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Background Paper on Annulment
For the Administrative Council of ICSID*

August 10, 2012

*This paper does not constitute legal advice. The information in this paper is current to June 30, 2012.

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I. Purpose of Background Paper

1. The ICSID Secretariat has prepared this paper to assist Contracting States with a matter raised by the delegation of the Republic of the Philippines ("the Philippines") at the 45th Annual Meeting of the ICSID Administrative Council on September 23, 2011, as promised at that meeting.[1]

A. *Request by the Philippines*

2. By letter dated June 27, 2011,[2] the Solicitor General of the Philippines wrote to the ICSID Administrative Council concerning a decision on annulment in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*.[3] In that case, the ICSID Tribunal award in favor of the Philippines was annulled by an ICSID *ad hoc* Committee on the ground that there had been a serious departure from a fundamental rule of procedure.[4] The *ad hoc* Committee found that the Tribunal had not given the parties an opportunity to address certain evidence submitted by the Philippines, which failure constituted a serious departure from the right to be heard and materially affected the outcome of the dispute.[5]

3. In the view of the Philippines, the *Fraport* Annulment Decision "was taken in excess of the *ad hoc* Committee's limited power under Article 52 of the ICSID Convention" and provided "further evidence of a systemic problem of ICSID *ad hoc* committees failing to adhere to the mandate established in Article 52 of the ICSID Convention."[6] The Philippines urged the Administrative Council to consider seriously the need to issue guidelines for use by *ad hoc* Committees to ensure fair and effective annulment proceedings.

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[1] The ICSID Secretariat takes no position in this paper as to whether a specific decision of an ICSID *ad hoc* Committee is correct or is within the proper scope of review allowed by Article 52 of the ICSID Convention. Annex 1, which is attached to this paper, lists all annulment cases, including the full and short form citations, members of the Tribunals and *ad hoc* Committees, and the outcome in each case.

[2] Letter from Mr. Jose Anselmo I. Cadiz, Solicitor General, Republic of the Philippines, to ICSID Administrative Council (June 27, 2011). The letter was distributed to the Administrative Council by the ICSID Secretariat at the 2011 Annual Meeting of the Administrative Council on September 23, 2011. For convenience, it is attached to this document as Annex 2.

[3] *Fraport*. Issued by an *ad hoc* Committee consisting of Judge Peter Tomka (President), Judge Dominique Hascher, and Professor Campbell McLachlan, Q.C. The Committee annulled the Award of August 16, 2007, *available at* http://italaw.com/documents/FraportAward.pdf, rendered by a Tribunal composed of Mr. L. Yves Fortier, C.C., Q.C. (President), Dr. Bernardo M. Cremades, and Professor W. Michael Reisman.

[4] *Fraport*, para. 218. *See* Article 52(1)(d) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965 ("ICSID Convention").

[5] *Fraport*, paras. 235 & 246. Following the annulment decision, ICSID registered a request for arbitration submitted by Fraport against the Philippines: *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12. For the current status of the proceeding, *see* ICSID's website at http://icsid.worldbank.org.

[6] Annex 2, *supra* note 2, at 1.

4. The Philippines recommended the following guidelines:

(1) Reaffirm the extraordinary and limited scope of Article 52 annulment.

(2) Reaffirm that an *ad hoc* committee's authority is limited to the application of the Article 52 standards.

(3) Reaffirm that as such, annulment is limited to the most serious and egregious cases, providing a specific definition of Article 52 standards.

(4) Confirm that it is not within the mandate of an *ad hoc* committee to offer critical or corrective commentary on decisions of the tribunal for which there is no basis to annul.

(5) In view of the importance of consent to the role of ICSID in the resolution of disputes, confirm that the mandate of an *ad hoc* committee under Article 52 of the Convention is limited to addressing the application for annulment presented.

(6) Confirm that *ad hoc* committees must accord the parties the same right to present their case as the parties enjoy in the arbitration and thus must be permitted to present observations on the issues to be decided by the *ad hoc* committee.

(7) *Ad hoc* committees should be composed of members with substantial experience with ICSID arbitrations either as an advocate or tribunal member. In addition, where one of the parties is from a developing country, at least one committee member should represent the developing country perspective either by virtue of nationality or experience.[7]

B. *Presentations at 2011 Meeting of the Administrative Council*

5. At the afternoon session of the September 23, 2011 Administrative Council meeting, the Secretary-General of ICSID reported to members concerning the operation of ICSID, including the ICSID annulment mechanism.[8] Thereafter, The Honorable Cesar V. Purisima, Secretary of Finance of the Republic of the Philippines, and Mr. Jose Anselmo Cadiz, Solicitor General of the Republic of the Philippines, explained to ICSID members the concerns of the Philippines about the application of the annulment mechanism. Solicitor General Cadiz

[7] The Philippines' Proposal to Analyze the Potential for Establishing Guidelines on the Implementation of Article 52 of the ICSID Convention (September 23, 2011), distributed to the Administrative Council on October 19, 2011, Annex 3, at 10 & 11. At the request of the Philippines, ICSID transmitted a previous version of Annex 3, in English, French and Spanish, to the Administrative Council by letter of September 16, 2011.

[8] Summary record of the proceedings of the 45th Annual Meeting of the ICSID Administrative Council (September 23, 2011), Washington D.C., distributed to the Administrative Council on October 19, 2011, Annex 4, paras. 28-30. *See also* ICSID FY 2011: An Overview, Report to the ICSID Administrative Council by the Secretary-General of ICSID (September 23, 2011), Annex 5, at 22-26.

requested that the Secretary-General conduct a thorough review of all annulment decisions and convene an exploratory task force of legal experts to assess the implementation of Article 52 of the ICSID Convention. Solicitor General Cadiz noted that such a task force could propose guidelines, if warranted, to assist future *ad hoc* Committees, and that any such guidelines should be submitted for approval and adoption by the Administrative Council at a subsequent Annual Meeting.[9] Solicitor General Cadiz also presented guidelines recommended by the Philippines (outlined above) that a task force might wish to consider. The presentation of the Philippines was accompanied by a PowerPoint document, which was distributed to ICSID Contracting States.[10]

6. The Secretary-General undertook for the ICSID Secretariat to prepare a background paper on annulment for consideration by the Administrative Council, and, if requested by Contracting States, to facilitate a meeting of representatives to look further into this subject.[11] No other Contracting State commented on the presentation of the Philippines or the undertaking of the Secretary-General to prepare this background paper. All information and statistics in this paper are current as of June 30, 2012.

II. Introduction to the Annulment Mechanism in the ICSID Convention

7. One of the unique features of the ICSID system is its autonomous nature. ICSID arbitration is known as self-contained, or de-localized, arbitration because local courts in any particular State have no role in the ICSID proceeding. Instead, the ICSID Convention and rules contain all provisions necessary for the arbitration of disputes, including provisions addressing the institution of proceedings, jurisdiction, procedure, the award to be rendered by the Tribunal, post-award remedies, and recognition and enforcement of the award.[12]

8. An important aspect of the self-contained nature of the system is the remedies available to the parties after an award has been rendered. ICSID awards are binding on the disputing parties, may not be appealed, and are not subject to any remedies except those provided for in the Convention.[13] As a result, unlike other international arbitral awards, ICSID awards cannot be challenged before national courts. Challenges to ICSID awards must be brought within the framework of the Convention and pursuant to its provisions.

9. The choice of remedies offered by the ICSID Convention reflects a deliberate election by the drafters of the Convention to ensure finality of awards. The only way to review an award is pursuant to the five specific remedies provided by the Convention. These remedies are:

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[9] Annex 3, *supra* note 7, at 8 & 9.

[10] *Id*.; *see also* Annex 4, *supra* note 8, at paras. 35-52.

[11] Annex 4, *supra* note 8, at para. 53.

[12] In accordance with Article 54 of the ICSID Convention, an award must be recognized by all ICSID Contracting States and pecuniary obligations imposed by an award are enforceable as a final judgment of the courts of a Contracting State.

[13] ICSID Convention Article 53.

- rectification (Article 49) – the Tribunal can rectify any clerical, arithmetical or similar error in its award;
- supplementary decision (Article 49) – the Tribunal may decide any question it omitted to decide in its award;
- interpretation (Article 50) – the Tribunal may interpret its award where there is a dispute between the parties as to the meaning or scope of the award rendered;
- revision (Article 51) – the Tribunal may revise its award on the basis of a newly discovered fact of such a nature as to decisively affect the award; and
- annulment (Article 52) – an *ad hoc* Committee may fully or partially annul an award on the basis one or more of the following grounds: (a) the Tribunal was not properly constituted; (b) the Tribunal manifestly exceeded its powers; (c) there was corruption on the part of a Tribunal member; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons on which it is based.

10. The following sections focus on the annulment remedy. Section III describes the drafting history of the annulment provisions in the Convention, Section IV outlines the conduct of an annulment proceeding before ICSID, and Section V describes the general standards and the grounds for annulment invoked in ICSID case law.

III. The Drafting History of the Annulment Provisions in the ICSID Convention

11. The approval of the ICSID Convention by the Executive Directors of the World Bank in 1965 was preceded by five years of negotiation and consultation among government officials and international legal experts. It involved preparatory work by World Bank staff and Executive Directors in 1961 and 1962, a series of Regional Consultative Meetings of Experts convened by the World Bank in 1963 and 1964, and meetings of a Legal Committee consisting of representatives of all interested States, held at the end of 1964. The final text was approved by the Executive Directors on March 18, 1965 and came into force on October 14, 1966.[14] As of August 10, 2012, there are 147 Contracting States to ICSID.

[14] For a summary of steps in drafting the Convention, *see* 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. I-IV(1970) ("History"), Vol. I, 2-10.

A. *The Origin of the Annulment Provision*

12. The grounds for annulment in the ICSID Convention derive from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure ("ILC Draft"), which was an effort to codify existing international law on arbitral procedure in State-to-State arbitration.[15] The ILC recognized that the finality of an award is an essential feature of arbitral practice, but also recognized that there was a need for "exceptional remedies calculated to uphold the judicial character of the award as well as the will of the parties as a source of the jurisdiction of the tribunal."[16] It thus "sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice."[17] During its deliberations, the ILC decided that no appeal against an arbitral award should be allowed, but that the validity of an award might be challenged "within rigidly fixed limits."[18] An independent body, the International Court of Justice, would rule on whether a challenge should lead to the annulment of the award.[19]

13. The provision in the ILC Draft read as follows:

> (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) That the tribunal has exceeded its powers;
>
> (b) That there was corruption on the part of a member of the tribunal;
>
> (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[20]

14. During its deliberations, the ILC debated the scope of specific grounds, including whether an excess of jurisdiction might warrant annulment, while misapplication of the law

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[15] *See* Documents of the Fifth Session Including the Report of the Commission to the General Assembly, [1953] 2 *Yearbook of the International Law Commission* 211, U.N. Doc. A/CN.4/SER.A/1953/Add.1 ("1953 ILC Yearbook II") (Article 30 of the Draft Convention on Arbitral Procedure); Aron Broches, "Observations on the Finality of ICSID Awards" *in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 299 (1995).

[16] 1953 ILC Yearbook II, *supra* note 15, at 202.

[17] Broches, *supra* note 15, at 298; *see also* comments by the ILC's special rapporteur, Mr. Georges Scelles, Summary Records of the Fifth Session, [1953] 1 *Yearbook of the International Law Commission* 46, U.N. Doc. A/CN.4/SER.A/1953 ("1953 ILC Yearbook I").

[18] 1953 ILC Yearbook II, *supra* note 15, at 205.

[19] *Id.* at 211 (Article 31 of the Draft Convention on Arbitral Procedure).

[20] The ILC adopted the Model Rules on Arbitral Procedure in 1958. The provision on annulment, Article 35, remained the same as to grounds (a) and (b), but ground (c) was phrased "failure to state the reasons for the award or a serious departure from a fundamental rule of procedure" and an additional ground was added: "(d) that the undertaking to arbitrate or the *compromis* is a nullity." Documents of the Tenth Session Including the Report of the Commission to the General Assembly, [1958] 2 *Yearbook of the International Law Commission* 86, U.N. Doc. A/CN.4/SER.A/1958/Add.1. Interestingly, the drafters of the ICSID Convention chose to model the ICSID annulment provision on the 1953 ILC Draft and not on the final provision adopted by the ILC in 1958.

would not.[21] Ultimately, the ILC Draft made no attempt to define what conduct each ground would cover, with the exception of the express reference to the "failure to state the reasons for the award" as an example of a serious departure from a fundamental rule of procedure.[22] The accompanying Report to the General Assembly stated that "[a]fter considerable discussion [the ILC] decided, having regard to the paramount requirement of finality, not to amplify - - subject to one apparent exception [the failure to state the reasons for the award] - - the grounds on which the annulment of the award may be sought."[23]

B. *Preliminary Draft ICSID Convention – 1963*

15. The ICSID Convention's earliest draft, an internal World Bank document entitled "Working Paper in the Form of a Draft Convention" of June 5, 1962, made no provision for annulment.[24] However, a text on annulment identical to the 1953 ILC Draft was included in the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States ("Preliminary Draft") in 1963.[25] The Preliminary Draft was a second working paper prepared by World Bank staff for consideration at the regional consultative meetings of experts. Section 13(1) read as follows:

> (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) that the Tribunal has exceeded its powers;
>
> (b) that there was corruption on the part of a member of the Tribunal; or
>
> (c) that there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[26]

16. The comment accompanying Section 13 explained the purpose of the provision:

> […] As a general rule the award of the Tribunal is final, and there is no provision for appeal. Sections 11 and 12, however, provide for interpretation and revision of the award, respectively. In addition, where there has been some violation of the fundamental principles of law governing the Tribunal's proceedings such as are listed in Section 13, the aggrieved party may apply to the Chairman [of the Administrative Council

[21] Summary Records of the Fourth Session, [1952] 1 *Yearbook of the International Law Commission* 84, U.N. Doc. A/CN.4/SER.A/1952; 1953 ILC Yearbook I, *supra* note 17, at 44.

[22] Documents of the Fourth Session Including the Report of the Commission to the General Assembly, [1952] 2 *Yearbook of the International Law Commission* 66, U.N. Doc. A/CN.4/SER.A/1952/Add.1; 1953 ILC Yearbook II, *supra* note 15, at 205.

[23] 1953 ILC Yearbook II, *supra* note 15, at 205.

[24] History, *supra* note 14, at Vol. II, 19.

[25] *Id.* at 184 (October 15, 1963).

[26] *Id.* at 217 (Article IV, Section 13 of Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

> of ICSID] for a declaration that the award is invalid. Under that section the Chairman is required to refer the matter to a Committee of three persons which shall be competent to declare the nullity of the award. It may be noted that this is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one or other of the three grounds listed in Section 13(1).[27]

C. *Regional Consultative Meetings – 1964*

17. The inclusion of a provision on annulment in the ICSID Convention does not appear to have been questioned or debated, nor is there any account of discussion concerning the general purpose and scope of annulment in the drafting history of the Convention. Indeed, a summary report of the meetings by the General Counsel of the World Bank concluded that no controversial issues of policy were raised by the draft annulment provision, but that a considerable number of detailed suggestions of a technical character had been raised.[28] The specific grounds for annulment were discussed at a series of Regional Consultative Meetings.

18. During the first set of Regional Consultative Meetings, legal experts from various countries made suggestions for changes to the Preliminary Draft.[29] Among other things, a proposal was made that the grounds for annulment be set out in greater detail and modeled on commercial arbitration laws.[30] However, Aron Broches, General Counsel of the World Bank at the time, who chaired the Regional Consultative Meetings and the subsequent meetings of the Legal Committee, discouraged the comparison with commercial arbitration.[31] He recalled that "it had been fully recognized that only limited recourse had been provided and that acceptance of the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal."[32]

19. A concern was raised by a legal expert from Germany that annulment posed a risk of frustrating awards and therefore the annulment provision should be made more restrictive. To that effect, this expert proposed a requirement that an excess of powers be "manifest" to warrant annulment.[33] In the context of the discussions on the meaning of "excess of powers," Chairman

[27] *Id.* at 218 & 219.

[28] *Id.* at 573 & 574.

[29] These meetings were held in the period December 1963 through May 1964 in Addis Ababa, Santiago, Geneva and Bangkok. *Id.* at 236-584.

[30] *Id.* at 423.

[31] *Id.*

[32] *Id.*

[33] *Id.*; Broches, *supra* note 15, at 303.

Broches confirmed that the intention was to cover the situation where a decision of the Tribunal went beyond the terms of the parties' arbitration agreement.[34]

20. Other suggestions were to add the words "a serious misapplication of the law" or "including the failure to apply the proper law" to the ground concerning excess of powers.[35] In this connection, Chairman Broches remarked that "a mistake in the application of the law would not be a valid ground for annulment of the award," stating that "[a] mistake of law as well as a mistake of fact constituted an inherent risk in judicial or arbitral decision for which appeal was not provided."[36] However, the legal expert from Lebanon observed that if the parties had agreed to apply a particular law and the Tribunal in fact applied a different law, the award would violate the parties' arbitration agreement and could be annulled.[37]

21. A further suggestion sought to clarify that "departure from a fundamental rule of procedure" excluded challenges on the basis of inobservance of ordinary arbitration rules, as opposed to "breaches of procedural rules which would constitute a violation of the rules of natural justice."[38] One proposal was to add the phrase "a serious departure from the principles of natural justice."[39] Another proposal was to replace the term by "fundamental principles of justice."[40] Chairman Broches subsequently explained that "fundamental rule of procedure" was to be understood to have a wider connotation, and to include under its ambit the so-called principles of natural justice. As an example, he mentioned the parties' right to be heard.[41]

D. *First Draft Convention – September 1964*

22. In light of the discussions at the Regional Consultative Meetings, World Bank staff prepared a further Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "First Draft"),[42] for consideration by the Legal Committee. This Committee was composed of experts representing member governments of the World Bank. The annulment provision in the First Draft read as follows:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;

[34] History, *supra* note 14, at Vol. II, 517.

[35] *Id*. at 423 & 517.

[36] *Id.* at 518.

[37] *Id.*

[38] *Id.* at 517.

[39] *Id.* at 271 & 423.

[40] *Id.* at 480.

[41] *Id.*

[42] *Id.* at 610 (September 11, 1964).

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.[43]

E. *Legal Committee Meetings – 1964*

23. The Legal Committee held a series of meetings in November and December 1964, chaired by Broches. At the meetings, clarification was sought by an Ethiopian Committee member regarding the meaning of the additional ground of improper constitution of the Tribunal.[44] It was explained that this expression was "intended to cover a variety of situations such as, for instance, absence of agreement or invalid agreement between the parties, the fact that the investor was not a national of a Contracting State, that a member of the Tribunal was not entitled to be an arbitrator, etc."[45] Two experts were in favor of deleting the ground of improper constitution but the majority of the Legal Committee decided to retain this ground.[46]

24. The Ethiopian Committee member also asked whether there was a contradiction in providing that a Tribunal is the sole judge of its competence and at the same time providing for excess of power as a ground of annulment.[47] Chairman Broches replied that:

> …the expression 'manifestly exceeded its powers' concerned the cases […] where the Tribunal would have gone beyond the scope of agreement of the parties or would have thus decided points which had not been submitted to it or had been improperly submitted to it. […] the *ad hoc* Committee would limit itself to cases of manifest excess of those powers.[48]

25. Suggestions that the word "manifestly" be omitted were defeated by a majority of 23 to 11 votes.[49] A proposal to include as a ground of annulment that the Tribunal had made a decision beyond the scope of the submissions was also defeated on a vote.[50]

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[43] *Id.* at 635 (Article 55(1)).

[44] *Id.* at 850.

[45] *Id.*

[46] *Id.* at 852 & 853.

[47] *Id.* at 850.

[48] *Id.*

[49] *Id.* at 851 & 852.

[50] *Id*. at 853.

26. Chairman Broches confirmed during the meetings that failure to apply the proper law could amount to an excess of power if the parties had agreed on an applicable law.[51] One proposal suggested adding the "manifestly incorrect application of the law" by the Tribunal as a ground of annulment, but it was defeated by a vote of 17 to 8.[52]

27. In regard to the ground concerning corruption on the part of a member of the Tribunal, there were suggestions by various legal experts to replace "corruption" with "misconduct,"[53] "lack of integrity"[54] or "a defect in moral character."[55] There were further suggestions that the ground be limited to cases where the corruption was evidenced by a judgment of a court, or in instances where there was "reasonable proof that corruption might exist."[56] These proposals were put to a vote and defeated by a large majority.[57]

28. The ground for annulment relating to a serious departure from a fundamental rule of procedure had become a stand-alone ground under the First Draft. A discussion was held about whether to add the words "or substance" after the words "rule of procedure," but the proposal was seen as confusing.[58] A further suggestion to replace the word "rule" by "principle" was also rejected because the reference to "fundamental" rules of procedure was considered to be a clear reference to principles.[59] Likewise, a specific reference noting that both parties must have a fair hearing was defeated.[60]

29. The last ground, failure to state reasons, also became a stand-alone ground in the First Draft. The possibility of raising this ground of annulment was subject to the parties' agreement on whether reasons for the award would have to be stated. The rationale for this discretion was to reconcile it with another provision which allowed the parties to agree that the award need not state the reasons.[61] However, during one of the Legal Committee's meetings, it was decided to remove the parties' discretion in this regard and, as a consequence, the discretion was also removed from the ground for annulment.[62]

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[51] *Id.* at 851.

[52] *Id.* at 851, 853 & 854.

[53] *Id.* at 851.

[54] *Id.* at 852.

[55] *Id.*

[56] *Id.* at 851.

[57] *Id.* at 852.

[58] *Id.* at 853 & 854.

[59] *Id.* at 854.

[60] *Id.* at 853.

[61] *Id.* at 633. Article 51(3) of the First Draft provided: "Except as the parties otherwise agree: (a) the award shall state the reasons upon which it is based."

[62] *Id.* at 816.

F. *Revised Draft Convention – December 1964*

30. Following the Legal Committee's meetings, a Revised Draft Convention on the Settlement of Investment Disputes ("Revised Draft) was prepared.[63] Article 52 of the Revised Draft read as follows:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;
>
> (c) that there was corruption on the part of a member of the Tribunal;
>
> (d) that there has been a serious departure from a fundamental rule of procedure; or
>
> (e) that the award has failed to state the reasons on which it is based.[64]

31. Since the First Draft, the only modification made to the provision was to subsection (1)(e).[65] As explained above, the ground was no longer subject to the parties' agreement that reasons need not be stated and, therefore, the words "unless the parties have agreed that reasons need not be stated" were deleted.

32. The Revised Draft was submitted for consideration by the Executive Directors of the World Bank. While further changes were subsequently made to other provisions of the Revised Draft, Article 52 remained the same and thus became the text of the ICSID Convention.

IV. The Conduct of an Annulment Proceeding

33. In addition to stipulating the grounds for annulment, Article 52 of the ICSID Convention sets out the general procedural framework for an annulment proceeding. It is implemented by the ICSID Arbitration Rules, which apply to all ICSID Convention arbitration proceedings and govern ICSID post-award remedy proceedings. ICSID Arbitration Rules 50 and 52 through 55 implement the annulment remedy in the Convention, including the institution of annulment proceedings, the appointment of an *ad hoc* Committee to decide the application, and stays of enforcement of the award while the annulment application is pending. The various steps in an annulment proceeding are described below.

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[63] *Id.* at 911 (December 11, 1964).

[64] *Id.* at 926 & 927.

[65] As to ground (d), in the French version of the Revised Draft, the word "*dérogation*" was replaced by "*inobservation*" and in the Spanish version the words "*grave apartamiento*" were replaced by "*quebrantamiento.*"

A. *Filing an Application for Annulment*

34. Either disputing party may initiate an annulment proceeding by filing an application for annulment with the ICSID Secretary-General. The application must: (i) identify the award to which it relates; (ii) indicate the date of the application; (iii) state in detail the grounds on which it is based pursuant to Article 52(1) of the ICSID Convention; and (iv) be accompanied by the payment of a fee for lodging the application.[66] It must be filed within 120 days after the date on which the award (or any subsequent decision or correction) was rendered, except that, in the case of corruption on the part of a Tribunal member, the application may be filed within 120 days after discovery of the corruption, and in any event within three years after the date on which the award was rendered.[67] The Secretary-General must refuse registration of an application for annulment that is not filed within the prescribed time limits.[68]

35. The application for annulment must concern an ICSID award, which is the final decision concluding a case. Since there can be only one award in the ICSID system, the parties must wait until that award is rendered before initiating any post-award remedies.[69] An application for annulment concerning a decision issued prior to the award (*e.g.* a decision on a challenge, a provisional measure, or a decision upholding jurisdiction) cannot be challenged before it becomes part of the eventual award, even if it raises issues that may constitute the basis for an annulment application.[70]

36. Since the entry into force of the ICSID Convention in 1966, annulment proceedings have been instituted in 50 cases.[71] In 3 of those cases, annulment proceedings were instituted a second time after a resubmission proceeding, meaning 53 annulment proceedings have been instituted in total.

[66] *See* Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Arbitration Rule 50(1). The fee for lodging an application for annulment is currently US$10,000.

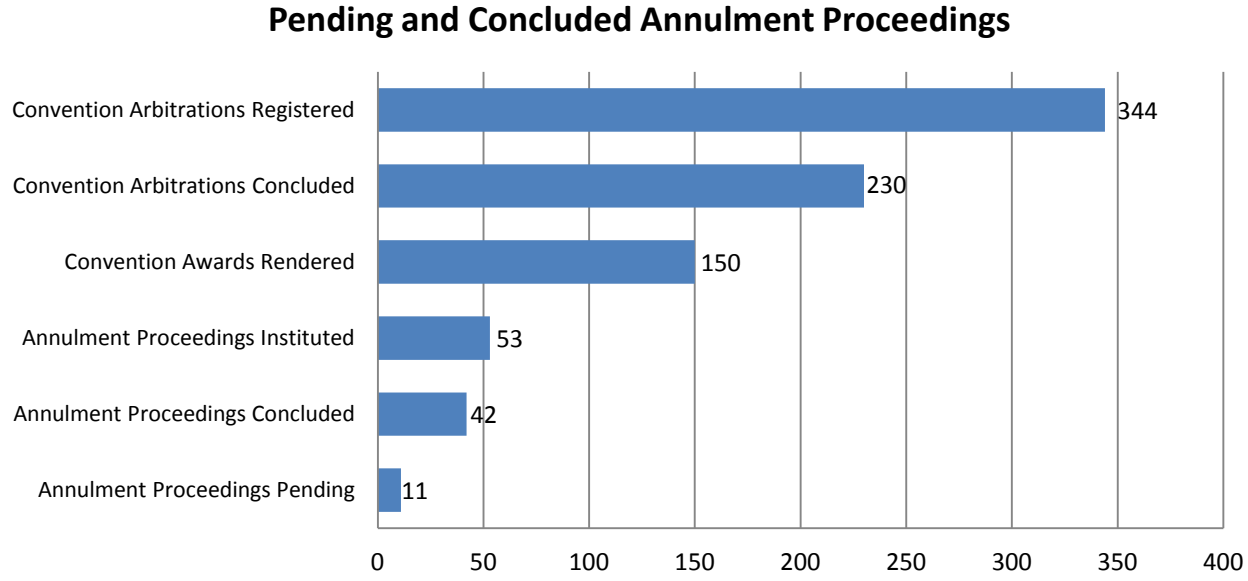
[67] Arbitration Rule 50(3)(b); ICSID Convention Article 52(2).

[68] *Id.*

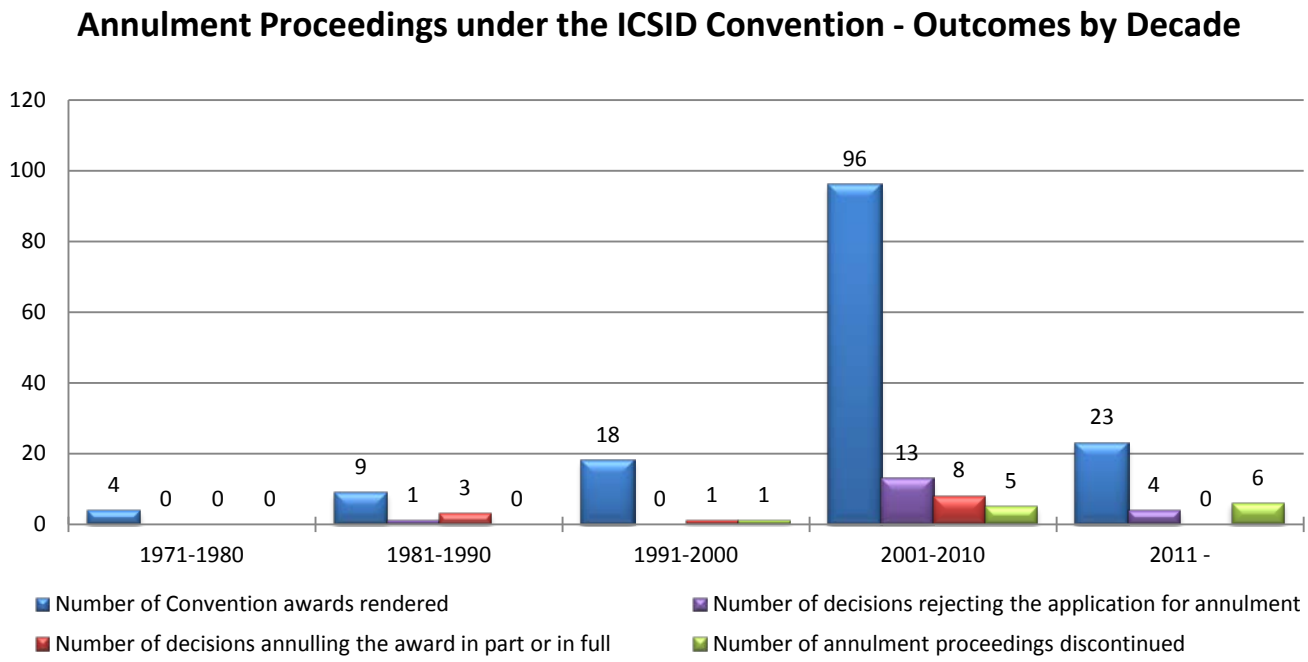
[69] *See in particular* ICSID Convention Articles 48-49 (addressing "the award"). Under the same principle, only the award is capable of enforcement under ICSID Convention Article 54. For enforcement purposes, ICSID Convention Article 53(2) provides that an "award" includes any decision interpreting, revising or annulling such award.

[70] Annulment applications in respect of decisions on jurisdiction in pending cases have consistently been refused registration. *See* Broches, *supra* note 15, at 302.

[71] *See* Annex 1.

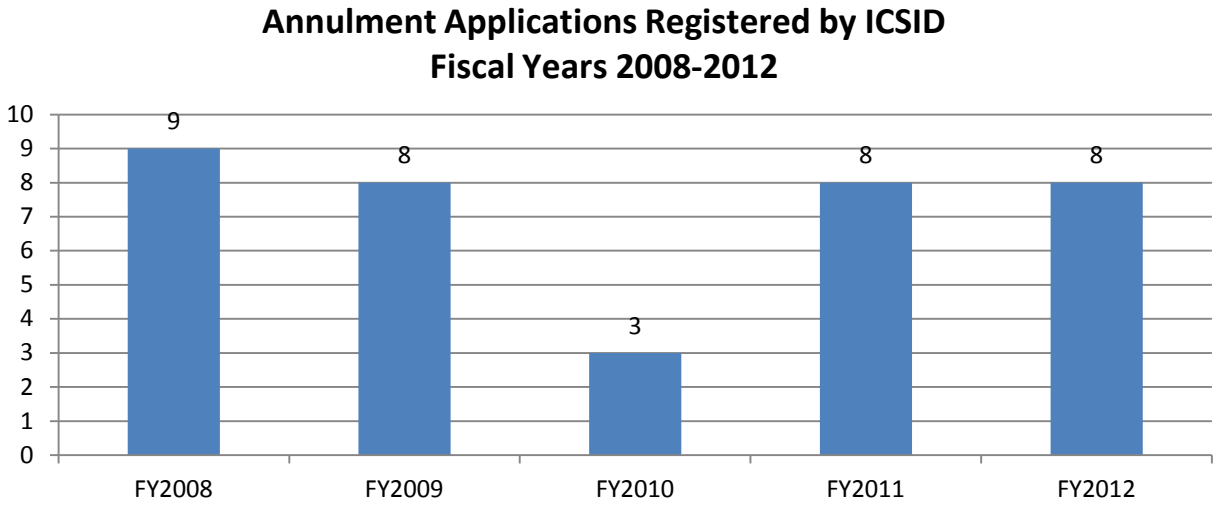


37. A greater number of annulment applications have been registered since 2001 than in prior years. This reflects the increased number of awards issued, and not an increased rate of annulment.[72] The rate of annulment for 2001 – present is 7 percent, while the rate of annulment for 1971 – 2000 is 13 percent.

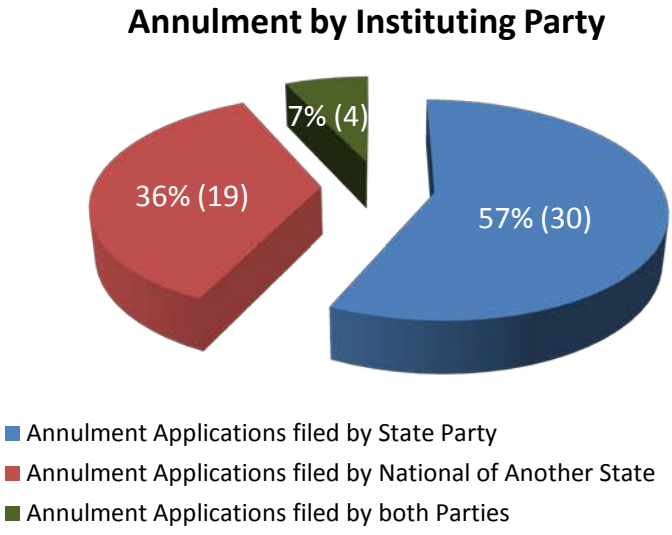


[72] *See infra* para. 69.

38. Sixty-eight percent of all annulment applications have been registered in the last 5 years, at about an even level per year.



39. The annulment remedy has been pursued by both claimants and respondents to ICSID proceedings. Approximately 57 percent of annulment proceedings were initiated by respondents (in all instances States) while 36 percent of the proceedings were initiated by claimants. In 4 cases (approximately 7 percent of all annulment proceedings), both parties filed an application for annulment.[73]



[73] Five of these were applications for the partial annulment of the award. As noted below, applicant-Nationals of Another State and applicant-States have had a similar rate of success in annulment applications.

B. *Constitution of an* ad hoc *Committee*

40. Once an application for annulment is registered, the Chairman of the Administrative Council must appoint an *ad hoc* Committee of three persons to decide the application.[74] The function of an *ad hoc* Committee is either to reject the application for annulment or to annul the award or a part thereof on the basis of the grounds enumerated in Article 52.[75] Its function is not to rule on the merits of the parties' dispute if it decides to annul, which would be the task of a new Tribunal should either party resubmit the dispute following annulment of the award.[76]

41. *Ad hoc* Committee members are appointed from the ICSID Panel of Arbitrators, which consists of persons designated by ICSID Contracting States and ten designees named by the Chairman of the Administrative Council.[77] The ICSID Convention requires that Panel designees be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[78] Both arbitrators and *ad hoc* Committee members are expected to be independent and impartial, and to decide the case solely on the basis of the facts before them and the applicable law.

42. Unlike the Centre's appointment of Tribunal members, which may in certain circumstances be made outside of the Panel of Arbitrators with the parties' consent,[79] the Chairman of the Administrative Council is restricted to appointing *ad hoc* Committee members from persons on the Panel of Arbitrators.[80] Many persons on the Panel of Arbitrators have served as members of both Tribunals and Committees.

43. The Panel of Arbitrators currently consists of 380 persons designated by 108 of the 147 Member States and the Chairman of the Administrative Council of ICSID.[81] As of June 30, 2012, ICSID appointed 159 *ad hoc* Committee members from the Panel, 35 of whom were appointed since 2011.

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[74] Arbitration Rule 52(1); ICSID Convention Article 52(3).

[75] ICSID Convention Article 52(3).

[76] *Id.* at Article 52(6).

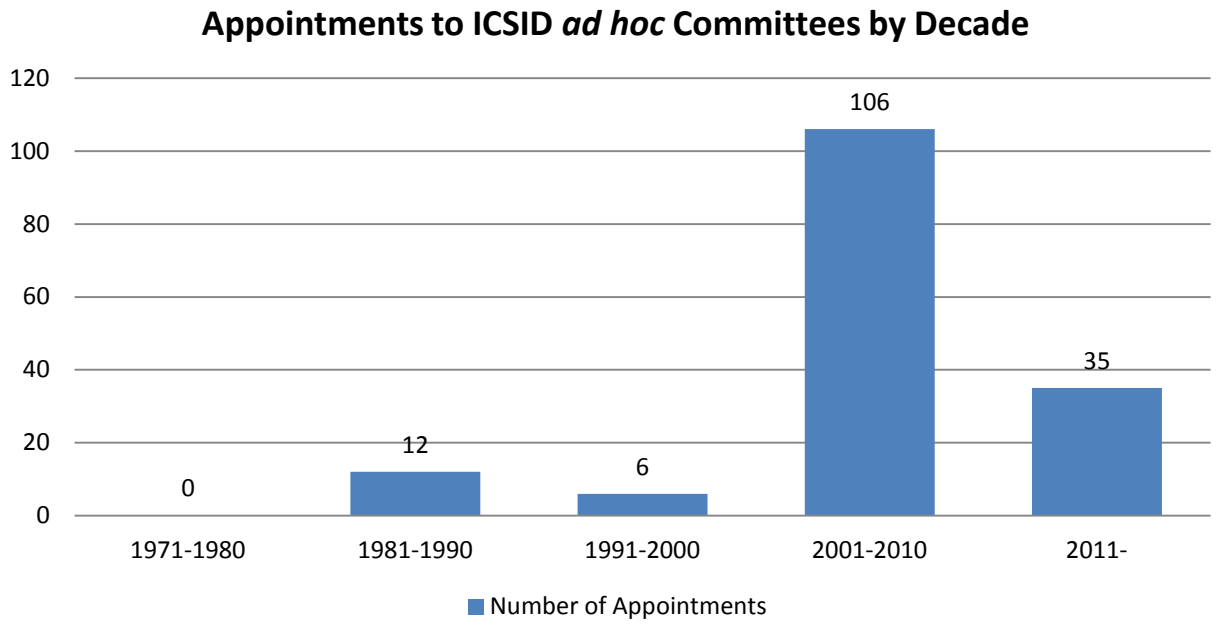
[77] *See id.* at Articles 12-16. Each Contracting State may designate up to four persons of any nationality to the Panel of Arbitrators, for renewable periods of six years.

[78] *Id.* at Article 14(1).

[79] ICSID appoints Tribunal members either by agreement of the parties or under the default rule in ICSID Convention Article 38, which can be invoked by either party if the Tribunal has not been constituted within 90 days from registration of the case. *Id.* at Article 38; *see also* Arbitration Rule 4.

[80] ICSID Convention Article 52(3); Arbitration Rule 52(1).

[81] Members of the Panels of Conciliators and Arbitrators, July 2012, Doc. ICSID/10, *available at* http://icsid.worldbank.org.



44. In addition to the general qualifications required for designation to the Panel of Arbitrators (see above, paragraph 41), a member of an *ad hoc* Committee must meet specific requirements prescribed by the ICSID Convention. First, the member of the *ad hoc* Committee cannot have been a member of the Tribunal which rendered the award or be of the same nationality as any of that Tribunal's members.[82] Second, the member cannot have the same nationality as the disputing parties (State and National of Another State) and cannot have been designated to the Panel of Arbitrators either by the State party to the dispute or the State whose national is a party to the dispute.[83] Third, the member cannot have acted as a conciliator in the same dispute.[84] As a result, in each annulment proceeding there are usually 5 or more excluded nationalities.[85]

45. A number of case-specific factors are considered, in addition to the formal requirements for appointment to an *ad hoc* Committee established by the ICSID Convention. For example, the languages used in the Tribunal proceeding and likely to be used before the *ad hoc* Committee are relevant, as is the experience of each candidate, including their past and current appointments. Before the name of the candidate is proposed to the parties, the Centre researches whether there are any conflicts of interest and, if none are found, the candidate is asked to confirm that he/she is free of any conflicts, has time to dedicate to the proceeding, and is willing to act as a member of the *ad hoc* Committee.

[82] ICSID Convention Article 52(3).

[83] *Id.*

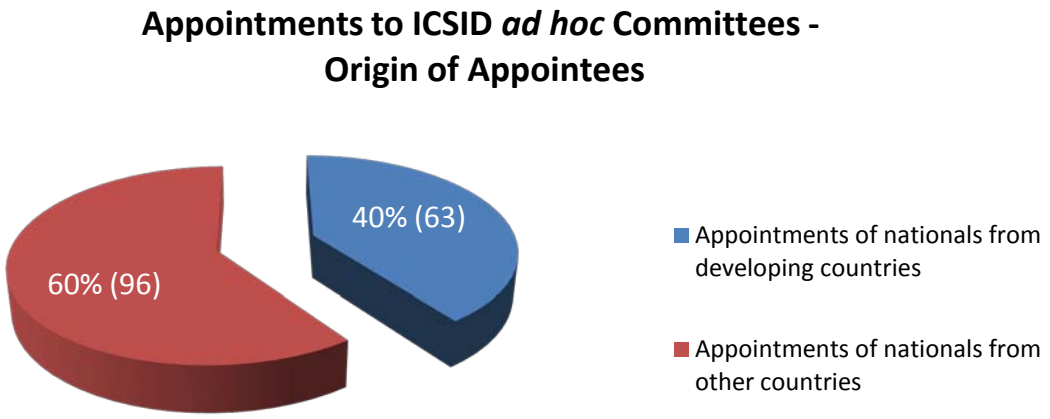
[84] *Id.*

[85] These requirements cannot be modified by agreement of the parties in annulment proceedings. This contrasts with Tribunal proceedings, where an arbitrator of an excluded nationality may be appointed, in accordance with Arbitration Rule 1(3).

46. Unlike the process for appointment of Tribunal members,[86] the ICSID Convention imposes no obligation on the Chairman to consult the parties about *ad hoc* Committee appointments. Nonetheless, before *ad hoc* Committee members are appointed, ICSID informs the parties of the proposed appointees and circulates their *curricula vitae*. This gives the parties an opportunity to submit comments indicating that there might be a manifest lack of the qualities required for serving as a Committee member,[87] for example that there is a conflict of interest which the Centre or the candidate was unaware of. In exceptional circumstances, a proposed candidate is withdrawn and replaced by another person.

47. The Centre makes its best effort to complete the appointment process as soon as possible after registration of the annulment application. While the historic average to complete the process is 10 weeks, this delay has been significantly reduced during the past 3 years to 6.5 weeks. This includes the time spent corresponding with the parties.

48. Approximately 40 percent of all Committee member appointments have been nationals of States which are classified by the World Bank Group as developing countries.[88] This corresponds to slightly more than one developing country national per case.[89] The number of women appointed to *ad hoc* Committees has historically been low (only 6 women have been appointed to *ad hoc* Committees to date). This reflects the few women designated to the Panel of Arbitrators (approximately 10 percent of the members on the Panel of Arbitrators are women).[90]



[86] ICSID Convention Articles 37-40.

[87] *Id.* at Articles 14(1) & 57.

[88] *See* the World Bank Group's country classifications, available at http://data.worldbank.org/about/country-classifications/country-and-lending-groups. The classifications are set each year on July 1.

[89] For the nationality of the members of *ad hoc* Committees and its classification at the time of appointment, *see* Annex 1.

[90] In September 2011 the Chairman designated 3 women and 6 developing country nationals out of 10 designees to the Chairman's list.

C. *The Proceeding*

49. Once the *ad hoc* Committee members have accepted their appointments,[91] the Secretary-General of ICSID notifies the parties of the constitution of the Committee. The party requesting annulment of the award is usually referred to as the "Applicant," and the other party is usually the "Respondent" or "Respondent on Annulment." A claimant in the Tribunal proceeding may thus become the respondent in the annulment proceeding. A Secretary to the *ad hoc* Committee is appointed from among ICSID staff to assist the Committee and the parties.

(i) Applicable Provisions

50. The Arbitration Rules apply, *mutatis mutandis*, to the proceeding before the *ad hoc* Committee.[92] This means that the Rules will apply with the changes necessary to take into account the fact that the proceeding is an annulment proceeding.

51. In addition, Article 52(4) of the ICSID Convention provides that Articles 41-45, 48, 49, 53 and 54 apply *mutatis mutandis* before the *ad hoc* Committee. By citing specific articles of the Convention, Article 52(4) implies that other provisions of the Convention do not apply to annulment. As a result, for example, it has been disputed whether Article 47 of the ICSID Convention concerning a Tribunal's power to recommend provisional measures applies to annulment proceedings.[93] Similarly, it has been argued that Article 52(4) does not allow a member of an *ad hoc* Committee to be challenged for a manifest lack of the qualities required by Article 14(1) of the Convention, suggesting that an *ad hoc* Committee member could not be disqualified.[94] However, this interpretation has been rejected in two annulment proceedings in which the *ad hoc* Committees found that they had the power to rule on disqualification but dismissed the requests.[95]

(ii) The First Session

52. The procedure before an *ad hoc* Committee normally corresponds to the procedure before a Tribunal. *Ad hoc* Committees must afford both parties the right to be heard

[91] The members of the *ad hoc* Committee must sign a declaration in a form analogous to that specified in Arbitration Rule 6(2) for Tribunal members.

[92] Arbitration Rule 53.

[93] *See Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for Provisional Measures (May 7, 2012), *available at* http://www.icsid.worldbank.org. The *ad hoc* Committee expressed doubts about its power to recommend provisional measures but rejected the request on other grounds.

[94] *See* ICSID Convention Articles 57 & 58.

[95] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (October 3, 2001), *available at* http://icsid.worldbank.org; *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Decisión sobre la Propuesta de Recusación del Dr. Stanimir A. Alexandrov (September 7, 2011), *available at* http://italaw.com/sites/default/files/case-documents/ita0561.pdf. In *Nations*, the parties did not dispute the power of the *ad hoc* Committee to rule on the request for disqualification.

and must respect the equality of the parties. There is an assumption that the parties' procedural agreements in the original proceeding will remain the same in the annulment proceeding, for example with respect to the choice of procedural language, the number and sequence of written pleadings, and the parties' representatives.[96] Nonetheless, the *ad hoc* Committee usually convenes a first session with the parties to discuss procedural matters, and it is not uncommon to agree on different arrangements, for example concerning the applicable rules, procedural language and place of proceedings. In most cases, the parties agree on a timetable involving two rounds of pleadings on the application for annulment (Memorial, Counter-Memorial, Reply and Rejoinder) and an oral hearing. In recent years, the time allowed for written pleadings rarely exceeded 4 months per party for the first round and 2 months per party for the second round.

53. The parties typically file with their written pleadings the factual and legal evidence from the original proceeding that they wish to rely on in the annulment proceeding. The record before the *ad hoc* Committee is usually limited to the factual evidence before the original Tribunal. However, new factual evidence could potentially be admitted.[97]

(iii) Advances to ICSID

54. Unlike the Tribunal proceedings, the Applicant is solely responsible for making all advance payments requested by ICSID in an annulment proceeding, unless the parties agree otherwise. These advances cover the hearing expenses such as transcription, translation and interpretation, the administrative fee of ICSID as well as fees and expenses of the *ad hoc* Committee ("Costs of Proceeding"). The payments are made without prejudice to the right of the *ad hoc* Committee to decide how and by whom the costs ultimately should be paid.[98] Consequently, an Applicant must be prepared to fund the entire proceeding subject to the Committee's ultimate decision on costs.

55. The Costs of Proceeding for annulments concluded in the past 5 years have averaged US$364,000.[99] The fees and expenses of *ad hoc* Committee members represented 78.5 percent of these costs, while the hearing costs and ICSID administrative fee accounted for the other 21.5 percent of these costs.

[96] *See* Note B to Arbitration Rule 53 of the annotated notes to the ICSID Regulations and Rules, 1968, Doc. ICSID/4/Rev. 1.

[97] *See e.g.*, *Sempra*, para. 74; *see also* Pierre Mayer, "To What Extent Can an *Ad Hoc* Committee Review the Factual Findings of an Arbitral Tribunal," *in Annulment of ICSID Awards* 243 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); Peter D. Trooboff, "To What Extent May an *Ad Hoc* Committee Review the Factual Findings of an Arbitral Tribunal Based on a Procedural Error," *in Annulment of ICSID Awards* 251 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).

[98] Administrative and Financial Regulation 14(3)(e); ICSID Convention Article 52(4).

[99] This includes one case in which such cost exceeded US$1.1 million. Excluding this case, the average cost of an annulment proceeding amounts to approximately US$330,000.

(iv) Stay of Enforcement

56. An Applicant may in its application for annulment, or either party may at any time during the proceeding, request a stay of enforcement of all or part of the Tribunal award.[100] The stay of enforcement could concern an award of damages, award of costs or some other form of relief ordered by the original Tribunal. If the request for stay is made in the application for annulment, the Secretary-General of ICSID must inform the parties of the provisional stay of enforcement when the application is registered.[101]

57. The provisional stay remains in place until the *ad hoc* Committee, on a priority basis, rules on the request after having given each party an opportunity to present its observations.[102]

58. If a stay is granted, the *ad hoc* Committee may modify or terminate the stay at the request of either party.[103] A Committee may terminate a stay if the party requesting the stay of enforcement has failed to fulfill a condition for the stay ordered by the Committee (*e.g.*, the provision of adequate financial security in respect of the amount due under the award). If a stay is not terminated during the proceeding, it terminates automatically upon the issuance of the *ad hoc* Committee's final decision on annulment.[104]

59. There have been a total of 24 requests for the stay of enforcement in the 53 registered annulments, 22 of which have led to Committee decisions.[105] All 22 decisions granted the stay of enforcement. In 13 of these instances where a stay was granted, it was conditioned upon the issuance of some type of security or written undertaking. In 4 of those 13 cases, the stay was terminated because the condition had not been satisfied.

[100] ICSID Convention Article 52(5); Arbitration Rule 54(1).

[101] ICSID Convention Article 52(5); Arbitration Rule 54(2).

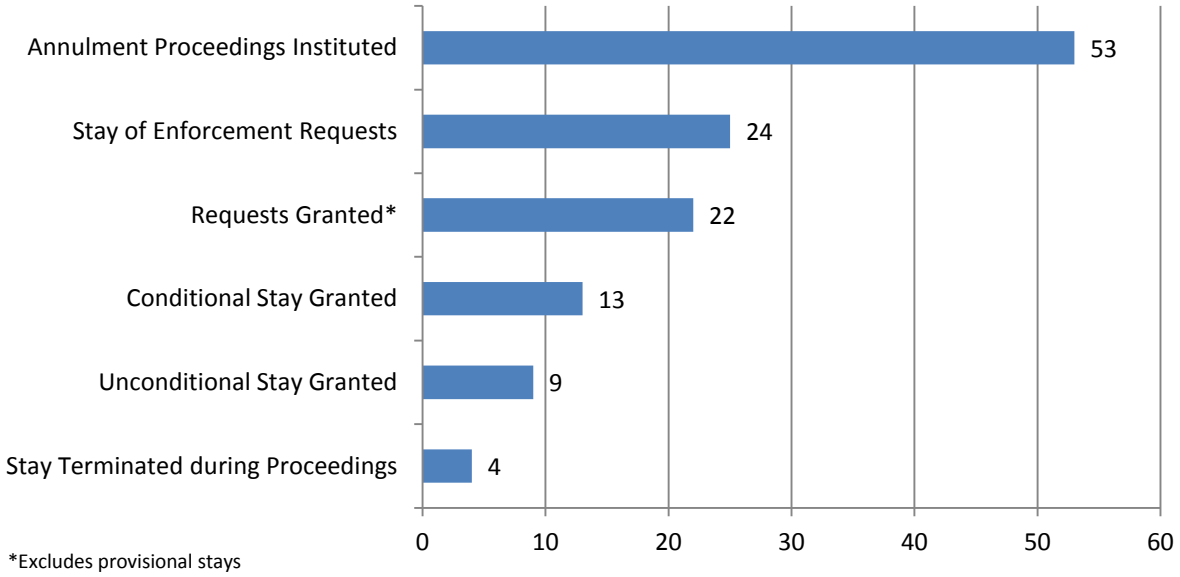
[102] Arbitration Rule 54(1) & (4). An expedited ruling may be requested, requiring the *ad hoc* Committee to decide within 30 days whether to continue the stay. The stay is automatically terminated if either party has requested an expedited ruling and the Committee does not continue the stay within 30 days of the request. *See* Arbitration Rule 54(2) and its explanatory note in ICSID Regulations and Rules, 1968, Doc. ICSID/4/Rev. 1.

[103] Arbitration Rule 54(3).

[104] *Id.* If an *ad hoc* Committee annuls part of an award, it may at its discretion "order the temporary stay" of the unannulled part. This enables the Committee to consider any advantage that the partial annulment may confer given that the annulled portion might be reconsidered by a new tribunal under ICSID Convention Article 52(6). If a Tribunal is reconstituted following a partial annulment, a party may request the stay of enforcement of the unannulled portion of the award until the date of the new tribunal's award. *See* Arbitration Rule 55(3). Although there have been several partial annulments with resubmissions, this situation has not yet occurred.

[105] The Decision of the *ad hoc* Committee on the Stay of Enforcement of the Award in *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18 and *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15 (November 12, 2012) has been counted as one Decision for these purposes.

Stay of Enforcement - Outcomes



*Excludes provisional stays

Decisions on the Stay of Enforcement of an Award

Case	Stay of Enforcement	Condition for Stay	Decision on Stay
1. Amco v. Indonesia I	Granted	Security	May 17, 1985; Noted in 1 ICSID Rep. 509 (1993)
2. Amco v. Indonesia II	Granted	Security	March 2, 1991; Available at 9 ICSID Rep. 59 (2006)
3. SPP v. Egypt	Stay agreed by the Parties	Security agreed by the Parties	September 29, 1992; Noted in 8 ICSID REV. – FILJ 264 (1993)
4. MINE v. Guinea	Granted	No condition	August 12, 1988; Available at 4 ICSID Rep. 111 (1997)
5. Vivendi v. Argentina II	Granted	Written Undertaking	November 4, 2008; Available at http://italaw.com
6. Pey Casado v. Chile	Granted	No Condition	August 5, 2008; Available at http://italaw.com
7. Wena Hotels v. Egypt	Granted	Security	April 5, 2001; Available at 18 (10) MEALEY'S INT'L ARB. REP. 33 (2003)
8. Mitchell v. DRC	Granted	No condition	November 30, 2004; Available at http://icsid.worldbank.org
9. Enron v. Argentina	Granted	No condition	October 07, 2008; Available at http://icsid.worldbank.org
10. MTD Equity v. Chile	Granted	No condition	June 1, 2005; Available at http://icsid.worldbank.org
11. CMS Gas v. Argentina	Granted	Written Undertaking	September 1, 2006**;** Available at http://icsid.worldbank.org
12. Repsol v. Petroecuador	Granted	Security	December 22, 2005; Available at http://icsid.worldbank.org
13. Azurix Corp. v. Argentina	Granted	No condition	December 28, 2007; Available at http://icsid.worldbank.org
14. Siemens A.G. v. Argentina	Provisional Stay granted by Secretary-General	N/A	Discontinued (Rule 43(1))
15. CDC Group v. Seychelles	Granted	Security	July 14, 2004; Available at 11 ICSID Rep. 225 (2007)

Case	Stay of Enforcement	Condition for Stay	Decision on Stay
16. Sempra Energy v. Argentina	Granted	Security	March 5, 2009; Available at http://icsid.worldbank.org
17. Continental Casualty v. Argentina	Granted	No condition	October 23, 2009; Available at http://icsid.worldbank.org
18. Duke Energy v. Peru	Granted	Written Undertaking	June 23, 2009; Noted in Decision on Annulment
19. Transgabonais v. Gabon	Granted	Written Undertaking	March 13, 2009; Noted in Decision on Annulment
20. Rumeli v. Kazakhstan	Granted	Written Undertaking	March 19, 2009; Noted in Decision on Annulment
21. Kardassopoulos /Fuchs v. Georgia	Granted	Security	November 12, 2010; Available at http://italaw.com
22. Togo Electricité v. Togo	Granted	No Condition	January 31, 2011; Noted in Decision on Annulment
23. Libananco v. Turkey	Granted	No Condition	May 7, 2012; Available at http://icsid.worldbank.org
24. Lemire v. Ukraine	Granted	Security	February 14, 2012; Noted in http://globalarbitrationreview.com

(v) Hearing and Post-Hearing Phase

60. The filing of written pleadings is followed by an oral hearing which most often lasts one to two days. The hearing is usually limited to the parties' oral arguments and, in some cases, to examination of legal experts whose opinions were submitted by the parties in the annulment proceeding. Because an *ad hoc* Committee does not reexamine the facts of the dispute, factual witnesses do not usually have any role in the process.[106]

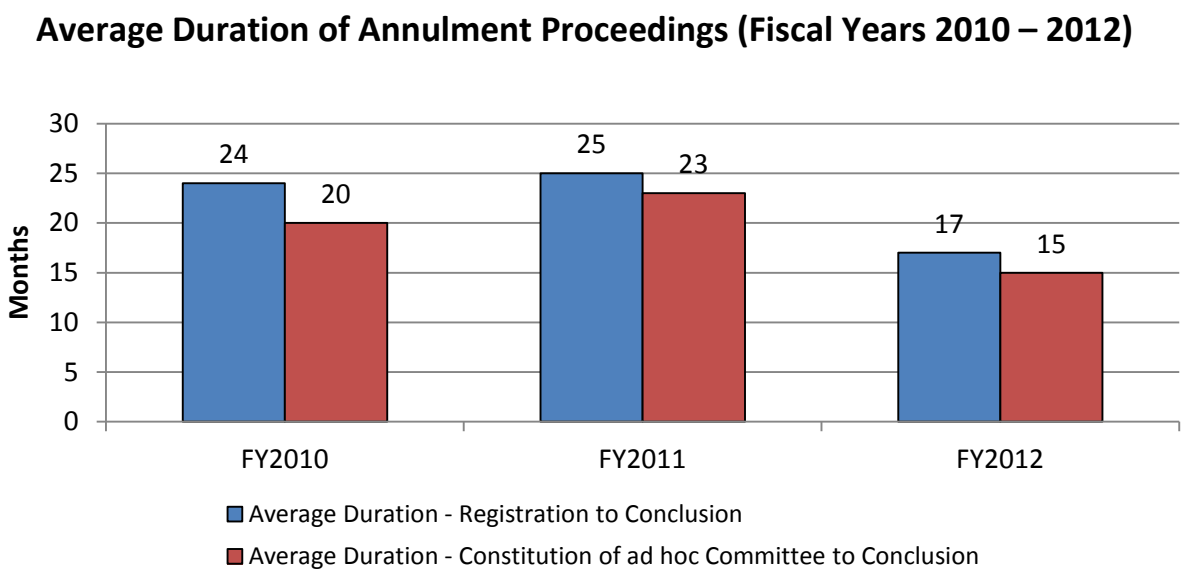
61. At the hearing or shortly thereafter, the *ad hoc* Committee invites the parties to file submissions on costs and sometimes also to file post-hearing briefs. The *ad hoc* Committee closes the proceeding once the presentation of the annulment case is concluded and the Committee has made progress in the deliberations. It must issue the decision on annulment within 120 days from the date of closure.[107]

62. Of the 19 decisions on annulment issued in the past 5 years, 16 have been rendered within one year of the hearing. The average time from the hearing to issuance of these 16 decisions was 6 months. Over the same period, the average time for an annulment proceeding from the registration of the application for annulment until the issuance of the decision was 26 months.[108] The overall average duration of all concluded annulment proceedings has decreased during the past year to 17 months from the date of registration (15 months from the date of constitution of the *ad hoc* Committee).

[106] *But see supra*, para. 53 & note 97.

[107] *See* Arbitration Rules 38(1) & 46.

[108] This average excludes discontinued proceedings.



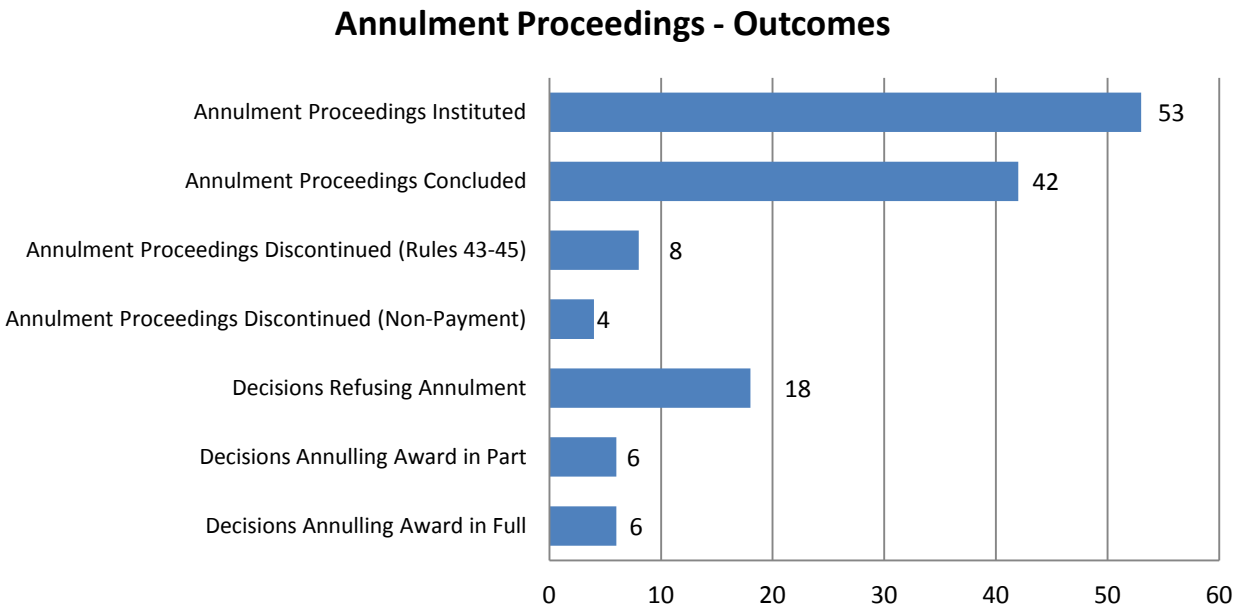
D. *The Decision on Annulment*

63. The proceeding ends with the *ad hoc* Committee's decision on annulment. The Committee may (i) reject all grounds for annulment, meaning that the award remains intact; (ii) uphold one or more grounds for annulment in respect of a part of the award, leading to a partial annulment; (iii) uphold one or more grounds for annulment in respect of the entire award, meaning that the whole of the award is annulled; or (iv) exercise their discretion not to annul notwithstanding that an error has been identified.[109] The proceeding may also be discontinued before the Committee issues a final decision, because the parties agree on a settlement, a party does not object to the other party's request for discontinuance, due to nonpayment of the advances requested by ICSID to cover the Costs of Proceeding, or because the parties fail to take any steps in the proceeding during six consecutive months.[110] In recent years, several annulment proceedings have been discontinued due to an Applicant's failure to pay the advances and the other party's unwillingness to make the outstanding payment.[111]

[109] ICSID Convention Article 52(3), *see infra*, para. 75(4).

[110] Arbitration Rules 43-45; Administrative and Financial Regulation 14(3)(d) & (e).

[111] *See* Annex 1. As noted above, the Applicant is solely responsible for the advance payments to ICSID in annulment proceedings. Under Administrative and Financial Regulation 14(3)(d) and (e), if an Applicant fails to make an advance, the Secretary-General informs both parties of the default and gives an opportunity to either of them to make the outstanding payment within 15 days. If neither party makes the payment, the proceeding may, after consultation with the Committee, be suspended and eventually discontinued after six months.



64. The *ad hoc* Committee's decision on annulment is not an award and is not subject to any further annulment proceeding, although it is equated to an award for purposes of its binding force, recognition and enforcement.[112] Likewise, the decision must contain the elements required in an award.[113] Notably, the decision must include the reasons upon which it is based.[114] As to the requirement to deal with every question, one *ad hoc* Committee has opined that, once an award is annulled in full on any ground, it is unnecessary to examine whether other grounds may also lead to annulment.[115] Similarly, some *ad hoc* Committees which partially annulled an award based on one ground did not see the need to examine alternative grounds for annulment of the same portion of the award that had been annulled.[116] Other *ad hoc* Committees examined all grounds raised, even where one of these grounds warranted full annulment.[117]

65. Nothing in the ICSID Convention or rules expressly prohibits an *ad hoc* Committee from stating its opinion on any issue addressed by the Tribunal award. However, some decisions have stated that an *ad hoc* Committee should not pronounce upon aspects of the Tribunal award that are not essential to its decision.[118]

[112] ICSID Convention Article 53(2).

[113] *Id.* at Articles 48 & 52(4); Arbitration Rules 47 & 53.

[114] ICSID Convention Articles 48(3) & 52(4); Arbitration Rules 47(1)(i) & 53.

[115] *See e.g.*, *Sempra*, para 78.

[116] *See e.g.*, *MINE*, para. 6.109; *Vivendi I*, paras. 115 & 116.

[117] *See e.g.*, *Amco I*, para. 16; *Klöckner I*, para. 82.

[118] *See*, *e.g.*, *Enron*, para. 340; *Azurix*, para. 362; *CDC*, para. 70; *Lucchetti*, para. 112; *AES*, para. 15.

66. The decision on annulment must also contain the *ad hoc* Committee's determination on the allocation of costs incurred by the parties in connection with the proceeding.[119] The Committee has discretion to decide how and by whom these costs should be paid, including each party's legal fees and expenses.[120] Most *ad hoc* Committees have divided the Costs of Proceeding[121] equally between the parties and ruled that each party must bear its own legal fees and expenses. However, in recent years some Committees have decided that the losing party should bear the Costs of Proceeding as well as the legal fees and expenses of the successful party, in most instances the defending party.[122]

Decisions on Allocation of Costs

Case	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
1. Amco v. Indonesia I	Annulled in full	Divided equally	Each Party bears its own costs
2. Amco v. Indonesia II	Annulment rejected	Divided equally	Each Party bears its own costs
3. Klöckner v. Cameroon I	Annulled in full	Divided equally	Each Party bears its own costs
4. Klöckner v. Cameroon II	Annulment rejected	Divided equally	Each Party bears its own costs
5. SPP v. Egypt	Discontinued	Information not publicly available	Information not publicly available
6. MINE v. Guinea	Annulled in part	Divided equally	Each Party bears its own costs
7. Vivendi v. Argentina I	Annulled in part	Divided equally	Each Party bears its own costs
8. Vivendi v. Argentina II	Annulment rejected	Divided equally	Each Party bears its own costs
9. Wena Hotels v. Egypt	Annulment rejected	Divided equally	Each Party bears its own costs
10. Gruslin v. Malaysia	Discontinued	No order on costs	No order on costs
11. Mitchell v. DRC	Annulled in full	Divided equally	Each Party bears its own costs
12. RFCC v. Morocco	Annulment rejected	Applicant	Each Party bears its own costs
13. Enron v. Argentina	Annulled in part	Divided equally	Each Party bears its own costs
14. MTD Equity v. Chile	Annulment rejected	Divided equally	Each Party bears its own costs
15. CMS Gas v. Argentina	Annulled in part	Divided equally	Each Party bears its own costs
16. Repsol v. Petroecuador	Annulment rejected	Applicant	Applicant

[119] ICSID Convention Articles 52(4) & 61(2); Arbitration Rules 47(1)(j) & 53; Administrative and Financial Regulation 14(3)(e).

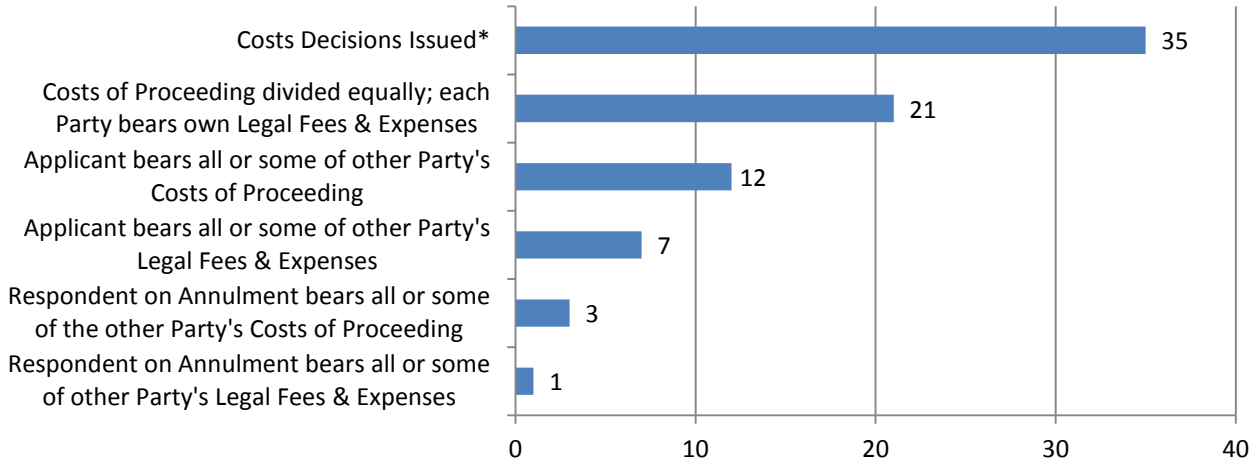
[120] *Id.*

[121] *See supra*, para. 54.

[122] As noted above, a decision on the allocation of costs in a decision on annulment is enforceable in the same manner as an ICSID award. ICSID Convention Article 53(2).

Case	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
17. Azurix Corp. v. Argentina	Annulment rejected	Applicant	Each Party bears its own costs
18. Soufraki v. UAE	Annulment rejected	Divided equally	Each Party bears its own costs
19. Siemens A.G. v. Argentina	Discontinued	Divided equally	Each Party bears its own costs
20. CDC Group v. Seychelles	Annulment rejected	Applicant	Applicant
21. Ahmonseto v. Egypt	Discontinued	Applicant	Each Party bears its own costs
22. Sempra Energy v. Argentina	Annulled in full	Respondent on Annulment	Each Party bears its own costs
23. Lucchetti v. Peru	Annulment rejected	Divided equally	Each Party bears its own costs
24. MCI Power v. Ecuador	Annulment rejected	Divided equally	Each Party bears its own costs
25. Continental Casualty v. Argentina	Annulment rejected	Divided equally	Each Party bears its own costs
26. Joy Mining v. Egypt	Discontinued	Settlement - no order on costs	Settlement – no order on costs
27. Fraport v. Philippines	Annulled in full	Divided equally	Each Party bears its own costs
28. Duke Energy v. Peru	Annulment rejected	Applicant	Each Party bears its own costs
29. Transgabonais v. Gabon	Annulment rejected	Applicant	Applicant
30. Vieira v. Chile	Annulment rejected	Applicant	Applicant
31. MHS v. Malaysia	Annulled in full	Respondent on Annulment	Each Party bears its own costs
32. RSM v. Grenada	Discontinued	Applicant	Applicant
33. Siag v. Egypt	Discontinued	Applicant	Each Party bears its own costs
34. Rumeli v. Kazakhstan	Annulment rejected	Divided equally	Each Party bears its own costs
35. Kardassopoulos / Fuchs v. Georgia	Discontinued	Settlement - no order on costs	Settlement – no order on costs
36. Helnan v. Egypt	Annulled in part	Divided equally	Each Party bears its own costs
37. Togo Electricité v. Togo	Annulment rejected	Applicant	Applicant
38. Nations v. Panama	Discontinued	Information not publicly available	Information not publicly available
39. AES Summit v. Hungary	Annulment rejected	Applicant	Applicant
40. Astaldi v. Honduras	Discontinued	Settlement - no order on costs	Settlement - no order on costs
41. ATA Construction v. Jordan	Discontinued	Respondent on Annulment	Respondent on Annulment

Allocation of Costs of Proceeding/ Legal Fees and Expenses

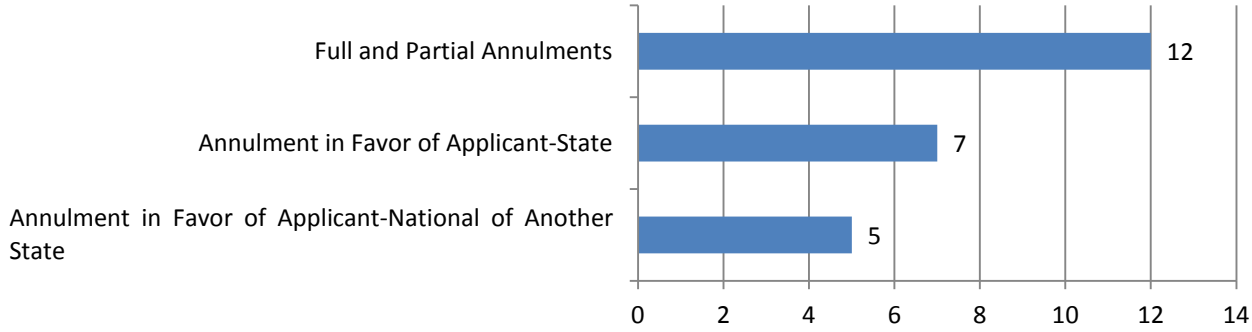


*Including 5 Orders of Discontinuance which contained orders on costs

67. Similar to a Tribunal award, the *ad hoc* Committee's decision on annulment may be accompanied by the individual opinion of a member of the Committee.[123] In practice, only 4 Committee members have partially or fully dissented from the majority's decision.[124]

68. Where an award has been partially or wholly annulled, the prevailing Applicant was roughly evenly divided between claimants and respondents in the Tribunal proceeding.

Full and Partial Annulment - By Party

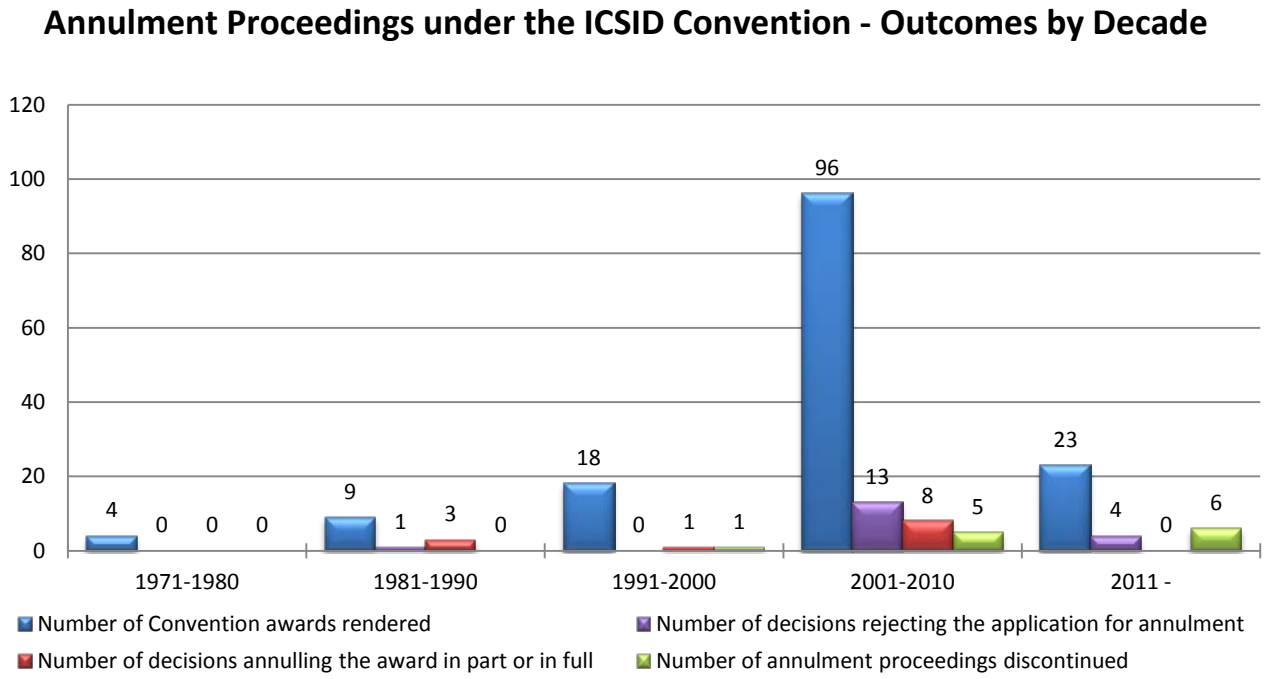


69. The rate of annulment is low, with 4 percent of registered cases (8 percent of all awards) ending in full or partial annulment. The ratio of annulments to awards fluctuates

[123] ICSID Convention Articles 48(4) & 52(4); Arbitration Rules 47(3) & 53.

[124] *See Vivendi II*; *Soufraki*; *Lucchetti*; *MHS*.

historically, but has been lower for 2001 – present (7 percent) than in the period 1971 – 2000 (13 percent).



E. *Resubmission Proceedings*

70. The effect of annulment is that the award or a part thereof becomes a nullity, meaning that the binding force of the annulled portion of the award is terminated. However, the decision on annulment does not replace the award or substitute any of the reasoning in the award. A party is entitled to request resubmission of the dispute by a newly constituted Tribunal to obtain a new award concerning the same dispute following annulment of the original award.[125] Either party may start this process by filing a request for resubmission of the dispute, identifying the original award, and explaining in detail which aspects of the dispute are to be submitted to the new Tribunal.[126] The new Tribunal is constituted by the same method as the original Tribunal[127] and is not bound by the reasoning of the *ad hoc* Committee. It is, however, bound by the unannulled portions of the original award in cases of partial annulment.[128]

[125] ICSID Convention Article 52(6); Arbitration Rule 55(1). The new Tribunal could reach the same conclusion as the original Tribunal whose award was annulled.

[126] Arbitration Rule 55(1). The Secretary-General is not given any authority to refuse registration of a resubmitted dispute. Arbitration Rule 55(2).

[127] Arbitration Rule 55(2)(d).

[128] Arbitration Rule 55(3). A partial annulment means that only those portions of the award that have been annulled may be resubmitted, whereas the remainder will be *res judicata*.

71. There have been 6 resubmission proceedings registered to date,[129] 3 of which led to awards that were subject to a second annulment proceeding.[130] The applications for annulment in those second annulment proceedings were rejected by the *ad hoc* Committees with the exception of the *Amco II* case, where the *ad hoc* Committee annulled the Tribunal's Decision on Supplemental Decisions and Rectification.[131]

V. Interpretation of the Annulment Mechanism, the Role of the *ad hoc* Committee, and the Individual Grounds for Annulment

A. *The General Standards Identified in the Drafting History and ICSID Cases*

72. As illustrated by Section III, the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, annulment was designed purposefully to confer a limited scope of review which would safeguard against "violation of the fundamental principles of law governing the Tribunal's proceedings."[132] The remedy has thus been characterized as one concerning "procedural errors in the decisional process" rather than an inquiry into the substance of the award.[133]

73. The drafting history of the ICSID Convention also demonstrates that annulment "is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment]."[134] It does not provide a mechanism to appeal alleged misapplication of law or mistake in fact. The Legal Committee confirmed by a vote that even a "manifestly incorrect application of the law" is not a ground for annulment.[135]

74. The limited and exceptional nature of the annulment remedy expressed in the drafting history of the Convention has been repeatedly confirmed by ICSID Secretary-Generals in Reports to the Administrative Council of ICSID, papers and lectures.[136]

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[129] *Amco II*; *Klöckner II*; *MINE*; *Vivendi II*; *Enron* (pending); *Sempra* (pending).

[130] *See Amco II*; *Klöckner II*; *Vivendi II*.

[131] *Amco II*. The annulment is regarded as a partial annulment of an award for purposes of the tables contained in this paper.

[132] *See* comment to Section 13 of the Preliminary Draft, History, *supra* note 14, at Vol. II, 218 & 219.

[133] Broches, *supra* note 15, at 298.

[134] *See* comment to Section 13 of the Preliminary Draft, History, *supra* note 14, at Vol. II, 218 & 219.

[135] *See supra* para. 26.

[136] *See e.g.*, Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twentieth Annual Meeting 3 (October 2, 1986): "The history of the Convention makes it clear that the draftsmen intended to: (i) assure the finality of ICSID awards; (ii) distinguish carefully an annulment proceeding from an appeal; and (iii) construe narrowly the ground for annulment, so that this procedure remained exceptional;" Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twenty-Second Annual Meeting (September 27-29, 1988): "It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the

75. ICSID *ad hoc* Committees have also affirmed these principles in their decisions.[137] These decisions have clearly established that: (1) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited; (3) *ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own; (4) *ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly: and (6) an *ad hoc* Committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full. The following section enumerates each of these commonly cited principles related to ICSID annulment, accompanied by excerpts of annulment decisions confirming the relevant principle.

(1) The grounds listed in Article 52(1) are the only grounds on which an award may be annulled

- "The remedy of annulment requested by either or by both Parties under Article 52 of the CONVENTION is essentially limited by the grounds expressly enumerated in paragraph 1, on which an application for annulment may be made. This limitation is further confirmed by Article 53 (1) by the exclusion of review of the merits of the Awards." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "It seems quite clear that, in accordance with Article 52(1), the grounds on which an application is founded can only be the five grounds provided for in the Convention." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner II*), ICSID Case No. ARB/81/2, Decision on Annulment, para. 4.24 (May 17, 1990) [unofficial translation from French].

- "Claimants and Respondent agree that an *ad hoc* Committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on Annulment, para. 62 (July 3, 2002).

- "The power for review is limited to the grounds of annulment as defined in [Article 52 of the ICSID Convention]." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision

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shortcomings against which it is meant to be a safeguard. It is also wrong to confuse the annulment proceeding with an appeals process which is not possible in respect of awards issued by ICSID's tribunals;" Broches, *supra* note 15, at 354 & 355; Annex 4, para. 28.

[137] All decisions on annulment have been published, either by ICSID with the consent of the parties, by the parties themselves, or in summaries of the legal reasoning of the *ad hoc* Committee excerpted by ICSID. *See* Annex 1, which includes references to each decision on annulment and its publication source. Pursuant to ICSID Arbitration Rule 48(4), the Centre has published the legal reasoning of the decisions on annulment in *RFCC*, *Repsol* and *Transgabonais.*

on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002).

- "Annulment may be based only on a very limited number of fundamental grounds exhaustively listed in Article 52(1)." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 222 (January 18, 2006) [free translation from French].

- "Both parties recognize that an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 43 (September 25, 2007).

- "The limitation of recourse to the annulment mechanism to the few grounds listed in Article 52(1) serves to reinforce the finality and stability of ICSID awards..." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 127 (June 5, 2007).

- "Annulment review is limited to a specific set of carefully defined grounds (listed exhaustively in Article 52(1) of the ICSID Convention)." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, para. 74 (June 29, 2010) (footnote omitted).

- "The role of the Committee is confined to the grounds of annulment in Article 52 of the ICSID Convention, and as noted above, even if the Tribunal erred in law, this would not be a ground for annulment." *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 237 (July 30, 2010).

- "The review conducted by an *ad hoc* Committee is limited to the grounds that were carefully contemplated and are exhaustively listed in Article 52(1) of the Convention." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 236 (December 10, 2010) (footnote omitted) [free translation from Spanish].

- "The grounds for annulment are exhaustively listed in Article 52(1). Neither the ordinary meaning of the terms used by such article nor its context allows any possibility for additional grounds." *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, para. 51 (September 6, 2011) (footnote omitted) [free translation from French].

(2) Annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited

- "Article 52(1) makes it clear that annulment is a limited remedy." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.04 (December 22, 1989).

- "Because of its focus on procedural legitimacy, annulment is 'an extraordinary remedy for unusual and important cases.'" *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 34 (June 29, 2005) (footnote omitted).

- "The sole purpose of Article 52 is to provide for an exceptional remedy in cases where there has been a manifest and substantial breach of a number of essential principles set out in this Article." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 223 (January 18, 2006) [free translation from French].

- "The purpose of the grounds for annulment under Article 52 of the Convention is to allow a limited exception to the finality of ICSID awards, which is highlighted by Article 53." *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, para. 81 (January 8, 2007) (footnote omitted) [unofficial translation from Spanish].

- "[T]he role of an *ad hoc* committee in the ICSID system is a limited one." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 54 (March 21, 2007) (footnote omitted).

- "At the outset, the Committee must recall that, in the ICSID system, annulment has a limited function." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 44 (September 25, 2007).

- "It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 20 (June 5, 2007).

- "[T]he Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 158 (September 25, 2007).

- "One general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 101 (September 5, 2007).

- "[T]he role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness." *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, para. 24 (October 19, 2009).

- "It is true that the annulment procedure is exceptional in its nature…the grounds for the annulment remedy and the mandate of the *ad hoc* committee are limited." *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision of the *ad hoc* Committee on the Application for Annulment of the Gabonese Republic, para. 228 (May 11, 2010) [free translation from French].

- "T]he Committee considers that annulment proceedings are confined to determining whether the integrity of the arbitration proceedings has been respected." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 236 (December 10, 2010)[free translation from Spanish].

- "It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that '. . . an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings.'" *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 20 (June 5, 2007) (footnote omitted).

(3) *Ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own

- "The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco I*), ICSID Case No. ARB/81/1, Decision on Annulment, para. 23 (May 16, 1986).

- "Annulment is not a remedy against an incorrect decision. An *ad hoc* Committee may not in fact review or reverse an ICSID award on the merits under the guise of annulment under Article 52." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "It is incumbent upon Ad Hoc Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.18 (December 17, 1992).

- "[I]t should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments. " *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner I*), ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, para. 83 (May 3, 1985) [unofficial translation from French].

- "Another basic consideration which must be mentioned concerns the limited scope of the annulment procedure, which cannot in any way serve as an appellate procedure." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner II*), ICSID Case No. ARB/81/2, Decision on Annulment, para. 5.07 (May 17, 1990) [unofficial translation from French].

- "Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.04 (December 22, 1989).

- "It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, para. 247(i) (August 10, 2010).

- "As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002) (footnote omitted).

- "No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award." *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006).

- "Even the most evident error of fact in an award is not in itself a ground for annulment." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 222 (January 18, 2006) [free translation from French].

- "In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* Committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 63 (July 30, 2010).

- "Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 31 (March 21, 2007).

- "[T]he 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 one." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 54 (March 21, 2007) (footnote omitted).

- "The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the

law and its own appreciation of the facts for those of the Tribunal." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 136 (September 25, 2007).

- "The Parties are aware that the annulment proceedings are designed to grant reparation for damages only in cases of serious violations of certain fundamental principles [footnote omitted]. Such procedures should not be confused with the proceedings of an Appeals Tribunal and, therefore, should be adopted only in special situations." *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, para. 86 (January 8, 2007) [unofficial translation from Spanish].

- "In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, para. 41 (September 1, 2009) (footnotes omitted).

- "An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process and may not, therefore, simply determine which party has the better argument. This means that an annulment, as already stated, is to be distinguished from an ordinary appeal, and that, even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 24 (June 5, 2007).

- "Article 52(1) looks not to the merits of the underlying dispute as such, but rather is concerned with the fundamental integrity of the tribunal, whether basic procedural guarantees were largely observed, whether the Tribunal exceeded the bounds of the parties' consent, and whether the Tribunal's reasoning is both coherent and displayed. To borrow Caron's terminology, annulment is concerned with the 'legitimacy' of the process of decision" rather than with the 'substantive correctness of decision.' Because of its focus on procedural legitimacy, annulment is 'an extraordinary remedy for unusual and important cases.' That annulment is not the same thing as appeal is a principle acknowledged, although applied unevenly, in the various decisions of *ad hoc* Committees." *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 34 (June 29, 2005) (footnotes omitted).

- "Annulment is distinct from an appeal. An *ad hoc* committee cannot substitute its own judgment on the merits for the decision of the Tribunal." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, para. 73 (June 29, 2010).

- "[A] request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (*formerly *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 101 (September 5, 2007).

- "[I]t is no part of the Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (*formerly *Empresas*

Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment, para. 97 (September 5, 2007).

- "It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires... Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. The committee cannot for example substitute its determination on the merits for that of the tribunal..." *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, para. 24 (October 19, 2009) (footnote omitted).

- "Although this Committee expressed earlier some reservations about the way the Tribunal proceeded in its interpretation exercise, it is not itself empowered to act as an appeal body and substitute its own interpretation of the BIT for the one adopted by the Arbitral Tribunal." *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, para. 112 (December 23, 2010).

- "An *ad hoc* committee, which is not an appellate body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal." *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, para. 144 (March 1, 2011).

- "It is very common for an *ad hoc* Committee considering an application for annulment to deem it necessary to delineate between appeal (which relates to the merits of the arbitral award) and annulment (a form of specific control over the arbitral process subject to the requirements of Article 52 of the ICSID Convention)…The Committee insists, however, on strongly emphasizing that annulment is certainly not a means by which a party to an arbitral proceeding may seek to invalidate the merits of the arbitral award that it does not like." *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision of the *ad hoc* Committee on the Application for Annulment of the Gabonese Republic, para. 19 (May 11, 2010) [free translation from French].

- "An *ad hoc* committee may not replace the Tribunal's decision on the merits of the dispute by its own decision." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 235 (December 10, 2010) [free translation from Spanish].

- "An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties." *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, para. 96 (March 25, 2010).

- "In respect to the legal framework of the ICSID annulment proceedings, both Parties agree that an annulment proceeding is not an appeal process and that Article 52 of the ICSID Convention should be construed in accordance with the Vienna Convention on the Law of Treaties." *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, para. 70 (March 25, 2010).

- "It is no part of the function of an annulment committee to reconsider findings of fact made by an ICSID arbitral tribunal. Rather the issues for this Committee are circumscribed by the terms of Article

52(1) of the ICSID Convention and relate to the Tribunal itself: its powers; its process; and the reasoning of its Award." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, para. 20 (June 14, 2010).

- "Article 52 excludes a review of the Award on the merits to the extent that article 53(1) excludes any appeal. As a result, an *ad hoc* Committee cannot consider new matters regarding the merits of a case in an annulment proceeding." *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, para. 50 (September 6, 2011) (footnote omitted) [free translation from French].

- "An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention. In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, para. 81 (September 16, 2011) (footnotes omitted).

- "As unambiguously expressed in Article 53 of the Convention, an award is not subject to an appeal. Annulment must therefore be different from appeal. It is well settled in international investment arbitration that an *ad hoc* committee may not substitute its own judgment on the merits for that of a tribunal." *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, para. 15 (June 29, 2012).

(4) *Ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards

- "An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.10 (December 22, 1989).

- "The *ad hoc* Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.20 (December 17, 1992).

- "[It] appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found... Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on Annulment, para. 66 (July 3, 2002).

- "Keeping the object and purpose of the Convention as well as these underlying policy considerations in mind, we note that the *ad hoc* Committees operating during the last two decades have considered that a Committee has discretion to determine not to annul an Award even where a ground for annulment under Article 52(1) is found to exist... We thus should consider the significance of the [alleged annullable] error relative to the legal rights of the parties." *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 37 (June 29, 2005) (footnotes omitted).

- "[The Committee] should therefore refrain from making an annulment decision too hastily. It must do so only in case of manifest error, substantial breach or, more specifically, whenever the breach is such that, if it had not been committed, the Tribunal would have reached a different outcome than the one reached. To this extent, the *ad hoc* Committee retains a measure of discretion." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 226 (January 18, 2006) (citations omitted) [free translation from French].

- "An *ad hoc* Committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule protected by Article 52." *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006).

- "[E]ven in the case of annullable error, the *ad hoc* Committee still has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, para. 252 (August 10, 2010).

- "An *ad hoc* committee will not annul an award if the Tribunal's disposition is tenable, even if the committee considers that it is incorrect as a matter of law." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, para. 55 (June 14, 2010) (footnote omitted).

(5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly

- "[A]pplication of the paragraph demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Klöckner I*), ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, para. 3 (May 3, 1985) [unofficial translation from French].

- "The fact that annulment is a limited, and in that sense extraordinary, remedy might suggest either that the terms of Article 52(1), i.e., the grounds for annulment, should be strictly construed or, on the contrary, that they should be given a liberal interpretation since they represent the only remedy against unjust awards. The Committee has no difficulty in rejecting either suggestion. In its view, Article 52(1) should be interpreted in accordance with its object and purpose, which excludes on the one hand, as already stated, extending its application to the review of an award on the merits and, on the other, an unwarranted refusal to give full effect to it within the limited but important area for

which it was intended." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.05 (December 22, 1989).

- "Article 52(1) should be interpreted in accordance with its object and purpose: this precludes its application to the review of an Award on the merits and in a converse case excludes an unwarranted refusal to give full effect to it within the limited but significant area for which it was intended." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "It also appears to be established that there is no presumption either in favour of or against annulment, a point acknowledged by Claimants as well as Respondent." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on Annulment, para. 62 (July 3, 2002) (footnote omitted).

- "As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal. The power for review is limited to the grounds of annulment as defined in this provision. These grounds are to be interpreted neither narrowly nor extensively." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002) (footnotes omitted).

- "As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied [footnote omitted]." *Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16*, Decision on the Argentine Republic's Request for Annulment of the Award, para. 75 (June 29, 2010).

- "[T]he grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively." *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006) (footnote omitted).

- "Furthermore, there is no presumption either in favor of or against annulment." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 220 (January 18, 2006) (citation omitted) [free translation from French].

- "Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty. Some commentators have suggested that in case of doubt, an annulment committee should decide in favor of the validity of the award. Such presumption, however, finds no basis in the text of Article 52 and has not been used by annulment committees." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, paras. 21-22 (June 5, 2007) (footnote omitted).

- "As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied. Nor is there any preponderant inclination "*in favorem validitatis*", i.e. a presumption in favour of the Award's validity." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine

Republic's Application for Annulment of the Award, paras. 75-76 (June 29, 2010) (footnotes omitted).

(6) An *ad hoc* Committee's authority to annul an award is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either full or partial

- "[M]erely because the Parties agree on the total or partial annulment of the Award on the same ground does not mean that the Committee must follow their requests in whole or in part. The annulment procedure is above all a procedure for the protection of the law. It is not instituted merely in the interest of the Parties." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner II*), ICSID Case No. ARB/81/2, Decision on Annulment, para. 9.15 (May 17, 1990) [unofficial translation from French].

- "The Committee notes that an *ad hoc* Committee may annul an award (or any part thereof) only pursuant to a request by a party and only within the scope of that request, unless by necessary implication annulment entails the annulment of other portions." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.08 (December 22, 1989).

- "[W]here a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 69 (July 3, 2002).

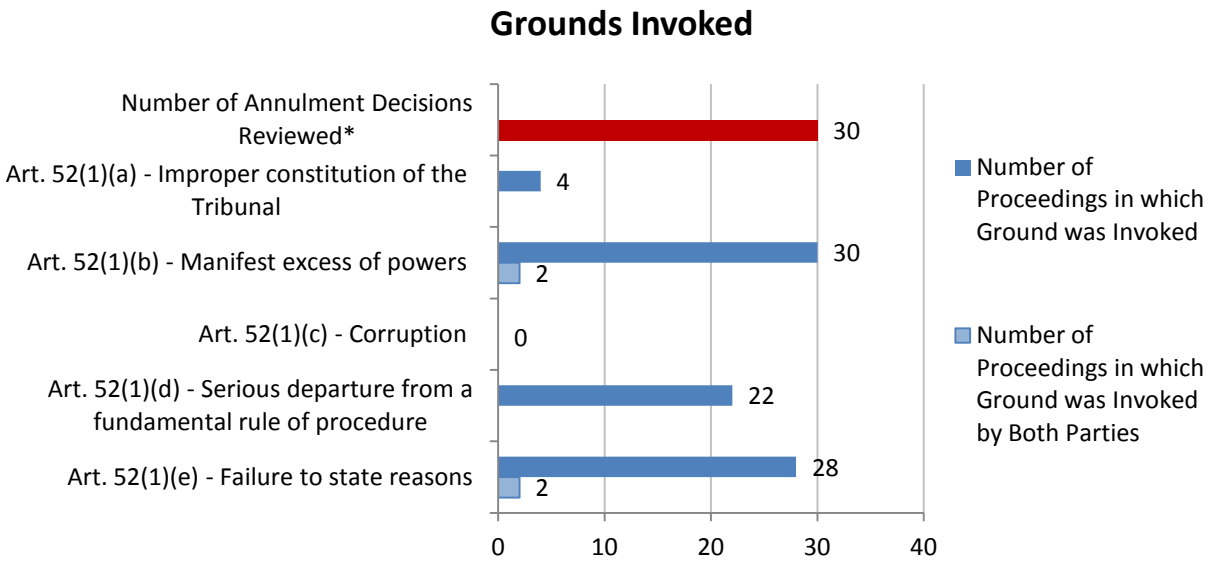
- "The *ad hoc* Committee derives its authority from the same source, the parties' will, as the Arbitral Tribunal itself. Its authority is no more legitimate than that of the Arbitral Tribunal. It should therefore refrain from deciding to annul too hastily." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 226 (January 18, 2006) [free translation from French].

- "Once an *ad hoc* committee has concluded that there is one instance of manifest excess of powers (or any other ground for annulment), which warrants annulment of the Award in its entirety, this will be the end of the *ad hoc* committee's examination. Since annulment of an award in its entirety necessarily leads to the loss of the *res judicata* effect of all matters adjudicated by the Tribunal, it is unnecessary to consider whether there are other grounds - whether in respect of the same matter or other matters - that may also lead to annulment. On the other hand, an *ad hoc* committee will need to proceed differently where it decides not to annul the Award or decides to annul the Award only in part. In those instances it will be necessary for the *ad hoc* committee to examine all of the grounds invoked by the applicant in support of its application." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, paras. 78-79 (June 29, 2010).

B. *The Interpretation of Specific Grounds*

76. The grounds for annulment in Article 52(1) of the ICSID Convention are: (a) the improper constitution of the Tribunal; (b) manifest excess of powers by the Tribunal; (c)

corruption on the part of a Tribunal member; (d) a serious departure from a fundamental rule of procedure; and (e) failure to state reasons. Grounds (b), (d) and (e) are the most frequently relied upon grounds for annulment and they are usually invoked cumulatively in support of the application to annul an award.[138]



**See Annex 6*

77. The specific grounds for annulment were discussed in the drafting history of the ICSID Convention and have been extensively analyzed and interpreted in ICSID cases, in particular grounds (b), (d) and (e). The following is a brief summary of the meaning of these grounds as indicated in the drafting history and as interpreted by *ad hoc* Committees. The table at Annex 6 details the grounds invoked in annulment decisions, showing which were upheld and rejected.[139]

(i) Improper Constitution of the Tribunal

78. The drafting history of the ICSID Convention indicates that the ground of improper constitution of the Tribunal was intended to cover situations such as a departure from the parties' agreement on the method of constituting the Tribunal or an arbitrator's failure to meet the nationality or other requirements for becoming a member of the Tribunal.[140]

79. No provision of the ICSID Convention or rules explicitly addresses when a Tribunal might be considered to be improperly constituted. However, Chapter I of the ICSID Arbitration Rules, entitled "Establishment of the Tribunal," provides detailed rules concerning constitution of a Tribunal, including nationality and other requirements for Tribunal members,

[138] ICSID Convention Article 52(1) provides that a party may request annulment "on one or more" grounds.

[139] *See* "Annulment Grounds in Concluded Proceedings," Annex 6.

[140] *See supra* para. 23.

the appointment process, and the arbitrator's declaration of impartiality and independence.[141] The parties may raise an objection concerning compliance with any of these provisions, which should be addressed by the Tribunal as soon as it has been constituted. In practice, Tribunals consistently ask the parties whether they have any objection to the constitution of the Tribunal or to any individual member during the Tribunal's first session dealing with procedural matters.[142] If a Tribunal decides that it has been properly constituted following an objection by a party, that party must await the Tribunal's award before filing an application for annulment on this ground.[143]

80. Improper constitution of a Tribunal has been raised in only 4 annulment cases leading to decisions. Three rejected the allegation based on this ground.[144] In a fourth case, the *ad hoc* Committee did not address the ground, as it had already decided to annul the award in full based on another ground.[145]

81. The 4 decisions indicate that annulment applications based on this ground are likely to succeed only in rare circumstances. One annulment decision held that the *ad hoc* Committee's role is limited to considering whether the provisions concerning constitution of the Tribunal were respected in the original proceeding, and did not extend to matters such as review of the Tribunal's decision on a request for disqualification of a Tribunal member under Article 58 of the Convention.[146] *Ad hoc* Committees have also indicated that a party with knowledge of an alleged improper constitution of the Tribunal in the original proceeding who fails to raise such issue may be taken to have waived its right to raise this as a ground for annulment.[147]

(ii) Manifest Excess of Powers

82. The drafters of the ICSID Convention anticipated an excess of powers when a Tribunal went beyond the scope of the parties' arbitration agreement, decided points which had not been submitted to it, or failed to apply the law agreed to by the parties.[148] The main powers of the Tribunal that appear to have been contemplated by this provision thus relate to the Tribunal's jurisdiction and to the applicable law. These two categories will be described separately below.

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[141] *See* Arbitration Rules 1-12 (which implement the provisions of ICSID Convention Articles 14(1), 37-40 & 56-58).

[142] *See* Arbitration Rule 13(1). The first session is to be held within 60 days after the Tribunal's constitution or such other period as the parties may agree.

[143] History, *supra* note 14, at Vol. II, 851 & 852.

[144] *See* Annex 6; *Vivendi II*; *Azurix*; *Transgabonais*.

[145] *Sempra*.

[146] *Azurix*, paras. 272-284.

[147] *Azurix*, para. 291; *Transgabonais*, paras. 129 & 130.

[148] *See supra* paras. 19, 24-25.

83. Article 52(1)(b) of the ICSID Convention provides that only instances of "manifest" excess of the Tribunal's powers may lead to an annulment, indicating a dual requirement of an "excess" that is "manifest."[149] As a result, *ad hoc* Committees have identified two methodological approaches to determine whether there is an annullable error on this ground. The first is a two-step analysis determining whether there was an excess of powers and, if so, whether the excess was "manifest."[150] The second is a *prima facie* test, consisting of a summary examination to determine whether any of the alleged excesses of power could be viewed as "manifest."[151]

84. The "manifest" nature of the excess of powers has been interpreted by most *ad hoc* Committees to mean an excess that is obvious, clear or self-evident,[152] and which is discernable without the need for an elaborate analysis of the award.[153] However, some *ad hoc* Committees have interpreted the meaning of "manifest" to require that the excess be serious or material to the outcome of the case.[154]

85. Manifest excess of powers has been invoked in every case leading to a decision on annulment. There have been 8 instances of partial or full annulment on this basis.[155]

(a) Manifest Excess of Powers Relating to Jurisdiction

86. A Tribunal is expected to observe the parties' arbitration agreement. If a Tribunal goes beyond the scope of the parties' arbitration agreement, it in effect surpasses the mandate granted to it by the parties. In addition, the ICSID Convention prescribes certain mandatory

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[149] *See supra* paras. 19 & 24–26.

[150] *Sempra*, para. 212; *Fraport*, para. 40; *AES*, para. 32.

[151] *Id*.

[152] *Vivendi II*, para. 245 ("must be 'evident'"); *Repsol*, para. 36 ("obvious by itself"); *Azurix*, para. 68 ("obvious"); *Soufraki*, para. 39 ("obviousness") (citing *Webster's Revised Unabridged Dictionary* (1913) ("'clear,' 'plain,' 'obvious,' 'evident'….")); *CDC*, para. 41 (citing *Wena*, para. 25 ("clear or 'self-evident'")); *MCI*, para. 49 (citing *Wena*, para. 25) ("self-evident"); *Rumeli*, para. 96 ("evident on the face of the Award"); *Helnan*, para. 55 ("obvious or clear").

[153] *See Wena*, para. 25 ("The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other."); *Mitchell*, para. 20 (manifest if found "with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award"); *Enron*, para. 69 (quoting *MTD*, para. 47 ("not arguable")); *Repsol*, para. 36 (quoting Christoph H. Schreuer, *The ICSID Convention: A Commentary* 933 (Cambridge University Press 2001) ("discerned with little effort and without deeper analysis")); *Azurix*, paras. 48 & 68; *CDC*, para. 41 ("Any excess apparent in a Tribunal's conduct, if susceptible 'one way or the other', is not manifest); *Sempra*, para. 213 ("quite evident without the need to engage in an elaborate analysis"); *MCI*, para. 49 ("the manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal").

[154] *Klöckner I*, para. 52(e) ("the [Tribunal's] answers seem tenable and not arbitrary"), *Vivendi I*, para. 86 ("clearly capable of making a difference to the result"); *Soufraki*, para. 40 ("at once be textually obvious and substantially serious"), *Fraport*, para. 44 ("demonstrable and substantial and not doubtful"), *MHS*, para. 80; *AES*, para. 31.

[155] *Amco I* (full); *Klöckner I* (full); *Vivendi I* (partial); *Mitchell* (full); *Enron* (partial); *Sempra* (full); *MHS* (full); *Helnan* (partial).

requirements that must be fulfilled for a Tribunal to have jurisdiction.[156] These jurisdictional requirements require: (i) 'a legal dispute;' (ii) 'arising directly out of an investment;' (iii) 'between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State);' (iv) 'and a national of another Contracting State;' (v) 'which the parties to the dispute consent in writing to submit to the Centre.'[157] The parties cannot agree to derogate from these criteria. In fact, the Tribunal must decline jurisdiction where a mandatory requirement is not met, even if neither party has raised any objection to jurisdiction.[158]

87. Objections to jurisdiction are often raised in international investment cases and the jurisdictional requirements have been extensively discussed and analyzed in such cases.

88. *Ad hoc* Committees have held that there may be an excess of powers if a Tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking,[159] or when the Tribunal exceeds the scope of its jurisdiction.[160] It has been recognized, in the inverse case, that a Tribunal's rejection of jurisdiction when jurisdiction exists also amounts to an excess of powers.[161]

89. At the same time, *ad hoc* Committees have acknowledged the principle specifically provided by the Convention that the Tribunal is the judge of its own competence.[162] 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."[163] However, one *ad hoc* Committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case.[164]

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[156] ICSID Convention Article 25(1).

[157] *Id.*

[158] ICSID Convention Article 41(1).

[159] *Vivendi I*, para. 86; *Mitchell*, paras. 47, 48 & 67; *CMS*, para. 47 (quoting *Klöckner I*, para. 4); *Azurix*, para. 45 (quoting *Klöckner I*, para. 4); *Lucchetti*, para. 99; *MCI*, para. 56 (quoting *Lucchetti*, para. 99).

[160] *Klöckner I*, para. 4; *Soufraki*, para. 42.

[161] *Vivendi I*, para. 86; *Soufraki*, para. 43 (quoting *Vivendi I*, para. 86); *Lucchetti*, para. 99; *Fraport*, para. 36 (citing *Vivendi I*, para. 86); *MHS*, para. 80; *Helnan*, para. 41 (citing *Soufraki*, para. 44 and *Vivendi I*, para. 86).

[162] *Enron*, para. 69 (citing *Azurix*, para. 67); *Azurix*, para. 67; *Soufraki*, para. 50; *see also* History, *supra* note 14, at Vol. I, 186-190, Vol. II, 206, 291-92, 406 & 511; International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* para. 38 (March 18, 1965).

[163] *See supra* para. 24; *MTD*, para. 54; *Azurix*, paras. 64–66 (quoting *Lucchetti*, paras. 101 & 102); *Soufraki*, paras. 118 & 119 ("the requirement that an excess of power must be 'manifest' applies equally if the question is one of jurisdiction"); *Lucchetti*, para. 101; *Rumeli*, para. 96.

[164] *Vivendi I*, paras. 72 & 86.

90. The issue of excess of jurisdiction has been ruled on in 18 annulment decisions and has led to one full annulment.[165] In addition, the non-exercise of an existing jurisdiction has been decided in 12 decisions and has resulted in one full and 2 partial annulments.[166]

(b) Manifest Excess of Powers Relating to the Applicable Law

91. The drafting history of the ICSID Convention shows that a Tribunal's failure to apply the proper law could constitute a manifest excess of powers, but that erroneous application of the law could not amount to an annullable error, even if it is manifest.[167] As stated above, there is no basis for an annulment due to an incorrect decision by a Tribunal, a principle that has been expressly recognized by many *ad hoc* Committees.[168]

92. The ICSID Convention provides as follows concerning the law to be applied by a Tribunal:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[169]

93. Where the parties' agree on applicable law, a disregard of this law would likely be equivalent to a derogation from the mandate conferred on the Tribunal by the parties.

94. *Ad hoc* Committees agree that a Tribunal's complete failure to apply the proper law or acting *ex aequo et bono* without agreement of the parties to do so as required by the ICSID Convention could constitute a manifest excess of powers.[170] However, *ad hoc* Committees have taken different approaches to whether an error in the application of the proper law may effectively amount to non-application of the proper law. Some *ad hoc* Committees have concluded that gross or egregious misapplication or misinterpretation of the law may lead to annulment,[171] while others have found that such an approach comes too close to an appeal.[172] Similarly, *ad hoc* Committees have discussed whether application of a law different from that

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[165] *See Mitchell*, para. 67. The award in *Mitchell* was annulled in full on 2 grounds: manifest excess of powers and failure to state the reasons.

[166] *Vivendi I* (partial); *Helnan* (partial); *MHS* (full).

[167] *See supra* paras. 20 & 26.

[168] *See supra* para. 75.

[169] ICSID Convention Article 42(1).

[170] *Amco I*, paras. 23 & 28; *Amco II*, para. 7.28; *Klöckner I*, para. 79; *MINE*, para. 5.03; *Enron*, para. 218 (quoting *Azurix*, para. 136 (footnotes omitted)); *MTD*, para. 44; *CMS*, para. 49, *Soufraki*, para. 85 (quoting *Amco I*, para. 23).

[171] *Soufraki*, para. 86; *Sempra*, para. 164; *MCI*, paras. 43 & 51 (quoting *Soufraki*, para. 86); *MHS*, para. 74; *AES*, paras. 33 & 34 (quoting *Soufraki*, para. 86).

[172] *MINE*, paras. 5.03 & 5.04; *MTD*, para. 47; *CMS*, paras. 50–51 (quoting *MINE*, paras. 5.03 & 5.04; *MTD*, para. 47); *Sempra*, para. 206.

purportedly applied by the Tribunal could be considered a manifest excess of powers.[173] These discussions have led *ad hoc* Committees to observe that there is sometimes a fine line between failure to apply the proper law and erroneous application of the law.[174] In this connection, one issue discussed by some *ad hoc* Committees concerns which rules of law apply when consent to arbitration is based on an arbitration clause in a bilateral investment treaty.[175]

95. The failure to apply the proper law has been invoked in 26 out of 30 annulment decisions. It has led to one partial and 3 full annulments.[176]

(iii) Corruption on the Part of a Tribunal Member

96. The drafters of the ICSID Convention decided not to replace the word "corruption" with "misconduct," "lack of integrity" or "a defect in moral character."[177] They also decided not to limit this ground to cases of corruption evidenced by a court judgment or a showing of "reasonable proof that corruption might exist."[178]

97. When an arbitrator accepts to serve as a member of a Tribunal, the arbitrator is required to sign a declaration that he or she "shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the ICSID Convention."[179] An arbitrator's conduct in breach of that declaration can thus lead to annulment of an award. If a party has knowledge of such conduct during the proceeding before the Tribunal, it should file a request for disqualification based on Article 57 of the ICSID Convention.

98. This ground has not been dealt with in any decision on annulment to date.

(iv) Serious Departure from a Fundamental Rule of Procedure

99. It appears from the drafting history of the ICSID Convention that the ground of a "serious departure from a fundamental rule of procedure" has a wide connotation including principles of natural justice, but that it excludes the Tribunal's failure to observe ordinary arbitration rules. The phrase "fundamental rules of procedure" was explained by the drafters as a reference to principles.[180] One such fundamental principle mentioned during the negotiations

[173] *MTD*, para. 47; *CMS*, para. 51 (quoting *MTD*, para. 47); *Azurix*, para. 136, fn 118 (citing *MTD*, para. 47); *Sempra*, para. 163, fn 44 (citing *MTD*, para. 47).

[174] *Klöckner I*, para. 60; *Enron*, paras. 68 & 220; *Azurix*, para. 47.

[175] *Enron*; *CMS*; *Sempra*.

[176] *Amco I* (full); *Klöckner I* (full); *Enron* (partial); *Sempra* (full).

[177] *See supra* para. 27.

[178] *Id*.

[179] *See* Arbitration Rule 6(2), which provides the standard form of the declaration.

[180] *See supra* para. 28.

was the parties' right to be heard.[181] The drafting history thus indicates that this ground is concerned with the integrity and fairness of the arbitral process.

100. Based on the words "serious" and "fundamental" in this ground, *ad hoc* Committees have adopted a dual analysis: the departure from a rule of procedure must be serious and the rule must be fundamental.[182] *Ad hoc* Committees have thus consistently held that not every departure from a rule of procedure justifies annulment.[183] Examples of fundamental rules of procedure identified by *ad hoc* Committees are: (i) the equal treatment of the parties; [184] (ii) the right to be heard; [185] (iii) an independent and impartial Tribunal;[186] (iv) the treatment of evidence and burden of proof;[187] and (v) deliberations among members of the Tribunal.[188]

101. 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. Some *ad hoc* Committees have required that the departure have a material impact on the outcome of the award for the annulment to succeed.[189]

102. The ground of serious departure from a fundamental rule of procedure has been pursued in 22 proceedings which led to annulment decisions. It resulted in the annulment in full of one award and in the annulment of a decision on supplemental decisions and rectification.[190]

(v) Failure to State the Reasons on which the Award is Based

103. During the drafting of the ICSID Convention, the ground of "failure to state the reasons on which the award is based" was originally included in the ground of a "serious departure from a fundamental rule of procedure."[191] It subsequently became a stand-alone ground. In addition, a proposed qualifier enabling parties to waive the requirement that reasons be stated was eliminated during the negotiation of the Convention.[192] This elimination of the proposed waiver related to the removal of the same discretion in another provision in the Convention, which now reads: "[t]he award shall deal with every question submitted to the

[181] *See supra* para. 21.

[182] *Amco II*, para. 9.07; *MINE*, para. 4.06; *Wena*, para. 56; *CDC*, para. 48; *Fraport*, para. 180.

[183] *MINE*, para. 4.06; *CDC*, para. 48; *Fraport*, para. 186.

[184] *Amco I*, paras. 87 & 88.

[185] *Amco II*, paras. 9.05-9.10; *Klöckner I*, paras. 89-92; *Wena*, para. 57; *CDC*, para. 49; *Lucchetti*, para. 71; *Fraport*, para. 197.

[186] *Klöckner I*, para. 95; *Wena*, para. 57; *CDC*, paras. 51-55.

[187] *Amco I*, paras. 90 & 91; *Klöckner II*, para. 6.80; *Wena*, paras. 59-61.

[188] *Klöckner I*, para. 84; *CDC*, para. 58.

[189] *Wena*, para. 58; *Repsol*, para. 81; *CDC*, para. 49; *Fraport*, para. 246.

[190] *Fraport*; *Amco II*.

[191] *See supra* para. 13.

[192] *See supra* para. 29.

Tribunal, and shall state the reasons upon which it is based."[193] There is thus a clear link between the provision in the Convention requiring the Tribunal to state the reasons for the award, and the ground providing for annulment when there has been a failure to provide the reasons on which the award is based. The drafting history of the Convention concerning annulment based on a failure to state reasons does not provide further guidance as to when such a failure has occurred, nor does the Convention specify the manner in which a Tribunal's reasons should be stated.

104. While a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment.[194] 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.[195] In addition, 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.[196] Therefore, certain issues relating to the reasoning or lack of reasoning in an award can be heard by the Tribunal that rendered the award.[197]

105. At the same time, if a Tribunal's failure to address a particular question submitted to it might have affected the Tribunal's ultimate decision, this could, in the view of some *ad hoc* Committees, amount to a failure to state reasons and could warrant annulment.[198] *Ad hoc* Committees have also noted that such failure could amount to a serious departure from a fundamental rule of procedure.[199]

106. *Ad hoc* Committees have explained that the requirement to state reasons is intended to ensure that parties can understand the reasoning of the Tribunal, meaning the reader can understand the facts and law applied by the Tribunal in coming to its conclusion.[200] The correctness of the reasoning or whether it is convincing is not relevant.[201]

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[193] *See supra* para. 29; ICSID Convention Article 48(3).

[194] History, *supra* note 14, at Vol. II, 849.

[195] ICSID Convention Article 49(2). The request must be made within 45 days of the dispatch of the award. The supplementary decision becomes part of the award and is thus subject to the remedy of annulment.

[196] *Id.* at Article 50(1). There is no time bar for a request to interpret an award under the ICSID Convention.

[197] *Wena*, para. 100.

[198] *Amco I*, para. 32; *Klöckner I*; para. 115; *MINE*, para. 5.13; *Soufraki*, para. 126; *Duke Energy*, para. 228.

[199] *Amco I*, para. 32; *Klöckner I*; para. 115.

[200] *MINE*, para. 5.09 ("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"); *Vivendi I*, para. 64; *Wena*, para. 81; *Transgabonais*, para. 88.

[201] *Klöckner I*, para. 129; *MINE*, paras. 5.08 & 5.09; *Vivendi I*, para. 64; *Wena*, para. 79; *CDC*, paras. 70 & 75; *MCI*, para. 82; *Fraport*, para. 277; *Vieira*, para. 355.

107. Some *ad hoc* Committees have suggested that "insufficient" and "inadequate" reasons could result in annulment.[202] However, the extent of insufficiency and inadequacy required to justify annulment on this basis has been debated.[203] 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.[204]

108. Finally, a majority of *ad hoc* Committees have concluded that "frivolous" and "contradictory" reasons are equivalent to no reasons and could justify an annulment.[205]

109. The ground of failure to state the reasons on which the award is based has been invoked by parties in 28 proceedings leading to decisions. The ground was upheld in 6 cases which resulted in 3 full and 3 partial annulments.[206]

VI. Conclusion

110. It is clear that annulment is a limited and exceptional recourse, available only on the basis of the grounds enumerated in Article 52 of the ICSID Convention. It safeguards against "violation of the fundamental principles of law governing the Tribunal's proceedings."[207]

111. While there is agreement on the general standards for annulment, commentators sometimes disagree on whether a specific case has been decided correctly or incorrectly.[208] The complexity of the task assigned to *ad hoc* Committees was summarized by Broches as follows:

> Annulment is an essential but exceptional remedy. It is well understood that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled. [footnote omitted] However, the application of that paragraph places a heavy responsibility on the *ad hoc* committees which must rule on requests for annulment. For example, in relation to a Tribunal's alleged "excess of powers" they may have to make fine

[202] *Mitchell*, para. 21 ("a failure to state reasons exists whenever reasons are... so inadequate that the coherence of the reasoning is seriously affected"); *Soufraki*, paras. 122-26 ("insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal").

[203] *Compare Amco I*, para. 43 ("sufficiently pertinent reasons"), *and Klöckner I*, para. 120 ("sufficiently relevant"), *with Amco II*, para. 7.55 ("no justification for adding a further requirement that the reasons stated be 'sufficiently pertinent'"), and *MINE*, para. 5.08 ("[t]he adequacy of the reasoning is not an appropriate standard of review").

[204] *Vivendi II*, para. 248; *Wena*, para. 83; *Soufraki*, para. 24; *CMS*, para. 127; *Rumeli*, para. 83 (with the caveat that if non-stated reasons "do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal").

[205] *Amco I*, para. 97; *Klöckner I*, para. 116; *MINE*, paras. 5.09 & 6.107; *CDC*, para. 70; *MCI*, para. 84; *Vieira*, para. 357.

[206] *Amco I* (full), *Klöckner I* (full), *MINE* (partial), *Mitchell* (full); *CMS* (partial), *Enron* (partial).

[207] *See supra*, para. 72.

[208] A number of authors have analyzed and commented on annulment decisions and the annulment mechanism generally. Such discussions are included in the bibliography at Annex 7 of this paper.

> distinctions between failure to apply the applicable law, which is a ground for annulment, and incorrect interpretation of that law, which is not. With respect to allegations that a tribunal's failure to deal with questions submitted to it constitutes a serious departure from a fundamental rule of procedure, or failure to state the reasons on which the award is based, they will have to assess the relevance of those questions, that is to say, their nature and potential effect, had they been dealt with, on the tribunal's award. They are also likely to be called on to give specific meaning to such terms as "manifest," "serious departure" and "fundamental rule of procedure" in judging the admissibility of claims for annulment.
>
> After these determinations have been made on the basis of objective legal analysis, the ad hoc committees may be faced with the delicate final task of weighing the conflicting claims of finality of the award, on the one hand and, on the other, of protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1). This requires that an *ad hoc* committee be able to exercise a measure of discretion in ruling on applications for annulment.[209]

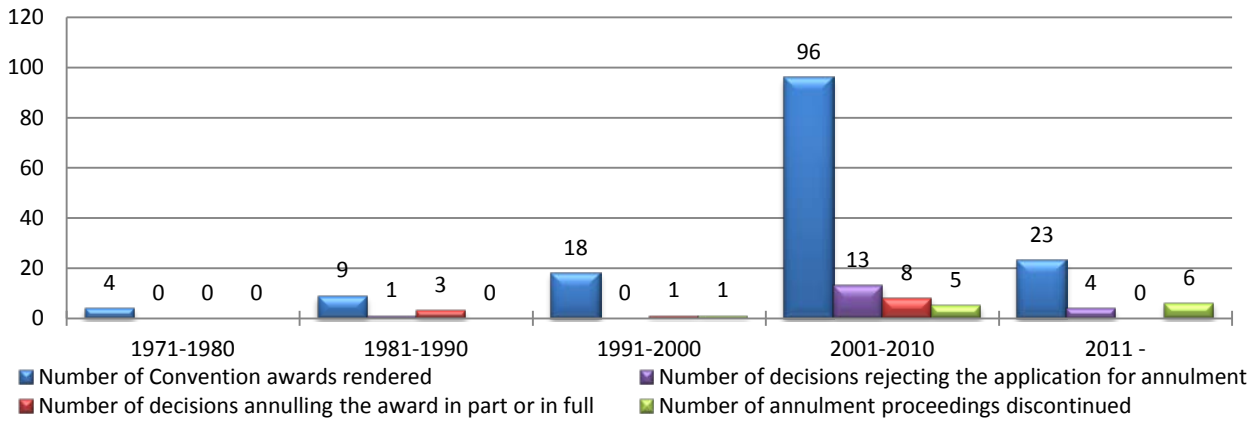
112. The task of an *ad hoc* Committee should also be assessed in the overall context of the ICSID case load. In its 47 year history, ICSID registered 344 cases and issued 150 awards. Of these, 6 awards have been annulled in full and another 6 awards have been partially annulled. In other words, only 4 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.

[209] Broches, *supra* note 15, at 354 & 355.

Annulment Proceedings under the ICSID Convention – Overview

113. While the number of applications for annulment registered annually may fluctuate, the increase in annulment applications in the last 11 years reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period. Between 2001 and June 2012, 119 awards were issued, 36 annulment proceedings were instituted (30 percent of the cases leading to awards) and 8 awards were annulled in full or in part (7 percent awards were annulled).[210] This should be compared to the period between 1966 and 2001, when 31 awards were rendered, 6 annulment proceedings were instituted (19 percent of the cases leading to awards) and 4 awards were annulled in full or in part (13 percent awards were annulled). In short, the rate of annulment in the past 11 years is lower than the rate for all previous years.

[210] *See supra* paras. 36 & 37.



114. Finally, it is vital that ICSID Contracting States continue to supply the ICSID Panel of Arbitrators with capable, experienced and impartial individuals who may be called upon to apply the standards of Article 52 of the ICSID Convention.

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Pending and Concluded Annulment Proceedings

Case (Short Title)	Award	Tribunal** (President in Bold)	*Ad Hoc* Committee** (President in Bold)	Outcome
1. Amco Asia Corporation and others v. Republic of Indonesia **ARB/81/1** ***(Amco I)***	Award of November 21, 1984 Available at 1 ICSID Rep. 413 (1993) (English); Unofficial French translation in 114 J. Droit Int'l 145 (1987) (excerpts)	**Berthold Goldman (French)** Isi Foighel (Danish) Edward W. Rubin (Canadian)	**Ignaz Seidl-Hohenveldern (Austrian)** Florentino P. Feliciano (Philippine)* Andrea Giardina (Italian)	Annulled in full Decision of May 16, 1986 Available at 1 ICSID Rep. 509 (1993) (English); Unofficial French translation in 114 J. Droit Int'l 175 (1987) (excerpts)
2. Amco Asia Corporation and others v. Republic of Indonesia **ARB/81/1-Resubmission** ***(Amco II)***	Award of June 5, 1990 Available at 1 ICSID Rep. 569 (1993) (English); Unofficial French translation in 118 J. Droit Int'l 172 (1991) (excerpts)	**Rosalyn Higgins (British)** Marc Lalonde (Canadian) Per Magid (Danish)	**Sompong Sucharitkul (Thai)*** Arghyrios A. Fatouros (Greek) Dietrich Schindler (Swiss)	Annulment rejected (Supplemental Decision and Rectification annulled) Decision of December 17, 1992 Available at 9 ICSID Rep. 9 (2006) (English)
3. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais **ARB/81/2** ***(Klöckner I)***	Award of October 21, 1983 Available at 111 J. Droit Int'l 409 (1984) (French; excerpts); Unofficial English translation in 2 ICSID Rep. 9 (1994)	**Eduardo Jimenez de Arechaga (Uruguayan)*** William D. Rogers (U.S.) Dominique Schmidt (French)	**Pierre Lalive (Swiss)** Ahmed Sadek El-Kosheri (Egyptian)* Ignaz Seidl-Hohenveldern (Austrian)	Annulled in full Decision of May 3, 1985 Available at 114 J. Droit Int'l 163 (1987) (French; excerpts); Unofficial English translation at http://icsid.worldbank.org

*Developing country nationality at the time of appointment
**Excludes members who resigned during the proceeding

4. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais **ARB/81/2 – Resubmission** ***(Klöckner II)***	Award of January 26, 1988 Available at 14 ICSID Rep. 8 (2009) (English); French version unpublished	**Carl F. Salans (U.S.)** Jorge Castaneda (Mexican)* Juán Antonio Cremades Sanz-Pastor (Spanish)	**Sompong Sucharitkul (Thai)*** Andrea Giardina (Italian) Kebá Mbayé (Senegalese)*	Annulment rejected Decision of May 17, 1990 Available at 14 ICSID Rep. 101 (2009) (Unofficial English translation); French original unpublished
5. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt **ARB/84/3** ***(SPP)***	Award of May 20, 1992 Available at http://icsid.worldbank.org (English); Official French translation in 121 J. Droit Int'l 229 (1994) (excerpts)	**Eduardo Jimenez de Arechaga (Uruguayan)*** Mohamed Amin Elabassy El Mahdi (Egyptian)* Robert F. Pietrowski, Jr. (U.S.)	**Claude Reymond (Swiss)** Arghyrios A. Fatouros (Greek) Kéba Mbaye (Senegalese)*	Discontinued (Rule 43(1))
6. Maritime International Nominees Establishment v. Republic of Guinea **ARB/84/4** ***(MINE)***	Award of January 6, 1988 Available at 4 ICSID Rep. 61 (1997) (English)	**Donald E. Zubrod (U.S.)** Jack Berg (U.S.) David K. Sharpe (U.S.)	**Sompong Sucharitkul (Thai)*** Aron Broches (Dutch) Kéba Mbaye (Senegalese)*	Annulled in part Decision of December 22, 1989 Available at http://icsid.worldbank.org (English); Unofficial French translation in 1 La Juris. du CIRDI 291(2004) (excerpts)

7. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic **ARB/97/3** ***(Vivendi I)***	Award of November 21, 2000 Available at http://icsid.worldbank.org (English and Unofficial Spanish translation)	**Francisco Rezek (Brazilian)*** Thomas Buergenthal (U.S.) Peter D. Trooboff (U.S.)	**L. Yves Fortier (Canadian)** James R. Crawford (Australian) José Carlos Fernández Rozas (Spanish)	Annulled in part Decision of July 3, 2002 Available at http://icsid.worldbank.org (English and Spanish); Unofficial French translation in 130 J. Droit Int'l 195 (2003)
8. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic **ARB/97/3-Resubmission** ***(Vivendi II)***	Award of August 20, 2007 Available at http://italaw.com (English and Spanish)	**J. William Rowley (Canadian)** Gabrielle Kaufmann-Kohler (Swiss) Carlos Bernal Verea (Mexican)*	**Ahmed Sadek El-Kosheri (Egyptian)*** Andreas J. Jacovides (Cypriot) Jan Hendrik Dalhuisen (Dutch)	Annulment rejected Decision of August 10, 2010 Separate Opinion by Jan Hendrik Dalhuisen Available at http://italaw.com (English and Spanish)
9. Víctor Pey Casado and President Allende Foundation v. Republic of Chile **ARB/98/2** ***(Pey Casado)***	Award of May 8, 2008 Available at http://italaw.com (French and Spanish)	**Pierre Lalive (Swiss)** Mohammed Chemloul (Algerian)* Emmanuel Gaillard (French)	**L. Yves Fortier (Canadian)** Piero Bernardini (Italian) Ahmed Sadek El-Kosheri (Egyptian)*	Pending

10. Wena Hotels Limited v. Arab Republic of Egypt **ARB/98/4** ***(Wena)***	Award of December 8, 2000 Available at http://italaw.com (English)	**Monroe Leigh (U.S.)** Ibrahim Fadlallah (Lebanese*/French) Don Wallace, Jr. (U.S.)	**Konstantinos D. Kerameus (Greek)** Andreas Bucher (Swiss) Francisco Orrego Vicuña (Chilean)*	Annulment rejected Decision of February 5, 2002 Available at http://italaw.com (English); Unofficial French translation in 130 J. Droit Int'l 167 (2003)
11. Philippe Gruslin v. Malaysia **ARB/99/3** ***(Gruslin)***	Award of November 28, 2000 Available at http://italaw.com (English)	Gavan Griffith (Australian)	**Thomas Buergenthal (U.S.)** Kamal Hossain (Bangladeshi)* Gabrielle Kaufmann-Kohler (Swiss)	Discontinued (Administrative and Financial Regulation 14(3)(d))
12. Patrick Mitchell v. Democratic Republic of the Congo **ARB/99/7** ***(Mitchell)***	Award of February 9, 2004 Unpublished (excerpts forthcoming)	**Andreas Bucher (Swiss)** Yawovi Agboyibo (Togolese)* Marc Lalonde (Canadian)	**Antonias C. Dimolitsa (Greek)** Robert S.M. Dossou (Beninese)* Andrea Giardina (Italian)	Annulled in full Decision of November 1, 2006 Available at http://italaw.com (English); French version in 2 La Juris. du CIRDI 333 (2010)
13. Consortium R.F.C.C. v. Kingdom of Morocco **ARB/00/6** ***(RFCC)***	Award of December 22, 2003 Available at http://icsid.worldbank.org (French)	**Robert Briner (Swiss)** Bernardo M. Cremades (Spanish) Ibrahim Fadlallah (Lebanese*/French)	**Bernard Hanotiau (Belgian)** Arghyrios A. Fatouros (Greek) Franklin Berman (British)	Annulment rejected Decision of January 18, 2006 Available at 26 ICSID Rev.— FILJ 196 (2011) (French; excerpts)

14. Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic **ARB/01/3** ***(Enron)***	Award of May 22, 2007 Available at http://italaw.com (English); Spanish version unpublished	**Francisco Orrego Vicuña (Chilean)*** Albert Jan Van den Berg (Dutch) Pierre-Yves Tschanz (Swiss/Irish)	**Gavan Griffith (Australian)** Patrick L. Robinson (Jamaican)* Per Tresselt (Norwegian)	Annulled in part Decision of July 30, 2010 Available at http://italaw.com (English); Spanish version unpublished
15. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile **ARB/01/7** ***(MTD)***	Award of May 25, 2004 Available at http://italaw.com (English); Spanish version unpublished	**Andrés Rigo Sureda (Spanish)** Marc Lalonde (Canadian) Rodrigo Oreamuno (Costa Rican)*	**Gilbert Guillaume (French)** James R. Crawford (Australian) Sara Ordoñez Noriega (Colombian)*	Annulment rejected Decision of March 21, 2007 Available at http://italaw.com (English and Spanish); Unofficial French translation in 2 La Juris. CIRDI 385 (2010) (excerpts)_
16. CMS Gas Transmission Company v. Argentine Republic **ARB/01/8** ***(CMS)***	Award of May 12, 2005 Available at http://icsid.worldbank.org (English and Spanish); Unofficial French translation in 2 La Juris. du CIRDI 177 (2010) (excerpts)	**Francisco Orrego Vicuña (Chilean)*** Marc Lalonde (Canadian) Francisco Rezek (Brazilian)*	**Gilbert Guillaume (French)** Nabil Elaraby (Egyptian)* James R. Crawford (Australian)	Annulled in part Decision of September 25, 2007 Available at http://icsid.worldbank.org (English and Spanish); Unofficial French translation in 2 La Juris. du CIRDI 413 (2010) (excerpts)

17. Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador) **ARB/01/10** ***(Repsol)***	Award of February 20, 2004 Available at 26 ICSID Rev.— FILJ 231 (2011) (Spanish; excerpts)	**Rodrigo Oreamuno (Costa Rican)*** Eduardo Carmigniani Valencia (Ecuadorian)* Alberto Wray Espinosa (Ecuadorian)*	**Judd L. Kessler (U.S.)** Piero Bernardini (Italian) Gonzalo Biggs (Chilean)*	Annulment rejected Decision of January 8, 2007 Available at http://icsid.worldbank.org (Spanish and unofficial English translation); Unofficial French translation in 2 La Juris. du CIRDI 375 (2010) (excerpts)
18. Azurix Corp. v. Argentine Republic **ARB/01/12** ***(Azurix)***	Award of July 14, 2006 Available at http://icsid.worldbank.org (English and Spanish)	**Andrés Rigo Sureda (Spanish)** Marc Lalonde (Canadian) Daniel H. Martins (Uruguayan)*	**Gavan Griffith (Australian)** Bola Ajibola (Nigerian)* Michael Hwang (Singaporean)	Annulment rejected Decision of September 1, 2009 Available at http://icsid.worldbank.org (English and Spanish)
19. LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic **ARB/02/1** ***(LGE)***	Award of July 25, 2007 Available at http://icsid.worldbank.org (English and Spanish)	**Tatiana Bogdanowsky de Maekelt (Venezuelan)*** Francisco Rezek (Brazilian)* Albert Jan van den Berg (Dutch)	Pending	Pending

20. Hussein Nuaman Soufraki v. United Arab Emirates **ARB/02/7** ***(Soufraki)***	Award of July 7, 2004 Available at http://italaw.com (English)	**L. Yves Fortier (Canadian)** Aktham El Kholy (Egyptian)* Stephen M. Schwebel (U.S.)	**Florentino P. Feliciano (Philippine)*** Omar Nabulsi (Jordanian)* Brigitte Stern (French)	Annulment rejected Decision of June 5, 2007 Dissenting Opinion by Omar Nabulsi Available at http://icsid.worldbank.org (English); Unofficial French translation in 2 La Juris. du CIRDI 395 (2010) (excerpts)
21. Siemens A.G. v. Argentine Republic **ARB/02/8** ***(Siemens)***	Award of February 6, 2007 Available at http://italaw.com (English); Spanish version unpublished	**Andrés Rigo Sureda (Spanish)** Charles N. Brower (U.S.) Domingo Bello Janeiro (Spanish)	**Gilbert Guillaume (French)** Florentino P. Feliciano (Philippine)* Mohamed Shahabuddeen (Guyanese)*	Discontinued (Rule 43(1))
22. CDC Group plc v. Republic of Seychelles **ARB/02/14** ***(CDC)***	Award of December 17, 2003 Available at http://icsid.worldbank.org (English)	Anthony Mason (Australian)	**Charles N. Brower (U.S.)** Michael Hwang (Singaporean) David A. R. Williams (New Zealand)	Annulment rejected Decision of June 29, 2005 Available at http://www.investmentclaims.com (English)
23. Ahmonseto, Inc. and others v. Arab Republic of Egypt **ARB/02/15** ***(Ahmonseto)***	Award of June 18, 2007 Available at 23 ICSID Rev.— FILJ 356 (2008) (English; excerpts)	**Pierre Tercier (Swiss)** Ibrahim Fadlallah (Lebanese*/French) Alain Viandier (French)	**Piero Bernardini (Italian)** Azzedine Kettani (Moroccan)* Peter Tomka (Slovak)*	Discontinued (Administrative and Financial Regulation 14(3)(d) and (e))

24. Sempra Energy International v. Argentine Republic **ARB/02/16** ***(Sempra)***	Award of September 28, 2007 Available at http://icsid.worldbank.org (English and Spanish)	**Francisco Orrego Vicuña (Chilean)*** Marc Lalonde (Canadian) Sandra Morelli Rico (Colombian)*	**Christopher Söderlund (Swedish)** David A.O. Edward (British) Andreas J. Jacovides (Cypriot)	Annulled in full Decision of June 29, 2010 Available at http://icsid.worldbank.org (English and Spanish)
25. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru **ARB/03/4** ***(Lucchetti)***	Award of February 7, 2005 Available at http://icsid.worldbank.org (English and Spanish)	**Thomas Buergenthal (U.S.)** Jan Paulsson (French) Bernardo M. Cremades (Spanish)	**Hans Danelius (Swedish)** Andrea Giardina (Italian) Franklin Berman (British)	Annulment rejected Decision of September 5, 2007 Dissenting Opinion by Franklin Berman Available at http://icsid.worldbank.org (English and Spanish); Unofficial French translation in 2 La Juris. du CIRDI 407 (2010) (excerpts)
26. M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador **ARB/03/6** ***(MCI)***	Award of July 31, 2007 Available at http://italaw.com (English and Spanish)	**Raúl E. Vinuesa (Argentine)*** Benjamin J. Greenberg (Canadian) Jaime C. Irarrázabal (Chilean)*	**Dominique Hascher (French)** Hans Danelius (Swedish) Peter Tomka (Slovak)*	Annulment rejected Decision of October 19, 2009 Available at http://icsid.worldbank.org (English and Spanish)

27. Continental Casualty Company v. Argentine Republic **ARB/03/9** ***(Continental Casualty)***	Award of September 5, 2008 Available at http://italaw.com (English); Spanish version unpublished	**Giorgio Sacerdoti (Italian)** V.V. Veeder (British) Michell Nader (Mexican)*	**Gavan Griffith (Australian)** Bola Ajibola (Nigerian)* Christopher Söderlund (Swedish)	Annulment rejected Decision of September 16, 2011 Available at http://icsid.worldbank.org (English and Spanish)
28. Joy Mining Machinery Limited v. Arab Republic of Egypt **ARB/03/11** ***(Joy Mining)***	Award of August 6, 2004 Available at http://icsid.worldbank.org (English); Unofficial French translation in 132 J. Droit Int'l 163 (2005) (excerpts)	**Francisco Orrego Vicuña (Chilean)*** C.G. Weeramantry (Sri Lankan)* William Laurence Craig (U.S.)	**Antonias C. Dimolitsa (Greek)** Michael Hwang (Singaporean) José Luis Shaw (Uruguayan)*	Discontinued (Rule 43(1))
29. El Paso Energy International Company v. Argentine Republic **ARB/03/15** ***(El Paso)***	Award of October 31, 2011 Available at http://italaw.com (English and Spanish)	**Lucius Caflisch (Swiss)** Piero Bernardini (Italian) Brigitte Stern (French)	**Rodrigo Oreamuno (Costa Rican)*** Teresa Cheng (Chinese)* Rolf Knieper (German)	Pending
30. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines **ARB/03/25** ***(Fraport)***	Award of August 16, 2007 Available at http://italaw.com (English)	**L. Yves Fortier (Canadian)** Bernardo M. Cremades (Spanish) W. Michael Reisman (U.S.)	**Peter Tomka (Slovak)*** Dominique Hascher (French) Campbell McLachlan (New Zealand)	Annulled in full Decision of December 23, 2010 Available at http://italaw.com (English)

31. Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru **ARB/03/28** ***(Duke Energy)***	Award of August 18, 2008 Available at: http://investmentclaims.com (English)	**L. Yves Fortier (Canadian)** Guido Santiago Tawil (Argentine)* Pedro Nikken (Venezuelan)*	**Campbell McLachlan (New Zealand)** Dominique Hascher (French) Peter Tomka (Slovak)*	Annulment rejected Decision of March 1, 2011 Available at http://investmentclaims.com (English)
32. Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic **ARB/04/5** ***(Transgabonais)***	Award of March 7, 2008 Available at 26 ICSID Rev.— FILJ 181 (2011) (French; excerpts)	**Ibrahim Fadlallah (Lebanese*/French)** Charles Jarrosson (French) Michel Gentot (French)	**Franklin Berman (British)** Ahmed Sadek El-Kosheri (Egyptian)* Rolf Knieper (German)	Annulment rejected Decision of May 11, 2010 Available at 26 ICSID Rev.— FILJ 214 (2011) (French; excerpts)
33. Sociedad Anónima Eduardo Vieira v. Republic of Chile **ARB/04/7** ***(Vieira)***	Award of August 21, 2007 Available at http://icsid.worldbank.org (Spanish)	**Claus von Wobeser (Mexican)*** Susana B. Czar de Zalduendo (Argentine)* W. Michael Reisman (U.S.)	**Christopher Söderlund (Swedish)** Piero Bernardini (Italian) Eduardo Silva Romero (Colombian*/French)	Annulment rejected Decision of December 10, 2010 Available at http://icsid.worldbank.org (Spanish)

34. Malaysian Historical Salvors, SDN, BHD v. Malaysia **ARB/05/10** ***(MHS)***	Award of May 17, 2007 Available at http://icsid.worldbank.org (English)	Michael Hwang (Singaporean)	**Stephen M. Schwebel (U.S.)** Mohamed Shahabuddeen (Guyanese)* Peter Tomka (Slovak)*	Annulled in full Decision of April 16, 2009 Dissenting Opinion by Mohamed Shahabuddeen* Available at http://icsid.worldbank.org (English) Unofficial French translation in 2 La Juris. du CIRDI 559 (2010) (excerpts)
35. RSM Production Corporation v. Grenada **ARB/05/14** ***(RSM v. Grenada)***	Award of March 13, 2009 Available at http://investmentclaims.com (English)	**V.V. Veeder (British)** Bernard Audit (French) David Berry (Canadian)	**Gavan Griffith (Australian)** Cecil W.M. Abraham (Malaysian)* Campbell McLachlan (New Zealand)	Discontinued (Administrative and Financial Regulation 14(3)(d) and (e))
36. Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt **ARB/05/15** ***(Siag)***	Award of June 1, 2009 Available at http://italaw.com (English)	**David A.R. Williams (New Zealand)** Francisco Orrego Vicuña (Chilean)* Michael C. Pryles (Australian)	**Stephen M. Schwebel (U.S.)** Azzedine Kettani (Moroccan)* Peter Tomka (Slovak)*	Discontinued (Rule 45)

37. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan **ARB/05/16** ***(Rumeli)***	Award of July 29, 2008 Available at http://italaw.com (English)	**Bernard Hanotiau (Belgian)** Stewart Boyd (British) Marc Lalonde (Canadian)	**Stephen M. Schwebel (U.S.)** Campbell McLachlan (New Zealand) Eduardo Silva Romero (Colombian*/French)	Annulment rejected Decision of March 25, 2010 Available at http://italaw.com (English)
38. Ioannis Kardassopoulos v. Georgia **ARB/05/18** ***(Kardassopoulos)***	Award of March 3, 2010 Available at http://italaw.com (English)	**L. Yves Fortier (Canadian)** Francisco Orrego Vicuña (Chilean)* Vaughan Lowe (British)	**Dominique Hascher (French)** Cecil W.M. Abraham (Malaysian)* Karl-Heinz Böckstiegel (German)	Discontinued (Rule 43(1))
39. Helnan International Hotels A/S v. Arab Republic of Egypt **ARB/05/19** ***(Helnan)***	Award of July 3, 2008 Available at http://icsid.worldbank.org (English)	**Yves Derains (French)** Michael J.A. Lee (British) Rudolf Dolzer (German)	**Stephen M. Schwebel (U.S.)** Bola Ajibola (Nigerian)* Campbell McLachlan (New Zealand)	Annulled in part Decision of June 14, 2010 Available at http://icsid.worldbank.org (English)
40. Togo Electricité and GDF-Suez Energie Services v. Republic of Togo **ARB/06/7** ***(Togo Electricité)***	Award of August 10, 2010 Available at http://icsid.worldbank.org (French)	**Ahmed Sadek El-Kosheri (Egyptian)*** Marc Gruninger (Swiss) Marc Lalonde (Canadian)	**Albert Jan van den Berg (Dutch)** Franklin Berman (British) Rolf Knieper (German)	Annulment rejected Decision of September 6, 2011 Available at http://icsid.worldbank.org (French)

41. Libananco Holdings Co. Limited v. Republic of Turkey **ARB/06/8** ***(Libananco)***	Award of September 2, 2011 Available at http://icsid.worldbank.org (English)	**Michael Hwang (Singaporean)** Henri C. Álvarez (Canadian) Franklin Berman (British)	**Andrés Rigo Sureda (Spanish)** Hans Danelius (Swedish) Eduardo Silva Romero (Colombian*/French)	Pending
42. Joseph C. Lemire v. Ukraine **ARB/06/18** ***(Lemire)***	Award of March 28, 2011 Available at http://italaw.com (English)	**Juan Fernández-Armesto (Spanish)** Jan Paulsson (French) Jurgen Voss (German)	**Claus von Wobeser (Mexican)*** Azzedine Kettani (Moroccan)* Eduardo Zuleta (Colombian)*	Pending
43. Nations Energy, Inc. and others v. Republic of Panama **ARB/06/19** ***(Nations)***	Award of November 24, 2010 Available at http://italaw.com (Spanish)	**Alexis Mourre (French)** José María Chillón Medina (Spanish) Claus von Wobeser (Mexican)*	**Stanimir A. Alexandrov (Bulgarian)*** Jaime C. Irarrázabal (Chilean)* Enrique Gómez-Pinzón (Colombian)*	Discontinued (Administrative and Financial Regulation 14(3)(d) and (e))
44. RSM Production Corporation v. Central African Republic **ARB/07/2** ***(RSM)***	Award of July 11, 2011 Unpublished	**Azzedine Kettani (Moroccan)*** Philippe Merle (French) Brigitte Stern (French)	**Bernardo M. Cremades (Spanish)** Abdulqawi Ahmed Yusuf (Somali)* Fernando Mantilla-Serrano (Colombian)*	Pending

45. Tza Yap Shum v. Republic of Peru **ARB/07/6** ***(Shum)***	Award of July 7, 2011 Available at http://italaw.com (Spanish)	**Judd L. Kessler (U.S.)** Hernando Otero (Colombian)* Juan Fernández-Armesto (Spanish)	**Dominique Hascher (French)** Donald M. McRae (Canadian) David A.R. Williams (New Zealand)	Pending
46. Ron Fuchs v. Georgia **ARB/07/15** ***(Fuchs)***	Award of March 3, 2010 Available at http://italaw.com (English)	**L. Yves Fortier (Canadian)** Francisco Orrego Vicuña (Chilean)* Vaughan Lowe (British)	**Dominique Hascher (French)** Cecil W. M. Abraham (Malaysian)* Karl-Heinz Böckstiegel (German)	Discontinued (Rule 43(1))
47. Impregilo S.p.A. v. Argentine Republic **ARB/07/17** ***(Impregilo)***	Award of June 21, 2011 Available at http://icsid.worldbank.org (English and Spanish)	**Hans Danelius (Swedish)** Charles N. Brower (U.S.) Brigitte Stern (French)	**Rodrigo Oreamuno (Costa Rican)*** Eduardo Zuleta (Colombian)* Teresa Cheng (Chinese)*	Pending
48. AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary **ARB/07/22** ***(AES)***	Award of September 23, 2010 Available at http://icsid.worldbank.org (English)	**Claus von Wobeser (Mexican)*** J. William Rowley (Canadian) Brigitte Stern (French)	**Bernard Hanotiau (Belgian)** Rolf Knieper (German) Abdulqawi Ahmed Yusuf (Somali)*	Annulment rejected Decision of June 29, 2012 Available at http://italaw.com (English)

49. SGS Société Générale de Surveillance S.A. v. Republic of Paraguay **ARB/07/29** ***(SGS v. Paraguay)***	Award of February 10, 2012 Available at http://italaw.com (English and Spanish)	**Stanimir A. Alexandrov (Bulgarian)*** Donald Donovan (U.S.) Pablo García Mexía (Spanish)	Pending	Pending
50. Astaldi S.p.A. v. Republic of Honduras **ARB/07/32** ***(Astaldi)***	Award of September 17, 2010 Available at http://investmentclaims.com (Spanish)	Eduardo Sancho González (Costa Rican)*	**Juan Fernández-Armesto (Spanish)** Jaime C. Irarrázabal (Chilean)* Eduardo Silva Romero (Colombian*/French)	Discontinued (Rule 43(1))
51. ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan **ARB/08/2** ***(ATA)***	Award of May 18, 2010 Available at http://icsid.worldbank.org (English)	**L. Yves Fortier (Canadian)** Ahmed Sadek El-Kosheri (Egyptian)* W. Michael Reisman (U.S.)	**Gilbert Guillaume (French)** Juan Fernández-Armesto (Spanish) Bernard Hanotiau (Belgian)	Discontinued (Rule 44)
52. Malicorp Limited v. Arab Republic of Egypt **ARB/08/18** ***(Malicorp)***	Award of February 7, 2011 Available at http://icsid.worldbank.org (English and French)	**Pierre Tercier (Swiss)** Luiz Olavo Baptista (Brazilian)* Pierre-Yves Tschanz (Swiss/Irish)	**Andrés Rigo Sureda (Spanish)** Stanimir A. Alexandrov (Bulgarian)* Eduardo Silva Romero (Colombian*/French)	Pending

53. Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador **ARB/09/17** ***(Commerce Group)***	Award of March 14, 2011 Available at http://icsid.worldbank.org (English and Spanish)	**Albert Jan van den Berg (Dutch)** Horacio A. Grigera Naón (Argentine)* J. Christopher Thomas (Canadian)	**Emmanuel Gaillard (French)** Michael C. Pryles (Australian) Christoph H. Schreuer (Austrian)	Pending

Republic of the Philippines
Office of the Solicitor General

27 June 2011

Members of the Administrative Council
International Centre for Settlement of Investment Disputes
1818 H Street NW
Washington, D.C. 20433

Dear Members of the Administrative Council:

The Republic of the Philippines submits this letter to draw to the Council's attention the seriously flawed decision dated December 23, 2010 of the ICSID *ad hoc* Committee (the "Annulment Decision") annulling the arbitral award issued on August 16, 2007 (the "Award") in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25.

The Annulment Decision was taken in excess of the *ad hoc* Committee's limited power under Article 52 of the ICSID Convention and, as such, stands as a threat to the continued utility and acceptance of the ICSID arbitration system.

As a party to the arbitration, the Philippines obviously is deeply disappointed by the Annulment Decision, as it annulled the product of four years of work before a stellar Tribunal to which considerable resources had been devoted to obtain final resolution for both parties of a costly and disruptive dispute.

As a Contracting State to the ICSID Convention, the Philippines is gravely concerned that the Annulment Decision is further evidence of a systemic problem of ICSID *ad hoc* committees failing to adhere to the mandate established in Article 52 of the ICSID Convention.[1]

For the reasons elaborated further below, the Philippines, therefore, respectfully urges the Council to exercise its authority under Article 6(3) of the ICSID Convention[2] to issue guidelines

[1] The recent annulment decisions in *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16 (Decision on Annulment dated June 29, 2010) and in *Enron Corp. Ponderosa Assets v. Argentine Republic*, ICSID Case No. ARB/01/3 (Decision on Annulment dated July 30, 2010) in particular have attracted similar serious concerns. *See, e.g.*, Promod Nair and Claudia Ludwig, ICSID annulment awards: the fourth generation? Global Arbitration Review, 28 Oct. 2010 (noting that following criticism of the recent Sempra, Enron, Helnan and Vivendi II annulment decisions, there have been "reiterated calls for the reform of the ICSID annulment regime"); Markus Burgstaller and Charles B. Rosenberg, Challenging International Arbitral Awards: To ICSID or not to ICSID?, Arbitration International, (Kluwer Law International 2011 Volume 27 Issue 1), at 91-108 (noting that following recent annulment decisions, "investors and their counsel may choose to avoid ICSID arbitration because under the ICSID Convention there are more comprehensive possibilities to annul awards than under most developed legal systems ....").

regarding the remedy of annulment, as a necessary measure to ensure implementation of Article 52 of the ICSID Convention in accordance with its provisions.

Summary

Annulment as established in Article 52 of the ICSID Convention is an extraordinary remedy. The very high threshold for invoking annulment in Article 52—"corruption" by an arbitrator, "manifest excess" of power, and "serious departure" from a fundamental rule of procedure—reflects its intentionally limited nature. Those limits serve to promote the finality of awards and confidence in ICSID as an effective system for dispute resolution.

An Article 52 committee has the authority to undo, potentially entirely, the work of an arbitral tribunal. The ICSID Convention provides no recourse against the decision of an Article 52 committee. The importance of proper implementation of Article 52 therefore is evident. *Yet nearly one third of all ICSID arbitral awards have been subjected to annulment proceedings.* Eleven of 41 annulment applications have resulted in annulment, with 8 pending to date. Significantly, 8 of the 11 annulments were rendered in the past 10 years. These high figures must be of concern. Users of the ICSID system must be able to rely on the efficacy of the system, and centrally, on the finality of awards.

The Annulment Decision in the dispute between Fraport and the Philippines is an unfortunate illustration of a failure to adhere to the Article 52 mandate and thus of the need for guidance for *ad hoc* committees to ensure the implementation of Article 52 in accordance with its provisions.

The Award

The Award in question was rendered by an ICSID Tribunal that by majority held it lacked jurisdiction over the claims asserted by Fraport pursuant to the bilateral investment treaty between Germany and the Philippines. In the Tribunal's view, which was accepted by the Committee, the treaty's protections applied only to investments that were in compliance with the law of the host state at the initiation of the investment. Regarding Fraport's investment, the Tribunal concluded that that Fraport knowingly and intentionally had structured its investment to circumvent a Philippine law known as the Anti Dummy Law and therefore did not fall within the scope of the treaty's protections.

Section 1 of the Anti Dummy Law requires entities deemed to be public utilities to have at least 60 percent Philippine equity ownership. Section 2A prohibits intervention by non-Philippine entities in the administration, management, operation and control of a Philippine public utility. The Tribunal concluded that Fraport had intervened in the management and control of PIATCO, the company that held the concession that was deemed to be a public utility under Philippine law, at the initiation of its investment, and thus violated Section 2A of the Anti Dummy Law.

The Tribunal reached this conclusion after considering extensive evidence, witness testimony and oral argument in light of its appreciation for the development of the evidence during a long

[2] Article 6(3) of the ICSID Convention provides that the Administrative Council "shall exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention."

proceeding. The Tribunal reached its conclusions with ample opportunity to examine credibility after fifteen days of oral hearings with witnesses, examination of thousands of documents, and eleven written submissions over four years. The Tribunal noted that Fraport's own internal documents showed that Fraport had consciously, intentionally and covertly structured its investment in violation of the Anti Dummy Law and that the relevant facts, found in Fraport's own documents, were incontrovertible.

The Annulment Decision

The *Ad Hoc* Committee annulled the Award for reasons not advanced by either party and announced for the first time in the Annulment Decision. The Committee concluded that the Tribunal had seriously violated a fundamental rule of procedure by failing to invite further submissions from the parties on a late-occurring legal development that the Committee pronounced to be of central relevance to the Award and to the Tribunal's application of the Anti Dummy Law.

That development was a resolution issued by a Philippine State Prosecutor. It dismissed private criminal complaints that alleged violations of both sections of the Anti Dummy Law by various defendants, including Fraport officials. The Committee concluded that the Prosecutor's Resolution was a critical legal authority because it showed how Philippine authorities applied the Anti Dummy Law—a line of reasoning that neither of the parties had proffered. Without the benefit of hearing from the parties, the Committee conducted its own analysis of the Prosecutor's Resolution as evidence of the application of the Anti Dummy Law. It concluded that the Tribunal's application of the Anti Dummy Law in the Award was not in accord with the analytic framework described in the Prosecutor's Resolution. Accordingly, in the Committee's view, the Tribunal's ruling against Fraport in the Award was based upon an understanding of Philippine law that had been rejected by the Philippine authorities.

This conclusion was wrong. Analytically, the Award was fully consistent with the description of the Anti Dummy Law set out in the Prosecutor's Resolution, which addressed a violation of Section 1 of the Anti Dummy Law and not, as the Committee mistakenly concluded, a violation of Section 2A. Moreover, without question, the Tribunal applied international and Philippine law to reach its conclusion. Under the guise of a serious departure from a fundamental rule of procedure, the *ad hoc* Committee effectively applied an appellate standard to set aside what it implicitly concluded was based on an incomplete and mistaken view of Philippine law. Thus the Committee concluded there was a basis to annul where none existed.

Moreover, by not seeking submissions from the parties on this question, which the Committee considered to be the most troubling issue before it, the Committee denied due process and caused a serious and costly miscarriage of justice.

The Committee's additional conclusion that the Tribunal seriously violated a fundamental rule of procedure because it failed to give the parties a further opportunity to address the state of the record before the Prosecutor is also flawed. The record does not support the conclusion that additional submissions by Fraport on this point, following the six letters Fraport and the Government of the Republic of the Philippines submitted to the Tribunal on the Prosecutor's Resolution, would have altered the Tribunal's assessment of the evidence that was before the

Prosecutor. Therefore there was no serious departure from a fundamental rule of procedure: the Committee misapplied the Article 52 standard.

The Annulment Decision is also objectionable because the *Ad Hoc* Committee criticized the Award on grounds that were not relevant to its decision to annul and not found to be a basis to annul, notably regarding the Tribunal's construction of Article 1(1) of the bilateral investment treaty. The Committee's criticism may imply that the Committee considered the Tribunal's construction of the treaty, although not a manifest excess of power, to be mistaken. The Committee's mandate, however, is not to sit as an appellate court or to provide purportedly corrective commentary on points fully litigated between the parties and on which there is no basis to annul. Such practice serves only to undermine the legitimacy of a Tribunal's determination and is destructive of the ICSID system.

There are profound consequences to the ICSID system quite apart from the significant consequences of this annulment for the Philippines, which now faces the continuation of a dispute that has been resubmitted to arbitration. If the Award in this case could be annulled for a purported failure to observe the right to be heard based on a committee's reassessment of the evidence after four years of contentious proceedings and submissions, there are few cases in which a similar procedural basis for annulment could not be found. Annulment proceedings should not serve as an incentive to losing parties to seek annulment. ICSID must address the problem presented by the annulment mechanism as it is currently being applied in order to remain a credible system of dispute resolution. The Philippines urges the Administrative Council to consider seriously the need for guidance to *ad hoc* committees as set forth herein.

The Extraordinary Nature of the Annulment Remedy and the Authority of an Article 52 Committee

As a necessary control mechanism, the ICSID Convention includes the possibility to obtain annulment as a safeguard against seriously flawed arbitration awards. The remedy is established in Article 52 of the ICSID Convention.[3]

The nature of the specified grounds, including "corruption" by an arbitrator, "manifest excess" of power, and "serious departure" from a fundamental rule of procedure, signifies that annulment is a remedy only for obvious failings by the tribunal or other egregious circumstances that if left standing would undermine ICSID as a just means of dispute resolution that the Contracting Parties to the Convention could accept. Accordingly, Aron Broches, the principal architect of the ICSID Convention, and the first Secretary-General of ICSID and General Counsel of the World Bank, underscored that the remedy of annulment under Article 52 is "extraordinary and narrowly circumscribed."[4]

[3] Article 52 permits annulment of an arbitral award only on the basis of the following grounds: "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[4] Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID Rev.-FILJ 321, 327 (1991). *See also* Christoph Schreuer, et al., The ICSID Convention: A Commentary 903 (2009) ("[Annulment] is designed to provide

Article 52 establishes a very high threshold for annulment in view of the extraordinary nature of the remedy, which is to set aside the work of the arbitral tribunal, leaving the parties with the option only of resubmitting the dispute to a new tribunal. Annulment was intentionally limited in scope in order to promote the finality of awards and confidence in ICSID as an effective system for dispute resolution.

Given that an Article 52 committee has the authority to undo, potentially entirely, the work of an arbitral tribunal, and that the ICSID Convention provides no recourse whatsoever against the decision of an Article 52 committee, the importance of proper implementation of Article 52 is evident. For that reason, former ICSID Secretary-General Ibrahim F.I. Shihata, in a Report to the Administrative Council submitted in 1986, underscored that Article 52 must be implemented so as to ensure that the remedy of annulment is applied as intended within its very narrow scope and is clearly distinguished from an appeal.[5]

Mr. Shihata observed that if Article 52 is implemented to permit annulment when the *ad hoc* committee concludes that the award is incorrect on a point of fact or law, it will undermine the ICSID system. According to Mr. Shihata, "The danger thus exists that if parties, dissatisfied with an award, make it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of ICSID arbitration."[6]

These concerns remain today. During the period between 1971 and 2010, 127 ICSID Convention awards were issued and 41 applications for annulment were registered. *That is, nearly one-third of all ICSID arbitral awards have been subjected to annulment proceedings.* Of the 41 applications, 11 have resulted in annulment and 8 remain pending to date.[7] Of the annulments, most striking is that 8 of the 11 annulments were rendered in the past 10 years. These high figures must be of concern to ICSID, as users of the Convention must be able to rely on the efficacy of the system, centrally including the finality of awards.

The Fraport Annulment Decision

The Annulment Decision is an unfortunate illustration of the need for guidance for *ad hoc* committees to ensure the implementation of Article 52 in accordance with its provisions.

In addition to criticizing the Award on grounds for which the *Ad Hoc* Committee concluded there was no basis to annul and that were not relevant to its decision to annul, and thus signaling its apparent disagreement with the conclusions reached in the Award, as if its mandate included providing such purported corrective commentary, the *Ad Hoc* Committee decided to annul the

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emergency relief for egregious violations of a few basic principles while preserving the finality of the decision in most respects. Art. 52 follows this model of a limited review process.").

[5] Report of the Secretary-General (Ibrahim F.I. Shihata) to the Administrative Council of ICSID, ICSID Doc. No. Ac/86/4, Annex A, at 3 (2 Oct. 1986) in vol. 2 International Arbitration Report (Feb. 1987).

[6] Report of the Secretary-General (Ibrahim F.I. Shihata) to the Administrative Council of ICSID, ICSID Doc. No. Ac/86/4, Annex A, at 2 (2 Oct. 1986) in vol. 2 International Arbitration Report (Feb. 1987).

[7] ICSID Caseload – Statistics, Issue 2011-1, at 15; List of ICSID Cases, *available at* http://icsid.worldbank.org/ICSID.

Award *sua sponte* for reasons not advanced by either party and announced for the first time in the Annulment Decision itself.

The *Ad Hoc* Committee thus denied the parties due process with respect to the annulment, as neither party had the opportunity to address the alleged ground justifying annulment of the Award. More egregious still, the *Ad Hoc* Committee's decision was premised on a mistaken assessment as to the content of the legal development that was the focus of its analysis. That is, having failed to advise the parties of the ground it was considering as a basis for annulment, and thus without the benefit of the parties' observations on the issue, the Committee concluded that the Tribunal seriously violated a fundamental rule of procedure by failing to invite further submissions from either of the parties on a late-occurring legal development that the Committee concluded was of central relevance to the Award. The Committee's assessment of that legal development, however, was wrong as a matter of fact, leading to a gross miscarriage of justice. The new development, a prosecutor's resolution, did not address the point of law that the Committee wrongly concluded was at issue, which explains why the Tribunal concluded it was irrelevant and why annulment was not sought on that basis. Thus, the Committee recklessly concluded there was a basis to annul where none existed.

The Award

On August 16, 2007, the Tribunal composed of L. Yves Fortier (President), Dr. Bernardo Cremades, and Professor W. Michael Reisman, by majority,[8] rendered the Award holding that it lacked jurisdiction over claims asserted by Fraport AG Frankfurt Airport Services Worldwide ("Fraport") under the bilateral investment treaty between Germany and the Philippines[9] (the "BIT" or "treaty").

The Tribunal concluded that Article 1(1) of the BIT limited the scope of the treaty's protections to investments that were in compliance with the law of the host state at the initiation of the investment.[10]

After extensive review of the evidence, the Tribunal concluded that Fraport had structured its investment "knowingly and intentionally" in circumvention of Philippine law.[11] The Tribunal found that Fraport "consciously concealed"[12] the violation, that Fraport's "comportment ..., as is clear from its own records was egregious,"[13] that the evidence of wrongdoing was "incontrovertible;"[14] and therefore that Fraport "cannot claim to have made an investment 'in accordance with law'" under the terms of the BIT.[15]

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[8] Dr. Cremades dissented from the Award.

[9] Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments, done at Bonn on 18 April 1997 and entered into force on February 2, 2000.

[10] Award ¶ 345.

[11] Award ¶ 401.

[12] Award ¶ 387.

[13] Award ¶ 397.

[14] Award ¶ 399.

[15] Award ¶ 401.

The Tribunal's findings were based upon its familiarity with both the content and the development of the evidentiary record over the course of the case, including in particular, following Fraport's resistance to producing evidence in certain categories. The record eventually included eleven full written submissions supported by more than 32 witness statements, 30 expert reports and legal opinions, 1,100 exhibits and 440 legal authorities. The Tribunal also assessed in person the credibility of the 16 witnesses and experts who were subject to examination during the course of an 11-day hearing, as well as the credibility and reliability of the parties themselves as they presented their respective cases over four years of proceedings.

The Philippine law at issue was Commonwealth Act No. 108, otherwise known as the Anti Dummy Law, which applied to Fraport's investment in PIATCO, the company that held the concession for a public utility under Philippine law. There are two distinct and autonomous modes of violation of the Anti Dummy Law: one is a disregard of the nationality requirement, which restricts public utilities to Philippine nationals, and in the case of companies, to companies with at least 60 percent Philippine equity ownership (Section 1 of the Law). The second and distinct violation of the Anti Dummy Law consists of disregard of the prohibition of intervention by non-Philippine entities in the administration, operation, management and control of a Philippine public utility (Section 2A of the Law).[16]

Although the Philippines had argued that Fraport's investment violated the Anti Dummy Law in both respects (Section 1 and Section 2A), the Tribunal rejected that argument. The Tribunal expressly concluded that Fraport's equity investment did not exceed the statutorily determined level of investment permitted to a foreign investor in a public utility, and likewise rejected other arguments put forward by the Philippines, such as that Fraport "loaned too much" to PIATCO or otherwise violated the nationality restrictions for investment in a public utility.[17] Thus the Tribunal concluded that Fraport did not violate the nationality portion of the Anti Dummy Law.[18]

The Tribunal had accepted Fraport's submission that, following the passage of the Foreign Investment Act of 1991, which defined Philippine national in a manner consistent with the so-called "Control Rule," other ways of assessing the level of foreign equity investment in a company were no longer applicable to an analysis under Section 1 of the Anti Dummy Law. Fraport's equity holding was consistent with the Control Rule requirements; and the arguments put forward by the Philippines that were based upon the so-called "Grandfather Rule" or on "badges" of dummy status as a means of demonstrating that Fraport violated the nationality provisions of the Anti Dummy Law (Section 1) could not be accepted.[19]

The Tribunal therefore turned to the second mode of Anti Dummy Law violation, that is, whether there was a violation of the prohibition of intervention by non-Philippine entities in the administration, operation, management and control of a Philippine public utility (Section 2A). The Control Rule, the Grandfather Rule and the so-called "badges" of dummy status were not relevant to this second mode of violation of the Anti Dummy Law. As to this second mode, the Tribunal took particular notice of the following record evidence:

[16] Award ¶ 354.

[17] Award ¶ 350.

[18] Award ¶ 350.

[19] Award ¶¶ 350, 352-55.

- A confidential "control agreement" or "pooling agreement" that required a majority of the Philippine investment company's shareholders to act in accordance with Fraport's binding "recommendations;"[20]

- A contemporaneous report on Fraport's investment made to Fraport's Supervisory Board, which concluded that Fraport's plan to control its investment through binding recommendations "cannot be enforced legally because of local laws;"[21]

- A contemporaneous report from a member of Fraport's Supervisory Board, which noted that the planned control was not consistent with Philippine law, observing that Fraport "cannot legally enforce its intended leadership in this consortium. This however, is the most important prerequisite for the entire transaction;"[22]

- Contemporaneous legal analyses of Philippine counsel that cautioned Fraport prior to its investment about the dual nature of the Anti Dummy Law restrictions[23] and subsequently that concluded that Fraport's investment structure violated the [management and control prohibitions of the] Anti Dummy Law.[24]

Based on this and other evidence,[25] including witness testimony, as well as the further submissions of the parties, including oral argument as to the provisions of the Anti Dummy Law, the Tribunal concluded that Fraport's "own internal documents show that Fraport was consciously, intentionally and covertly structuring its investment in a way which it knew to be a violation of the [Anti Dummy Law]."[26] The Tribunal further stated that "this is a case in which *res ipsa loquitur*. The relevant facts, all of which are found in Fraport's own documents, are incontrovertible."[27]

The Tribunal also discussed the question of estoppel as to the Philippines' jurisdictional objection, *i.e.*, whether "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[28] It

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[20] Award ¶¶ 319-27.

[21] Award ¶ 313 (quoting Final Holding Report dated Feb. 26, 1999).

[22] Award ¶ 315 (quoting Report from Dr. Werner Schmidt dated Mar. 7, 1999).

[23] Award ¶¶ 309-10.

[24] Award ¶¶ 329-30.

[25] Evidence as to the content of Philippine law, included a due diligence report by Philippine counsel that described the regulatory environment that applied to the investment, the Foreign Investments Act of 1991, the investment limitations of the Philippine Constitution and the Anti Dummy Law, with reference to opinions of the Philippine Department of Justice that addressed the Anti Dummy Law (Award ¶¶ 309-10); documents from Fraport's files showing that Fraport decided to make its investment using covert arrangements, including confidential agreements, to obtain control over the project in violation of Philippine law (Award ¶¶ 311-27); and 2001 documents showing that when the covert arrangements subsequently were communicated to Philippine counsel, Fraport's Philippine counsel and Philippine counsel for potential third-party investors advised Fraport that its investment structure violated the Anti Dummy Law (Award ¶¶ 329-30).

[26] Award ¶ 323.

[27] Award ¶ 399.

[28] Award ¶ 346.

concluded, however, that "[t]here is no indication in the record that the Republic of the Philippines knew, should have known or could have known of the covert arrangements which were not in accordance with Philippine law when Fraport first made its investment in 1999."[29]

The Tribunal's unchallenged conclusion regarding the covert nature of the way in which Fraport structured its investment was reinforced, according to the Tribunal, by Fraport's failure to produce in a timely fashion evidence of its investment structure, including all of the associated agreements, which Fraport had repeatedly been called upon to produce:

> Despite requests for document production, the obvious relevance of these secret documents to the Respondent's jurisdictional objection, and a stern warning by the President of the Tribunal early in the arbitration that adverse consequences could be drawn from the failure to produce such documents, it was only in the course of the hearing that the existence of many of these documents became known.[30]

The Tribunal thus also considered the manner in which Fraport approached the evidence in question and drew conclusions as to its import accordingly.

The Prosecutor's Resolution

After the completion of the written submissions in the case and after the Tribunal had declared the proceedings to be closed, the Philippines wrote to the Tribunal to transmit a copy of a resolution of the Philippine State Prosecutor dismissing private criminal complaints that had been made against various defendants, including Fraport officials, alleging violations of both Sections 1 and 2A of the Anti Dummy Law in regard to Fraport's investment in PIATCO ("Prosecutor's Resolution"). The Prosecutor's Resolution dismissing the complaints turned on the application of Section 1 of the Anti Dummy Law.

Fraport and the Philippines then submitted six letters *in seriatim* to the Tribunal regarding the Prosecutor's Resolution, focusing in particular on the question whether the Prosecutor had available to him the confidential shareholder agreements that were the focus in the arbitration as to violations of the Anti Dummy Law.[31] The Tribunal requested the Philippines to produce "*in extenso*" the documents from the record of the proceeding before the Prosecutor. The Philippines submitted documents in response and Fraport supplemented the record as well,

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[29] Award ¶ 347.

[30] Award ¶ 400.

[31] *See* Letter from Fraport to the Tribunal dated Jan. 8, 2007; Letter from Fraport to the Tribunal dated Jan. 10, 2007; Letter from the Republic to the Tribunal dated Jan. 11, 2007; Letter from Fraport to the Tribunal dated Jan. 12, 2007; Letter from Fraport to the Tribunal dated Feb. 27, 2007; Letter from Fraport to the Tribunal dated Mar. 16, 2007. Subsequently, the Philippines submitted a resolution dated Mar. 19, 2007 of the National Bureau of Investigation granting a motion of reconsideration that had been filed by the private complainants ("Reconsideration Resolution").

including with evidence of the scope of the Prosecutor's subpoena powers.[32] The Tribunal took the parties letters into consideration.[33]

Based on its review of the documents submitted by the parties and, in particular, testimony from Fraport officials submitted to the Prosecutor denying that there were any control agreements, the Tribunal concluded that the shareholder agreements that were at issue in the ICSID arbitration, and that were subject to confidentiality agreements requiring that such documents only be used in the context of the ICSID arbitration, were not in the record before the Prosecutor. The Tribunal also concluded that the record would not have indicated to the Prosecutor that there may have been such agreements.[34]

The Tribunal therefore concluded that the Prosecutor's Resolution dismissing the Anti Dummy Law complaints was made without consideration of the shareholder agreements that were at issue in the ICSID arbitration.

Fraport's Application to Annul

In support of its application to annul the Award, Fraport argued that it was a serious departure from a fundamental rule of procedure that the Tribunal had not provided it further opportunity to comment on the evidentiary record before the Prosecutor. Fraport claimed that it was denied a further opportunity to demonstrate that the shareholder agreements at issue were available to the Prosecutor, by way of subpoena or otherwise, and to address the testimony that the Tribunal viewed as confirming that Fraport misled the Prosecutor as to the existence of the agreements.

In fact, however, Fraport already had made the point, which had been considered by the Tribunal, that the Prosecutor had the authority to subpoena documents at issue and already had argued that the Prosecutor was put on notice that such documents may exist.[35] The Tribunal considered these points, but simply was not persuaded that the Prosecutor was put on notice that such agreements may have existed, particularly in light of repeated statements of Fraport officials denying that there were such agreements.[36] As to those statements, Fraport also already had elaborated its position as to why such statements denying that there were control agreements were correct and not misleading.[37] The Tribunal had considered those arguments as well, but was not persuaded.[38]

Fraport did not argue that it was denied the opportunity to address the legal standard for establishing an Anti Dummy Law violation as discussed in the Prosecutor's Resolution. That is because insofar as the Prosecutor's Resolution addressed the applicable legal standard, it supported the arguments that Fraport had made in the arbitration, an observation that Fraport

[32] Award ¶¶ 67-75.

[33] Award ¶¶ 368, 371, 381.

[34] Award ¶ 373.

[35] *See* Letter from Fraport to the Tribunal dated Jan. 8, 2007; Letter from Fraport to the Tribunal dated Jan. 12, 2007; Letter from Fraport to the Tribunal dated Mar. 16, 2007.

[36] *See generally* Award ¶¶ 371-82.

[37] Oral Hearing Transcript 2320:9 – 2324:5 (Jan. 15, 2006).

[38] Award ¶¶ 323-32, 395.

made in its letters to the Tribunal regarding the Prosecutor's Resolution,[39] and which the Tribunal accepted in its Award.[40]

The Annulment Decision

The Committee rejected the several other arguments that Fraport claimed supported annulment of the Award. The Committee focused on the procedure followed by the Tribunal to address the Prosecutor's Resolution. Adopting a line of reasoning not proffered by either party, the Committee concluded that the Prosecutor's Resolution was a critical legal authority because, the Committee observed, it showed how Philippine authorities applied the Anti Dummy Law. The Committee considered the Prosecutor's decision was of particular importance because it concluded that the record contained little other evidence of how the provisions of the Anti Dummy Law were to be applied.

In that respect, the Committee disregarded the record of evidence and submissions made by the parties that formed the basis of the Tribunal's findings as to the content of the Philippine law. As Fraport only first produced the shareholder agreement that was the principal evidence of an Anti Dummy Law violation weeks before the hearing on the merits and some further shareholder agreements at the merits hearing itself, the significance of the agreements had not been addressed by the parties in their principal written submissions. Nevertheless, the record included contemporaneous assessments by Philippine counsel as to the application of the Anti Dummy Law to Fraport's investment, evidence of Fraport's own contemporaneous understanding informed by Philippine counsel as to the Anti Dummy Law restrictions, the text of the statute itself, additional legal materials relating to the Anti Dummy Law, as well as the submissions of counsel, including at the oral hearing.

While it was correct to observe that the Prosecutor's Resolution was relevant to an assessment of the content of the Philippine legal rules, most critically, based upon the Committee's own review of the Prosecutor's Resolution, without the benefit of hearing from the parties on the issue, the Committee concluded that the Tribunal's analysis as to the application of the Anti Dummy Law was not in accord with the analytical framework described in the Prosecutor's Resolution.[41] Thus, evidently, in the Committee's estimation, the Tribunal ruled against Fraport and dismissed its claims based upon an understanding of Philippine law that had been rejected by the Philippine authorities, as evidenced by the Prosecutor's Resolution. The fact that the resolution had been introduced so late in the process and, according to the Committee, was not well considered by the Tribunal, presented what appeared to be a troubling result, which clearly motivated the Committee's Annulment Decision. It was, however, the Committee that was mistaken.

The Committee accepted that the Tribunal applied Philippine law to reach its decision and thus that the Tribunal did not manifestly exceed its powers. The Prosecutor's Resolution took the position that in regard to the nationality restrictions set forth in the Constitution and penalized in the Anti Dummy Law, since the passage of the Foreign Investment Act, which defined

[39] *See* Letter from Fraport to the Tribunal dated Jan. 8, 2007; Letter from Fraport to the Tribunal dated Jan. 12, 2007.

[40] Award ¶¶ 352-53, 361.

[41] *See* Annulment Decision ¶¶ 215-27.

Philippine nationals as those companies considered Filipino by virtue of the so-called Control Test, other means of assessing whether a company was in compliance with the nationality rules were no longer applicable. Thus, reference to the so-called Grandfather Rule was no longer to be made in this context and similarly, references to "badges" of dummy status were no longer to be applied to determine the nationality of a company. For that reason, the Prosecutor rejected the various arguments of the private complainants that were made on those bases and resolved to dismiss the complaints accordingly in regard to Section 1 of the Anti Dummy Law.[42]

Notably, the complainants had asserted that Fraport's investment in PIATCO also was in violation of Section 2A of the Anti Dummy Law, relying, however, on the same corporate structure it claimed constituted a violation of Section 1. On that point, and with reference to Section 2A of the Law, the Prosecutor's Resolution concluded that based on "the foregoing corporate structure of PIATCO, it is far-fetched that a foreign corporation like FRAPORT could gain dominion, control and ascendancy in the management or control of PIATCO considering 60 % of its shares are owned by Filipinos." As the Prosecutor thus observed, as a matter of fact, that *based on the foregoing corporate structure* it was "far-fetched" that Fraport could exercise control over PIATCO, the question was presented whether the Prosecutor had taken into consideration shareholder agreements actually granting such control.

While the Prosecutor's Resolution is clear that since the introduction of the Foreign Investment Law, such control, even if it were established, would not be relevant to a determination of the nationality requirement, *i.e.*, Section 1 of the Anti Dummy Law, nothing in the Prosecutor's Resolution stated that such control by a foreign investor would be irrelevant to a Section 2A violation. To the contrary, the text of Section 2A itself is expressly focused on the possibility of such control.

The Tribunal's Award was entirely consistent with the Prosecutor's Resolution in that respect. The Award rejected the argument put forward by the Philippines that Fraport's investment violated both the nationality provisions of the Constitution and the Anti Dummy Law (Section 1 and Section 2A of the Anti-Dummy Law),[43] and accepted Fraport's submission that nationality is only to be determined with reference to the "Control Rule" and not by reference to the "Grandfather Rule" or "badges" of dummy status.[44] The Tribunal observed, however, that the Anti Dummy Law *separately* prohibited actual control by a foreign investor, as the text of the Anti Dummy Law itself makes clear. The Tribunal noted that the Prosecutor's Resolution stated that the Control Test applied to determine "the nationality of the corporation" and that "badges of dummy status" were no longer applicable in that regard.[45] Having observed that the Prosecutor focused on these various determinations of nationality, as opposed to any actual

[42] The Reconsideration Resolution was to the same effect. Referring to the nationality restrictions penalized in Section 1 of the Anti Dummy Law, it stated "DOJ Opinion No. 165 was issued way before the DOJ, the SEC and RA No. 7042 decided to do away with the strict application and computation of the 'Grandfather Rule'. The cited indicators or badges of dummy status now find no application vis-à-vis the categorical and clear cut rule laid down by the DOJ, the SEC and RA No. 7042 *for determining the citizenship of corporations with foreign equity.*" (Emphasis added.)

[43] Award ¶ 350.

[44] Award, ¶ 352.

[45] Award ¶ 370.

demonstration of managerial control, and on that basis considered that it would be "far-fetched" to conclude that Fraport could exercise actual control, the Tribunal considered whether the Prosecutor had any basis to focus on any evidence of actual managerial control.

Thus, analytically, the Award was fully consistent with the description of the Philippine law set out in the Prosecutor's Resolution, and was consistent also with Fraport's position that the nationality provisions of the Constitution and Section 1 of the Anti Dummy Law could only be evaluated by reference to the Control Test, with which Fraport's investment complied.[46]

The Committee, however, concluded that the failure of the Tribunal to permit the parties to make further submissions on the Prosecutor's Resolution amounted to a serious departure from a fundamental rule of procedure.[47] The Committee considered that Fraport was denied the opportunity to present its case both as to the factual record before the Prosecutor and as to the issues of Philippine law.

There Was No Serious Departure from a Fundamental Rule of Procedure

While the right of a party to present its case is a fundamental rule of procedure, the record in this case did not support the conclusion that there was a serious departure from that fundamental rule. Under Article 52(1)(d), a "serious departure" from a fundamental rule of procedure means a departure that likely was outcome determinative.[48] Permitting the parties to make further submissions on the Prosecutor's Resolution would not have resulted in any different assessment on the ultimate disposition of the case.

The Committee concluded that failing to invite additional submissions from the parties, "in light of important new material casting doubt on the whole basis on which the Tribunal was proceeding underscores the serious nature of the departure from the right to be heard;"[49] and that the "resolutions state in express terms, in response to a specific complaint that Fraport's exercise of management control over PIATCO constituted a breach of the ADL, that this test was no longer applicable to determine breach."[50]

Thus, the Committee, lacking the benefit of the parties' observations on its theory justifying annulment, mistakenly concluded that the Tribunal based its Award on an understanding of the Anti Dummy Law that was different from the Prosecutor. The Committee incorrectly concluded that the Prosecutor stated that control was not relevant to a Section 2A violation, when, as a matter of fact, the Prosecutor's observations in that regard related to a Section 1 violation.

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[46] The Dissent appears to confuse this point, conflating violations of Section 1 and Section 2A of the Anti Dummy Law, and this might have contributed to the Committee's confusion. This aspect of the Dissent, however, was never addressed by the parties in the annulment phase, as Fraport did not seek annulment on this basis and as the Committee's focus on this issue was not made known until its Annulment Decision.

[47] Annulment Decision ¶ 218.

[48] CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2d ed. 2009), at 982 ("In order to be serious the departure must be more than minimal. It must be substantial. In addition, the cases confirm that this departure must potentially have caused the tribunal to render an award 'substantially different from what it would have awarded had the rule been observed.'").

[49] Annulment Decision ¶ 235.

[50] Annulment Decision ¶ 241.

It was thus the Committee's denial of due process on what it considered to be the most troubling issue before it that caused the serious and costly miscarriage of justice in this case.

The Committee also concluded that Fraport should have been given a further opportunity to address the evidence that was before the Prosecutor. The Committee concluded that the opportunity that Fraport was given was inadequate because, in the Committee's view, the state of the record "had been shown to be unreliable" and "the Tribunal could not properly, in the Committee's view," have made the determinations it did on the basis of the record before it.[51]

The Tribunal, however, did not consider the record "unreliable," and even if the Committee would have preferred to have given the parties another opportunity to submit observations as to whether the record before the Prosecutor included (i) the secret shareholder agreements that Fraport had failed to produce until weeks before or even during the oral hearing, or (ii) sufficient indications that such agreements existed to cause the Prosecutor to subpoena them, that is not a basis to conclude that there was a serious departure from a fundamental rule of procedure.

The record in the case was such that it was open for the Tribunal reasonably to conclude that the shareholder agreements, which were governed by confidentiality agreements that prevented their disclosure outside of the arbitration, which Fraport had routinely failed to produce until the merits hearing, and which were not discussed in the Prosecutor's Resolution, were not in the record before the Prosecutor. Fraport did address the Prosecutor's Resolution in five different letters[52] and never indicated that it had produced those documents in that proceeding or that there was any reason to consider that it otherwise was likely that the Prosecutor would have had access to them. It is difficult to see how further submissions from the parties on that issue would have altered the Tribunal's assessment on that point.

There was no dispute that although the Prosecutor had the power to subpoena documents, there was no indication that the Prosecutor had sought to do so in regard to the shareholder agreements at issue of which it had no knowledge. Fraport sought to make the point that the failure to issue such subpoenas must be taken to mean that the Prosecutor considered that such agreements would be irrelevant to a violation of the Anti Dummy Law. There are several reasons, however, why the Tribunal need not have accepted such an argument. The first is that nothing in the Prosecutor's Resolution supported the notion that an actual show of control would be irrelevant, only that the Prosecutor saw no such evidence on the record before it. Second, the text of the Anti Dummy Law itself indicates that an agreement for a foreign investor to control a public utility was illegal and therefore relevant. Third, the fact that a Prosecutor, faced with meager resources, such as clearly is the case in the Philippines, did not subpoena documents not found in the file is not meaningful evidence that the documents at issue could not be relevant, *a fortiori* because an international tribunal is not bound by such determinations made by municipal

[51] Annulment Decision ¶ 227.

[52] *See* Letter from Fraport to the Tribunal dated Jan. 8, 2007; Letter from Fraport to the Tribunal dated Jan. 10, 2007; Letter from Fraport to the Tribunal dated Jan. 12, 2007; Letter from Fraport to the Tribunal dated Feb. 27, 2007; Letter from Fraport to the Tribunal dated Mar. 16, 2007.

authorities.[53] Finally, in addition to the statement given to the Prosecutor by a Fraport official that "Fraport never entered into a control agreement with respect to PIATCO,"[54] the Tribunal had heard and considered testimony from the same official on the very same issue, *i.e.*, why he believed that the agreements at issue did not convey control over PIATCO to Fraport,[55] and the Tribunal also had posed questions to Fraport's counsel and heard counsel's argument on what the witness meant when he said the agreements did not convey control.[56]

So, even if Fraport had been given another opportunity to make a submission to the effect that there were indicia in the record before the Prosecutor that there might be other shareholder agreements for which the Prosecutor could have considered issuing a subpoena, it is difficult to see how one can conclude that another submission on that point would have altered the Tribunal's assessment of the evidence that was before the Prosecutor (because every point already had been specifically addressed to and expressly considered by the Tribunal) or the legal test under the Anti Dummy Law (because the Tribunal already accepted Fraport's argument as to the test set forth in the Prosecutor's Resolution concerning nationality restrictions).

The Annulment Decision was the first and only indication that the Committee interpreted the Prosecutor's Resolution in the manner that it did. Neither the parties nor the Committee had raised this view of the Prosecutor's Resolution as being in tension with the Award at any time during the annulment proceeding. Thus the Committee did not have the benefit from any observations from the parties as to the principal basis for its annulment decision.

The Committee Concluded That There Was No Basis to Annul the Award on the Basis of the Tribunal's Interpretation of the BIT

Fraport sought annulment of the Award on several grounds, including that the Tribunal manifestly exceeded its powers by means of its construction of Article 1(1) of the BIT. Although the Committee concluded that there was no manifest excess of powers, it nevertheless criticized the manner in which the Tribunal reached its interpretation of the BIT, including the scope of the evidence the Tribunal considered[57] and the weight that the Tribunal accorded to that evidence.[58] The Committee stated that Fraport's preferred construction of the Treaty was "alternative and plausible."[59] Thus the Annulment Decision implies that the Committee considered the Tribunal's construction of the Treaty to be mistaken.[60]

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[53] Award ¶ 390, 391; Annulment Decision ¶ 242 ("This is not to say that the Prosecutor's Resolution was necessarily dispositive of the point for the purpose of the Tribunal's determination of its jurisdiction. ... The Tribunal retains the ultimate power to judge the probative value of the evidence placed before it.").

[54] Award ¶ 373.

[55] Oral Hearing Transcript 1230:10 – 1235:5 (Jan. 10, 2006).

[56] Oral Hearing Transcript 2320:9 – 2324:5 (Jan. 15, 2006).

[57] Annulment Decision ¶ 84.

[58] Annulment Decision ¶ 99.

[59] Annulment Decision ¶ 110.

[60] *See* Annulment Decision ¶ 112 ("The Committee, without necessarily endorsing the interpretation of the BIT provided by the Tribunal, considers that the latter's interpretation ... is not untenable.").

In this important respect, the Annulment Decision is profoundly objectionable, as the Committee acted in excess of its powers under Article 52. The Committee's mandate is not to sit as an appellate body or to comment in a purportedly corrective manner on the arbitral award at issue. The mandate of the Article 52 Committee is limited to determining whether the Tribunal's construction of the Treaty furnished a basis for annulment. Having decided that the Tribunal's construction of the Treaty was tenable, *there was no basis for the Committee to go further*. Such purportedly corrective commentary by an *ad hoc* committee serves to undermine the legitimacy of the tribunal's determinations on points already fully litigated between the parties and as to which, admittedly, there is no basis to annul.

Indeed, proceeding in such a manner by any *ad hoc* committee, is highly problematic. The losing party inevitably will resist complying with an award whose legal or factual basis has been questioned by an ICSID *ad hoc* committee notwithstanding that the award stands as final and binding under the Convention and the decisions not annulled stand as *res judicata*. Similar difficulties may be encountered by non-disputing Contracting States that may find it difficult to give recognition and to enforce an award in accordance with Article 54 of the Convention, where the legitimacy of the award, although not annulled, has been called into question. Such practices by annulment committees thus are destructive of the ICSID system and should not continue.

* * *

The *ad hoc* Committee reached its decision to annul by exceeding its authority, usurping the powers and duties of the Tribunal, and denying the parties the opportunity to comment on the basis for its decision. The Committee acted as a court of appeal, conducting its own *de novo* assessment of the evidence and annulling on the basis of its disagreement with the Tribunal's determinations of points of law and findings of fact. It based its decision to annul not only on its improper and mistaken assessment of the legal determination by a State Prosecutor without permitting the parties to comment fully on its approach, but also on an erroneous application of the "serious departure" ground set forth in Article 52(1)(d). It also improperly and gratuitously criticized the Award on issues already fully litigated by the parties and decided by the Tribunal.

Aside from the significant consequences of this annulment for the Philippines, as it now faces the continuation of the dispute with Fraport, which now has been resubmitted to arbitration, the consequences for the ICSID system are profound. On the ground of a purported procedural departure that was in fact no departure, much less a serious one, the Committee annulled a well-reasoned and carefully considered award reached after more than four years of strongly contested proceedings that consumed substantial amounts of the time, attention and resources of the parties. Far from assuring that arbitration under the ICSID system will be effective, this case serves as an incentive to losing parties to seek annulment. If the Award in this case could be annulled for a purported failure to observe the right to be heard based on a committee's reassessment of the evidence after four years of contentious proceedings and submissions, it is likely that there are few cases in which a similar procedural basis for annulment could not be found.

In order for ICSID to remain a credible system of dispute resolution that parties are likely to select, ICSID must address the real difficulty presented by the annulment mechanism as it currently is being applied. This is particularly true given that parties have a number of other institutional options for the administration of investor-State disputes, such as the Permanent Court of Arbitration, that do not provide for such a mechanism for annulment of awards. The Philippines urges the Administrative Council to consider seriously the need for guidance to *ad hoc* committees to ensure that an appropriate course correction is made. This guidance should (1) clarify and reaffirm the very limited nature of the applicable annulment standards and the very limited authority of an *ad hoc* committee; (2) underscore the serious consequences of an annulment for the parties and lack of recourse against an annulment decision; (3) require that *ad hoc* Committees assure due process by permitting, indeed requiring, parties to comment on any potentially dispositive issue not fully briefed and submitted by the parties before a decision is taken; and, (4) encourage the appointment of appropriately experienced persons to *ad hoc* Committees. The Philippines submits the following points for the Committee's consideration and suggests that these issues also may be usefully analyzed further by a special task force to focus on the ICSID annulment mechanism and to make recommendations as to guidelines that may be issued or possible to changes in the ICSID Arbitration Rules as may be warranted.

Recommended Guidelines for Annulment Proceedings

In order to promote fair and effective annulment proceedings under Article 52 and to prevent similar miscarriages of justice as occurred in the *Fraport* annulment proceeding, the Philippines recommends that the Administrative Council issue guidelines for future *ad hoc* committees that:

1. Reaffirm the extraordinary and limited scope of Article 52 annulment.

2. Reaffirm that an *ad hoc* Committee's authority is limited to the application of the Article 52 standards.

3. Reaffirm that as such, annulment is limited to the most serious and egregious cases.

4. Confirm that it is not within the mandate of an *ad hoc* committee to offer critical or corrective commentary on decisions of the tribunal for which there is no basis to annul.

5. In view of the importance of consent to the role of ICSID in the resolution of disputes, confirm that the mandate of an *ad hoc* Committee under Article 52 of the Convention is limited to addressing the application for annulment presented.

6. Confirm that *ad hoc* Committees must accord the parties the same right to present their case as the parties enjoy in the arbitration and thus must be permitted to present observations on the issues to be decided by the *ad hoc* committee.

7. *Ad hoc* committees should be composed of members with substantial experience with ICSID arbitrations either as an advocate or Tribunal member. In addition, where one of the parties is from a developing country, at least one committee

member should represent the developing country perspective either by virtue of nationality or experience.

The Philippines would be pleased to provide additional input and assistance with the preparation of such guidelines, which the Philippines considers to be critical to the continued viability and success of ICSID.

Respectfully submitted,

JOSE ANSELMO I. CADIZ
Solicitor General
Republic of the Philippines

Annex 3

The Philippines' Proposal to Analyze the Potential for Establishing Guidelines on the Implementation of Article 52 of the ICSID Convention

September 23, 2011

The ICSID Convention

- **The ICSID Convention was established to promote private foreign investment through the creation of a stable and reliable institutional mechanism for settlement of investment disputes.**

- **The ICSID Convention places paramount importance on finality of awards and the certainty that this provides to parties.**

- **One of the distinguishing characteristics of the ICSID Convention is that it creates a self-contained, autonomous system of dispute settlement.**

- **Awards rendered under the ICSID Convention are not subject to challenge by national courts; recourse against an ICSID award can be exercised only within the framework of the Convention.**

Annulment under the ICSID Convention

Article 52 of the ICSID Convention provides a limited exception to the principle of finality by permitting parties to seek annulment of an award in proceedings before an *ad hoc* committee appointed by ICSID.

Article 52(1): "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based."

ICSID Annulment Intended to Be Extraordinary Remedy

- **The annulment of an arbitral award is a drastic remedy that invalidates, potentially completely, the work of an arbitral tribunal and the expense and efforts of the parties.**
- **For this reason, annulment under Article 52 is intentionally restricted to extraordinary and egregious circumstances.**
- **Grounds for annulment of ICSID awards under Article 52 generally are narrower than grounds for set-aside in national court systems (i.e., no public policy exception).**
- **Annulment is not intended to correct alleged errors of fact or law, but is rather intended to be a relatively rare occurrence to address fundamental and serious flaws relating to the procedural legitimacy of the award, or to an ICSID Tribunal acting manifestly in excess of its lawful authority.**

Increasing Concerns about ICSID Annulment Mechanism

- **Recently there has been intense and renewed criticism of the ICSID annulment mechanism by users, practitioners, and commentators.**

- **Growing sentiment that there is a serious and systemic problem of *ad hoc* committees issuing unpredictable annulment decisions that:**

  - Recite but fail to adhere to Article 52's narrowly circumscribed grounds for annulment;

  - Engage in unauthorized appellate review by basing annulment on perceived errors of law or fact;

  - Include gratuitous criticism of awards on points for which there was no basis to annul;

  - Annul awards for reasons not put forward by the party applying for annulment or otherwise addressed by the parties; and

  - Do not evidence balanced appreciation or sensitivity for developing economies.

Issues Arising from Misapplication of Article 52

- **Misapplication of the Article 52 annulment standards serves to elongate and exacerbate disputes by:**
  - Encouraging meritless applications for annulment; or
  - Incorrectly permitting or encouraging the resubmission of a dispute already decided in accordance with the provisions of the ICSID Convention, that is, provoking the start of a second round of arbitration.
- **This undermines the finality of ICSID awards and the legitimacy of the ICSID system.**

Troublesome Statistical Trends

- **Approximately one-third of ICSID awards are subject to annulment proceedings.**

	Annulments Applications	ICSID Awards Rendered	Annulment Applications Registered	Annulment Applications vs. Awards	Decisions Resulting in Annulment	vs.
1971-1980:	4	0	0 %	0	0 %	
1981-1990:	9	4	44 %	3	75 %	
1991-2000:	18	3	17 %	1	33 %	
2001-2010:	96	34	35 %	8	24 %	
TOTAL:	127	41	32 %	12	28 %	

- **In 2010, 4 of 8 annulment decisions resulted in whole or partial annulment.**

Threat to ICSID's Status as a Leading Arbitral Institution

- **As former ICSID Secretary General Ibrahim Shihata warned in his 1986 Report to the ICSID Administrative Council:**
  - *"The danger thus exists that if parties, dissatisfied with an award, make it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of ICSID arbitration."*
- **Several other institutional options for the administration of investor-State disputes, such as the Permanent Court of Arbitration, UNCITRAL or the ICC, do not rely upon a similar annulment mechanism.**
- **National courts increasingly appear more deferential to awards than ICSID annulment committees.**

Need for Affirmative Action

- **Not the first time ICSID annulment has come under intense scrutiny.**
- **There previously were other periods in ICSID's history marked by questionable annulment decisions and corresponding calls for reform of the annulment mechanism.**
- **This is a recurring and serious issue that needs to be affirmatively addressed; it cannot be assumed the problem will resolve itself.**
- **Article 6(3) of the ICSID Convention directs the Administrative Council to exercise such powers and perform such functions "as it shall determine to be necessary for the implementation of the provisions of this Convention."**

Proposed Recommendation

- **The Philippines respectfully urges the Secretary-General to convene a task force of legal experts who will analyze and prepare a report on the implementation of the annulment mechanism under Article 52.**

- **The task force may then propose guidelines, if warranted, to assist future *ad hoc* committees in understanding and applying Article 52.**

- **Any guidelines formulated by the Task Force would be submitted for approval and adoption by the Administrative Council at a subsequent Annual Meeting.**

Issues for Potential Consideration

The task force of legal experts may wish to consider whether guidelines on any of the recommendations below would be appropriate:

1. Reaffirm the limited scope of Article 52 annulment.

2. Reaffirm that an *ad hoc* committee's authority is limited to the application of the Article 52 standards.

3. Reaffirm that as such, annulment is limited to the most serious and egregious cases, providing a specific definition of Article 52 standards.

4. Confirm that it is not within the mandate of an *ad hoc* committee to offer critical or corrective commentary on decisions of the tribunal for which there is no basis to annul.

Issues for Potential Consideration

5. In view of the importance of consent to the role of ICSID in the resolution of disputes, confirm that the mandate of an *ad hoc* committee under Article 52 of the Convention is limited to addressing the application for annulment presented.

6. Confirm that *ad hoc* committees must accord the parties the same right to present their case as the parties enjoy in the arbitration and thus must be permitted to present observations on the issues to be decided by the *ad hoc* committee.

***7. Ad hoc* committees should be composed of members with substantial experience with ICSID arbitrations either as an advocate or tribunal member. In addition, where one of the parties is from a developing country, at least one committee member should represent the developing country perspective either by virtue of nationality or experience.**

Annex 4

ICSID

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE (202) 458 1534 | FACSIMILE (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

October 19, 2011

The Representative on the
Administrative Council

(The Governor of the World Bank)

Dear Madam/Sir:

The Administrative Council of the International Centre for Settlement of Investment Disputes convened for its 45th Annual Meeting on September 23, 2011 in Washington, DC. The Council's Meeting was held in conjunction with the Annual Meetings of the World Bank Group and the International Monetary Fund. Pursuant to Regulation 5(3) of the ICSID Administrative and Financial Regulations, please find enclosed a copy of the summary record of the proceedings.

Yours sincerely,

Meg Kinnear
Secretary-General

Enclosure

cc (with enclosure):
Alternate Representative
Executive Director, World Bank

ADMINISTRATIVE COUNCIL • 45th ANNUAL MEETING (2011)
WASHINGTON, D.C.

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID)

SUMMARY PROCEEDINGS

Morning Session

September 23, 2011, 10:00 a.m.

DAR Constitution Hall
1776 D Street NW
Washington, D.C.

Afternoon Session

September 23, 2011, 2:00 p.m.

IFC Auditorium
2121 Pennsylvania Avenue NW
Washington, D.C.

A. Morning Session

I. Opening of the Meeting

1. The 45th Annual Meeting of the ICSID Administrative Council took place in conjunction with the Annual Meetings of the World Bank Group and the International Monetary Fund.

2. **Mr. Robert B. ZOELLICK**, Chairman of the Administrative Council, presided over the morning session of the Council's Meeting.

II. Agenda of the Morning Session

3. Mr. Zoellick introduced the two Items on the Council's Agenda for the morning session: the adoption of resolutions regarding (1) the 2011 ICSID Annual Report; and (2) the ICSID Administrative Budget for Fiscal Year 2012.

III. 2011 Annual Report and Proposed Budget for Fiscal Year 2012

4. Mr. Zoellick noted that the draft Resolutions had been circulated in advance by the ICSID Secretariat and were before the Representatives. Mr. Zoellick then turned to consideration of the draft resolutions regarding the 2011 ICSID Annual Report and the Administrative Budget for Fiscal Year 2012, proposing that they be adopted.

5. There being no comments, or questions, and in the absence of any objection, resolutions approving the 2011 ICSID Annual Report and the Administrative Budget for Fiscal Year 2012 were adopted.

IV. Adjournment of the Morning Session

6. Mr. Zoellick then announced that the afternoon session of the 45th Annual Meeting of the ICSID Administrative Council would take place at 2:00 p.m. in the IFC Auditorium.

B. Afternoon Session

I. Opening of the Afternoon Session

7. **Mr. Javed TALAT**, the Temporary Alternative Representative of Pakistan and Temporary Presiding Officer, opened the meeting by welcoming the participants to the afternoon session of the 45th Annual Meeting of the ICSID Administrative Council.

II. Agenda of the Afternoon Session

8. Mr. Talat stated that there were two remaining Items on the Council's Agenda: Item No. 3, "Report by the ICSID Secretary-General;" and Item No. 4, "Recommended Guidelines for ICSID Annulments," which had been placed on the Agenda at the request of the Republic of the Philippines. Mr. Talat noted that no draft resolution had been proposed for consideration at this session of the Administrative Council.

9. Mr. Talat called upon **Secretary-General Meg KINNEAR**, to deliver her report.

III. Report of the Secretary-General

10. After thanking Mr. Talat and the Administrative Council, Secretary-General Kinnear reported on the work of ICSID during the year under review.

11. With regard to membership, Secretary-General Kinnear reported the number of ICSID Convention Contracting and signatory States at 147 and 157 respectively. Ms. Kinnear welcomed Qatar, Cape Verde, and Moldova, which had joined ICSID as Contracting States during Fiscal Year 2011. Ms. Kinnear noted that the majority of States today are ICSID Contracting States and that ICSID remains the premier international investment arbitration facility in the world, having facilitated 65-70% of all known international investment arbitration cases. Ms. Kinnear thanked Member States for their continuing confidence.

12. Secretary-General Kinnear reaffirmed the Centre's commitment to fulfilling its mandate to provide a neutral, efficient, and cost-effective international facility for resolution of legal disputes between foreign investors and host States. Ms. Kinnear explained that the existence of the Centre builds the confidence of foreign investors and thereby encourages the flows of cross-border investment.

13. The Secretary-General highlighted that ICSID does not make the legal decisions in individual cases, which is exclusively the province of arbitrators. Nor does ICSID determine applicable law, which is usually selected by the parties in the applicable treaty or contract. Rather, ICSID provides facilities for arbitration and conciliation proceedings, which frequently take place at the Washington and Paris offices of the World Bank. The Centre has also signed Facilities Cooperation Agreements with institutions in Bahrain, Cairo, Frankfurt, Kuala Lumpur, Lagos, Melbourne, Sydney,

Singapore (2), and The Hague, and signed a further such agreement with the Hong Kong International Arbitration Centre in the past year. In addition to these institutions, Ms. Kinnear noted that ICSID can provide arbitration facilities in any region of the world and strives to use videoconferencing and webcasting technology whenever possible to reduce costs.

14. Secretary-General Kinnear then presented an overview of ICSID and the respective roles and responsibilities of the Administrative Council and the Secretariat. The Administrative Council, which is comprised of one representative from each of the current 147 Contracting States, is primarily responsible for the adoption of Rules and Regulations of the Centre; the election of the ICSID Secretary-General and Deputy Secretary-General; and the approval of ICSID's annual reports and budgets. Ms. Kinnear explained that the day-to-day management of the cases is done by the ICSID Secretariat. Ms. Kinnear noted that Contracting States have an overarching governance function, but cannot interfere in or take steps that would affect the outcome of any specific case. As a result, the Contracting States must clearly delineate and keep separate their role as a disputing party in cases from their role as a member of the Administrative Council.

15. Secretary-General Kinnear described the operations of the ICSID Secretariat and stated that its staff numbered roughly 40 persons during Fiscal Year 2011. The Secretariat is made up of six teams, each headed by a senior staff member. Four teams are dedicated to running arbitrations and providing case support for the tribunals and the disputing parties. One team is dedicated to institutional affairs and is responsible for issues related to membership, outreach, and technical assistance. The sixth team is the administration and business team.

16. With regard to disputes before the Centre, Secretary-General Kinnear reported that there have been 359 cases in the entire history of ICSID and that the Centre had administered 159 of those cases during the last Fiscal Year, representing 45 percent of all ICSID cases.

17. Secretary-General Kinnear reported on the institutional initiatives undertaken by the Centre in Fiscal Year 2011 to address the increased caseload, including the development of in-house service standards regarding time frames for action on cases;

the adoption of electronic case and document management systems; staffing efforts to improve services, including the creation and staffing of a hearing and conference organizer position; and the renewed focus on fiscal stewardship and financial administration. This included efforts to ensure that unused funds at the end of a case are refunded to the parties quickly, and that arbitrator bills are processed expeditiously.

18. Secretary-General Kinnear reported that 32 new cases were filed at ICSID in Fiscal Year 2011, which represents approximately a 20 percent increase from the previous year. There were also 11 post-award remedy proceedings filed in Fiscal Year 2011: one was a request for revision, two were requests for interpretation, and eight were applications for annulment. The Centre concluded 37 cases in the same period, reflecting the Centre's efforts to keep proceedings moving expeditiously and, when the parties do not wish to continue, to discontinue inactive cases.

19. Secretary-General Kinnear noted that 20 different States were named as respondents in the 32 new cases registered in Fiscal Year 2011. As in prior years, the parties' consent in these cases was most often found in bilateral investment treaties, followed by contracts between a host State and a foreign investor.

20. Secretary-General Kinnear noted that about 40 percent of all cases that are commenced at ICSID are ultimately either discontinued or settled and stated that this might be construed as an indication that there is a role for better use of alternative dispute resolution techniques, such as mediation or conciliation.

21. Secretary-General Kinnear reported that empirically, States have won just slightly more than half of all cases and won 56% of cases in Fiscal Year 2011. When damages are awarded to foreign investors, the amounts awarded averaged 5-12% of what was originally claimed.

22. Secretary-General Kinnear then discussed three particular matters related to investor-State dispute settlement.

23. First, Secretary-General Kinnear spoke about a concern expressed in the user community that arbitrations take too long to complete. Ms. Kinnear noted that this concern is not just an ICSID issue, but pervades investor-State dispute settlement in

general. Ms. Kinnear noted that it is important to assure as expeditious a process as possible, while at the same time ensuring that both parties have the time necessary to properly assert or defend a claim. ICSID has taken measures to proceed expeditiously wherever possible, including a practice of registering Requests for Arbitration in an average of 24 days or less, and constituting a tribunal within an average of six weeks from the parties' request for arbitrator appointments. In addition, the Centre has provided various calendaring and scheduling techniques for tribunals, and tracks the progress of cases. Ms. Kinnear reported that average case duration was reduced from 37 months to 25 months from the date of the constitution of the tribunal in Fiscal Year 2011.

24. The second matter that Secretary-General Kinnear described related to the ICSID Panels of Conciliators and of Arbitrators. While noting that an ICSID tribunal typically has three arbitrators (one appointed by the claimant, one appointed by the respondent, and the presiding or third appointed by agreement of the parties), she explained that where the parties cannot agree, they may ask ICSID to name the third arbitrator. In this instance, ICSID must select the arbitrator from the Panel of Arbitrators. In addition, Ms. Kinnear noted that the ICSID Convention requires that all three members of ICSID annulment or *ad hoc* Committees be selected from the Panel of Arbitrators as well.

25. Given the increased volume and complexity of cases, more arbitrators are necessary for matters to proceed expeditiously. Each Contracting State is entitled under the ICSID Convention to name four arbitrators and four conciliators to the Panels and Ms. Kinnear urged Member States to keep their designations to these important Panels current and replenished with qualified candidates.

26. Secretary-General Kinnear reiterated that persons designated to the ICSID Panels must be of high moral character, with an expertise in law or in commerce, and the ability to exercise independent judgment. In addition, it is very useful for Panel members to be familiar with international investment law; to have a background in public international law, contract or commercial law; to have an expertise in running complex arbitrations; and to be available to take on ICSID proceedings. Individuals named to the Panels by States do not have to be citizens of the designating States, so States can

name non-nationals to these positions. She also noted that, while former government officials are suitable for designation to the Panels, ICSID's experience has been that current government officials are not selected as arbitrators by parties, perhaps due to the concern that they would be successfully challenged.

27. Secretary-General Kinnear then reported that the Chairman of the ICSID Administrative Council had recently designated 10 individuals to each of the Conciliation and Arbitration Panels for six-year terms commencing on September 15, 2011. These designations included more female and Spanish-speaking panelists than previously.

28. The third topic examined by Secretary-General Kinnear was the ICSID annulment mechanism. Ms. Kinnear explained that once an award has been rendered in a dispute between an investor and a host-State at ICSID, it is final and no appellate mechanism is available. The annulment mechanism created by Article 52 of the ICSID Convention was designed purposefully by the drafters to create a limited scope of review focused on serious procedural flaws in the arbitration.

29. An annulment Committee is made up of neutral independent international arbitrators named from the Panel of Arbitrators who are from countries different from the Contracting States involved in the dispute.

30. Ms. Kinnear reported that the Centre has charted by decade how many awards were issued, and how many annulments were requested, and the outcomes of annulment proceedings. Between 1966 and 2000, 31 ICSID awards were rendered, 3 awards were annulled in part or in full, and 2 annulment applications were rejected. Between 2001 and 2010, 96 awards were rendered, 8 awards were annulled in full or in part, and 13 annulment applications were rejected. Ms. Kinnear explained that the increased number of annulment applications in the last decade was largely a factor of the increase in the number of cases and awards. Overall, of the 320 cases arbitrated under the ICSID Convention, there have only been 11 annulment awards, totaling only 3% of all cases registered.

31. Ms. Kinnear summarized the achievements of ICSID in Fiscal Year 2011, noting in particular technical assistance given through the "ICSID 101" course, which is an introduction to the ICSID process taught by members of the Secretariat; efforts to

secure permission from parties to publish past awards, decisions, and procedural orders; and bringing the *ICSID Review Foreign Investment Law Journal* up-to-date.

32. Ms. Kinnear closed by thanking the staff of the ICSID Secretariat for their efforts and the Chairman of the Administrative Council for his support of ICSID during Fiscal Year 2011.

33. At the conclusion of the Secretary-General's report, Mr. Talat asked if there were any questions or comments on the Report of the Secretary-General.

34. There being no questions or comments on the Report of the Secretary-General, Mr. Talat turned to the next item on the Council's Agenda, Item No. 4.

IV. Recommended Guidelines for ICSID Annulments

35. Mr. Talat called upon the Representative of the Republic of the Philippines, **The Honorable Cesar V. PURISIMA**, Secretary of Finance, to address the Administrative Council.

36. Mr. Purisima thanked Mr. Talat and noted the appreciation of the Republic of the Philippines for ICSID's role as the premier institution for resolving disputes between investors and host States. Mr. Purisima described ICSID as a self-contained autonomous system of resolving disputes founded upon the rule of law as contained in the provisions of the Convention.

37. Mr. Purisima explained that due, in part, to his country's recent participation in a case subject to an annulment proceeding, the Republic of the Philippines believes that there is merit to certain criticism of the ICSID system with respect to the misapplication of annulment mechanism.

38. Mr. Purisima then introduced **Mr**. **Jose Anselmo CADIZ,** Solicitor General and Temporary Alternate Representative of the Republic of the Philippines, and invited him to expound on the proposal of the Republic of the Philippines to study the ways by which the annulment mechanism may be improved to ensure that the finality of tribunal awards be respected.

39. Solicitor General Cadiz began by thanking Presiding Officer Talat, Secretary-General Kinnear, the Representatives of the Administrative Council and The Honorable Secretary of Finance Cesar Purisima. Mr. Cadiz then explained that the Republic of the Philippines had concerns regarding both the substance of recent annulment

decisions and the implementation of the annulment mechanism embodied in Article 52 of the ICSID Convention. Solicitor General Cadiz stated that the Republic of the Philippines urges further analysis and study of the implementation of Article 52 from its inception until the present for the benefit of parties in future ICSID disputes and to preserve ICSID's reliability as a leading international arbitral institution.

40. Solicitor General Cadiz noted that the ICSID Convention was established to promote private foreign investment, particularly to spur economic development through the creation of an institutional mechanism for settlement of investment disputes outside of the host State's national courts. The ICSID Convention considers the finality of awards to be of paramount importance to provide additional certainty and reliability to users of the ICSID system. This is evident from the fact that awards rendered under the ICSID Convention are not subject to challenge in national courts, but are subject only to annulment within the self-contained and autonomous ICSID system on certain enumerated and very limited grounds under Article 52.

41. Solicitor General Cadiz stated that the nature of Article 52's specified grounds for annulment, including corruption by an arbitrator, a manifest excess of power, and a serious departure from a fundamental rule of procedure, signifies that annulment is a remedy only for extraordinary and most egregious circumstances. Mr. Cadiz further noted that Article 52 does not permit an *ad hoc* Committee to revise an award or to replace the Award's reasoning with its own.

42. Solicitor General Cadiz stated that annulment is not an appeal and was not designed to be a remedy for alleged errors of fact or law because annulment is a drastic remedy that has the potential to invalidate years of effort by an arbitral tribunal and the parties. Instead, Article 52 was intended to address fundamental and serious flaws relating to the procedural legitimacy of the Award while according deference to the work of the arbitral tribunal.

43. Solicitor General Cadiz stated that recently there has been intense and renewed criticism of the ICSID annulment mechanism by users, practitioners, and commentators. Mr. Cadiz stated that these comments suggest that annulment committees had issued decisions that (1) failed to adhere to Article 52's narrowly circumscribed grounds for annulment; (2) engaged in unauthorized appellate review

by basing annulment on perceived errors of fact or law; (3) included *ultra vires* criticism of awards on points for which there is no basis to annul, thereby eroding the legitimacy of legal rulings and factual findings not subject to any flaw warranting annulment and that otherwise remain final and binding; (4) annulled awards for reasons not addressed by the parties; and (5) have not shown a balanced appreciation or sensitivity for developing economies.

44. Due in part to its own participation in a case subject to an annulment proceeding, Solicitor General Cadiz explained that the Republic of the Philippines believes that there is merit to at least some of these criticisms.

45. Solicitor General Cadiz stated that the misapplication or inconsistent application of Article 52 annulment standards could prolong and exacerbate disputes by encouraging losing parties to file unmeritorious applications for annulment causing potential inefficiency and injustice by incorrectly permitting or encouraging the resubmission of a dispute already decided and imposing a significant burden on the limited resources of a developing State.

46. Solicitor General Cadiz stated that approximately one-third of ICSID awards have been subjected to annulment proceedings and that in the calendar year of 2010, four out of eight annulment decisions resulted in whole or partial annulment of the award. Mr. Cadiz further stated that numbers do not tell the whole story, as most complaints are directed at the substance of individual annulment decisions rather than aggregated statistics, but that these figures were of concern to ICSID users.

47. Solicitor General Cadiz quoted former ICSID Secretary-General Ibrahim F. I. Shihata stating that: "The danger does exist that if parties dissatisfied with an award make it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and contracting states might be deterred from making use of the ICSID arbitration."

48. Solicitor General Cadiz noted that this is not the first time that ICSID annulment has come under intense scrutiny and that there were previously other periods in ICSID's history marked by controversial annulment decisions and corresponding calls for reform of the annulment mechanism. Therefore, Mr. Cadiz stated that this is a

recurring and serious issue that must be affirmatively addressed because ICSID dispute resolution must be perceived by all as fair and predictable.

49. Solicitor General Cadiz stated that the Administrative Council is authorized to examine the implementation of Article 52 pursuant to Article 6(3) of the ICSID Convention, which directs the Administrative Council to exercise such powers and perform such functions as it shall determine to be necessary for the implementation of the provisions of the Convention.

50. To determine whether additional steps should be taken, Solicitor General Cadiz requested that the Secretary-General conduct a thorough review of all annulment decisions and convene an exploratory task force of legal experts from the ICSID Contracting States to assess the implementation of the annulment mechanism under Article 52. Following its review and considerations, Mr. Cadiz proposed that the task force may then propose guidelines, if warranted, to assist future *ad hoc* Committees in understanding and applying Article 52. Any guidelines formulated by the task force would then be submitted for approval and adoption by the Administrative Council at a subsequent meeting.

51. Solicitor General Cadiz presented the following proposed guidelines that such a task force may wish to consider:

    1. Reaffirm the limited scope of Article 52 annulment.
    2. Reaffirm that an *ad hoc* Committee's authority is limited to the application of the Article 52 standards.
    3. Reaffirm that annulment is limited to the most serious and egregious cases, providing a specific definition of Article 52 standards.
    4. Confirm that it is not within the mandate of an *ad hoc* Committee to offer critical or corrective commentary on decisions of the tribunal for which there is no basis to annul.
    5. In view of the importance of consent to the role of ICSID in the resolution of disputes, confirm that the mandate of an *ad hoc* Committee under Article 52 of the Convention is limited to addressing the application for annulment presented.

6. Confirm that *ad hoc* Committees must accord the parties the same right to present their case as the parties enjoy in the arbitration and thus must be permitted to present observations on the issues to be decided by the *ad hoc* Committee.

7. Ensure that *ad hoc* Committees are composed of members with substantial experience with ICSID arbitrations either as an advocate or tribunal member. In addition, where one of the parties is from a developing country, at least one Committee member should represent the developing country perspective either by virtue of nationality or experience.

52. Solicitor General Cadiz indicated that the Republic of the Philippines would be pleased to offer any further assistance as requested and concluded by thanking the Secretariat and the Administrative Council for its attention to this important matter.

53. Following the presentation of Solicitor General Cadiz, Secretary-General Kinnear thanked the representative from the Republic of the Philippines for his comments and undertook for the Secretariat to prepare a background paper on annulment as requested for the consideration of the Administrative Council. Ms. Kinnear indicated that such a paper will be circulated by electronic mail, and, if so requested by Member States, the Secretariat would be glad to facilitate a meeting of representatives to look further into the issues involved.

V. Concluding Remarks and Adjournment

54. There being no further questions or comments on the remarks of Solicitor General Cadiz, Mr. Talat concluded the meeting by thanking the Administrative Council for their cooperation and the Secretary-General for organizing the session. Mr. Talat then declared the meeting adjourned at 3:00p.m.

Attachments

- Powerpoint of the Secretary-General, Sept. 23, 2011
- Powerpoint of the Republic of the Philippines, Sept. 23, 2011

Annex 5

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

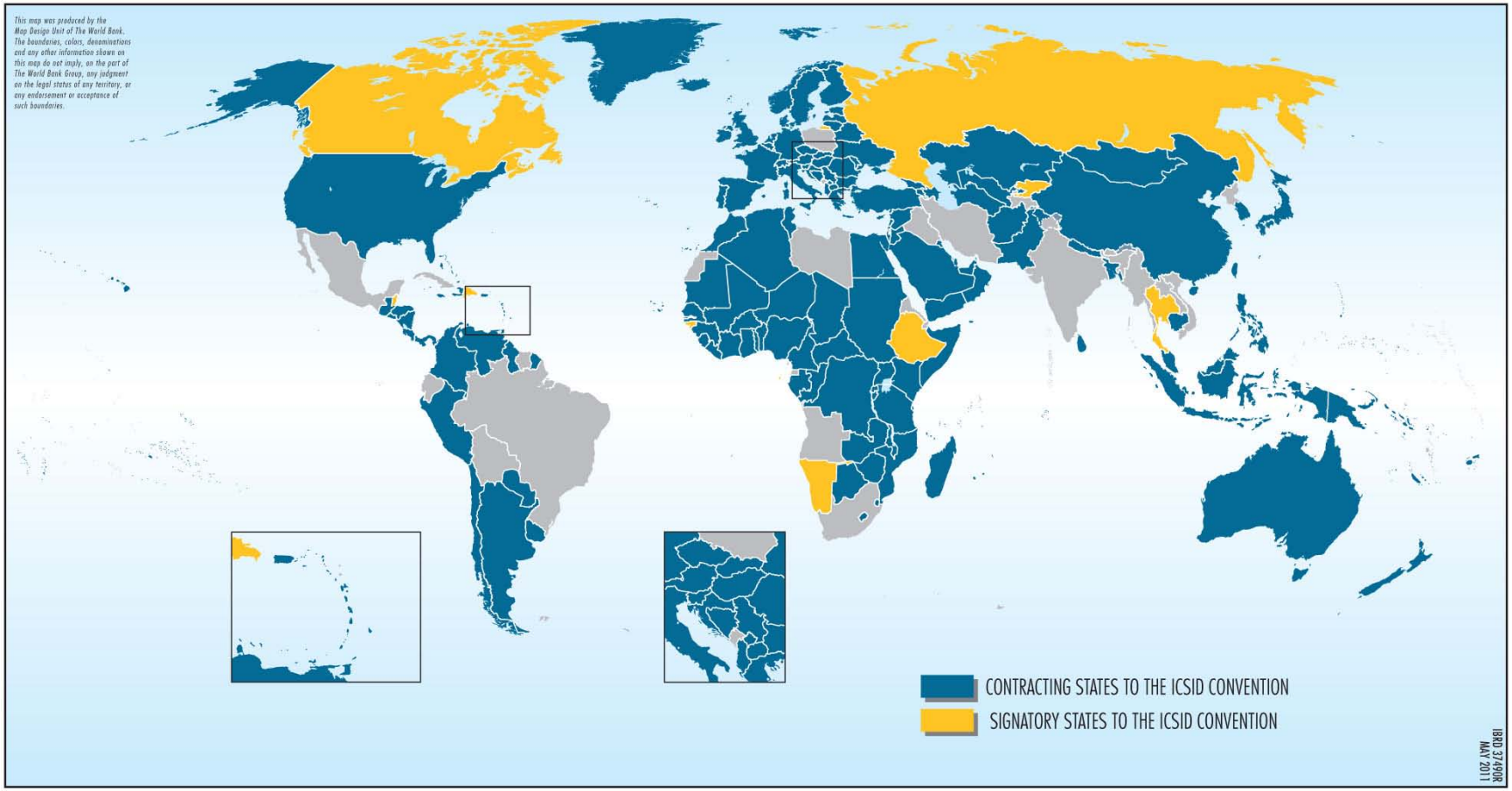
ICSID FY 2011: AN OVERVIEW

Report to the ICSID Administrative Council
by the Secretary-General of ICSID
September 23, 2011

MEMBERSHIP IN FY 2011

- Now have 147 members and 157 signatories
- Qatar, Cape Verde, and Moldova became Contracting States in FY2011

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES



(As of June 30, 2011)

PURPOSE OF ICSID

- To offer a neutral facility to resolve investment disputes between foreign investors and host States
- In turn, this enhances investor confidence and contributes to increased cross-border investment flows

ICSID's ROLE

- ICSID provides facilities for conciliation and arbitration of investment disputes
- ICSID supports the parties and the arbitrators at the direction of the President of the Tribunal or ad hoc Committee
- ICSID does not make the decisions

STRUCTURE OF ICSID

- Administrative Council
- Secretariat

ADMINISTRATIVE COUNCIL

- One representative of each Contracting State sits on the Council
- Each representative has one vote

PRIMARY FUNCTIONS OF ADMINISTRATIVE COUNCIL

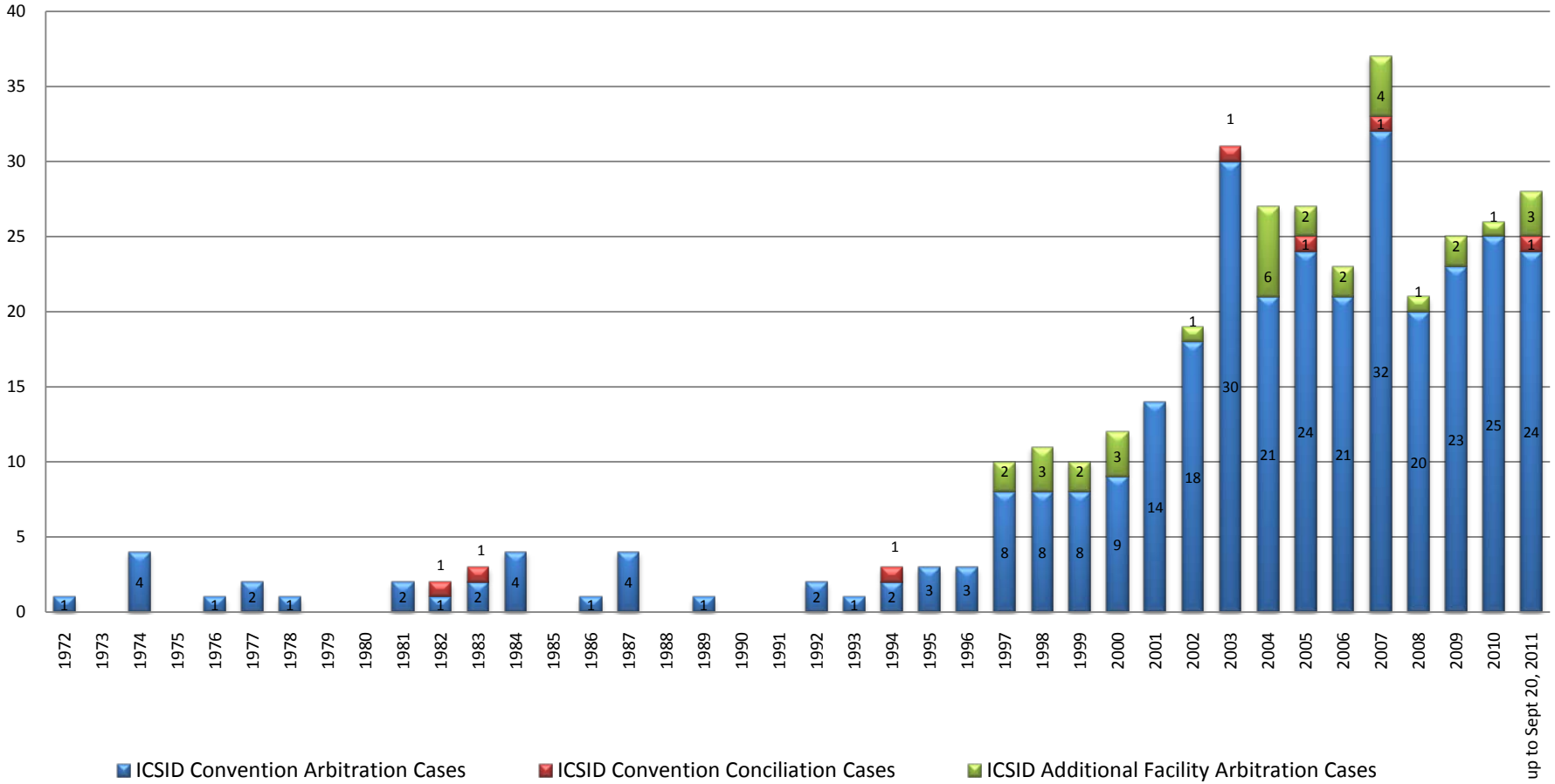
- Adopt rules
- Adopt budget and annual report
- Determine conditions of service of Secretary-General & Deputy Secretary-Generals

ICSID SECRETARIAT

- Secretary-General
- Staff of about 40
- Provide day-to-day support for ICSID arbitrations

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

TOTAL CASES REGISTERED - BY CALENDAR YEAR



WORKLOAD – HISTORIC AND CURRENT

- 359 cases as of September 20, 2011
- 159 cases were worked on during FY 2011
- 130 cases currently pending

CASE TRENDS IN FY 2011

- 20% increase in arbitrations registered (32)
- 11 post-award proceedings commenced
- 37 cases concluded
- No conciliation cases filed (although numerous arbitrations settled by agreement of parties)

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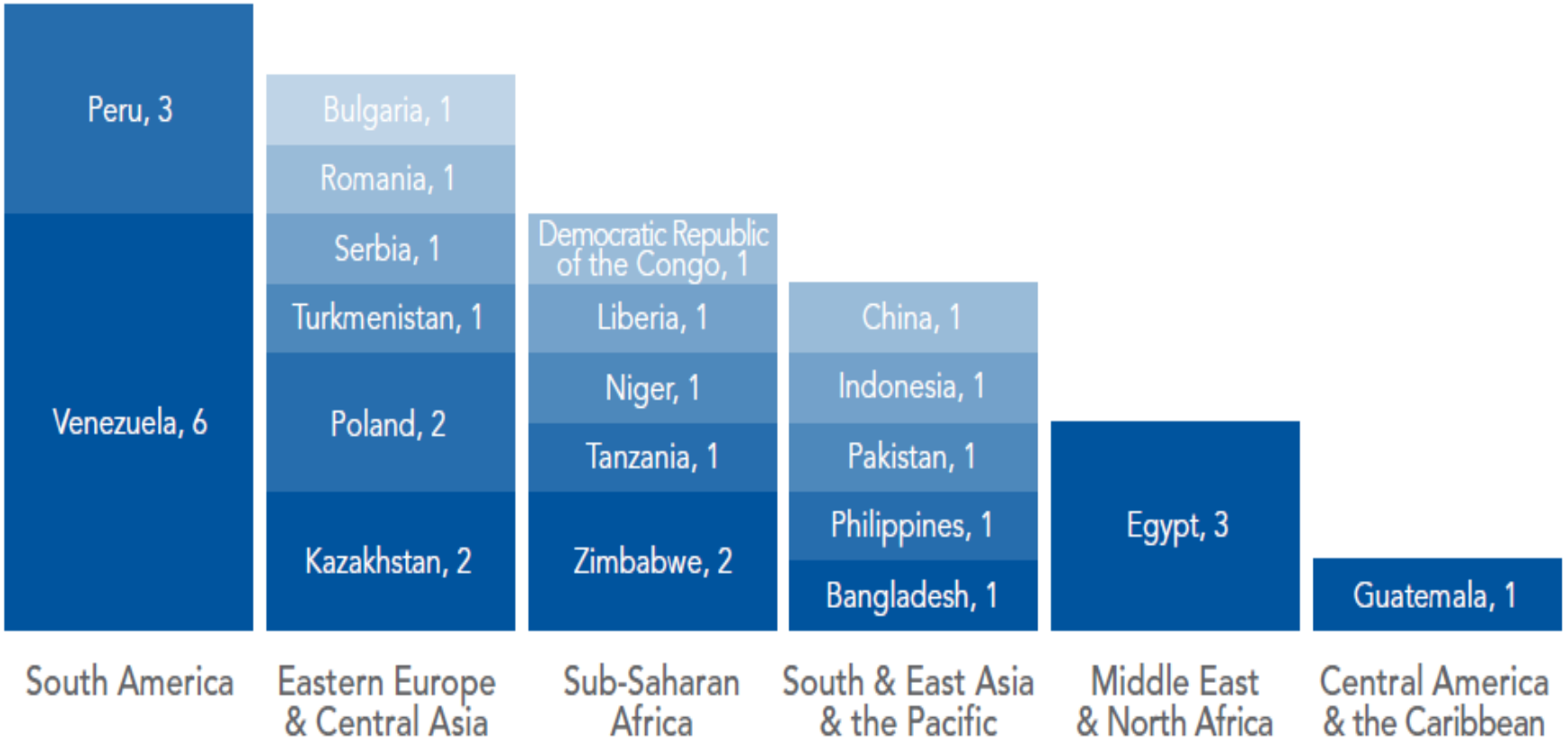
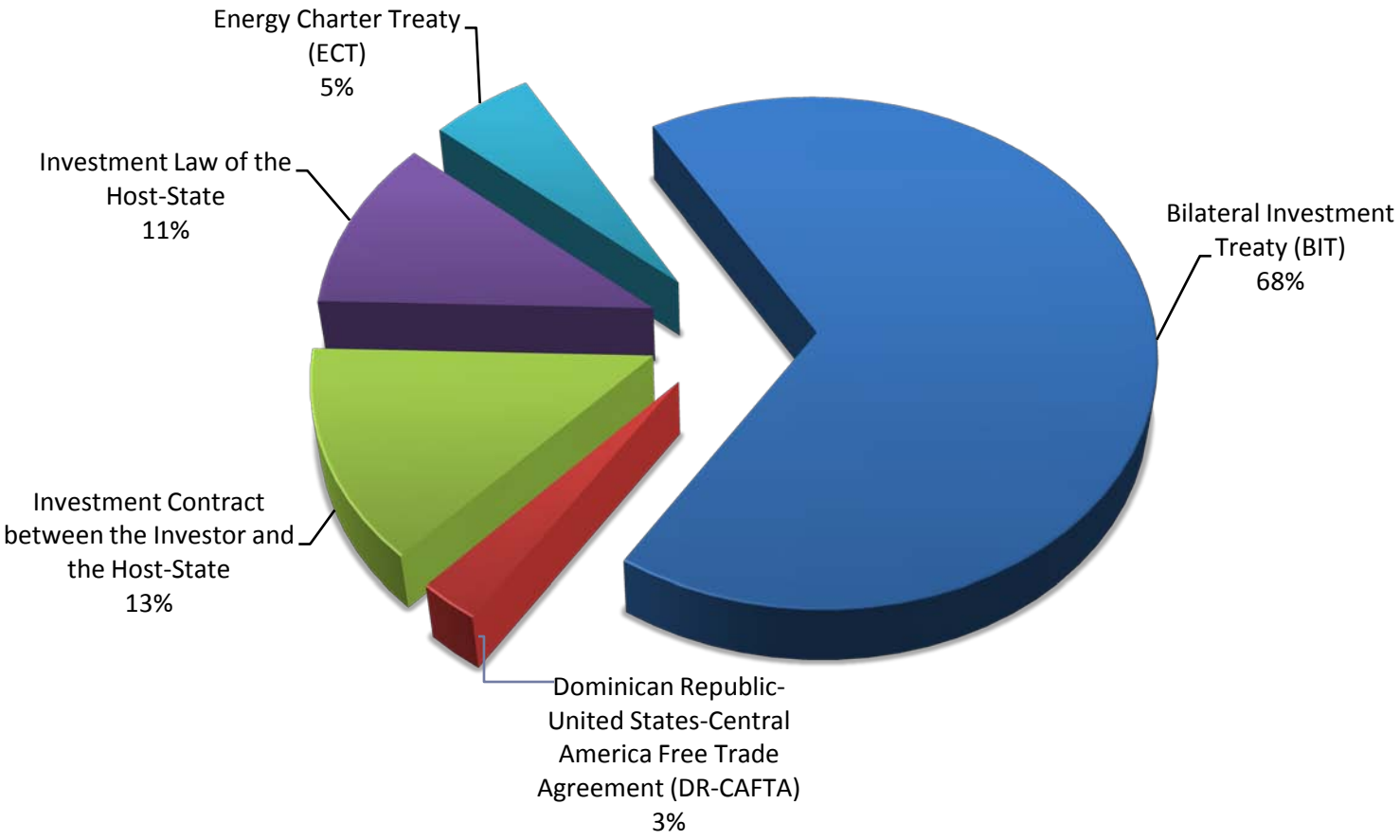
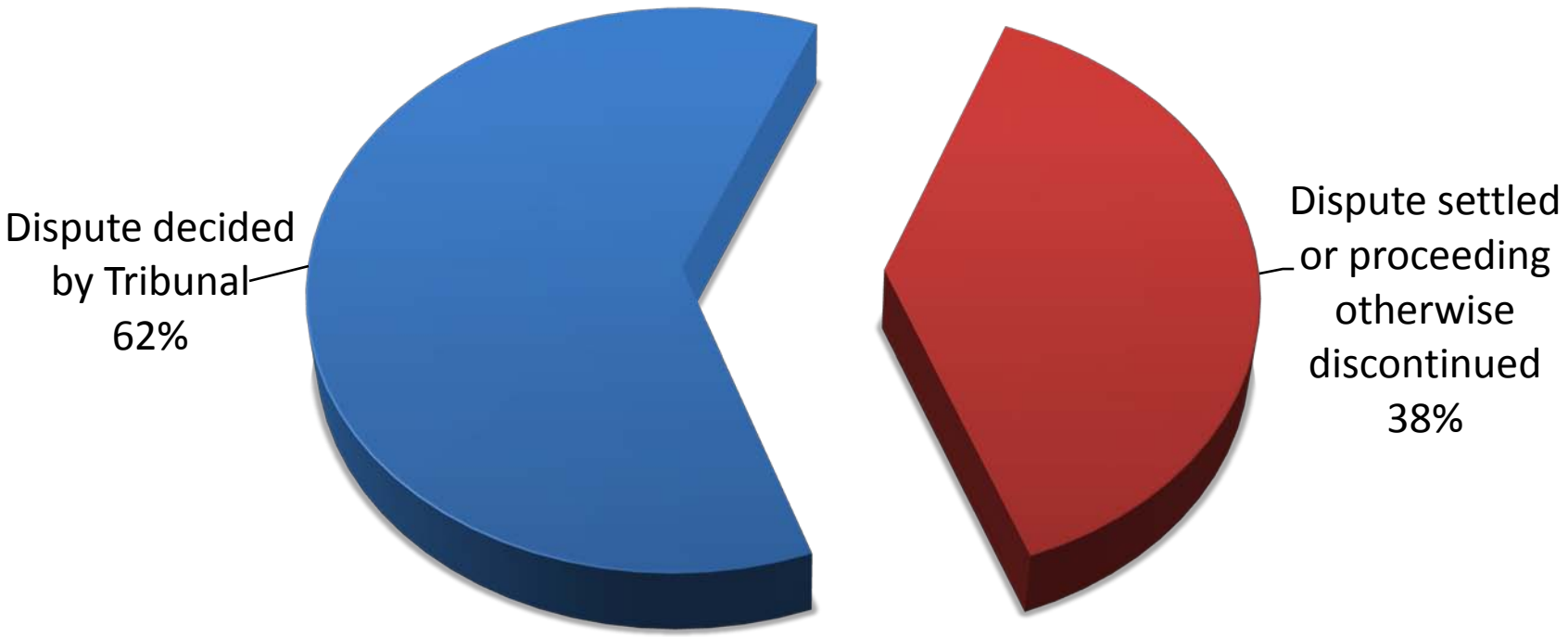
STATE PARTIES IN CASES IN FY 2011



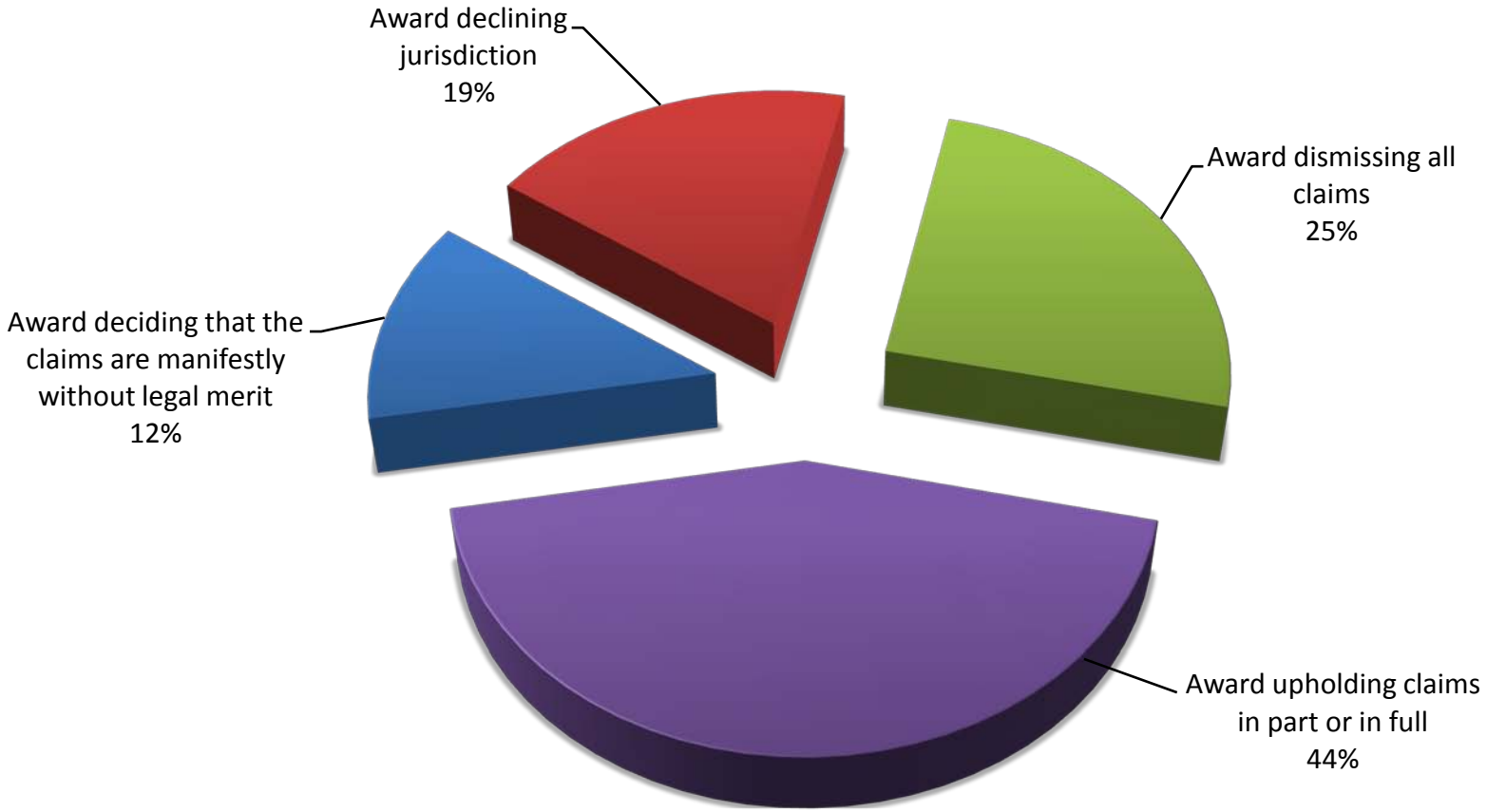
SOURCE OF CONSENT FOR CASES IN FY 2011



ARBITRATION PROCEEDINGS CONCLUDED IN FY 2011



AWARDS IN CONCLUDED ARBITRATIONS – FY 2011



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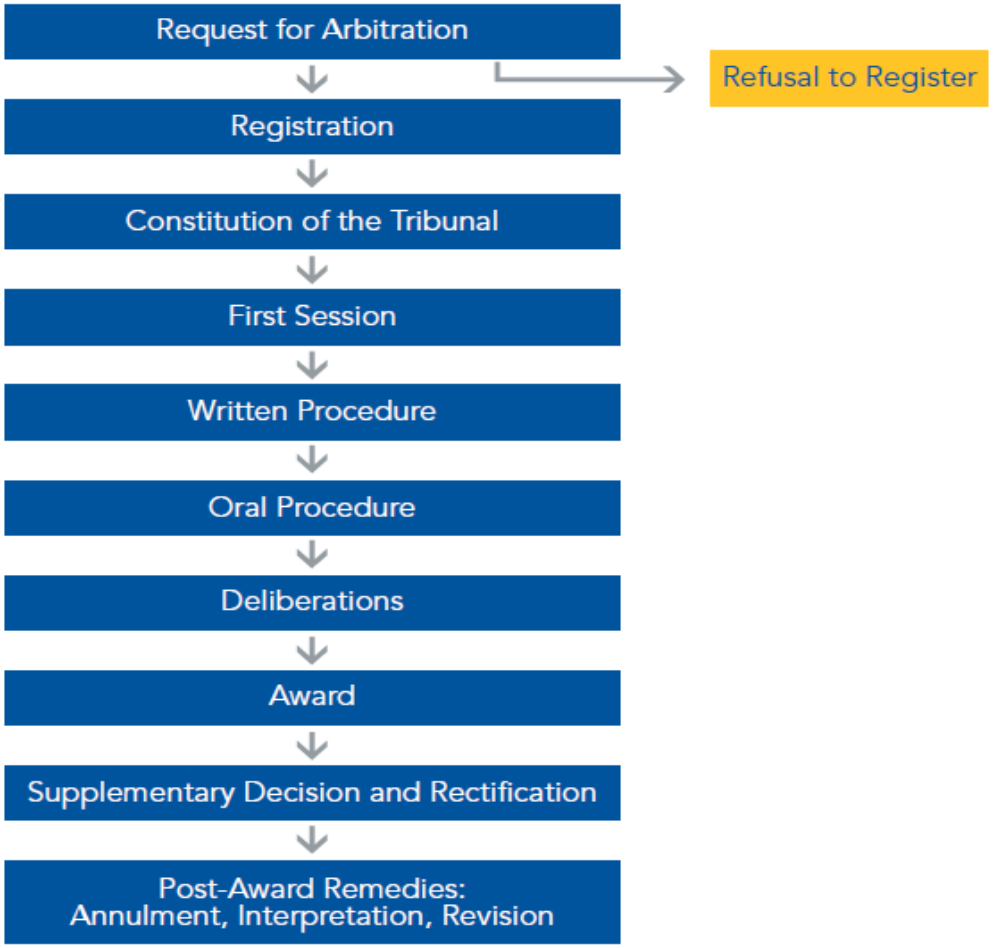
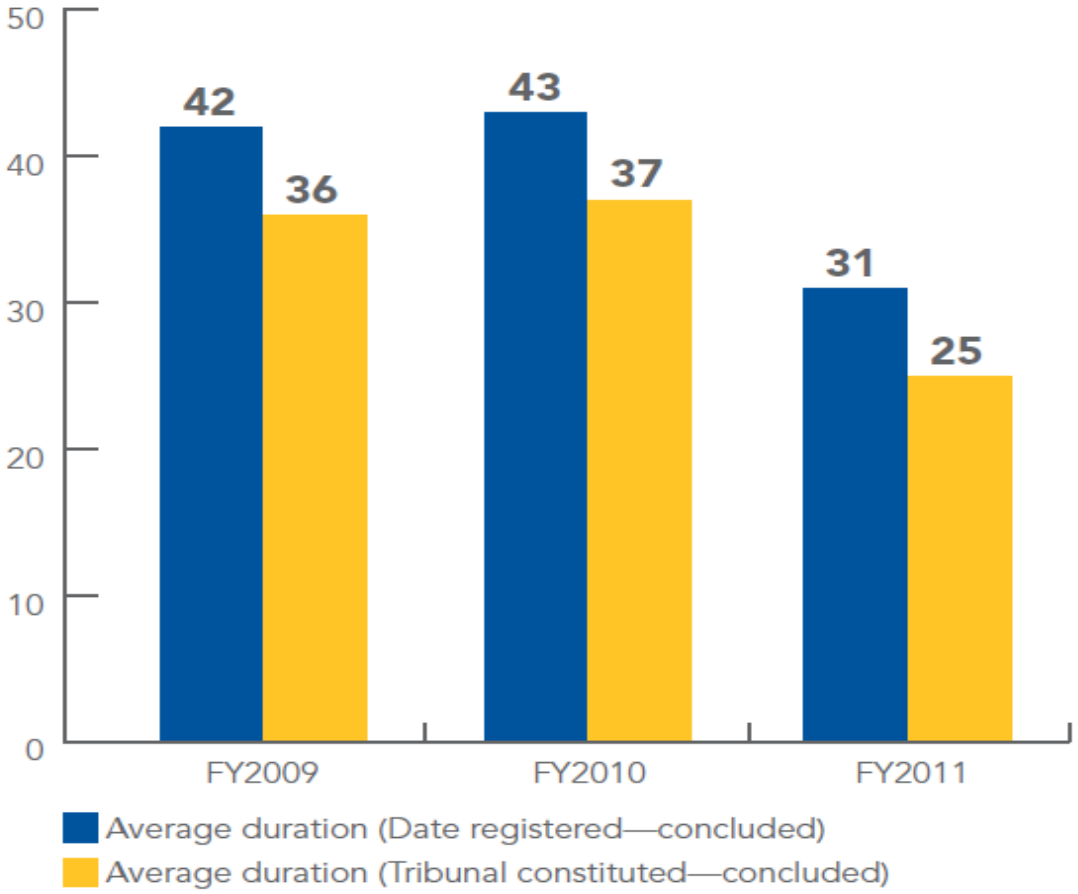
STEPS IN AN ICSID CASE



DURATION OF CASES (MONTHS)



ARBITRATOR PANELS

- Need for additional qualified arbitrators on the ICSID Panels due to the increasing caseload

CONSIDERATIONS FOR PANEL NOMINATIONS

- Public international law, investment law and commercial law expertise
- Expertise in arbitral or similar proceedings
- Need not be nationals

CHAIRMAN'S LIST

- Revised September 15, 2011
- Separate arbitrator and conciliator lists

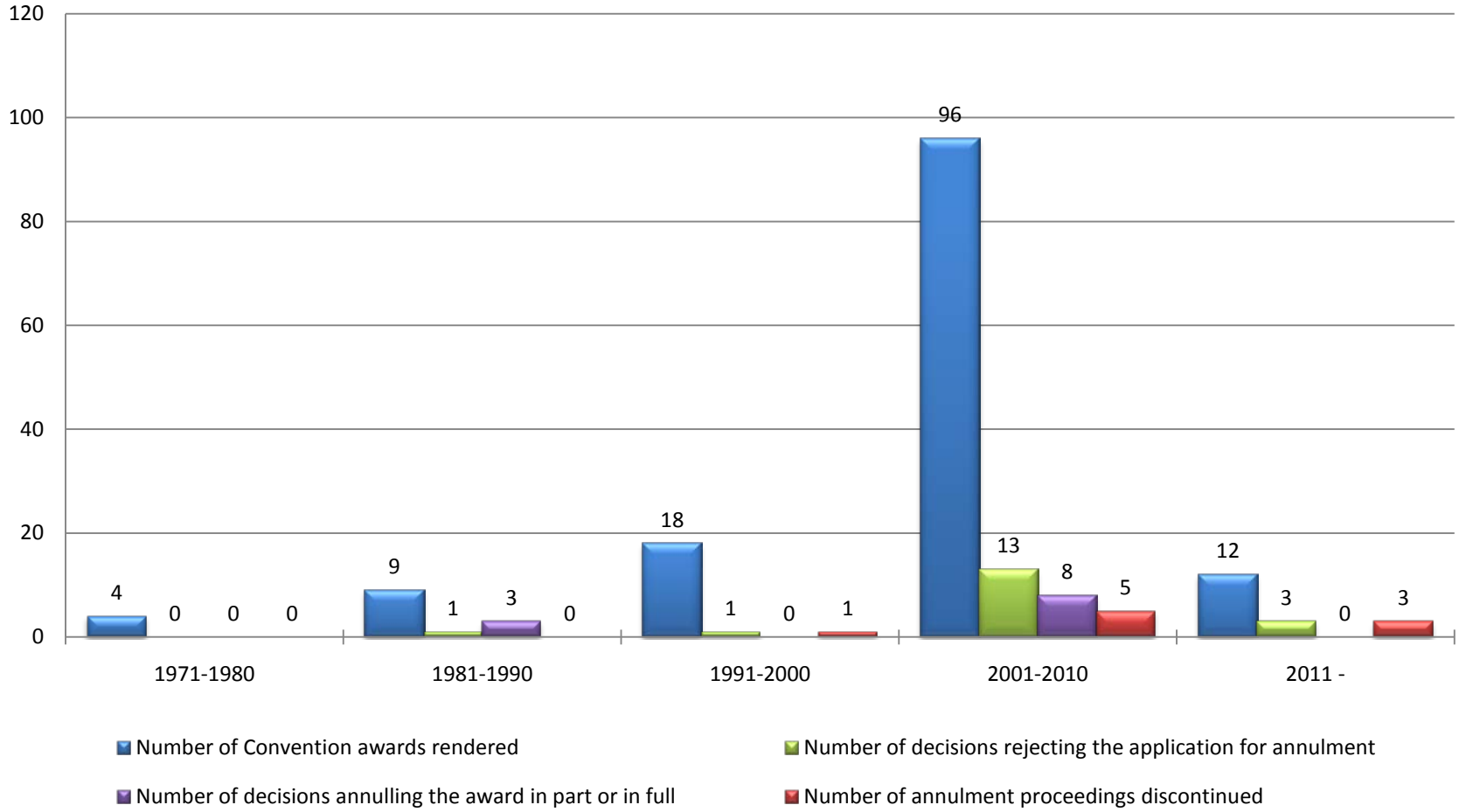
ANNULMENT

- A post-award remedy
- Provided by Article 52 ICSID Convention

ANNULMENT - GROUNDS

- Tribunal was not properly constituted;
- Tribunal manifestly exceeded its powers;
- Corruption on the part of a member of the Tribunal;
- A serious departure from a fundamental rule of procedure; or
- Award failed to state the reasons on which it is based.

ANNULMENT FACTS - BY DECADE



ANNULMENT - OVERALL

EFFECTIVE SEPTEMBER 19, 2011:

- 3% of all cases registered have ultimately resulted in annulment (in full or in part)

- 8% of all awards rendered have been annulled (in full or in part)

ICSID
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

INSTITUTIONAL ACHIEVEMENTS IN FY 2011

- Record number of cases concluded
- Speedier registration of cases & constitution of Tribunals
- New system for prompt refunds
- In-house templates and best practices
- Staffing
- On-going replenishment of open panel designations, including new designations to the Chairman's list
- Transparency project to obtain consent to publish all awards
- Primer course on procedure: "ICSID 101"
- Numerous presentations & publications

DIRECTIONS FOR UPCOMING YEAR

- Priority: increasing efficiency and service to facility users in on-going cases
- Continue improvements in systems
- Review publications program
- Further training, including for arbitrators
- Updating lists of arbitrators and conciliators

Annulment Grounds in Concluded Proceedings

Case (Short Title)	Applicant	Request for Full or Partial Annulment	Ground Invoked: Article 52(1) (a)-(e)*	Ground Invoked: Description	Upheld	Outcome
1. Amco Asia Corporation and others v. Republic of Indonesia* ARB/81/1** ***(Amco I)	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulled in full
			(b)	Failure to apply proper law	Y	
			(d)	Lack of impartiality	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	Not addressed	
			(e)	Contradictory reasons	Y	
2. Amco Asia Corporation and others v. Republic of Indonesia* ARB/81/1-Resubmission** ***(Amco II)	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
			(d)	Lack of impartiality	N	
			(d)	Treatment of evidence	N	
			(e)	Insufficient and/or inadequate reasons	N	
	Claimants	Partial	(b)	Lack or excess of jurisdiction	N	

*In a number of annulment proceedings, the Applicant characterized its arguments as falling within more than one of the grounds for annulment envisaged in Article 52 of the ICSID Convention.

3. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais **ARB/81/2** ***(Klöckner I)***	Claimants	Full	(b)	Lack or excess of jurisdiction	N	Annulled in full
			(b)	Failure to apply proper law	Y	
			(d)	Lack of due process	N	
			(d)	Lack of impartiality	N	
			(d)	Right to be heard	N	
			(d)	Lack of deliberation	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	Y	
4. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais **ARB/81/2 – Resubmission** ***(Klöckner II)***	Respondent	Not specified	(b)	Failure to apply proper law	N	Annulment rejected
			(d)	Lack of impartiality	N	
			(d)	Right to be heard	N	
			(d)	Lack of deliberations	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
	Claimants	Partial	(e)	Failure to state reasons	N	
5. Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt ***ARB/84/3*** ***(SPP)***						Discontinued

6. Maritime International Nominees Establishment v. Republic of Guinea* ARB/84/4** ***(MINE)	Respondent	Partial	(b)	Failure to apply proper law	Not addressed	Annulled in part
			(d)	Right to be heard	Not addressed	
			(e)	Failure to state reasons	Y	
			(e)	Contradictory reasons	Y	
			(e)	Failure to deal with questions	Y	
7. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ARB/97/3** ***(Vivendi I)	Claimants	Partial	(b)	Lack or excess of jurisdiction	N	Annulled in part
			(b)	Non-exercise of jurisdiction	Y	
			(d)	Right to be heard	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	Not addressed	

8. Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* ARB/97/3- Resubmission** ***(Vivendi II)	Respondent	Full	(a)	Improper constitution of the tribunal	N	Annulment rejected
			(b)	Lack or excess of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(d)	Lack of impartiality	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Failure to deal with questions	N	
9. Wena Hotels Limited v. Arab Republic of Egypt* ARB/98/4** ***(Wena)	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
			(d)	Right to be heard	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Failure to deal with questions	N	
10. Philippe Gruslin v. Malaysia* ARB/99/3** ***(Gruslin)						Discontinued
11. Patrick Mitchell v. Democratic Republic of the Congo* ARB/99/7** ***(Mitchell)	Respondent	Full	(b)	Lack or excess of jurisdiction	Y	Annulled in full
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	Y	
			(e)	Contradictory reasons	N	

12. Consortium R.F.C.C. v. Kingdom of Morocco **ARB/00/6** ***(RFCC)***	Claimant	Full	(b)	Non-exercise of jurisdiction	N	Annulment rejected
			(d)	Right to be heard	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
13. Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic **ARB/01/3** ***(Enron)***	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulled in part
			(b)	Failure to apply proper law	Y	
			(d)	Lack of impartiality	N	
			(d)	Right to be heard	N	
			(d)	Treatment of evidence	N	
			(d)	Breach of party autonomy	N	
			(e)	Failure to state reasons	Y	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
14. MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile **ARB/01/7** ***(MTD)***	Respondent	Full	(b)	Failure to apply proper law	N	Annulment rejected
			(d)	Right to be heard	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Contradictory reasons	N	

15. CMS Gas Transmission Company v. Argentine Republic **ARB/01/8** ***(CMS)***	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulled in part
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	Y	
			(e)	Contradictory reasons	N	
16. Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador) **ARB/01/10** ***(Repsol)***	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
17. Azurix Corp. v. Argentine Republic **ARB/01/12** ***(Azurix)***	Respondent	Full	(a)	Improper constitution of the tribunal	N	Annulment rejected
			(b)	Lack or excess of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(d)	Lack of impartiality	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	

18. Hussein Nuaman Soufraki v. United Arab Emirates* ARB/02/7** ***(Soufraki)	Claimant	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Non-exercise of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
19. Siemens A.G. v. Argentine Republic* ARB/02/8** ***(Siemens)						Discontinued
20. CDC Group plc v. Republic of Seychelles* ARB/02/14** ***(CDC)	Respondent	Full	(b)	Failure to apply proper law	N	Annulment rejected
			(d)	Lack of impartiality	N	
			(d)	Lack of deliberation	N	
			(d)	Treatment of evidence	N	
			(d)	Untimely issuance of award	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
21. Ahmonseto, Inc. and others v. Arab Republic of Egypt* ARB/02/15** ***(Ahmonseto)						Discontinued

22. Sempra Energy International v. Argentine Republic* ARB/02/16** ***(Sempra)	Respondent	Full	(a)	Improper constitution of the tribunal	Not addressed	Annulled in full
			(b)	Lack or excess of jurisdiction	N	
			(b)	Failure to apply proper law	Y	
			(d)	Treatment of evidence	Not addressed	
			(e)	Failure to state reasons	N	
23. Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru* ARB/03/4** ***(Lucchetti)	Claimants	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Non-exercise of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(d)	Lack of due process	N	
			(d)	Treatment of evidence	N	
			(e)	Contradictory reasons	N	
24. M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador* ARB/03/6** ***(MCI)	Claimants	Full	(b)	Non-exercise of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	

25. Continental Casualty Company v. Argentine Republic **ARB/03/9** ***(Continental Casualty)***	Respondent	Partial	(b)	Contradictory reasons	N	Annulment rejected
			(e)	Failure to state reasons	N	
	Claimant	Partial	(b)	Failure to apply proper law	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
26. Joy Mining Machinery Limited v. Arab Republic of Egypt **ARB/03/11** ***(Joy Mining)***						Discontinued
27. Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines **ARB/03/25** ***(Fraport)***	Claimant	Full	(b)	Non-exercise of jurisdiction	N	Annulled in full
			(d)	Lack of due process	N	
			(d)	Right to be heard	Y	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	

28. Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru **ARB/03/28** ***(Duke Energy)***	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Non-exercise of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
29. Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic **ARB/04/5** ***(Transgabonais)***	Respondent	Full	(a)	Improper constitution of the tribunal	N	Annulment rejected
			(b)	Lack or excess of jurisdiction	N	
			(b)	Non-exercise of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
30. Sociedad Anónima Eduardo Vieira v. Republic of Chile **ARB/04/7** ***(Vieira)***	Claimant	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Non-exercise of jurisdiction	N	
			(b)	Failure to apply proper law	N	
			(d)	Right to be heard	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
31. Malaysian Historical Salvors, SDN, BHD v. Malaysia **ARB/05/10** **(*MHS*)**	Claimant	Full	(b)	Non-exercise of jurisdiction	Y	Annulled in full

32. RSM Production Corporation v. Grenada **ARB/05/14** ***(RSM v. Grenada)***						Discontinued
33. Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt **ARB/05/15** ***(Siag)***						Discontinued
34. Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan **ARB/05/16** ***(Rumeli)***	Respondent	Full	(b)	Lack or excess of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
35. Ioannis Kardassopoulos v. Georgia **ARB/05/18** ***(Kardassopoulos)***						Discontinued

36. Helnan International Hotels A/S v. Arab Republic of Egypt **ARB/05/19** ***(Helnan)***	Claimant	Full	(b)	Non-exercise of jurisdiction	Y	Annulled in part
			(b)	Failure to apply proper law	N	
			(d)	Right to be heard	N	
			(d)	Treatment of evidence	N	
			(e)	Failure to state reasons	N	
			(e)	Contradictory reasons	N	
37. Togo Electricité and GDF-Suez Energie Services v. Republic of Togo **ARB/06/7** ***(Togo Electricité)***	Respondent	Full	(b)	Failure to apply proper law	N	Annulment rejected
			(d)	Right to be heard	N	
			(e)	Failure to state reasons	N	
38. Nations Energy Inc. and others v. Republic of Panama **ARB/06/19** ***(Nations)***						Discontinued
39. Ron Fuchs v. Georgia **ARB/07/15** ***(Fuchs)***						Discontinued

40. AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary **ARB/07/22** ***(AES)***	Claimants	Full	(b)	Non-exercise of jurisdiction	N	Annulment rejected
			(b)	Failure to apply proper law	N	
			(e)	Failure to state reasons	N	
			(e)	Insufficient and/or inadequate reasons	N	
			(e)	Contradictory reasons	N	
			(e)	Failure to deal with questions	N	
41. Astaldi S.p.A. v. Republic of Honduras **ARB/07/32** ***(Astaldi)***						Discontinued
42. ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan **ARB/08/2** ***(ATA)***						Discontinued

Annex 7

Bibliography on ICSID Annulment

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