Mr. Biagosch, and his evidence that the requirement to pay certain prizes by cheque was designed to prevent a money-laundering technique called "*smurfing*." Hence payment by cheque was a legal obligation even before adoption of Resolution No. 90/12 by which such an obligation was enacted.[442]

390. It is correct that the Majority did not come to the same conclusion as Mr. Biagosch. But this is insufficient to ground the allegation that the Majority thereby failed to consider the evidence of Mr. Biagosch. The Committee has no basis to so conclude.

391. Further, Casinos has pointed out three inaccuracies in Argentina's account as to the content of Mr. Biagosch's testimony, of which two appear correct.[443] First, Casinos submits that the transcript of Mr. Biagosch's oral testimony makes no reference to the term "*smurfing*." This, however, has been countered by Argentina, noting that the concept of "*smurfing*" ("*pitufeo*") was translated at the hearing on the merits as "*ant-like work*," and was indeed introduced by Mr. Biagosch.[444] Casinos' second point, however, remains compelling, namely that Argentina's counsel explicitly clarified that Mr. Biagosch is not a lawyer, and so not qualified to opine on Argentine law.[445] Casinos' third point is also important, namely that Mr. Biagosch did not in fact testify that there was a legal obligation to pay certain prizes by cheque.[446]

[442] Argentina's Memorial, para 149; Argentina's Reply, para 118.
[443] Casinos' Counter-Memorial, para 270.
[444] Argentina's Reply, para 118, citing Hearing on the Merits, Tr. Day 6, Biagosch, 167:12-168:4 (English version).
[445] Hearing on the Merits, Tr. Day 6, Biagosch, 123:24–124:9.
[446] Hearing on the Merits, Tr. Day 6, Biagosch, 125:20–126:3.

392. In all these circumstances, the Committee considers that this objection is unsubstantiated.

(iv) The testimony of the Parties' experts on the notion of "operator"

393. Argentina argues that the Majority failed to take account of the expert testimony of Mr. Biagosch that an "*operator*" under Law No. 7020 is to be interpreted as a "*final beneficiary*."[447]

394. Once again, the Majority did not come to the same conclusion as Mr. Biagosch, but there is no basis to conclude that it failed to consider the evidence of Mr. Biagosch. On the contrary, it is clear from the Award that the Majority considered the testimony of the experts on both sides:

> In the Tribunal's view, ENREJA in a manifestly arbitrary manner considered Emsenor, Prodec, and DEK, as well as Video Dome to be "operators" of games of chance in the sense of Article 5 of Law No. 7020. While the term "operator" is an indeterminate legal concept, which is not further defined either in Law No. 7020 or any other instrument passed by ENREJA, the type of activities Emsenor, Prodec, and DEK, as well as Video Drome had engaged in, cannot, in the Tribunal's view, plausibly be considered to qualify as operating games of chance, which, as the experts of both Parties agree, requires responsibility for, control over, and exploitation of games of chance.[448]

395. Further, as noted above, the interpretation of the term "*operator*" raised a question of Argentine law, and it was made clear that Mr. Biagosch was not presented as an expert on law (not being a lawyer).[449]

396. Further still, as Casinos has observed,[450] this issue could not have had any impact on the outcome of the Award in any event, given the finding of the Majority that even if all allegations concerning ENJASA's breaches of the regulatory framework had been correct,

[447] Argentina's Memorial, para 150; Argentina's Reply, paras 119-120.
[448] Award, para 389.
[449] Hearing on the Merits, Tr. Day 6, Biagosch, 123:24–124:9.
[450] Casinos' Counter-Memorial, para 275.

ENREJA's revocation of the License in the circumstances of the case was disproportionate as a sanction as a matter of international law.[451]

(v) Argentina's allegations on "final beneficiaries"

397. Argentina contends that the Majority failed to consider evidence that the unlawful outsourcing of "*final beneficiaries*" was a regular practice of ENJASA based on previous conduct.[452]

398. The short answer to this complaint is that, as is apparent from the Award, the Majority did in fact take into account all violations that had been raised, but discounted those in question because they were time-barred:

> The Tribunal has noted before that nearly all the alleged infractions, which were the basis for the revocation of ENJASA's license, were based on manifestly ill-conceived and arbitrary interpretations and applications of the regulatory framework in place and can therefore not serve as legitimate grounds for the imposition of sanctions on ENJASA. […]
>
> […] all alleged infractions, which had been committed more than one year before ENREJA's investigations started on 11 December 2012 were time-barred under Article 49 of Law No. 7020.[453]

399. It follows that there can be no complaint on this ground.

400. By reason of all these points, Argentina's application to annul the Award under Article 52(1)(d) of the ICSID Convention must be dismissed. In the Committee's view, there has been no departure (serious or not) from a fundamental procedural rule.

[451] Award, para 403.

[452] Argentina's Memorial, para 152.

[453] Award, para 400.

VI. GROUND 3: FAILURE TO STATE REASONS - ART 52(1)(E)

A. THE PARTIES' POSITIONS

(1) Argentina

a. The Standard

401. Argentina invokes Article 52(1)(e) of the ICSID Convention in relation to the following matters:

(i) contradictory reasons;

(ii) failure to state reasons for the conclusions at which it arrived; and

(iii) inclusion of frivolous reasons that amounts to a failure to state reasons.[454]

402. Argentina notes that Article 52(1)(e) of the ICSID convention provides that a party may request the annulment of an award when "[…] *the award has failed to state the reasons on which it is based*," and that this provision must be interpreted in accordance with Article 48(3) ("*[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*") as well as with Arbitration Rule 47(1)(i) (which requires that the award include "*the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based*.")[455]

403. According to Argentina:

> The requirement to state the reasons on which a judicial or arbitration decision is based is key for the proper administration of justice, and this is even more relevant in the context of arbitrations administered by ICSID, the main purpose of which is directly related to the possibility of consolidating as a trustworthy, effective and appropriate mechanism of international dispute resolution, where the key objective of the system is to ensure the purpose of the

[454] Argentina's Memorial, para 166.
[455] Argentina's Memorial, para 167.

> award, which would be undermined by unreasonable or arbitrary decisions.[456]

404. While it is not required that a tribunal respond to every aspect of each argument advanced by a party with regard to a particular question, it is required that it state its findings of fact, as well as its findings as to applicable legal principles and to the application of the law to the disputed facts.[457]

405. As stated by the *ad hoc* Committee in *MINE v. Guinea,* an award should enable one "*to follow how the Tribunal proceeded from Point A to Point B and eventually to its conclusion.*" Grounds for annulment may exist not only where there is a total lack of reasons, but also where a certain line of reasoning is so incoherent and/or contradictory that it cannot be understood or followed by the parties.[458]

406. In this regard, it is not necessary that a failure to state reasons be manifest, serious or fundamental.[459] But Argentina accepts that:

[456] Argentina's Memorial, para 168, citing (*inter alia*) *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Annulment of 28 May 2021, para 161 (AALA-0004); *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for Stay of Enforcement of the Award of 28 December 2007, paras 28-31 (AALA-0007); ICSID Convention Preamble, para 3; ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 7 (AALA-0009); *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales de Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Annulment of 14 December 2018, para 166 (AALA-0008).

[457] Argentina's Memorial, para 171, citing *Glencore International AG and CI Prodeco SA v. Colombia (I)* (ICSID Case No. ARB/16/6), Decision on Annulment of 22 September 2021, para 237 (AALA-0006), and *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Annulment of 30 July 2010, para 222 (AALA-0010).

[458] Argentina's Memorial, para 172, citing (*inter alia*) *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, para 5.09 (AALA-0013); and *Tenaris S.A. and Talta -Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23), Decision on Annulment of 28 de December 2018, para 114 (AALA-0022); Argentina's Reply, paras 123-124.

[459] Argentina's Memorial, para 173, citing *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Decision on Annulment of 18 March 2022, para 126 (AALA-0015); Argentina's Reply, para 125.

> It is the failure by a tribunal to address issues raised by a party whose analysis could affect the tribunal's conclusion that constitutes a failure to state reasons as grounds for annulment.[460]

407. Even though not all the reasons given by a tribunal need to be explained in detail, they do need to be sufficient in order for a common reader to understand how, based on the evidence and the arguments presented by the parties, the tribunal arrived at the conclusions it reached. This requirement to state reasons seeks to ensure that the tribunal's reasoning will be understood not only by the parties, but also by an informed reader.[461]

408. As identified in *Soufraki v* UAE, a failure to state reasons may take many forms, including:

> - a total absence of reasons for the award, including the giving of merely frivolous reasons;
>
> - a total failure to state reasons for a particular point, which is material for the solution;
>
> - contradictory reasons; and
>
> - insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.[462]

409. Insufficient or inadequate reasons are reasons that "*cannot logically explain the decision they are purportedly supporting*." Frivolous and contradictory reasons are equivalent to no reasons.[463]

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[460] Argentina's Reply, para 126, citing Christoph Schreuer and others, The ICSID Convention: A Commentary, 2009, Article 48, para 64 (AALA-0046).

[461] Argentina's Reply, para 127, citing (*inter alia*) *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Annulment of 22 September 2014, paras 217, 220 (RALA-0044).

[462] Argentina's Memorial, para 175, citing *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 126 (AALA-0002).

[463] Argentina's Memorial, para 176, citing (*inter alia*) *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, para 250 (AALA-0049); ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 107 (AALA-0009); *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of 16 May 1986, para 97 (AALA-0043); *Maritime International Nominees Establishment v. Government*

410. Argentina also notes that some annulment committees have also held that failure to address certain evidence relevant to the determination of damages amounted to a failure to state reasons for the purposes of Article 52(1)(e) of the ICSID Convention.[464] In particular, Argentina cites the following statement by the *ad hoc* committee in *TECO v Guatemala*:

> While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.[465]

411. Finally, Argentina emphasizes that if there is a failure to state reasons as set out in Article 52(1)(e) of the ICSID Convention, an annulment committee does not have the power to make up for that omission by providing reasons not given by the tribunal, or to cure the defects of the tribunal's reasoning.[466]

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of Guinea (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, paras 5.09, 6.105, 6.107, 6.108 (AALA-0013); *Amco Asia Corporation et al. v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of the Award and the Supplementary Award of 3 December 1992, para 1.18 (AALA-0058); *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6), Decision on Annulment of 28 May 2021, para 163 (AALA-0004); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11), Decision on Annulment of 18 March 2022, para 127 (AALA-0015); Argentina's Reply, paras 131-132.

[464] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 104, citing the Decision on Annulment in *TECO v. Republic of Guatemala* (AALA-0009); *TECO Guatemala Holdings LLC v. Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, paras 127-138 (AALA-0049); *UAB E Energija (Lithuania) v. Republic of Latvia* (ICSID Case No. ARB/12/33), Decision on Annulment of 8 April 2020, para 120 (AALA-0034).

[465] Argentina's Memorial, para 178, citing *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment, 5 April 2016, para 131 (AALA-0049).

[466] Argentina's Memorial, paras 179-180, citing (*inter alia*) *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, para 151 (AALA-0012); *TECO Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, paras 137-138 (AALA-0049).

412. In this regard, Argentina rejects Casinos' submission (based on *Cube Infrastructure v. Spain*) that it is irrelevant whether a tribunal reaches incorrect conclusions on the facts or the law. According to Argentina, in order for a committee to be able to assess whether the tribunal has relied on facts and legal considerations that may logically serve as the basis for the conclusions reached in the award, it is absolutely essential for those factual and legal considerations to be capable of serving as the basis for those conclusions. That is not possible if the conclusions derived from the facts and the law relied upon are incorrect, because the logical connection is broken.[467]

b. Challenges

1. Contradictory Reasons

413. Argentina contends that the reasoning of the Majority includes several contradictions which are tantamount to a failure to state reasons.[468] Four areas are identified in this regard.[469]

(i) Reasoning on lack of proportionality

414. First, Argentina argues that contradictions exist in the reasoning of the Majority as to the lack of proportionality as a matter of international law in ENREJA's revocation of the License.[470]

415. Argentina posits that the Majority acknowledged that ENREJA had the authority to impose sanctions under Law No. 7020,[471] and considered that the regulatory framework and the sanctions mechanism were legitimate, as were ENREJA's Resolutions Nos. 26/00 and 90/12, which contain regulations to prevent money laundering, consistent with the recommendations made by the FATF.[472] Further, the Majority recognized that Articles 13

[467] Argentina's Reply, para 129.
[468] Argentina's Memorial, Section II.C.1; Argentina's Reply, Section II.C.1.
[469] Sub-headings have been supplied by the Committee.
[470] Argentina's Memorial, para 183.
[471] Award, para 375.
[472] Award, paras 357, 358.

(license revocation) and 40 and 41 (administrative and criminal sanctions) of Law No. 7020 apply to breaches of that Law and of ENREJA's resolutions.[473]

416. However, when considering the question of proportionality, Argentina states that the Majority began by establishing a limit to its own analysis, namely that it only had to address how the regulatory framework had been applied and whether or not ENREJA had adequately exercised its police power. It noted that:

> the Tribunal is limited to reviewing the legality
>
> of ENREJA's exercise of its regulatory and supervisory powers, including in particular whether the revocation of ENJASA's license complied with the principle of good faith, the prohibition of arbitrariness, the principle of proportionality, and due process under international law.[474]

417. The Majority then analyzed ENREJA's actions with respect to several sanctions applied to ENJASA while the License was in force, and rejected Casinos' submission that the increase in the number of investigations and sanctions reflected "*the harassing attitude taken towards ENJASA and was part of a broader plan to oust it from the Province*."[475] On this, the Majority stated that it

> did not find that [Casinos] have submitted conclusive evidence of a long-term strategy as from 2007, when Governor Urtubey took office, to oust ENJASA of its operations in the gaming sector in Salta.[476]

418. In this regard, Argentina asserts that the Majority also recognized that ENJASA had committed twenty violations of the anti–money laundering regulations, established in sixteen investigations in the years before ENJASA's License was revoked; that the sanctions imposed by ENREJA in its investigations gradually increased because of

[473] Award, para 373.
[474] Argentina's Memorial, para 188, citing Award, para 359.
[475] Argentina's Memorial, para 190, citing the Award, para 141.
[476] Award, para 362.

recidivism on the side of ENJASA; that it remained unimpressed by Casinos' argument that these investigations and sanctions were groundless; and that there was no violation of due process.[477]

419. However, Argentina argues, the Majority ultimately concluded that the revocation of the License imposed by ENREJA had been disproportionate and arbitrary, as ENREJA had not considered adopting any sanctions other than the termination of the License.[478]

420. On Argentina's case, on the basis of the findings it had made, the Majority had no basis to conclude that ENREJA had failed to consider "*other equally effective measures […] to prevent money laundering in the gaming sector short of revoking ENJASA's License.*"[479] According to Argentina, in so determining, the Majority was in contradiction with its initial premise, namely ENREJA's power to impose sanctions. This is so:

> because not only is it impossible to hold that the measure was disproportionate by affirming that ENREJA failed to consider other measures, but also because the evidence submitted by the Argentine Republic confirms that such other measures had already been considered and applied, and therefore ENREJA was left with no alternative but to revoke the licence.[480]

421. Argentina asserts that, put another way, the Majority recognized ENJASA's recidivism and found that ENREJA had imposed sanctions for twenty breaches of the anti–money laundering regulations, which gradually increased in terms of magnitude and severity, but still concluded that ENREJA failed to adopt other milder sanctions, without explaining what those sanctions were and citing license suspension as the only example, even though such measures had already been adopted six times (and had been discussed by the Majority in its reasoning).[481] As summarised by Argentina:

[477] Argentina's Reply, para 137, citing the Award, paras 404, 411, fn 492, 426.
[478] Argentina's Reply, para 137.
[479] Argentina's Memorial, para 191, citing the Award, para 403; Argentina's Reply, para 138.
[480] Argentina's Memorial, para 192; Argentina's Reply, paras 138-141.
[481] Argentina's Reply, para 142.

> […] insofar as the majority of the Tribunal was aware of the Resolutions that punished ENJASA for its violations of the applicable regulatory framework, in particular, Resolutions Nos. 39/10, 104/10 and 161/10, it could not subsequently deny the warnings contained in them with respect to repeated breaches, in particular the revocation of the License. Therefore, in reproaching ENREJA for not having adopted other milder sanctions or for not having given additional warnings on the consequences of ENJASA's breaches, the majority of the Tribunal seriously contradicted itself.[482]

(ii) Reasoning on arbitrariness

422. Second, Argentina argues that a contradictory line of reasoning exists where the Majority analyzed and gave an opinion on the alleged arbitrariness of the revocation of the License and its purpose.[483]

423. On the one hand, the Majority concluded that the License was revoked for the purpose of increasing the Province of Salta's benefits from the execution of gaming operations (by asking for higher licence fees from new licensees), and that the actions leading to the revocation may have revealed a change in ENREJA's policy towards ENJASA.[484] This line of reasoning is "*unequivocal*" and "*not expressed in the conditional mood*:"

> [T]he majority of the Tribunal specifically held, first, that ENREJA had changed its policy towards ENJASA, as a result of which it revoked the License, which in turn enabled it to modify its contractual commitments without negotiations and improve Salta's finances.[485]

424. But on the other hand, Argentina posits, the Majority stated that it was not possible to establish whether a real change of policy had occurred, or whether any such change had been motivated by an intention to exclude ENJASA from the gaming sector in the Province of Salta and transfer its operations to local companies on terms that were more lucrative

[482] Argentina's Reply, para 144.

[483] Argentina's Memorial, para 193; Argentina's Reply, paras 145-153.

[484] Argentina's Memorial, para 194, citing the Award, paras 366, 368; Argentina's Reply, paras 146-148.

[485] Argentina's Reply, para 148.

for the Province. The Majority thus concluded that "*the Tribunal will therefore not […] speculate what ENREJA's motives for issuing Resolution No. 240/13 may have been*."[486]

425. Argentina argues that this contradiction is significant, given that the purpose of the measure is one of the elements to be considered in an expropriation claim in the context of the exercise of regulatory powers.[487] According to Argentina, the two lines of reasoning in the Award are so contradictory that they cancel each other out. [488]

(iii) Reasoning on domestic law

426. Third, Argentina contends that the Majority held that its analysis was not a reconsideration of the evidence on which ENREJA had based its decisions as to the sanction to be imposed. Hence, the Majority established that it would analyze the legality of the revocation in the light of international law, but would not review the application of domestic law *de novo*. Further, the Majority specified that "*the legal standard to determine the legality of that conduct does not consist of domestic (administrative) law, but of the standards of treatment contained in the BIT*" and that "*the Tribunal's function in the present proceeding is not to replace domestic courts in exercising domestic judicial review, but to exercise a form of internationalized judicial review.*"[489]

427. However, according to Argentina, the Majority then contradicted this position by taking on the powers of a reviewing court, concluding that ENREJA had committed a number of errors that:

> encompass: (i) manifestly incorrect interpretations of several legal rules that form part of the regulatory framework; (ii) manifestly incorrect findings of fact; and/or (iii) combinations of both types of errors in the application of the regulatory framework in Resolution No. 240/13. Taken together, these errors lead the Tribunal to

[486] Argentina's Memorial, para 195, citing the Award, para 368; Argentina's Reply, paras 149-150.

[487] Argentina's Memorial, para 196; Argentina's Reply, paras 151-153.

[488] Argentina's Reply, para 151, citing *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2), Decision on Annulment of 3 May 1985, para 116 (AALA-0012).

[489] Argentina's Memorial, para 197, citing the Award, paras 306, 307, 377; Argentina's Reply, para 154.

> conclude that ENREJA, in revoking ENJASA's operating license, has abused its powers and acted arbitrarily under international law.[490]

428. This contradiction is evident, for example when considering the breach of the obligation to request authorization to hire third-party operators. The Majority found that there was "*awareness*" and "*tolerance*" from the parties in connection with the activities of third-party operators, which had been decisive in concluding that there had been no serious breach of Article 5 of Law No. 7020 by ENJASA. But when examining the mandatory nature of the registration and payment of prizes over certain amounts by non-negotiable cheques, the Majority found that the pre-2012 practice on the part of ENJASA, whereby it was "*aware of*" and "*accepted*" the obligation to pay prizes over certain amounts by cheque, was not binding and, therefore, it was not possible to establish that ENJASA's actions had amounted to a breach.[491]

429. Further, Argentina asserts that the Majority noted that Article 13 of Law No. 7020 belonged to the realm of criminal administrative law, and so applied the *nullum crimen sine lege* principle in finding that there was no violation of the regulatory framework in the non-registration and non-payment of prizes above certain amounts by non-negotiable cheques, pursuant to Resolution No. 381/12. And yet, in analyzing the time bar contained in Law No. 7020 in connection with Resolution No. 381/12, the majority said that:

> […] the Tribunal does not follow Respondent's legal expert, Prof. Marcer, who argued that the explicit time bar contained in Law No. 7020 would not apply […] given that the revocation of ENJASA's license was based on Article 13 […] were covered by the 5-year statute of limitation under Argentina's federal criminal law.[492]

[490] Argentina's Memorial, paras 199-200, citing the Award, paras 378, 400; Argentina's Reply, paras 158-160.
[491] Argentina's Memorial, para 201, citing the Award, paras 384, 390; Argentina's Reply, paras 163-166.
[492] Argentina's Memorial, para 202, citing the Award, paras 385-386; Argentina's Reply, paras 161-162.

(iv) Reasoning on expropriation

430. Fourth, Argentina argues that a contradiction exists in the reasoning of the Majority as to whether or not the revocation of ENJASA's licence amounted to expropriatory conduct. And the Majority's analysis does not contain any reasons or explanations for the conclusion at which it arrived.[493]

431. On the one hand, Argentina asserts that the Majority stated that it would:

> [F]irst set out the legal framework to be applied to claims under Article 4 of the BIT. It will start with [Casinos'] principal claim for indirect expropriation under Article 4(1) and (2) of the BIT, before turning to [Casinos'] alternative claim for breach of Article 4(3) of the BIT. The key issue that emerges from the legal framework thus expounded is whether the revocation of ENJASA's license amounted to expropriatory conduct in the sense of Article 4(1) or whether it qualified as a regular exercise of the host State's regulatory or police power, that is, as a lawful administration of a sanction by ENREJA under Law No. 7020, which does not qualify as an expropriation and does not require the payment of compensation.[494]

432. However, so Argentina argues, the Majority failed to carry out that analysis.[495]

2. Failure to State Reasons

433. Argentina contends that it is not possible to follow the reasoning of the Majority, as it continuously failed to state reasons justifying its decision.[496] It particularizes this objection as follows.[497]

[493] Argentina's Memorial, para 205; Argentina's Reply, para 167.
[494] Argentina's Memorial, paras 206-207, citing the Award, para 322.
[495] Argentina's Memorial, para 208.
[496] Argentina's Memorial, para 209; Argentina's Reply, paras 168-181.
[497] Sub-headings have been supplied by the Committee.

(i) ENJASA's breaches & "systematic disregard"

434. First, Argentina contends that the Majority stated that some of the breaches allegedly committed by ENJASA could have been a valid ground for sanctions under the regulatory framework. However, the Majority raised the bar without giving any reasons and held that the breaches did not indicate any "*systematic disregard*" by ENJASA of the regulatory framework for the prevention of money laundering, thereby rendering the revocation of the License disproportionate.[498]

435. Argentina argues that neither the source, scope and contents of this "*systematic disregard*" requirement, nor its relationship with the requirements of proportionality under international law, were explained. Indeed, when determining the issue of proportionality, the Majority never applied the requirements it had identified.[499]

436. Further, Argentina states that Casinos' reference to Article 48 of Law No. 7020, establishing that, in imposing sanctions, ENREJA must take into account the "*infringer's record of relapses*,"[500] is mistaken. Considering the infringer's record and assessing how many times they have infringed the rule with a view to determining the severity of the sanction, which is what Article 48 requires, is completely different from requiring that the breach should amount to a "*systematic disregard*" of the rule in order for it to be taken into account in revoking a license.[501]

437. Argentina posits that further still, the Majority described ENJASA's breaches as "*errors*" or "*minor*" infractions, without stating any reasons. And in arriving at this conclusion, the Majority, notably, did not refer to the guidelines and recommendations of the FATF, or to the regulatory framework for the prevention of money laundering, or to the context of a border-area province.[502]

[498] Argentina's Memorial, para 210, citing the Award, para 402; Argentina's Reply, paras 168-176.
[499] Argentina's Memorial, paras 211-213, citing the Award, para 402.
[500] Casinos' Counter-Memorial, para 338.
[501] Argentina's Reply, para 175.
[502] Argentina's Memorial, paras 215-216, citing the Award, para 402.

(ii) Reasoning on Proportionality

438. In the context of the enquiry into proportionality, Argentina submits that it is not possible to follow the reasoning of the Majority with respect to ENJASA's previous twenty-one breaches of the regulations for the prevention of money laundering.

439. In this regard, Argentina states, the Majority found that "*[h]ad the prevention of money laundering been the primary concern for ENREJA*," ENREJA should have taken "*a more pro-active […] approach to request ENJASA to remedy whatever was wrong*." The Majority concluded that ENREJA never "*requested ENJASA to rectify the situation*;" and "*could have issued a clear warning that, if the conduct in question was not remedied, ENJASA's license would be revoked*." However, according to Argentina, this is nothing more than speculation by the Majority, based on no evidence, and a disregard of the 21 investigations that had resulted in sanctions for breaches of the applicable regulations.[503]

440. Further, the main line of reasoning of the Majority was that ENREJA's interpretation of the regulatory framework had been manifestly erroneous, and that ENJASA had only committed two breaches, which the Majority described as "*minor*." Hence, the revocation of the License was considered disproportionate. Yet the Majority stated that even if ENJASA had been in beach of the applicable regulations, its conduct could never have justified the revocation because ENREJA should have applied "*other equally effective measures […] to prevent money laundering in the gaming sector*." According to Argentina, there was no explanation as to what these measures were or what the regulation was which set forth such obligation. Further, there was no consideration of the fact that ENREJA had applied other, less grievous sanctions after prior breaches by ENJASA.[504]

441. Argentina notes in this regard that during the proceedings, it submitted witness statements and documentary evidence demonstrating that ENREJA had, prior to the revocation of the Licence, imposed less severe and less intense sanctions on ENJASA, in keeping with the

[503] Argentina's Memorial, para 217, citing the Award, paras 407-408; Argentina's Reply, para 177.
[504] Argentina's Memorial, paras 219-220, citing the Award, para 403.

provisions of Article 13 of Law No. 7020. These sanctions varied based on the gravity of the action or infraction committed and on recidivism, including warnings and large fines, and even partial and temporary suspensions of the License so that the breaches could be cured. Further, because of ENJASA's constant recidivism, ENREJA had warned ENJASA through several resolutions of the consequences that would follow from ever more serious and reiterated breaches, including the termination of the License, and even granted the Licensee an opportunity to cure its breaches.

442. In light of these points, it is not possible to understand what the reasons were for deeming the revocation a violation of the BIT on the ground that it was disproportionate.[505]

3. Frivolous Reasons

443. Argentina contends that the reasons explaining the determination that the revocation of the License had been an arbitrary measure were frivolous.[506] This is elaborated as follows.[507]

(i) International law requirements and the "sole effects" doctrine

444. In assessing the legality of the revocation as a matter of international law, the Majority considered that the following requirements had to be met: that the measure complies with due process and the principle of good faith; is neither arbitrary nor discriminatory; and is otherwise proportionate. But when examining whether the requirements had been met, the Majority focused only on the manifest nature of the errors as an indication of lack of good faith and of arbitrariness, without analysing the intention behind or purpose pursued by the measure.[508]

445. According to Argentina, it is frivolous to establish the arbitrary nature of the measure by reference to an analysis of the adverse and permanent nature of the revocation, because any

[505] Argentina's Memorial, paras 221-223.

[506] Argentina's Memorial, paras 224-225, citing the Award, paras 354, 400, 417, 427; Argentina's Reply, paras 182-192.

[507] Sub-headings have been supplied by the Committee.

[508] Argentina's Memorial, para 226, citing the Award, paras 343, 350-351; Argentina's Reply, para 184.

revocation will have these effects by definition. This is all the more so when such power is regulated in the applicable regulations (which were not deemed unlawful by the Majority) and was within the framework for the exercise of sovereign power to regulate the operation of games of chance. This was an application of the so-called "*sole effects*" doctrine, which is outdated, excessive and incomplete. In addition to effects, the analysis should have addressed the causes, context and nature of the measure.[509]

(ii) Normalizing of ENJASA's breaches

446. On Argentina's case, the flaws in the reasoning outlined above were rendered worse by the Majority, in spite of having recognized that ENJASA had committed constant breaches of the regulatory framework, justifying such actions on the basis that such breaches were "*inevitable*" in the case of a company like ENJASA.[510]

447. In this regard, Argentina contends that Casinos is wrong in asserting that the Majority only referred to the two breaches that it considered to be valid in assessing the seriousness of ENJASA's violations of the regulatory framework, and concluding that it was "*inevitable*" for the rules to be infringed in the case of a company such as ENJASA.[511]

448. According to Argentina, the affirmation of "*inevitability*," which seeks to "*normalize*" breaches of anti-money laundering regulations, was frivolous – a fact laid bare by the absolute lack of a legal basis and of any evidence submitted in the case record supporting the Majority's conclusion.[512]

[509] Argentina's Memorial, paras 227-230, citing the Award, para 357, and Dissenting Opinion on the Merits, paras 92, 93, 116-124, 234; Argentina's Reply, para 187.

[510] Argentina's Memorial, para 231, citing the Award, para 405.

[511] Argentina's Reply, paras 188-190.

[512] Argentina's Memorial, paras 232-233.

(2) Casinos

a. The Standard

449. Casinos submits that Article 52(1)(e) of the ICSID Convention provides for a very limited scope of review in relation to a tribunal's failure to state reasons. The purpose of this provision is to ensure that a tribunal has fulfilled the minimum standard of reasoning regarding findings that are essential to the outcome of the decision.[513]

450. However, the review under Article 52(1)(e) excludes any assessment of the legal or factual determinations a tribunal has made. It is, in particular, not decisive whether a committee agrees with or deems the assessment of the tribunal persuasive.[514] As stated by the annulment committee in *Daimler v. Argentina*:

> Article 52(1)(e) of the ICSID Convention does not empower the Committee to review the merits of the case. Such a review would amount to an appeal which is not a remedy provided for in Article 53 of the ICSID Convention.[515]

451. Casinos analyses Article 52(1)(e) in terms of a "*minimum requirement*" for reasoning. On its case, the ICSID Convention does not impose on tribunals an obligation to provide reasoning on all points of an award. It suffices for a tribunal to fulfil the "*minimum requirements*," which have been described by the *MINE* committee as follows:

> […] the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.[516]

[513] Casinos' Counter-Memorial, para 284; Casinos' Rejoinder, para 137.

[514] Casinos' Counter-Memorial, para 285; Casinos' Rejoinder, para 136.

[515] Casinos' Counter-Memorial, para 285, citing *Daimler Financial Services A.G. v. Argentine Republic* (ICSID Case No. ARB/05/1), Decision on Annulment of 7 January 2015, para 76 (RALA-0024).

[516] Casinos' Counter-Memorial, para 289, citing *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, para 5.09 (AALA-0013); Casinos' Rejoinder, para 138.

452. Casinos argues that reasoning that is unintelligible, contradictory, frivolous or absent will violate the minimum standard. But it stresses that each of these deficits must be extreme.[517]

453. According to Casinos, for reasoning to be "contradictory," a strict test is imposed. The contradiction must relate to "*important facts that can impossibly be reconciled*," with the effect that there is a failure to state reasons. And there is no failure to state reasons even if not all considerations contained in an award are entirely consistent.[518]

454. Casinos posits that the standard to establish a complete lack of reasoning is equally high. An award will be upheld as long as it fulfils "*minimum requirements*," it being generally accepted that this ground for annulment only applies in the case where there has been a failure by the tribunal to state any reasons for its decision on an essential question. The question is not whether the reasoning is sparse or otherwise lacking – but whether there is any reasoning at all.[519]

455. Further, Casinos asserts that the duty to provide reasoning only applies to issues that are decisive and essential to the outcome of the case. An ICISID tribunal does not have a duty to address every argument brought forward or piece of evidence submitted by a party throughout the proceedings. In line with the principle of the final and binding nature of ICSID awards, annulment can only be sought in cases where the lack of reasoning had an impact on the outcome of the case.[520]

b. Challenges

456. Casinos argues that Argentina's contentions under this head are based on a selective reading and misrepresentation of the Award. In particular, it contends that Argentina's approach is similar to its approach in previous cases. As the committee in *El Paso v. Argentina* held:

[517] Casinos' Counter-Memorial, para 292.
[518] Casinos' Counter-Memorial, paras 294-297; Casinos' Rejoinder, para 138.
[519] Casinos' Counter-Memorial, paras 298-301.
[520] Casinos' Counter-Memorial, paras 302-303.

> "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. […] 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."[521]

1. Contradictory Reasons

457. Casinos argues that each of the instances of alleged contradictory reasoning identified by Argentina fails to meet the required standard, namely that competing reasons fully cancel each other out.[522]

(i) Reasoning on lack of proportionality

458. Casinos addresses Argentina's case under this head in three stages. First, it observes that the finding that ENREJA had the power to impose sanctions is not inconsistent with the finding that ENREJA failed to take into account other equally effective measures to prevent money laundering in the gaming sector, instead of revoking ENJASA's License.[523] Second, it notes that the finding that the revocation was disproportionate is not inconsistent with the rejection of Casinos' case that ENJASA had been subject to politically motivated harassment.[524] Third, it submits that Argentina's assertion that it was "*impossible to hold that the measure was disproportionate by affirming that ENREJA failed to consider other measures*" is unsubstantiated, given that the Majority did not base its finding on proportionality only on the failure of ENREJA to consider alternative sanctions.[525]

[521] Casinos' Counter-Memorial, paras 305-306, citing *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic of 22 September 2014, para 232 (RALA-0044); Casinos' Rejoinder, para 140.

[522] Casinos' Counter-Memorial, para 309.

[523] Casinos' Counter-Memorial, paras 311-312; Casinos' Rejoinder, para 143.

[524] Casinos' Counter-Memorial, paras 313-316.

[525] Casinos' Counter-Memorial, paras 317-320.

(ii) Reasoning on arbitrariness

459. Casinos argues that Argentina's case that the Majority contradicted itself in its findings relating to financial motives behind Resolution No. 240/13 is misconceived, and built on a "*blunt misrepresentation*" of the statements in para 366 of the Award. In fact, the Majority explored possible financial motivations behind ENREJA's actions, but then went on to analyze further evidence on this point, concluding that there was insufficient evidence to draw a conclusion. There was no contradiction.[526]

(iii) Reasoning on domestic law

460. According to Casinos, Argentina's contentions under this head, even in the abstract, are incapable of constituting a violation of Article 52(1)(e) ICSID Convention. There is precise, consistent reasoning in the Award on the role of domestic law in the analysis under international law, even if Argentina is dissatisfied with the Award's conclusions. The Majority indeed stated it would not conduct a *de-novo* review of domestic law as a court of appeal in the host State would. However, in the same paragraph it explained the relevance of domestic law for its analysis under international law. The Majority thus performed an analysis of domestic law as an incidental question for its assessment under international law. Again, there is no contradiction.[527]

461. Similarly, Casinos asserts, the reference to the widely accepted principle of *nullum crimen sine lege* in the Award in the context of the assessment of Law No. 7020 is equally conclusively reasoned.[528]

(iv) Reasoning on expropriation

462. Casinos posits that contrary to Argentina's case, where the Award states that "*the key issue that emerges from the legal framework is whether the revocation of ENJASA's licence amounted to expropriatory conduct or not*," the Majority then proceeded to analyse that

[526] Casinos' Counter-Memorial, paras 321-324; Casinos' Rejoinder, paras 149-152.
[527] Casinos' Counter-Memorial, paras 325-328; Casinos' Rejoinder, paras 153-160.
[528] Casinos' Counter-Memorial, paras 329-330.

"*key issue*." The analysis on this point extends from paragraph 357 to para 417 of the Award, which comprise an extensive and consistent review of the standard under Article 4 of the BIT.[529]

2. Failure to State Reasons

463. Casinos argues that Argentina's assertions under this head are based on misrepresentations and selective quotations of the Award.[530]

(i) ENJASA's breaches and "systematic disregard"

464. It is Casinos' case that the Majority provided extensive reasoning, explaining in detail why it considered the alleged "*systematic disregard*" of domestic administrative law and why it found that there were no systematic violations. In particular, the inquiry into the claimed "*systematic*" disregard of administrative laws by ENJASA is based in part on the applicable domestic regulations. Pursuant to Article 48 of Law No. 7020 regulating sanctions for breaches of the law, the "*infringer's record of relapses*" is relevant in order to establish the fine.[531]

(ii) Reasoning on Proportionality

465. Casinos argues that there can be no allegation of a failure to state reasons on this issue, in particular with regard to the finding that ENREJA should have had a more pro-active approach, and that it never requested ENJASA to rectify the situation (findings with which Argentina takes issue).[532]

466. Casinos asserts that the Majority actually found that it "*would have expected ENREJA to take a more pro-active and expedited approach to request ENJASA to remedy whatever was wrong*" if the prevention of money-laundering had been the primary focus. According

[529] Casinos' Counter-Memorial, paras 331-334.
[530] Casinos' Counter-Memorial, para 336; Casinos' Rejoinder, paras 161-166.
[531] Casinos' Counter-Memorial, paras 337-341.
[532] Casinos' Counter-Memorial, paras 342-347.

to Casinos, this conclusion, which forms part of the analysis of compliance with the BIT, stands on its own and needs no further explanation. Argentina simply disagrees with the conclusion, which is not an annulment ground.[533]

467. Casinos states that the evidentiary basis of the Majority's statement that "*[t]he Tribunal finally observes that neither before the formal investigations, nor in the eight months between the start of this investigation in December 2012 and the revocation of the License, has ENREJA ever requested ENJASA to rectify the situation*" is clear: in the course of the arbitration proceedings, Argentina neither claimed that there was ever such a request, nor produced a single request to this effect.[534]

468. As to the evidence that Argentina now contends it produced on this issue and which the Majority failed to address, Casinos argues that this evidence was in fact considered, as is evident from the Award itself.[535]

3. *Frivolous Reasons*

469. Casinos rejects Argentina's case under this head, submitting that the Award's reasons are based upon careful legal analysis that is neither frivolous nor absurd.[536]

(i) International law requirements and the "sole effects" doctrine

470. The Majority provided an extensive and careful analysis of the arbitrary nature of the revocation. Argentina's contention that the reasoning on this point would be frivolous simply cannot be reconciled with the content of the Award. In particular, the Majority set out a detailed analysis and assessment of the facts.[537]

[533] Casinos' Counter-Memorial, para 344.
[534] Casinos' Counter-Memorial, paras 342-345.
[535] Casinos' Counter-Memorial, paras 346-347, citing Award, para 181.
[536] Casinos' Counter-Memorial, para 348; Casinos' Rejoinder, paras 171-182.
[537] Casinos' Counter-Memorial, paras 351-353.

471. In so far as Argentina refers to the Dissenting Opinion on the Merits provided by Dr. Torres Bernárdez, Casinos asserts that it is undisputed between the Parties that the ICSID annulment mechanism does not function as a court of appeal. The views of the Dissenting Opinion on the Merits of the case are irrelevant in annulment proceedings as the substantive correctness of the Award is not subject to review.[538]

(ii) Normalizing of ENJASA's breaches

472. Contrary to Argentina's assertion, Casinos argues that the Majority did not "*frivolously*" justify noncompliance of ENJASA with administrative laws and regulations. Rather, it concluded that only two administrative breaches had occurred and that these breaches could not be considered severe.[539]

B. THE COMMITTEE'S ANALYSIS

(1) The Standard

473. Article 52(1)(e) of the ICSID Convention provides as follows:

> 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:
>
> […]
>
> (e) that the award has failed to state the reasons on which it is based.

474. There is a large measure of agreement between the Parties as to the nature and interpretation of this provision.

[538] Casinos' Counter-Memorial, paras 351-354.
[539] Casinos' Counter-Memorial, paras 355-358.

475. As noted by Argentina,[540] and in the ICSID Background Paper 2016,[541] Article 52(1)(e) is to be read alongside Article 48(3) of the ICSID Convention ("*[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based*") and Arbitration Rule 47(1)(i) (which requires that the award include "*the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based*.")

476. The Committee recalls the three general propositions with regard to the nature of the ICSID annulment process that were set out earlier in the context of Article 52(1)(b), and that apply equally here.[542]

477. A number of key principles have been established by what is now a large body of annulment decisions on Article 52(1)(e). These may be summarised as follows.

478. While a tribunal must deal with every question submitted to it, the drafting history of the ICSID Convention indicates that a failure to do so should not result in annulment. Instead, the ICSID Convention provides another remedy where a tribunal fails to address a question (the dissatisfied party may request that the same tribunal issue a supplementary decision concerning the question not addressed[543]) or if there is a dispute between the parties as to the meaning or scope of the award (either party may request interpretation of the award by the original tribunal[544]).[545]

479. The requirement to state reasons is intended to ensure that parties and readers can understand the reasoning of the tribunal, meaning they can understand the facts and law

[540] Argentina's Memorial, para 167.

[541] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 102 (AALA-0009). Also, ICSID Updated Background Paper 2024, para 108 (in substantively the same terms.)

[542] *See* paras 141-146 above.

[543] ICSID Convention, Article 49(2).

[544] ICSID Convention, Article 50(1).

[545] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 103 (AALA-0009). Also, ICSID Updated Background Paper 2024, para 109 (in substantively the same terms).

applied by the tribunal in coming to its conclusion.[546] In the oft-quoted words of the *ad hoc* committee in *MINE* (cited by both Parties here):

> In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law.[547]

480. The correctness of the reasoning or whether it is convincing is not relevant.[548] As stated by the *ad hoc* committee in *Cube Infrastructure v. Spain*:

> The ability to follow the reasoning of an award is sufficient and may even include situations where the tribunal made an error of fact or law.[549]

481. The safeguard provided by Article 52(1)(e) is to ensure a minimum standard of reasoning regarding findings that are essential to the outcome of the decision.[550] To this end,

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[546] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 105 (AALA-0009), citing a large body of cases, including (*e.g.) Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, para 5.09 (AALA-0013); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para 81 (RALA-0029); *El Paso Energy International Company v. Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 22 September 2014, para 220 (RALA-0044). Also, ICSID Updated Background Paper 2024, para 111 (in substantively the same terms).

[547] *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on

Annulment of 22 December 1989, para 5.09 (AALA-0013).

[548] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 105 (AALA-0009), citing a large body of cases, including (*e.g.) Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, paras 5.08 and 5.09 (AALA-0013); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para 64 (RALA-0029); *Wena Hotels LTD v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of 5 February 2002, para 79 (AALA-0042); *CDC Group plc v. The Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, paras 70 and 75 (AALA-0018). Also, ICSID Updated Background Paper 2024, para 111 (in substantively the same terms).

[549] *Cube Infrastructure Fund SICAV and others v. the Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on Annulment of 28 March 2022, para 321 (AALA-0029).

[550] *Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on

Annulment of 22 December 1989, para 5.09 (AALA-0013).

annulment can only be sought where the lack of reasoning might have had an impact on the outcome of the case.[551] As quoted by Argentina:

> It is the failure by a tribunal to address issues raised by a party whose analysis could affect the tribunal's conclusion that constitutes a failure to state reasons as grounds for annulment.[552]

482. Whilst some *ad hoc* committees have suggested that "*insufficient*" and "*inadequate*" reasons could result in annulment,[553] the extent of insufficiency and inadequacy required to justify annulment on this basis has been debated. Notably, other *ad hoc* committees have suggested that they have discretion to further explain, clarify, or infer the reasoning of the tribunal rather than annul the award.[554]

483. Reasoning that is "*either unintelligible or contradictory or frivolous or absent*"[555] has been taken to fall within Article 52(1)(e) of the ICSID Convention. In each case, a high threshold must be satisfied, in order to guard against the annulment process trespassing into the realm of an appeal. To this end, the extent of the unintelligibility, contradiction or frivolity in the

[551] *Cube Infrastructure Fund SICAV and others v. the Kingdom of Spain* (ICSID Case No. ARB/15/20), Decision on Annulment of 28 March 2022, para 337 (AALA-0029); *UAB Energija v. Republic of Latvia* (ICSID Case No. ARB/12/33), Decision on Annulment of 8 April 2020, paras 121, 156 (AALA-0034); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Argentina's Application for Annulment of 29 May 2019, para 210 (ALA-0049).

[552] Argentina's Reply, para 126, citing Christoph Schreuer and others, *The ICSID Convention: A Commentary*, 2009, Article 48, para 64 (AALA-0046).

[553] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 106 (AALA-0009), citing a large body of cases, including (*e.g.) Mr. Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7), Decision on the Application for Annulment of the Award of 1 November 2006, para 21 (RALA-0006); *Hussein Nuaman Soufraki v UAE* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, paras 122-26 (AALA-0002); *TECO Guatemala Holdings LLC v. RepublicGuatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, paras 248-250 (AALA-0049). Also, ICSID Updated Background Paper 2024, para 112 (in substantively the same terms).

[554] ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 106 (AALA-0009), citing a large body of cases, including (*e.g) Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment of 5 February 2002, para 83 (AALA-0042); *Hussein Nuaman Soufraki v UAE* (ICSID Case No. ARB/02/7), Decision on Annulment of 5 June 2007, para 24 (AALA-0002). Also, ICSID Updated Background Paper 2024, para 112 (in substantively the same terms).

[555] *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment of 10 July 2014, para 202 (RALA-0002).

reasoning must be such that, in substance, it is as if there is no reasoning at all. This was put by the *ad hoc* committee in *AES v Hungary* as follows:

> The giving of frivolous reasons will almost never amount to a failure to state reasons within the meaning of Article 52(1)(e), since this would impermissibly encroach into appellate territory. The better approach is to recognise that reasons which are sufficiently frivolous or absurd in nature would in effect amount to no reasons at all.[556]

484. "*Contradictory*" reasons on facts or law may be equated with a failure to state reasons if the contradiction cannot be reconciled, and is so flagrant as to cancel out each conflicting finding. In the words of the *ad hoc* committee in *Continental Casualty Company v. Argentina:*

> The Committee adds that for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the non-existence of fact A. In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument.[557]

485. Care must be taken, however, in identifying contradictions, again in order to ensure that the annulment process does not shade into an appeal, and because tribunals must often

[556] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Hungary* (ICSID Case No. ARB/07/22), Decision of the *ad hoc* Committee on the Application for Annulment of 29 June 2012, para 54 (RALA-0058). *See*, to the same effect, ICSID Secretariat, Updated Background Paper on Annulment for the Administrative Council of ICSID, 5 May 2016, para 107 (AALA-0009), citing a large body of cases, including (*e.g.) Maritime International Nominees Establishment v. Government of Guinea* (ICSID Case No. ARB/84/4), Decision on Annulment of 22 December 1989, para 5.09 and 6.107 (AALA-0013); *CDC Group plc v. The Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Annulment of 29 June 2005, para 70 (AALA-0018); *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic of 22 September 2014, para 221 (RALA-0044); TECO *Guatemala Holdings LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Decision on Annulment of 5 April 2016, paras 90, 275, 278 (AALA-0049). Also, ICSID Updated Background Paper 2024, para 113 (in substantively the same terms).

[557] *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Decision on Annulment of 16 September 2011, para 103 (RALA-0053).

balance conflicting considerations. As per the caution of the *ad hoc* committee in *Vivendi v Argentina*:

> [A]n ad hoc committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.[558]

486. An "*absence*" of reasons also entails a high threshold. Two requirements have been identified:

(i) a failure to state reasons that leaves the decision on a particular point essentially lacking in any expressed rationale; and

(ii) a failure to state reasons with respect to a point that is necessary to the tribunal's decision.[559]

487. In this regard, as noted in the context of the other grounds for annulment relied upon by Argentina in this case, a tribunal is not required to rule separately on each point of law or fact which the parties have raised,[560] and need not refer in its decision to every piece of evidence that was adduced before it.[561] Importantly, as noted in *EDF*:

> What does, or does not, constitute a question that has to be decided is an objective matter and not one which can be shaped by the way in which a party chooses to put its case or the emphasis which it places on any particular point.[562]

[558] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulmentof 3 July 2002, para 65 (RALA-0029).

[559] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compagnie Générale des Eaux) v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on Annulment of 3 July 2002, para 65 (RALA-0029).

[560] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment of 5 February 2016, para 346 (AALA-0023).

[561] *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Decision on Annulment of 30 December 2015, para 149 (AALA-0048).

[562] *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009, para 346 (RALA-0043).

(2) Challenges

488. Having carefully considered each of Argentina's complaints under this head, the Committee is unpersuaded that there is any basis for annulment under Article 52(1)(e) of the ICSID Convention. In the Committee's view, the Majority has provided extensive reasons throughout the Award, such that there is no difficulty in understanding the facts and law that have been applied in coming to each conclusion.

1. Contradictory Reasons

489. The Committee considers that none of the four instances elaborated by Argentina meet the standard of contradictory reasoning, as set out above.

(i) Reasoning on lack of proportionality

490. Argentina argues that the finding of the Majority that ENREJA did not take into account "*other equally effective measures to prevent money laundering in the gaming sector, instead of revoking ENJASA's License*" is inconsistent with the finding that "*ENREJA had the power to exercise sanctioning powers*."[563]

491. As put succinctly by Casinos, there is no inconsistency here, given that the "*finding that ENREJA in principle has sanctioning powers that include the power to revoke licenses in certain instances does not mean that the application of these powers is permitted and reasonable in every case*."[564] On the facts of this case, the Majority concluded – as it was entitled to do – that the exercise of the (acknowledged) power was disproportionate and arbitrary as a matter of international law.

492. Argentina then contends that there is a contradiction between, on the one hand, the finding on lack of proportionality, and, on the other hand, the rejection of Casinos' assertion that

[563] Argentina's Memorial, from para 184 (as summarised earlier in this Decision).
[564] Casinos' Counter-Memorial, para 312.

ENJASA had been the subject of politically motivated harassment, and the evidence that in previous years other sanctions had been considered and applied by ENREJA.[565]

493. But again, there is no contradiction here. The finding that there was no evidence of political harassment does not mean that the revocation was a proportionate measure. Equally, the fact that other, less severe, sanctions had been considered by ENREJA in previous years is not inconsistent with the finding that ENREJA failed to consider such alternative measures when it imposed the revocation. Indeed, as Casinos has noted, this latter finding followed a careful evaluation by the Majority of the previously imposed sanctions.[566]

494. Whilst one may take issue with the substance of the reasons in question, they are not such as to cancel each other out, which is the required threshold for annulment under this head.

495. As to Argentina's argument that "*it* [is] *impossible to hold that the measure was disproportionate by affirming that ENREJA failed to consider other measures*,"[567] the Committee does not consider this a question of "*contradictory*" reasoning. As Casinos has noted,[568] the Majority set out detailed reasoning for its conclusion that ENREJA's revocation of the License was disproportionate as a matter of international law, by reference to factors other than the availability of alternative measures, including (*inter alia*) the gravity of the breaches.[569] It then considered other factors, including the number of breaches in relation to the size of ENJASA's business, and whether ENREJA had issued any rectification requests or warnings.[570] To this end, Argentina's complaint is really as to the substance of the Majority's determination, rather than a true contradiction in its reasoning.

[565] Argentina's Memorial, from para 190 (as summarised earlier in this Decision).
[566] Casinos' Counter-Memorial, para 315, citing the Award, paras 404-415.
[567] Argentina's Memorial, para 192.
[568] Casinos' Counter-Memorial, paras 317-320.
[569] Award, para 402.
[570] Award, paras 408-409.

(ii) Reasoning on arbitrariness

496. As summarised earlier, Argentina contends that there is a contradiction between the finding that "*the Licence was revoked for the purposes of increasing the Province's benefits from the execution of gaming operations*," and the finding that "*it was not possible to establish whether a real change of policy had occurred*."[571]

497. As Casinos has set out,[572] Argentina's case on this point appears to turn on a misreading of the actual findings of the Majority. As is clear from paragraph 366 of the Award (which refers to a press conference of and interview with an Argentinian minister regarding Resolution No. 240/13), the Majority considered evidence concerning a possible financial motivation for ENREJA's actions:

> The Minister's statements could be understood to suggest that ENJASA's exclusive license was revoked in order to increase the Province's benefits from the operation of gaming operations by asking for license fees from new licensee that would be higher than what ENJASA paid to the Province. At the press conference of 13 August 2013, the Minister stated that: "If we negotiate with each manager, we may reach 20% [...] an additional amount between 20 and 25 million per year." The Minister then specified the social projects on which the money could be spent. […] The Minister thus may be seen as confirming that the purpose of the revocation was to improve Salta's finances; where in the past this objective had to be achieved by negotiating amendments to the contractual arrangements with ENJASA, the revocation of its License now allowed for the same without negotiations.[573]

498. But having considered further evidence, the Majority ultimately concluded that there was "*insufficient*" material to draw any inference as to the intentions or motives of ENREJA and the Province of Salta in issuing Resolution No. 240/13.[574] The reasoning, therefore,

[571] Argentina's Memorial, paras 193-196; Award, paras 366, 368.

[572] Casinos' Counter-Memorial, paras 321-324.

[573] Award, para 366.

[574] Award, para 368.

reflects a chain of analysis, in which an hypothesis was raised and then discounted. This cannot be characterised as a contradiction.

(iii) Reasoning on domestic law

499. Argentina points to an alleged contradiction between the Majority's statement that it would not reconsider the evidence on which ENREJA had based its decision, and the Majority's actual analysis, which Argentina argues did just this (as illustrated by the findings in the Award that ENREJA had relied upon manifestly incorrect interpretations of legal rules, and manifestly incorrect findings).[575]

500. It is correct that the Majority stated that it would not conduct a *de novo* review of domestic law, or position itself as a court of appeal on Argentine law.[576] However, as the Majority was careful to explain, this did not mean that it could not address Argentine law at all. On the contrary, consideration of ENREJA's position and options under Argentine law was obviously important in evaluating its conduct as a matter of international law.[577] As the Majority explained:

> Not only the lack of a legal basis, or the lack of competence of a domestic agency, for imposing a sanction can lead to arbitrariness under international law. Arbitrariness can also consist of an abuse of power. However, an investment treaty tribunal, which is not assuming the function of a domestic administrative court, but is reviewing the international legality of the administrative conduct in question, will not engage in reviewing the application of domestic law *de novo*. In the exercise of due deference, and taking into account that arbitrariness is more than a violation of a rule of law, but rather of *the* rule of law, the Tribunal's examination is limited to the issue of whether the decisions in question appear so manifestly incorrect that they must be deemed to constitute an abuse

[575] Argentina's Memorial, para 197 *et seq.* (as summarised earlier in this Decision).
[576] Award, para 307.
[577] Award, para 307.

> of power and thus constitute arbitrary conduct from the perspective of international law.[578]

501. In substance, Argentina's complaint on this ground is little different to its criticism of the approach of the Majority under Article 52(1)(b) (manifest excess of powers), addressed earlier in this Decision.[579] For present purposes, it suffices to note that there is no contradiction in the Majority's reasoning.[580]

502. Further under this heading, Argentina points to an alleged contradiction in the application by the Majority of the principle of *nullum crimen sine lege* (when assessing Law No. 7020).[581]

503. In the course of the assessment of the allegations underlying Resolution No. 381/12, the Majority found that ENREJA had charged ENJASA with breaches of Regulation No. 90/12 before that regulation had been brought into effect. On the basis of expert evidence, it was concluded that the principle of *nullum crimen sine lege* was applicable.[582] Once again, the Committee can find no contradiction in the reasoning.

(iv) Reasoning on expropriation

504. Finally under this heading, Argentina argues that there is a contradiction between the assertion by the Majority that the key issue was whether ENREJA's revocation of the License amounted to expropriatory conduct, and Argentina's assertion that the analysis in the Award contains no reasons or explanation for the conclusion at which the Majority arrived.[583]

[578] Award, para 377.
[579] *See* paras 157-193 above.
[580] *See* paras 157-164 above.
[581] *See* para 429 above.
[582] Award, para 383.
[583] Argentina's Memorial, paras 205-208 (as summarised earlier in this Decision).

505. Once again, the Committee considers this, in substance, a criticism as to the substance of the determinations in the Award, rather than a contradiction in the reasoning. Argentina has not been able to identify one part of the reasoning that is cancelled out by another.

506. In any event, the Committee does not accept Argentina's assertion that the Award contains no reasoning on whether ENREJA's revocation of the License amounted to expropriatory conduct, as opposed to a lawful exercise of regulatory powers. As noted by Casinos,[584] the reasoning of the Majority on this issue extends from paragraphs 357 to 417 of the Award.

2. Failure to State Reasons

507. The Committee is unpersuaded by Argentina's claim that the Award suffers from an absence of reasons.

(i) ENJASA's breaches and "systematic disregard"

508. Argentina's complaint with regard to the reference by the Majority to "*systematic disregard*" of Argentine law is little different in substance to the same complaint that was advanced under Article 52(1)(b) of the ICSID Convention and addressed earlier in this Decision.[585]

509. Contrary to Argentina's submission, the reference to "*systematic disregard*" was the subject of detailed reasoning in the Award. As noted earlier,[586] even though not so stated by the Majority,[587] "*systematic disregard*" was a test that was applied by Mr Mendoza of ENREJA in seeking to justify the revocation of the License. Mr Mendoza alleged that "*ENJASA had an irresponsible attitude in the compliance with anti-money laundering provisions, breaching them in a systematic manner*." [588] This was a reference to the

[584] Casinos' Counter-Memorial, para 333.
[585] *See* paras 190-193 above.
[586] *See* para 190 above.
[587] Argentina's Reply, para 172.
[588] Award, para 117, quoting exhibit C-169, page 1.

standard under Article 48 of Law No. 7020 by which the "*infringer's record of relapses*" is relevant in order to determine a fine.[589]

510. Hence, in response to the test that was actually applied by ENREJA in the course of its revocation of the License, the Majority concluded that there were only two minor breaches that could have been relied upon by ENREJA, neither of which could qualify as "*systematic disregard*," and thus justify the revocation of the License.[590]

511. As noted earlier, the Majority did not refer to "*systematic disregard*" as a test in international law, and hence no reasoning in this regard was needed. Rather, it was referenced in the context of the analysis of domestic Argentine law (Article 48 Law No 7020).

512. In the circumstances, the Committee cannot conclude that the Award was deficient in reasons in this respect.

(ii) Reasoning on Proportionality

513. As summarised earlier in this Decision, Argentina argues that it is not possible to follow the reasoning of the Majority on the proportionality of ENREJA's revocation of the License, and specifically with respect to ENJASA's previous twenty-one breaches of the regulations for the prevention of money laundering.[591]

514. In the Committee's view, it cannot be said that the Award suffers from an absence of reasons on the issue of proportionality. On the contrary, extensive and clear reasoning has been provided, which details (*inter alia*) the requirements of proportionality as a matter of international law; the Majority's assessment of the alleged infractions by ENJASA upon which ENREJA relied; consideration of the nature of ENJASA's business; consideration of the treatment by ENREJA of past infractions; a weighing of the nature of these

[589] Casinos' Counter-Memorial, paras 134, 338; Award, para 411, quoting Resolution No. 240/13.
[590] Award, paras 401-402.
[591] Argentina's Memorial, paras 217-223.

infractions and the sanction of revocation; and consideration of other available options open to ENREJA.[592]

515. In so far as Argentina criticizes the reasoning (in particular with respect to ENREJA's conduct) as "*nothing more than speculations* […] *based on no evidence or regulation at all*,"[593] this is a complaint about the merits of the decision, not the absence of reasons *per se*. All such criticisms fall beyond the scope of Article 52(1)(e) of the ICSID Convention.

516. As to past infractions, Argentina argues that it provided evidence that contradicted the findings of the Majority as to ENREJA's supposed lack of action against ENJASA.[594] In particular, it refers certain Resolutions, such as Resolution No. 140/10 and Resolution No. 39/10, which it suggests were not addressed in the Award. Once again, however, this kind of criticism does not equate to an absence of reasons. As noted earlier, a tribunal is not required to address in its award every item of evidence, or every submission. In any event, as Casinos has pointed out,[595] the Award did in fact make reference to this category of evidence (even though Argentina argues that this was not part of the Majority's actual reasoning[596]):

> [Casinos] submit in particular that ENREJA was obliged to alert ENJASA of the possible consequences of the administrative inquiries initiated by Resolutions Nos. 380/12, 381/12, and 384/12. ENREJA did not do so, however. Contrary to [Agentina's] contention, Resolutions Nos. 39/10, 104/10, and 161/10 did not contain sufficient warnings about a possible revocation of ENJASA's license arising out of the conduct investigated under Resolutions Nos. 380/12, 381/12, and 384/12. Moreover, by August 2013, when Resolution No. 240/13 was handed down, these earlier resolutions were three years old and were not mentioned or referenced in Resolutions Nos. 380/12, 381/12, and 384/12.

[592] In particular, Award, paras 336-337; 397-417.
[593] Argentina's Memorial, para 217.
[594] Argentina's Memorial, paras 221-222.
[595] Casinos' Counter-Memorial, para 346.
[596] Argentina's Reply, para 179.

3. Frivolous Reasons

517. The Committee does not agree with Argentina's allegations as to "*frivolous*" reasoning in the Award.

(i) International law requirements and the "sole effects" doctrine

518. As has already been noted in earlier sections of this Decision, the Award comprised an extensive analysis of ENREJA's conduct and its implications as a matter of international law. In particular, Argentina is incorrect in asserting that the Majority focused only on the manifest nature of the errors as an indication of lack of good faith and of arbitrariness, without analysing the intention behind or purpose pursued by the measure.[597] The Majority carefully analysed (*inter alia*) the possible intention and purpose behind the measures taken;[598] the application of domestic administrative laws and regulations;[599] the gravity of the administrative breaches upon which ENREJA relied, as compared to the sanctions it imposed;[600] and the process of revocation.[601]

519. Argentina is, thus, also incorrect in contending that the revocation of the License was only evaluated by reference to the "*sole effects*" doctrine. Indeed, even if the Majority had relied upon the "*sole effects*" doctrine alone, as Argentina suggests, this would not render the reasoning in the Award "*frivolous*," given that, as noted earlier,[602] this standard will only be met if the flaw in the reasoning is tantamount to no reasoning at all. This is analytically distinct from an assertion that the reasons given were incorrect.

(ii) Normalizing of ENJASA's breaches

520. Argentina contends that, despite having recognized that ENJASA had committed constant breaches of the regulatory framework, the reasoning in the Award was frivolous because

[597] Argentina's Memorial, para 226, citing the Award, paras 343, 350-351.
[598] Award, paras 360-370.
[599] Award, paras 377-396.
[600] Award, paras 397-417.
[601] Award, paras 418-426.
[602] *See* para 483 above.

the Majority then justified these breaches on the basis that they were "*inevitable*" in the case of a company like ENJASA.[603] This, so it is argued, was an attempt to "*normalize*" breaches of anti-money laundering regulations, which was frivolous because of the absolute lack of a legal basis or any evidence to support this.[604]

521. The Committee considers this an inaccurate characterization of the reasoning in the Award on this issue. The Majority analyzed the breaches upon which ENREJA had relied in imposing its sanction, and concluded that only two administrative breaches had occurred, and that these were minor (the failure to properly register one prize of a tombola game and one erroneous registration of another prize). These breaches were then put into context by reference to the nature of ENJASA's business, including the extent of its operations; the number of its staff; the number of casinos and slot machine halls it operated; the number of lottery tickets sold per day; the number of draws each week; and so on. Against this background, the Majority concluded that it was inevitable that:

> sometimes someone makes a mistake or that sometimes some rules are not complied with by someone, without such mistakes or non-compliances indicating or resulting in serious and systemically relevant breaches of the regulatory framework by ENJASA. Besides, the risk that someone sometimes does not apply the rules is the reason why ENJASA's activities had to be monitored by ENREJA, which had a full array of sanctions at its disposition to secure future compliance that fell short of revoking ENJASA's license.[605]

522. Argentina contends that the analysis on this issue in the Award failed to cover all relevant breaches.[606] As noted earlier, several of the alleged breaches took place prior to the expiry of the limitation period, a fact of which the Majority took cognizance in focusing its inquiry on the two breaches.

[603] Argentina's Memorial, para 231, citing the Award, para 405.
[604] Argentina's Memorial, para 232.
[605] Award, para 405.
[606] Argentina's Reply, paras 188-190.

523. The reasoned decision by the Majority to focus on just two breaches rather than on many, and the substance of the reasoning itself – even if one were to disagree with it – cannot, on any view, be regarded as "*frivolous*."

524. For all the reasons set out above, it follows that Argentina's application to annul the Award under Article 52(1)(e) of the ICSID Convention must be dismissed.

VII. COSTS

A. THE PARTIES' POSITIONS

(1) Argentina

a. The Standard

525. Argentina cites Articles 61(2) and 52(4) of the ICSID Convention, and Rules 28 and 53 of the ICSID Arbitration Rules, as establishing a broad discretion on the allocation and assessment of costs.[607] It notes that when exercising this discretion, arbitral tribunals and annulment committees have considered the particular circumstances of the case, including (*inter alia*) the importance of the arguments at stake, the reasonableness of the costs incurred and the parties' overall conduct during the proceedings.[608]

526. Contrary to Casinos' submission, Argentina contends that there is no unanimous rule that costs should follow the event in ICSID annulment proceedings. It notes that annulment

[607] Argentina's Costs Submissions, paras 1-2.

[608] Argentina's Costs Submissions, para 3, citing, e.g. *Wena Hotels LTD v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para 112 (AALA-0042); *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Decision on Annulment, 18 March 2019, para. 264 (AALA-0077); *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela (I)*, ICSID Case No. ARB/12/21, Decision on Annulment, 22 November 2019, para. 132 (AALA-0078); 9REN Holding S.a.r.l v. Kingdom of Spain, ICSID Case No. ARB/15/15, Decision on Annulment, 17 November 2022 (RALA-0012); *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, para 343 (AALA-0065); *Nasib Hasanov v. Georgia*, ICSID Case No. ARB/20/44, Decision on Costs (Inter-State Negotiation Objection), 2 August 2022, para 9 (AALA-0066); *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, 14 September 2020, paras 943-944 (AALA-0062).

committees have held that each party should bear their own costs, even when an annulment is rejected.[609]

b. Allocation of Costs

527. In this case, Argentina contends that the reasonableness of its Request for Annulment has been demonstrated by the serious flaws in the Majority's decision which have been elaborated in this proceeding. Further, Argentina submits that it has been cooperative in "*moving forward a smooth annulment proceeding.*" For these reasons, Argentina argues that it should not bear the costs Casinos has incurred in connection with its own defence.[610]

528. Further, Argentina contends that it should not bear the costs of its application to stay enforcement of the Award. Argentina contends that Casinos caused the Parties to incur unnecessary costs by opposing this application, which required the filing of written submissions; holding a one-day hearing; deliberations and a decision from the Committee. According to Argentina, although costly, the exercise was futile, because after the stay was lifted, Casinos did not attempt to pursue any enforcement.

c. Assessment of Costs

529. As set out in an Annex to Argentina's Costs Submissions, Argentina incurred a total of USD 165,886.70 in costs (including costs of legal representation; allowances and other reasonable travel and accommodation costs; translation, stationery and courier expenses).

530. As for Casinos' claimed costs and expenses, Argentina contends that there are no grounds for Casinos to be reimbursed the costs incurred by in-house counsel. This is because (1) it

[609] Argentina's Reply Costs Submissions, p.1, citing *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Decision on Annulment, 21 February 2023, para 318 (AALA 0079); *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, 28 November 2022, paras 439-443 (AALA 0080); *Rumeli v. Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment, 25 March 2010, para 183 (AALA 0081); *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, paras 755-757 (AALA 0082); *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, 2 April 2021, paras 240, 243 (AALA 0005).

[610] Argentina's Costs Submissions, para 4; Argentina's Reply Costs Submissions, pages 1-3, 6.

is reasonable to assume in-house counsel receives a monthly salary which encompasses tasks such as involvement in litigation in any event; (2) such costs are inappropriate in annulment proceedings given their limited scope with respect to factual or evidential matters; and (3) none of the jurisprudence cited by Casinos on the recovery of such costs pertains to annulment proceedings.[611]

d. Interest

531. As for Casinos' claim for interest on costs at a rate of 5 percentage points above LIBOR compounded annually, Argentina submits that this is "*groundless and baseless*" for five reasons,[612] namely: (1) that Casinos has not explained what the relationship is between inflation rates and the principle of full reparation; (2) that Casinos has not submitted any evidence to show what the inflation rates were during the proceedings, whereas Argentina has shown that annual inflation in the US has not exceeded 10% since 1985, remaining consistently well below this threshold;[613] (3) that Casinos has not provided any justification for its addition of 5% to the 6-month LIBOR rate, which, according to Argentina, results in an interest rate of 10.37%; (4) that Casinos' reference to the LIBOR rates for 6-month deposits denominated in USD is inconsistent with the fact that the costs incurred by Casinos are in Euros; and (5) that the 6-month USD LIBOR rate is not published after June 2023, such that the published LIBOR rate at the date of this Decision will not be representative of the current rate of interest.

532. Argentina comments in this regard that the Committee has already taken notice of the disparity between the rate of interest specified in the Award (4% per annum compounded annually on all amounts due until full payment) and the current time value of money put by Casinos at the stay of enforcement hearing at 8% or 9%.[614]

[611] Argentina's Costs Submissions, para 7; Argentina's Reply Costs Submissions, page 4.
[612] Argentina's Reply Costs Submissions, page 5.
[613] Argentina's Costs Submissions, para 9.
[614] Argentina's Costs Submissions, para 13.

533. Given that, according to Argentina, the amount Casinos claims for costs is a certain and risk-free amount, Argentina submits that the Committee should apply an interest rate corresponding to short-term risk-free assets in US Dollars, such as the rate on 6-month or 1-year US Treasury Bonds, from the date of this Decision.[615]

(2) Casinos

a. The Standard

534. Casinos argues that, as a general rule, committees in past annulment decisions have relied on the standard of "*costs follow the event*."[616] Further, this is not affected by such factors as the importance of the arguments at stake, the reasonableness of the costs incurred or the Parties' overall conduct during the proceedings.[617] Specifically:

(1) Consideration of the importance of the arguments at stake can only apply to cases where the legal arguments raised are "*fundamental in nature and are either so complex or novel that it is impossible to realistically assess the outcome of the annulment proceedings*." This rationale has no application where (as here) guidance can be found in the reasoning of prior annulment decisions.[618]

(2) The reasonableness of costs relates to the assessment, not allocation, of costs. [619]

(3) Parties' conduct is generally considered relevant where (unlike here) the conduct of one party significantly protracts the proceedings without reason.[620]

[615] Argentina's Costs Submissions, paras 11, 12 & 14; Argentina's Reply Costs Submissions, page 6.

[616] Casinos' Costs Submissions, paras 25-30, citing, e.g., Infrastructure Services and Energia Termosolar (formerly Antin) v. Kingdom of Spain, (ICSID Case No. ARB/13/31), Decision on Annulment of 30 July 2021, para 266 (RALA-0046); *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* (ICSID Case No. ARB/14/3), Decision on Annulment of 13 April 2020, para 339 (RALA-0021); *Glencore International A.G. and C.I. Prodeco S.A. v. Colombia,* (ICSID Case No. ARB/16/6), Decision on Annulment of 22 September 2021, para 418 (AALA-0006); *Central European Aluminium Company (CEAC) v. Montenegro,* (ICSID Case No. ARB/14/8), Decision on Annulment of 1 May 2018, para 155 (RALA-0051).

[617] Casinos' Reply Costs Submissions, para 5.

[618] Casinos' Reply Costs Submissions, para 6.

[619] Casinos' Reply Costs Submissions, para 7.

[620] Casinos' Reply Costs Submissions, para 8.

b. Allocation of Costs

535. Casinos claims reimbursement by Argentina for all of its costs and expenses, including internal costs, incurred in relation to these proceedings.[621]

536. As for Argentina's submission that Casinos caused the Parties to incur unnecessary costs by opposing Argentina's request for a stay of enforcement of the Award, Casinos contends that there was no obligation on its part to initiate enforcement proceedings. Rather, it was for Argentina, pursuant to its obligations under the ICSID Convention, to comply with the Award. Argentina sought to be released from this obligation but failed to show circumstances that would justify such a step. All costs incurred by Casinos in relation to this part of the proceeding should therefore be borne by Argentina.[622]

c. Assessment of Costs

537. The costs and expenses incurred by Casinos, as summarized in Annexes A and B to its Reply Costs Submissions, total EUR 553,839.52, comprising:

(i) EUR 487,692.77 in respect of costs, fees and legal expenses (including EUR 470,261.77 in respect of external legal representation and EUR 17,431.00 in respect of in-house legal services);

(ii) EUR 22,054.08 in respect of travel costs;

(iii) EUR 19,082.00 in respect of accommodation costs;

(iv) EUR 4,835.67 in respect of other travel expenses and disbursements;

(v) EUR 20,175.00 in respect of translation costs.

[621] Casinos' Rejoinder, para 189(ii); Casinos' Costs Submissions, paras 2 & 31.
[622] Casinos' Reply Costs Submissions, paras 8-9.

538. Of the total costs and expenses incurred, Casinos states that EUR 115,130.02 is attributable to Argentina's Request for a Stay of Enforcement.

539. As for the cost of Casinos' in-house legal services, Casinos states that its external counsel KNOETZL worked closely with Casinos' Head of Legal Affairs.[623] Casinos submits that it is standard practice in international arbitration that the costs of in-house counsel are treated "*in a similar fashion as outside lawyers*." This, so Casinos argues, is especially required when – as here – a party has a fully integrated legal team that actively partakes in the defence.[624]

540. Casinos submits that the costs and expenses that it has incurred are reasonable and proportionate, considering the complexity of the case, the issues raised by Argentina and the amount in dispute. In particular, Casinos had to prepare three extensive written submissions and prepare and conduct two oral hearings. Further, according to Casinos, these costs and expenses are substantially lower than those awarded in other recent annulment proceedings.[625]

d. Interest

541. Casinos refers to the Majority's view that:

> even though Article 61(2) of the ICSID Convention does not mention the payment of interest on costs, these costs are part of the Award and should be covered by the interest provision of the Award, if so requested by the Party in question.[626]

[623] Casinos' Costs Submissions, para 11.

[624] Casinos' Costs Submissions, paras 12-13, citing, e.g., *Webster/Bühler*, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, Thomson Reuters, paras 37-47 (RALA-0110); Final Award, ICC Case No. 6564 (1993) in: ICC Extracts from ICC Awards on Arbitration Costs, ICC Bull. 1993, pp. 45, 46 (RALA-0111); *Elsing/Flecke-Giammarco*, *Costs of the Arbitration* in *Flecke-Giammarco*, Boog et al, Kluwer Lat International (2020), paras 54 et seq. (RALA-0012); *Cavalieros*, *In-House Counsel Costs and Other Internal Party Costs in International Commercial Arbitration*, Arbitration International, Volume 30, Issue 1 (2014) pp. 148-149 (RALA-0013); *Baltag*, *In-House Counsel and Recoverability of Costs in International Arbitration: Time for a Clear-Cut Position*, in Tung/*Fortese , et al.* (eds), *Finances in International Arbitration*, p. 12 (2019)(RALA-0014).

[625] Casinos' Costs Submissions, paras 22-23; Casinos' Reply Costs Submissions, para 7.

[626] Casinos' Rejoinder, para 186, citing the Award, para 610; Casinos' Submissions on Costs, para 33.

542. Casinos relies on the Majority's determination that full reparation in the sense of Article 38 ILC Articles requires that interest be paid on the costs of the proceedings from the date the Award was rendered.[627] Casinos also cites recent ICSID annulment decisions that have awarded interest on costs.[628]

543. In accordance with the principle of full compensation, Casinos claims interest on costs at a rate of 5 percentage points above LIBOR compounded annually, from the date of this Decision until full payment. Since the compensation is expressed in US Dollars, Casinos contends that the appropriate rate of reference for the calculation of interest should be the LIBOR rates for 6-month deposits denominated in USD. Should LIBOR cease to exist as a reference rate, the Secured Overnight Funding Rate (SOFR) should be substituted.[629]

544. In the alternative, Casinos requests interest at a rate above LIBOR (or should LIBOR cease to exist the SOFR) as deemed appropriate by the Committee, taking into account relevant inflation rates.[630]

545. As to Argentina's arguments on Casinos' proposed interest rate, Casinos contends that:

(1) The currency in which Casinos incurred costs in these proceedings is Euros, not US Dollars, so the annual inflation rate in the US is not the relevant benchmark. Instead,

[627] Casinos' Rejoinder, para 187, citing the Award, para 610.

[628] Casinos' Costs Submissions, para 32, citing, e.g. *Hydro S.r.l., Costruzioni S.r.l., Francesco Becchetti, Mauro De Renzis, Stefania Grigolon, Liliana Condomitti v. Republic of Albania, (*ICSID Case No. ARB/15/28), Decision on Annulment of 2 April 2021, para 249 (AALA-0005); *Bernhard von Pezold and Others v. Republic of Zimbabwe,* (ICSID Case No. ARB/10/15), Decision on Annulment of 21 November 2018 (RALA-0016); *Adem Dogan v. Turkmenistan, (ICSID Case No. ARB/09/9), Decision on Annulment of 15 January 2016, para 282 (RALA-0005); 9REN Holding S.a.r.l v. Spain,* (ICSID Case No. ARB/15/15), Decision on Annulment of17 November 2022 (RALA-0012); *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, (ICSID Case No. ARB/14/11*), Decision on Annulment of 18 March 2022, paras 531, 533 (AALA-0015). *Victor Pey Casado and President Allende Foundation v.Chile,* (ICSID Case No. ARB/98/2), Decision on Annulment of 18 December 2012, (AALA-0040).

[629] Casinos' Costs Submissions, para 34; Casinos' Reply Costs Submissions, para 17.

[630] Casinos' Reply Costs Submissions, para 18.

inflation in Austria is relevant, and in Austria, the average inflation rate between October 2022 and September 2023 was 9.17%.[631]

(2) The award of costs is not a "*certain and risk-free amount*" if it must be enforced. Especially against a sovereign State and even more so a sovereign State with a record of a "*low payment morale.*"[632]

B. THE COMMITTEE'S ANALYSIS

(1) The Standard

546. 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 those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

547. This provision, together with Arbitration Rule 47(1)(j) (applied by virtue of Arbitration Rule 53) gives the Committee discretion to allocate all costs of the proceeding, including attorney's fees and other costs, between the Parties as it deems appropriate.

548. There is a discernible presumption in many prior ICSID annulment decisions that costs should follow the event. But the Committee accepts, as Argentina contends, that this is not an immutable rule, and that when exercising its discretion, the Committee must have regard to the particular circumstances of the case. Such circumstances will include (*inter alia*) the importance, difficulty and novelty of the arguments at stake and the parties' overall conduct during the proceedings.

[631] Casinos' Reply Costs Submissions, para 14.
[632] Casinos' Reply Costs Submissions, para 15.

549. As far as the reasonableness of the costs incurred is concerned, the Committee considers that this is relevant to the assessment, as opposed to the allocation, of costs.

(2) Allocation of Costs

550. In this case, Argentina's application to stay enforcement of the Award has been dismissed and every ground it has advanced to annul the Award has been dismissed.

551. Having carefully considered all the circumstances of this case, the Committee concludes that costs should follow the event, there being no factor to displace this presumption. In particular:

(1) None of the grounds advanced by Argentina raised arguments of any particular importance, difficulty or novelty. On the contrary, as is apparent from the Committee's analysis in this Decision, the bulk of Argentina's challenges to the Award amounted to no more than attempts to appeal the merits of the decision, which could never have been sustainable given the well-established principles that govern this proceeding.

(2) Casinos' conduct of this proceeding warrants no criticism and cannot be said to have protracted the proceeding or increased costs.

(3) Argentina's contention that Casinos should not have resisted Argentina's application to stay enforcement of the Award is, in the Committee's view, misplaced. The application was dismissed. Thus, there can be no basis to allocate the costs of this application to Casinos. Whether or not Casinos itself took any step to compel Argentina to comply with its obligations is of no relevance.

552. On the contrary, the Committee considers that there are factors that militate in favour of Casinos recovering from Argentina the costs and expenses it has incurred in defending itself in this proceeding. In particular, the Committee notes that Argentina chose to advance a large number of arguments under each ground for annulment. Many of these arguments were duplicative, and many took considerable time and work to untangle and

properly understand. In the result, Casinos (and also the Committee) was faced with an unusually extensive task in ensuring that all points were addressed.

(3) Assessment of Costs

553. *Casinos' Legal Fees and Expenses:* The Committee considers that each of the costs and expenses incurred by Casinos, as itemised in paragraph 537 above, was reasonable and proportionate, given the scale and complexity of this proceeding. The Committee notes the disparity between these costs and those incurred by Argentina, but considers that this reflects the decision by Argentina not to engage external legal counsel, and does not render Casinos' figure unreasonable. With the exception of Casinos' in-house legal costs, the Committee concludes that the costs and expenses listed in paragraph 537 above ought to be reimbursed by Argentina.

554. As for Casinos' claim for reimbursement of the costs incurred by its in-house counsel, the Committee agrees with Argentina that this is inappropriate in circumstances where (1) in-house counsel receives a standing salary which would ordinarily encompass involvement in litigation; (2) there is no evidence before the Committee that in this case, Casinos' in-house legal team was required to act beyond its ordinary scope of work; and (3) this annulment proceeding primarily involved questions of law, as opposed to factual or evidential issues, for which the assistance of in-house counsel would not normally be required.

555. Accordingly, the Committee orders Argentina to reimburse Casinos the total amount of USD 618,285.92, being the US dollar equivalent[633] of EUR 536,408.52 (i.e. EUR 553,839.52 less EUR 17,431.00) to cover Casinos' legal fees and expenses.

556. *Costs of the Proceeding:* The costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, amount to (in USD):

[633] At the exchange rate current on 2 November 2025.

Committee's fees and expenses:	
Mr. Toby Landau KC, President	236,368.48
Prof. Andrea Bjorklund, Member	54,984.02
Mr. Felipe Bulnes Serrano, Member	81,368.28
ICSID's administrative fees	188,000.00
Direct expenses	69,060.75
Total	**629,781.53**

557. In line with its determination that costs follow the event, the Committee orders Argentina to bear all costs of the proceeding, including the fees and expenses of the Committee, ICSID's administrative fees and direct expenses, in the total amount of USD 629.781,53.

558. The Committee notes that the above costs of the proceedings have been paid out of the advances made by Argentina pursuant to ICSID Administrative and Financial Regulation 15(5).[634]

(4) Interest

559. There appears to be no dispute between the Parties that the Committee has power to award interest on costs, and the Committee so concludes in any event.

560. The Committee considers that interest ought to be awarded in this case, to ensure that Casinos is properly compensated for the costs and expenses that Argentina has caused it to incur.

561. Casinos refers to LIBOR, but that rate no longer exists. In the alternative, Casinos refers to the Secured Overnight Funding Rate (SOFR), which the Committee considers is the appropriate rate.

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

562. Taking all these factors into account, the Committee considers that a rate of 5 percentage points above the 12-month SOFR rate per annum, compounded annually, is appropriate.

VIII. DECISION

563. For the reasons set forth above, the *ad hoc* Committee decides as follows:

(1) Argentina's Application for Annulment is dismissed in its entirety.

(2) Argentina shall bear the entire costs of the proceeding, including the fees and expenses of the Members of the Committee, ICSID's administrative fees and direct expenses in the amount of USD 629.781,53;

(3) Argentina shall, within thirty days of the date of dispatch of this Decision, pay to Casinos the sum of USD 618,285.92 in respect of the latter's legal fees and expenses;

(4) Argentina shall pay interest at a rate of 5 percentage points above the 12-month SOFR rate per annum, compounded annually, on USD 618,285.92 from 30 days after the date of dispatch of this Decision until payment.

[Signed]

Prof. Andrea Bjorklund
Member of the Committee

Date: 6 November 2025

Mr. Felipe Bulnes Serrano
Member of the Committee

Date:

Mr. Toby Landau KC
President of the Committee

Date:

[Signed]

Prof. Andrea Bjorklund Member of the Committee	Mr. Felipe Bulnes Serrano Member of the Committee
Date:	Date: 6 November 2025

Mr. Toby Landau KC
President of the Committee

Date:

Prof. Andrea Bjorklund
Member of the Committee

Date:

Mr. Felipe Bulnes Serrano
Member of the Committee

Date:

[Signed]

Mr. Toby Landau KC
President of the Committee

Date: 6 November 2025