



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law**

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**Award Name and Date:** *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 Argentina’s Application for Annulment – 29 May 2019

**Case Report by:** Ted Gleason\*\*, Editor: Diego Luis Alonso Massa \*\*\*

**Summary:** Following the 2017 ICSID Award in *Teinver et. al. v Argentine Republic*, Argentina initiated an annulment proceeding based on Art. 52 of the ICSID Convention. Argentina argued that the Tribunal had manifestly exceeded its powers, seriously departed from fundamental rules of procedure, and failed to state the reasons upon which the Award was based. Argentina made numerous challenges to the Tribunal’s findings concerning the existence of an investment and protected investors, the capacity of the Claimants’ attorneys after insolvency administrators took control of the claimant companies, the role of a third-party funder and the validity of the funding agreement, the Claimants’ failure to make contractual capital contributions and allocation of funds during the post-establishment phase of the investment, and the link between contract breaches and international responsibility. Argentina’s request for annulment was denied in its entirety and costs were shifted in favour of the Claimants.

**Main Issues:** Definition of an investment and protected investors where the investment consists of indirect shareholding interests; validity of powers of attorney when a claimant company enters insolvency; validity of third party funding agreements and impact on ICSID arbitration; post-establishment phase conduct of an investor; the relationship between contractual obligations of a host-state and international responsibility.

**Tribunal:** Mr. Alexis Mourre (President of the *ad hoc* Committee), Prof. Fernando Cantuarias Salaverri (Member of the *ad hoc* Committee) and Mr. Ricardo Ramírez Hernández (Member of the *ad hoc* Committee)

**Applicant’s (Argentina’s) Counsel:** Dr. Bernardo Saravia Frías, Dr. Miguel Francisco Bóo, Dra. María Teresa Gianelli (Procuración del Tesoro de la Nación, Buenos Aires)

**Claimants’ Counsel:** Mr. Roberto Aguirre Luzi, Mr. R. Doak Bishop, Mr. Craig S. Miles, Mr. Eduardo Bruera, Mr. Brian Jacobi (King & Spalding, LLP, Houston, TX)

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## Digest:

### 1. Procedural History

This case concerns the annulment proceeding following the Award in the arbitration between the Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A., the Claimants' in the original proceeding (“**Claimants**”), and the Argentine Republic (“**Argentina**”) (¶ 1). The underlying arbitration was based on the Agreement between the Government of the Argentine Republic and the Kingdom of Spain on the Promotion and Protection of Investments, dated October 3, 1991 (“**BIT**”) (¶ 2). The Award was rendered on 21 July 2017 and by majority decision found that Argentina had committed various BIT breaches, including unjustified measures interfering with Claimants' rights concerning their investments, a breach of the fair and equitable treatment standard, and unlawful expropriation (¶ 6). The Tribunal awarded Claimants USD 320.7 million in damages and interest plus USD 3.5 million in legal costs and expenses (¶ 6). Notably, the dissenting opinion of Dr. Kamal Hossein stated that in his view the Tribunal had no jurisdiction, as the Claimants had not established that they were protected investors under the Treaty (¶ 6). He also noted that the beneficiaries of the Award would not be the Claimants, but rather the Claimants' third-party funder and legal counsel (¶ 6). On 17 November 2017, Argentina filed an application seeking annulment of the Award (¶ 8). On 21 December 2017 the Parties were notified that an *ad hoc* Committee composed of Mr. Alexis Mourre (France), Prof. Fernando Cantuarias Salaverry (Peru), and Prof. Ricardo Ramírez Hernández had been constituted (¶ 10). On 15 May 2018 Argentina filed its Memorial on Annulment (¶ 15). On 30 July 2018 Claimants filed their Counter-Memorial on Annulment, with a revised version submitted on 21 August 2018 (¶ 20). On 1 October 2018 Argentina filed its Reply (¶ 21) and on 3 December 2018 the Claimants filed their Rejoinder (¶ 22). The Committee held a Hearing on Annulment at the World Bank's headquarters in Washington, D.C. on 5 and 6 February 2019 (¶ 41). On 8 March 2019 each party filed a Statement of Costs (¶ 43) and the proceeding was closed on 23 April 2019 (¶ 44). The Decision on Argentina's Application for Annulment was dispatched to the Parties on 29 May 2019.

### 2. Relevant Facts

The arbitration underlying the annulment proceeding was based on Claimants' allegations that Argentina had violated the BIT, international law, and Argentine law, by unlawfully re-nationalizing and taking other measures regarding Claimants' investments in two Argentine

airlines (¶ 5). The Claimants, based in Spain, had invested in Air Comet, another Spanish company (¶ 62). On 2 October 2001 Air Comet entered a Share Purchase Agreement (“SPA”) with a Spanish state-owned firm, Sociedad Estatal de Participaciones Industriales del Reino de España (“SEPI”) (¶ 62). Pursuant to the SPA, Air Comet acquired shares in an Argentine company, Interinvest S.A., which in turn held two Argentine Airlines, Aerolíneas Argentinas S.A. (“ARSA”) and Austral-Cielos del Sur S.A. (“AUSA”) (¶ 62).

On 21 July 2008, in the context of the delicate financial situations of ARSA and AUSA, Argentina and Interinvest entered into a Memorandum of Agreement to determine the price of the Airlines’ shares, which were to be purchased by Argentina (“July 2008 Agreement”) (¶ 140). Pursuant to the July 2008 Agreement, a third party valuator would be appointed to determine the value of the shares, however, due to disagreements between Interinvest and Argentina, no such valuator was ever appointed (¶ 142). Thereafter the Argentine Congress enacted a law declaring ARSA and AUSA of public interest and subject to expropriation (¶ 142). As a result, Claimants initiated arbitration pursuant to the BIT. The Tribunal ultimately found that Argentina breached the July 2008 Agreement by failing to comply with its obligation to purchase Interinvest’s shares in ARSA and AUSA, and that such breach was an unjustified measure (BIT Art. III (1)), constituted a breach of the fair and equitable treatment standard (BIT Art. IV (1)), and that expropriation of the ARSA and AUSA shares was an unlawful expropriation (BIT Art. V) (¶ 143).

On 18 January 2010, subsequent to initiating the arbitration, Claimants assigned their rights arising out of the arbitration to Air Comet for no price or consideration (“Assignment Agreement”) (¶ 66). Thereafter, on 14 April 2010, Claimants entered into a third-party funding arrangement with Burford Capital (“Funding Agreement”). In late 2010 and early 2011, the three Claimant companies became subject to insolvency proceedings, and in April 2013 Claimants’ management and disposition powers were suspended and transferred to Trustees in Insolvency (¶ 96). No new powers of attorney were obtained by Claimants’ counsel King & Spalding (¶ 97). Claimants did nonetheless make filings from the insolvency administrators with the Tribunal concerning King & Spalding’s powers to act in the arbitration including letters from the insolvency administrators filed on 16 June 2011, and again with the Reply in August 2013, and public deeds executed by the insolvency administrators filed in October 2015 (¶ 104).

### 3. Discussion on the Grounds for Annulment

Argentina argued for annulment of the Award based on three grounds, manifest excess of powers, departure from a fundamental rule of procedure, and failure to provide reasons (¶ 49).

#### 3.1. *Manifest Excess of Powers*

Concerning the manifest excess of powers argument Argentina contended that tribunals exceed their power when they act beyond the consent of the parties (¶ 51) and in this case the Tribunal exceeded its powers concerning jurisdiction by failing to apply the applicable law, and failing to address all issues raised by the Parties in the case (¶ 52). The Claimants argued that “manifest” means obvious or clear, and if the Tribunal’s interpretation was tenable, then the award should not be annulled (¶ 56). Claimants posited that since the Tribunal discussed and considered the proper law, even an incorrect application thereof cannot be a failure to apply the applicable law (¶ 57). Furthermore, the Claimants stated that the Tribunal addressed all

issues raised by the Parties, and even if it did not, this would not be a ground for annulment (¶ 58).

The Committee recognized that situations where a tribunal exercises jurisdiction not conferred upon it by the parties, or conversely refuses to exercise jurisdiction conferred upon it, could be an excess of powers, but a mere error in a tribunal's jurisdictional findings is not (¶ 59). The Committee also stated that a tribunal's reliance on tenable solutions from several previous cases indicates that an excess of powers is not manifest (¶ 59). The Committee then distinguished between disregarding proper law, which would be a manifest excess of powers, and incorrect or imperfect application, which would generally not (¶ 60). Finally, a failure to address one or more of the Parties' arguments could be relevant to annulment based on a failure to provide reasons, but not manifest excess of powers (¶ 61). The Committee further noted on this point that a tribunal is not required to respond to every argument or sub-argument raised by the parties (¶ 61).

### *3.1.1. The Tribunal's Exercise of Jurisdiction*

Argentina made a variety of arguments that the Tribunal manifestly erred in exercising jurisdiction over the case. First, Argentina argued that Claimants' did not make any protected investment, as the nature of its alleged investment was indirect (¶ 62). Additionally, Argentina also argued that the investment did not meet the *Salini* test as Claimant's did not contribute to the host-State's development or assume any risk through the investment (¶ 65). Argentina further argued that Claimants were not protected investors under the BIT (¶ 64) and that they did not have the quality of investors as they assigned their rights arising out of the arbitration to Air Comet for no price or consideration (¶ 66). Finally, Argentina submitted that Claimants' had abused the ICSID system by allowing the third-party funder, Burford Capital Limited, along with the nominated lawyers, King & Spalding, to benefit from the BIT based on the Funding Agreement since these parties would be the principal beneficiaries of any award in the case (¶ 67). This was argued to be against the object and purpose of the ICSID Convention, and the principle of good faith (¶ 70).

The Claimants responded by pointing out that the Tribunal analysed the issue concerning indirect investments (¶ 72) and correctly found that Art. I(2) of the BIT allowed for "*shares and other forms of participation*" in Argentine companies to be considered as protected investments (¶ 73). It was noted that other tribunals have considered the same arguments in the same context under the same BIT (¶ 74). Claimants also posited that Argentina did not meet their burden of showing that any error was obvious and self-evident (¶ 75). Concerning Argentina's argument on the *Salini* test, Claimants argued that the criteria are indicators concerning the existence of an investment, but tribunals are not bound to apply them, thus even if the Tribunal had failed to strictly adhere to the criteria, there would be no manifest error warranting annulment (¶ 76). Claimants then addressed Argentina's abuse of process argument by stating that they only assigned the proceeds of the arbitration, and not the claims (¶ 77). They argued that the Tribunal was correct in concluding that the assignment of the proceeds to Burford was irrelevant to jurisdiction, especially considering that jurisdiction is assessed at the time a case is filed, and the Funding Agreement was executed one year after arbitration was initiated (¶ 77).

In its analysis, the Committee stated that if a tribunal relies on tenable solutions adopted in previous cases, there should as a matter of principle be no annulment (¶ 80). The Committee recognized the Tribunal's analysis of the broad language of Art. I(2) of the BIT (¶¶ 81, 82),

and found no manifest excess of powers in the Tribunal's interpretation that an indirect investment such as Interinvest is protected by the BIT (¶ 83). Concerning the *Salini* test the Committee noted that Argentina did not argue the *Salini* criteria in its jurisdictional objections before the Tribunal, thus the Committee could not rely on the argument to find that the jurisdictional findings amounted to a manifest excess of powers (¶ 86). Furthermore, the Committee was satisfied that even if the *Salini* criteria were relevant, they were complied with (¶ 88). The Committee also found that jurisdiction is assessed as of the date the case is filed, and as the Assignment Agreement was entered into more than one year after the arbitration was initiated it did not affect the Tribunal's jurisdiction (¶ 90).

Finally, the Committee found Argentina's argument that the Burford Funding Agreement was a vehicle of fraud to the ICSID system to be without merit (¶ 91). Similar to its analysis concerning the Assignment Agreement, the Committee determined that since the Funding Agreement was made 16 months after the Request for Arbitration it was irrelevant to the assessment of the Tribunal's jurisdiction and Claimants' standing (¶ 92). Moreover, nothing in the Funding Agreement allowed for a conclusion that Burford owned the claims. There was no assignment of the interest in the dispute or proceeds of the award, and the right to enforce and collect on the Award continued to belong to Claimants (¶ 93). The Committee found that Argentina failed to articulate how the funder's role amounted to an abuse of process (¶ 94). In sum, the Committee found that there was no manifest excess of powers in the Tribunal's jurisdictional decisions (¶ 95).

### *3.1.2. Lack of Capacity of Claimants' Counsel*

As all three Claimants became subject to insolvency proceedings in Spain, in April 2013 their management and disposition powers were suspended and transferred to insolvency administrators (¶ 96). Argentina argued that it was these administrators who had standing in the arbitration and contended that the powers of attorney granted to King and Spalding were no longer valid as no similar powers of attorney were obtained from the insolvency administrators (¶ 97). Argentina argued that neither the 2011 and 2013 letters from the insolvency administrators submitted to the Tribunal, nor the 2015 public deed submitted to the Tribunal met Spanish law requirements for powers of attorney (¶ 99). Argentina further stated that the reason King & Spalding did not obtain new powers of attorney from the insolvency administrators was to avoid putting the Funding Agreement with Burford at risk (¶ 99). The thrust of Argentina's argument was that the Tribunal failed to apply relevant Spanish law concerning the powers of attorney, thus manifestly exceeding its powers (¶ 109).

The Claimants argued that Argentina's position was simply a disagreement with the Tribunal's decision, and that the Tribunal found that under Spanish law King & Spalding's representation was re-affirmed and ratified by the insolvency administrators (¶¶ 101 – 104). They also noted that the Tribunal found that the insolvency administrators were fully aware of the Funding Agreement with Burford (¶ 106). Claimants' argued that the Tribunal issued a comprehensive, thoughtful, and correct decision on this issue and did not manifestly exceed its powers (¶ 108).

The Committee agreed that failure to apply the law agreed upon by the parties may be the basis for an annulment for excess of powers, but recognized that a distinction needs to be made between non-application and error in application (¶ 110). As the Committee is not an appellate body, it determined that the relevant question was whether the Tribunal applied Spanish law, not whether the Tribunal's reasoning was correct under Spanish law (¶ 118). The Committee analysed the Award and found the Tribunal's findings to be based on Spanish bankruptcy law

(¶¶ 113 – 117). Whether the reasoning was correct or not, there was no doubt in the eyes of the Committee that the Tribunal applied Spanish law concerning the capacity of King & Spalding to represent the Claimants’ in the arbitration, as such there was no manifest excess of powers on this issue (¶ 118).

### *3.1.3. Misappropriation of the SEPI Funds*

Argentina also noted that the 2001 SPA between Air Comet and SEPI required Air Comet to make a USD 50 million capital contribution (¶ 119). Air Comet also received USD 803 million from SEPI to be specifically distributed according to the SPA (¶ 119). Argentina argued that Air Comet failed to make the required capital contribution and did not use the SEPI funds as intended, and that this breached the SPA and violated the principle of good faith (¶ 120). Its position was that these breaches triggered the inadmissibility of the claims under international law (¶ 122). The Tribunal decided that the facts raised by Argentina would be dealt with in the merits phase of the arbitration; however, Argentina contends that the Tribunal ultimately failed to address these issues (¶ 121).

The Claimants noted that Argentina was not a party to the SPA and had no standing to complain about it (¶ 124). Any complaint concerning use of the funds should have been made by SEPI, and the Tribunal found that SEPI was aware of how the funds were being used and did not invoke contractual remedies nor attempt to revoke the agreement (¶ 124). The Claimants also pointed out that the Tribunal extensively discussed and rejected Argentina’s arguments on the misappropriation of the SEPI funds (¶ 125).

The Committee found that Argentina’s arguments concerned alleged breaches of the SPA occurring after the investment was made and could not form the basis of a jurisdictional argument (¶ 127). Concerning Argentina’s position that the Tribunal failed to address its argument concerning misuse of funds (¶ 128), the Committee found that the Tribunal carefully analysed Argentina’s grievances on this issue (¶ 130). It did not find any reason to question the Tribunal’s findings (¶ 132), and noted that while a tribunal must address all claims in a case, it is not required to address all arguments or sub-arguments advanced by the parties in support of their claims (¶ 136). The Committee also found that Argentina did not explain why the facts should be considered as a breach of good faith in international law, and why the investors should be deprived of BIT protection (¶ 129). In short, the Committee determined that the Tribunal did address Argentina’s arguments concerning use of the SEPI funds (¶ 138) and held that the Tribunal did not commit a manifest excess of powers in rejecting Argentina’s arguments based on the alleged misuse of the SEPI funds (¶ 139).

### *3.1.4. The July 2008 Agreement*

Argentina’s final argument concerning manifest excess of powers was that the only basis for the Tribunal’s finding of BIT breaches was the July 2008 Agreement (¶ 140), and as such the Tribunal essentially elevated contract claims to treaty claims (¶ 144). Argentina also argued that the Tribunal had no jurisdiction to base its findings on the July 2008 Agreement because the Claimants were not a party to that contract (¶ 144).

The Claimants submitted that the relevant question was whether the breach of the 2008 Agreement also caused a violation of the FET standard (¶ 146). The Claimants pointed out that the Tribunal found that the breach of the July 2008 Agreement was a violation of the FET standard (¶ 148).

The Committee recognized that the Tribunal found that Argentina's refusal to comply with the July 2008 Agreement was a breach of the FET standard since Argentina had acted in its capacity as a sovereign, not merely as a contracting party (¶ 151). Since the July 2008 Agreement was part of a legal framework established by Argentina for the operation of the investment and possible sale thereof, a breach of the contract could also be a breach of treaty obligations, irrespective of the existence of an umbrella clause (¶ 152). This was not elevating mere contract breaches to an international plane; rather the facts concerning Argentina's action were inconsistent with its international obligations (¶ 153). Claimants had a legitimate expectation that Argentina would act consistently with the legal framework in place, and the Committee found that the Tribunal, in considering the July 2008 Agreement as part of this legal framework, did not exceed its powers (¶ 153).

The Committee also rejected Argentina's argument that the Tribunal manifestly exceeded its powers by adopting a Credit Suisse valuation submitted by Interinvest as the basis for assessing damages instead of following the July 2008 Agreement which required an independent expert to complete the valuation (¶ 156). The Committee found Argentina's argument to be erroneous since the Tribunal was required to assess reparation by equivalent, i.e., fixing damages corresponding to fair market value of the shares, and not the price fixing mechanism of the July 2008 Agreement (¶ 157). The question is one of the assessment of the evidence by the Tribunal, which cannot be revisited by the Committee (¶ 158). The Committee concluded that the Tribunal did not exceed its powers in its assessment of damages (¶ 160).

### *3.2. Serious Departure from a Fundamental Rule of Procedure*

Argentina has also argued that the Tribunal made several serious departures from fundamental rules of procedure. It posited that these arguments concern principles of natural justice alongside the integrity and fairness of the arbitral process (¶ 161). The Claimants agreed that this ground of annulment is concerned with the integrity and fairness of the arbitral process, but further contended that the ICSID Convention Art. 52(1)(d) threshold for a procedural violation to constitute a ground of annulment is very high (¶ 162). The Committee agreed with the Parties that this ground of annulment is linked to the integrity and fairness of the proceedings, and in particular fundamental principles of due process (¶ 163). The Committee found that only serious matters of procedure can be argued under Art. 52(1)(d), and a serious departure from a fundamental rule of procedure does not allow for substantive review of the award (¶ 163).

#### *3.2.1. Exercise of Jurisdiction*

Argentina levied various arguments concerning the Tribunal's exercise of jurisdiction over the case as constituting a serious departure from a fundamental rule of procedure. It first argued that Claimants' failed to prove their capacity as investors and the existence of an investment under the BIT, and as such the Tribunal departed from a fundamental rule of procedure in exercising jurisdiction (¶ 165). Argentina also argued that the Tribunal departed from fundamental procedural rules by allowing King & Spalding to continue representing Claimants despite the previously discussed issues related to powers of attorney, and by allowing Burford and King & Spalding to be the principal beneficiaries of the Award proceeds (¶ 165). Finally, Argentina made arguments concerning abuse of process and public policy stating that the Funding Agreement was based on champerty (¶ 167), that King & Spalding was imposed by

Burford, (¶ 169), and that the terms of the Funding Agreement releasing Burford from paying any costs or sums awarded against the Claimants (¶ 170).

The Claimants refuted Argentina's arguments that its due process rights were violated when the Tribunal rejected the objection concerning the absence of a protected investment by pointing out there was no real question of due process as Argentina's submissions were thoroughly addressed by the Tribunal (¶ 172). Concerning the Funding Agreement, the Claimants contended that the Tribunal was not required to take any position on the validity thereof (¶ 173).

The Committee found that Argentina did not explain which fundamental rule of procedure would have been breached by the Tribunal finding that the Claimants were investors and the existence of an investment under the BIT (¶ 176). As a committee has no powers to revisit the assessment of evidence made by a tribunal (¶ 175), and as there was no substantial difference as to the relevant facts between the Parties concerning the Tribunal's jurisdiction, the Committee considered Argentina's arguments to be based on a consideration that the Tribunal erred in its assessment of legal questions (¶ 176). The Committee followed the same approach concerning the powers of attorney and Funding Agreement issues and restated that it is not up to an annulment committee to review the tribunal's assessment of evidence (¶ 176). As such, the Committee determined that there was no serious departure from a fundamental rule of procedure in the Tribunal's jurisdictional findings (¶ 177).

### 3.2.2. *Lack of Capacity of Claimants' Counsel*

Argentina then argued that by allowing King & Spalding to continue representing Claimants in the arbitration despite the installation of insolvency administrators in 2013, the Tribunal breached basic standing and representation principles amounting to a serious departure from a fundamental rule of procedure (¶ 178). The Claimants stated that this was simply an attempt to review the Tribunal's findings on the matter, and that Argentina failed to establish whether the principles of representation upon which they relied were fundamental rules of procedure, nor that the alleged departure was serious (¶ 179).

The Committee recognized that a false representation may be a breach of a fundamental rule of procedure and that allowing a person deprived of powers to represent a party could lead to an annulment (¶ 180). The Committee nevertheless differentiated between a false representation and a procedural irregularity and found Argentina's complaints to be formalistic since the will of the insolvency administrators to be represented by King & Spalding was supported by the record (¶ 181). As the insolvency administrators intended to be represented by King & Spalding, a failure to comply with purported requirements of form under Spanish law for powers of attorney was not a departure from a fundamental rule of procedure (¶ 182).

### 3.2.3. *Funding Agreement and role of Burford*

Argentina also argued that the Funding Agreement substituted Burford as the real party in the arbitration and that based on principles of *champerty* and *maintenance* the Funding Agreement was an abuse of process contrary to public policy (¶ 183). Its position was that by failing to verify that the Funding Agreement complied with good practices related to third-party funding and taking jurisdiction nonetheless, the Tribunal seriously departed from a fundamental rule of procedure (¶ 183). The Claimants objected that the Tribunal did not have to take a position on the validity of the Funding Agreement, which was irrelevant in the dispute between Claimants



and Argentina (¶ 184). They also pointed out that Argentina failed to point to any specific fundamental rule of procedure at issue, and there was no evidence that Burford exercised any control in the arbitration (¶184).

The Committee found that the fact that a funding agreement is contrary to public policy, international law, and the object and purpose of the ICSID Convention is not necessarily sufficient in and of itself to entail Art. 52(1)(d) annulment (¶ 186). Argentina was required to identify a fundamental rule of procedure from which the Tribunal departed. While recognized good practices may be relevant in assessing whether there was a departure from a fundamental rule of procedure, an applicant still has to identify the rule that was departed from, which Argentina failed to do in this case (¶ 187). It was unable to show that the sources used to demonstrate best practices in third-party funding were fundamental rules of procedure mandatory in ICSID Arbitration (¶ 187). Argentina also failed to demonstrate that the prohibition on *champerty* and *maintenance* applies in ICSID arbitration.

The Committee did find that Argentina identified a fundamental rule of procedure that a party may not appear on behalf of another without disclosing the representation and being empowered to that effect (¶ 188). However, as the Committee found that the Funding Agreement did not transfer any rights to Burford, the Claimants were not deprived of their standing to pursue the claims (¶ 189). Furthermore, the Committee noted that King & Spalding represented Claimants' prior to the existence of the Funding Agreement, thus Argentina's argument that King & Spalding was imposed on the Claimants could not be upheld (¶ 192).

Argentina also attacked a variety of provisions of the Funding Agreement (¶¶ 192, 193). However, Argentina failed to identify a fundamental rule of procedure that these provisions would offend (¶¶ 192, 194). The Committee found that it was entirely reasonable that the Funding Agreement contained provisions prohibiting non-agreed changes in representation and making release of funds contingent on an agreement concerning the identity of counsel in the case (¶ 192). Nor did the Committee find other provisions, such as the Claimants' obligation to accept a settlement agreement at certain conditions, or limitations on Claimants' rights to initiate other legal proceedings (¶ 193) to be improper interference by Burford, nor deprive Claimants of control over the case (¶ 194). Argentina's arguments concerning possible conflicts of interest between King & Spalding and Burford were also disregarded as no specification concerning the alleged conflicts of interest were provided (¶ 195). As no fundamental rule of procedure inconsistent with the Funding Agreement was identified, the Committee rejected Argentina's claims on this issue (¶ 196).

#### 3.2.4. Misappropriation of the SEPI Funds

Finally, Argentina argued that the Tribunal seriously departed from a fundamental rule of procedure by granting protection to the investment, despite the fact that Air Comet improperly used funds received from SEPI (¶ 197). The basis of this argument was twofold, first that the Tribunal reversed the burden of proof requiring Argentina to prove Claimants' investment, and second that the Tribunal failed to deal with its argument relating to the misuse of the funds received from SEPI (¶ 197). The Claimants noted that the Tribunal dealt with the use of SEPI's funds in the Award, and did not reverse the burden of proof (¶ 198).

The Committee found that Argentina's arguments concerning misappropriation of the SEPI funds did not establish a ground for annulment for serious departure from a fundamental rule of procedure, rather the argument went to the assessment of the evidence (¶ 199). It was not up

to the Committee to second guess the Tribunal's findings on the admissibility and probative value of the evidence, and an error in the assessment thereof is not ground for annulment under Art. 52 (¶ 199). It also rejected Argentina's argument that the burden of proof was reversed on this issue as the Award made clear reference to arguments and evidence put forward by the Claimants (¶ 201). The Committee then reiterated that it has no obligation to address each and every single argument advanced in support of their claims, and in any event the Tribunal did address the questions concerning the misappropriation of the SEPI funds both explicitly and implicitly (¶ 202). The Committee found no serious departure from a fundamental rule of procedure in the Tribunal's findings relating to the SEPI funds (¶ 203).

### *3.3. Failure to State the Reasons on Which the Award is Based*

Argentina's third line of attack on the Tribunal's decision was that the Tribunal failed to state the reasons on which the award was based. It argued that the requirement that tribunals state the reasons for their decisions is an essential aspect of ICSID arbitration citing to ICSID Convention Art. 52(1)(e) (¶¶ 205, 206). Argentina raised various complaints concerning the Award in this regard. First, it claimed that the Tribunal failed to provide reasons with respect to its findings as to the existence of an investment (¶ 204). Moreover, Argentina posited that the Tribunal's reasoning was contradictory concerning the question of validity of the powers of attorney, with the respect to the SEPI funds, and with respect to the July 2008 Agreement and assessment of damages (¶ 204). Finally, Argentina argued that that the Tribunal failed to express reasons regarding international law principles on good faith, and use of the SEPI funds, (¶204).

The Claimants cited to jurisprudence and commentators to support their argument that the requirement to state reasons is intended to enable readers to understand and follow the reasoning of the tribunal, and that tribunals have discretion and are not required to discuss every issue raised by the parties (¶ 208).

The Committee interpreted Art. 52(1)(e) as expressing the minimum requirement that a good faith reader of the award can understand the motives that lead the Tribunal to adopt its decisions, considering the award in its entirety (¶ 209). Unclear or imperfect expression of reasons is an insufficient reason to annul an award, and contradictory reasons are only sufficient if it becomes impossible to understand a tribunal's motives (¶ 209). The Committee also agreed with the Claimants that a tribunal does not have to follow the parties in the detail of their arguments, nor address all of the evidence in the record. A failure to address an argument or a piece of evidence only entails annulment if it is so important as to be determinative to the outcome (¶ 210).

#### *3.3.1. Jurisdictional finding concerning the existence of an investment*

Argentina submitted that the Tribunal failed to explain how the Spanish Claimants shareholding in a Spanish company, Air Comet, could be considered as assets in Argentina. Likewise, Argentina argued that the Tribunal failed to explain how Air Comet's shareholdings in the Argentine firm, Interinvest, could be considered to be assets acquired by the Claimants and an investment under the BIT and ICSID Convention (¶ 212). The Claimants contended that the Tribunal did coherently explain its reasons on these issues in over 30 paragraphs in the Award (¶ 213) as well as over several pages in the Decision on Jurisdiction (¶ 214). The Committee disagreed with Argentina and found the Tribunal's decision as to the existence of an investment and investors under the BIT to be reasoned and exempt of contradictions (¶ 215).

What matters in the context of Art. 52(1)(e) is that there is an understandable explanation of how the Tribunal reached its conclusions, which according to the Committee was the case here (¶ 215).

### *3.3.2. Lack of Capacity of Claimants' Counsel*

Argentina complained that the Tribunal contradicted itself by stating that Spanish law was applicable to King & Spalding's powers of attorney, and then ignoring the applicable law (¶ 218). The Claimants reiterated the same arguments that they made on this point in addressing manifest excess of powers (¶ 219). The Committee also reiterated its position on this issue by incorporating its analysis from the manifest excess of powers portion of the Decision, and finding that the Tribunal's decisions on this issue were reasoned and not contradictory (¶ 221).

### *3.3.3. Misappropriation of Funds Received from SEPI*

Various additional arguments were put forth by Argentina concerning the SEPI funds received by Air Comet and the alleged misappropriation. Argentina submitted that the Tribunal engaged in contradictory reasoning in addressing its argument concerning a specific tranche of the funds, and failed to address its argument concerning the use of a separate tranche of the funds (¶ 222). The Claimants stated that in their view these issues were not relevant noting that SEPI, the contractual party who would have been aggrieved by the alleged misappropriation of the funds, did not complain about the use of the funds, and that the Tribunal's decision was clearly supported by the record even if not stated expressly (¶ 223). They also pointed out that Argentina could have sought a supplementary decision under Art. 49(2) of the ICSID Convention to remedy their complaint that the Tribunal did not settle certain arguments, but as it did not avail itself of that remedy it could not seek annulment on those grounds (¶ 225).

The Committee noted that the Tribunal dedicated 15 pages to Argentina's averments on use of the SEPI funds, thus satisfactorily providing a comprehensive and detailed answer to Argentina's arguments pursuant to Art. 48(3) of the ICSID Convention (¶ 226). The Committee again highlighted that the Tribunal had no duty to address every argument put forth by the parties, and a failure to do so is not a failure to provide reasons (¶ 226). Furthermore, the Committee found no contradictory reasoning concerning use of the SEPI funds (¶¶ 227, 228). As to Argentina's complaint that its arguments concerning the use of certain funds was not addressed by the Tribunal, the Committee agreed that the issue was only cursively addressed in the Award (¶ 229), but implicitly concluded that SEPI had no complaint about the way the funds were used (¶ 230). The Award allowed understanding of the Tribunal's findings on all aspects of the use of the SEPI funds, thus there was no failure to provide reasons concerning these issues (¶ 230). Finally, the Committee found that Argentina failed to explain how the alleged misappropriation of the funds breached the principle of good faith in international law leading to inadmissibility of the claims (¶ 231). As such, the Committee found that the Tribunal did not fail to provide reasons concerning the use of the SEPI funds.

### *3.3.4. The July 2008 Agreement*

Argentina's final argument concerning a failure of the Tribunal to state reasons upon which the Award was based concerns the July 2008 Agreement. Argentina restated that the Tribunal established international responsibility and a treaty breach based on a contractual breach (¶ 233). It argued that the Award does not allow for understanding how the contractual breach could be a treaty breach, the Tribunal's reasoning on damages was illogical and contradictory,

and that the Tribunal failed to address criticism raised in the arbitration concerning the Credit Suisse valuation (¶ 234). The Claimants stated that the Tribunal did not fail to state reasons on these issues and in fact explained in detail how the breach of the contract also violated the FET standard along with its findings on quantum (¶ 235).

The Committee found that the Tribunal expressed clear and coherent reasons concerning how the breach of contract also violated the FET standard (¶¶ 236, 237). The Committee stated that it is not its role to opine as to whether the findings are correct, and acknowledged that the findings were reasoned, clear, and understandable (¶¶ 238, 239). Nor did the Committee find any contradiction in the Tribunal's reasoning on damages (¶ 241) and highlighted that the Tribunal used the Credit Suisse valuation as the best available evidence of the fair market value of the Airlines at the time of the taking (¶ 242). The Committee noted that Argentina's complaint of the Tribunal's approach on this point was based on a conceptual error (¶ 242). In using the Credit Suisse valuation, the Tribunal was not enforcing the July 2008 agreement, which required an independent valuation; rather the Tribunal used the Credit Suisse valuation presented by Claimants as evidence of fair market value in order to provide Claimants with full reparation pursuant to international law (¶ 243). This was not contradictory, nor unclear, nor incomprehensible (¶ 243). The Committee went on to state that there is no conceptual inconsistency in finding that a company in a difficult situation may generate value in the future, while simultaneously acknowledging that this is not a finding that an *ad hoc* committee may address (¶ 246). Finally, the Committee noted that a failure by a tribunal to comment on certain portions of an expert report produced by a party does not entail the annulment of an Award (¶ 249). Thus, the Committee found that the Tribunal did not fail to provide reasons with respect to its assessment of damages (¶ 250).

#### **4. Costs**

Argentina argued that Claimants should bear the total arbitration costs incurred, including legal fees and expenses totalling USD 884,319.88, including USD 725,000 in ICSID costs and USD 127,138.46 in representation costs (¶ 251). The Claimants requested that Argentina bear all costs incurred by Claimants in the annulment proceeding, including legal fees and expenses, totalling USD 1,531,833.0, of which USD 1,514,322 were for representation costs (¶ 252). The Committee considered that the Claimants prevailed and were entitled to be compensated for their costs (¶ 257). The Committee also noted a significant disproportion in representation costs between the parties, and in view of the complexity of the case and the interests at stake, decided that Claimants were entitled to be reimbursed for USD 1,000,000 of their representation costs in addition to their expenses, in an amount totalling USD 1,017,512.