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# **RABID REDUX: THE SECOND WAVE OF ABUSIVE ICSID ANNULMENTS**

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\* The authors are lawyers in the International Arbitration Group of White & Case LLP (New York). The authors thank Tuuli Timonen, also a lawyer in the White & Case International Arbitration Group, for her contributions to this article. The title of this article is adapted from J. Updike, RABBIT REDUX (1971). Nothing below is intended to dispute the essential function served by annulments under Article 52 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (“ICSID Convention”). The criticism advanced by the authors is directed not at annulments (or annulment applications) that comport with Article 52, but at annulments that depart from both its language and purpose.

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Had Article 52 of the ICSID Convention<sup>1</sup> been drafted expansively, ICSID parties would know that they face the common prospect of a two-staged process, arbitration followed by *ad hoc* committee review.

Article 52 is, however, drafted restrictively, and its text creates the reasonable expectation of parties to ICSID cases that annulment will be available only for egregious injustices of a procedural nature and not in situations where the *ad hoc* committee disagrees with the substantive decision rendered by the tribunal.<sup>2</sup> ICSID's annulment history has mostly been faithful to the language of Article 52. But there have been periods when annulment has been the norm, or an omnipresent threat.

ICSID's annulment virus first appeared in the *Klöckner v. Republic of Cameroon*<sup>3</sup> decision in 1983, and took a worse form in the *Amco Asia Corp. v. Republic of Indonesia I* annulment in 1985.<sup>4</sup> The virus then lay dormant for some 25 years, re-appearing with the *ad hoc* Committee decisions in *Sempra Energy International v. Argentine Republic*,<sup>5</sup> *Enron Creditors Recovery Corp. v. Argentine*

1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

2. The grounds for ICSID annulment are similar to, but more restrictive than, those set out in the UNCITRAL Model Law for review of arbitral awards, yet, courts have been more deferential than *ad hoc* Committees to arbitral awards. Juan Fernández-Armesto, *Different Systems for the Annulment of Investment Awards*, ICSID REV. – FOREIGN INV. L. J. 128, 145 (2011).

3. *Klöckner Industrie-Anlagen GmbH v. Rep. of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID REP. 95 (1994) [hereinafter *Klöckner*].

4. *Amco Asia Corp. v. the Rep. of Indon.*, ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986), 1 ICSID REP. 509 (1993) [hereinafter *Amco I*].

5. *Sempra Energy Int'l v. Arg. Rep.*, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550En&caseId=C8>

*Republic*,<sup>6</sup> and *Fraport AG Frankfurt Airport Service Worldwide v. Republic of the Philippines*,<sup>7</sup> all decided in 2010.<sup>8</sup> Two decisions from September 2011 (*Continental Casualty Corp. v. Argentine Republic*<sup>9</sup> and *Togo Electricité v. Republic of Togo* (“GDF”)<sup>10</sup>) suggest that the second viral phase may have been short lived.

Following the decisions in *Klöckner* and *Amco I*, the problems caused by excessive annulments were clearly perceived. Those decisions were heavily criticized by both academics and practitioners for their “hair trigger” approach to annulment.<sup>11</sup> Following *Klöckner*, a number of decisions over a period of some 20 years adopted a much more cautious approach to the review of ICSID awards.<sup>12</sup> This

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[hereinafter *Sempra*].

6. *Enron Creditors Recovery Corp. v. Arg. Rep.*, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf> [hereinafter *Enron*].

7. *Fraport AG Frankfurt Airport Serv. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Decision on Annulment (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf> [hereinafter *Fraport I*].

8. *Mitchell v. Dem. Rep. Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006), <http://italaw.com/documents/mitchellannulment.pdf>, could also be seen as overly-exuberant, but there is no indication that this case, whose facts were singular, gave rise to a trend.

9. *Continental Casualty Corp. v. Arg. Rep.*, ICSID Case No. ARB/03/9, Decision on Annulment (Sept. 16, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291\\_En&caseId=C13](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291_En&caseId=C13) [*Continental Casualty Corp.*].

10. *Togo Electricité v. Rep. of Togo*, ICSID Case No. ARB/06/07, ICSID Case No. ARB/06/07, Decision on Annulment (Sept. 6, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2272\\_Fr&caseId=C75](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2272_Fr&caseId=C75) [hereinafter *Togo Electricité*].

11. See, e.g., A.D. Redfern, *ICSID – Losing its Appeal?*, 3 ARB. INT’L 98, 109 (1987) (acknowledging that the *ad hoc* Committee’s decision in *Klöckner*, which held that a Tribunal’s failure to deal with every question before it could lead to annulment, may be applied to annul many other ICSID awards); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 89 DUKE L.J. 739, 762 (1989) [hereinafter Reisman, *Breakdown of the Control Mechanism in ICSID Arbitration*] (defining “hair trigger” as a mechanism of sensitivity where nullification of an award would be automatically instated if a defect, no matter how slight, were established); W. Michael Reisman, *Repairing ICSID’s Control System: Some Comments on Aron Broches’ “Observations on the Finality of ICSID Awards,”* 7 ICSID REV. – FOREIGN INV. L.J. 196, 200 (1992) (arguing that the *ad hoc* Committee misinterpreted Article 52(3) when justifying its conclusion that it must annul an award even without a material violation).

12. See, e.g., *Compañía de Aguas del Aconquia S.A. v. Argentine Republic*,

led many to believe that the annulment virus had been permanently eradicated. For example, in 2005, the *ad hoc* Committee in *CDC Group PLC v. Republic of Seychelles*<sup>13</sup> stated:

[T]here has been an evolution in the ICSID annulment case law and scholarship away from *Klöckner I* and *Amco Asia I* that has culminated, in our view correctly, in *ad hoc* Committees reviewing arbitral proceedings only to the extent of ensuring their fundamental fairness, eschewing any temptation to “second guess” their substantive result.<sup>14</sup>

However, only five years after *CDC* was decided, the lessons of *Klöckner I* and *Amco I* appear to have been sufficiently forgotten to enable the second viral phase of annulment decisions in 2010. In *Enron*, *Sempra* and *Fraport*, the respective *ad hoc* Committees succumbed to the temptation to annul decisions because of a perception that the tribunal had got it wrong.

Even if the second viral phase is assumed to be finished, experience suggests that, once the memory of this second phase has faded, *ad hoc* committees may again find themselves unable to resist the temptation of annulling awards that they consider to have been wrongly decided. Given the availability of alternative fora for the resolution of investment disputes,<sup>15</sup> a further phase of excessive

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ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 65 (July 3, 2002), 6 ICSID REP. 340 (2004) [hereinafter *Vivendi I*] (“[A]nnulment under Article 52(1)(e) should only occur in a clear case. . . . the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and . . . that point must itself be necessary to the tribunal’s decision.”); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 53 (Feb. 5, 2002), 6 ICSID REP. 67 (2004) [hereinafter *Wena Hotels*.] (positing that the Tribunal’s reliance on “[in]appropriate criteria” in evaluating the merits of the case would not have justified annulment); *Mar. Int’l Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Partial Annulment, ¶ 5.07–11 (Dec. 22, 1989), 4 ICSID REP. 79 (1997) [hereinafter *MINE*] (determining that the failure of the Tribunal to deal with every question submitted to it, pursuant to article 48(3) of the Convention, does not necessarily require annulment).

13. *CDC Group PLC v. Rep. of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (June 29, 2005), 11 ICSID REP. 206 (2007) [hereinafter *CDC*].

14. *Id.* ¶ 35.

15. For example, investment disputes can be, and many are, settled by *ad hoc* arbitration under the UNCITRAL Arbitration Rules. See generally UNCITRAL Arbitration Rules, adopted on Apr. 28, 1976, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1976Arbitrationrules.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1976Arbitrationrules.html). An award rendered by such a tribunal is subject only to review by national courts in the supervisory

annulments could result in irreversible damage to ICSID's reputation as the world's pre-eminent forum for the settlement of investment disputes.

In this article, we consider in Section I two preliminary questions: (i) whether the Convention's travaux préparatoires offer a justification for an expansive interpretation of Article 52; and (ii) whether annulments have in fact been problematically frequent during the peak phases of nullification. We then discuss in Section II how *ad hoc* committees have treated the three principal grounds for annulment, and seek to show the similarity between the two rabid phases of annulment.<sup>16</sup> In Section III, we offer concluding observations about the way forward.

## I. TWO PRELIMINARY QUESTIONS

### A. DO THE CONVENTION'S TRAVAUX OFFER ANY JUSTIFICATION FOR AN EXPANSIVE INTERPRETATION OF ARTICLE 52(1)?

The answer to the question is: no.

There was relatively little discussion of Article 52(1) during the negotiation of the ICSID Convention.<sup>17</sup> The final text is in substantially the same form as that proposed in the Preliminary Draft.<sup>18</sup>

The drafting history suggests that annulments were intended to be exceptional events<sup>19</sup> and that the grounds for annulment in Article

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jurisdiction in which, or under the law of which, the award was made. *See* UNCITRAL MODEL LAW ON INT'L COM. ARB. art. 34 (2006). In most cases, the only available grounds for review will be those set out under national law, which often is based on the UNCITRAL Model Law on International Commercial Arbitration. *See id.* (allowing national courts to review and annul awards that are inconsistent with state law).

16. There are, in particular, similarities between the two rabid phases of ICSID's annulment history in relation to the treatment of manifest excess of power under Article 52(1)(b). *See* ICSID Convention, *supra* note 1, art. 52(1)(b).

17. *Cf.* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES [ICSID], 1 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 230–32 (1970) [hereinafter HISTORY OF ICSID VOL. 1] (providing an early draft of the article).

18. *Id.*

19. For example, the Netherlands delegate stated that annulments “should be confined to very rare cases because in the ordinary course of events[,] the award

52(1) were to be more restrictive than the grounds laid down in the New York Convention.<sup>20</sup> The fact that the drafters anticipated a paucity of annulment proceedings is also suggested by the absence of any provision for a permanent body of Article 52 decision-makers<sup>21</sup> and the restrictive eligibility requirements for persons to sit on *ad hoc* committees.<sup>22</sup>

(i) *Manifest Excess of Powers*

The Preliminary Draft of the ICSID Convention provided that an award's validity could be challenged if "the Tribunal has exceeded its powers."<sup>23</sup> This ground was amended to require that a Tribunal must have "manifestly" exceeded its powers.<sup>24</sup> The justification given for this change was that the more restrictive wording would help to avoid the "risk of frustration of awards."<sup>25</sup>

The drafters of the Convention did not debate the meaning of the word "manifestly." Aron Broches, General Counsel of the World Bank and principal architect of the ICSID Convention, stated that:

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should be treated as final." ICSID, 2 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION pt. 2, at 852 (1968) [hereinafter HISTORY OF ICSID VOL. 2, PT. 2]. However, it also appears that the drafters considered and rejected a proposal to include specific language to "clearly indicate that the causes for annulment would be exceptional." *Id.* at 854.

20. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 7, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38, 50 [hereinafter New York Convention]; *see also* ICSID, 2 HISTORY OF THE ICSID CONVENTION: DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION pt. 1, at 423 (1968) [hereinafter HISTORY OF ICSID VOL. 2, PT. 1] ("[I]t 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.").

21. *See generally* William Laurence Craig, *Uses and Abuses of Appeal from Awards*, 4 ARB. INT'L 174 (1988).

22. HISTORY OF ICSID VOL. 2, PT. 2, *supra* note 19, at 854–55 ("Mr. Burrows (United Kingdom) stated that their suggestion was that a further ground of ineligibility for membership of the Reviewing Committee should be possession of the same nationality as any member of the Tribunal which rendered the award. The reason was that these nullity proceedings were only for very extreme cases of serious misconduct . . .").

23. HISTORY OF ICSID VOL. 1, *supra* note 17, at 230.

24. Subsequent proposals to delete the word "manifestly" were defeated by a vote. *See* HISTORY OF ICSID VOL. 2, PT. 2, *supra* note 19, at 851–52.

25. HISTORY OF ICSID VOL. 2, PT. 1, *supra* note 20, at 423.

the expression “manifestly exceeded its powers” concerned the cases referred to earlier as *ultra petita*, namely, where the Tribunal would have gone beyond the scope of agreement of the parties or would have decided points which had not been submitted to it or had been improperly submitted to it. He added that the *ad hoc* Committee would limit itself to cases of manifest excess of those powers.<sup>26</sup>

A particular example of “an excess of power” discussed by the drafters was the failure by the Tribunal to apply the law chosen by the parties. Broches confirmed that “failure to apply the right law would constitute an excess of power if the parties had instructed the Tribunal to apply a particular law.”<sup>27</sup> However, the drafters considered and rejected a proposal to add a ground of annulment for “manifestly incorrect application of the law.”<sup>28</sup>

*(ii) Serious Departure from a Fundamental Rule of Procedure*

The basic formula of Article 52(1)(d) remained unchanged throughout the drafting history of the ICSID Convention and its inclusion was never challenged in principle.<sup>29</sup>

Broches stated that the term fundamental rules of procedure “would comprise, for instance, the so-called principles of natural justice *e.g.*, that both parties must be heard and that there must be adequate opportunity for rebuttal.”<sup>30</sup> The preparatory works thus “make it clear that only procedural principles of special importance would qualify as ‘fundamental rules’” but they “do not give guidance as to the serious nature of a violation.”<sup>31</sup>

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26. HISTORY OF ICSID VOL. 2, PT. 2, *supra* note 19, at 850.

27. *Id.* at 851.

28. *Id.* at 853–54. Broches also stated, in relation to a suggestion to expand the scope of what is now Article 52(1)(d), that “if sub-paragraph (c) were expanded to cover serious errors in the application of substantive law, it would be tantamount to providing for an appeal, a step which had not thus far been contemplated.” HISTORY OF ICSID VOL. 2, PT. 1, *supra* note 20, at 340.

29. CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 888 (2nd ed. 2001).

30. HISTORY OF ICSID VOL. 2, PT. 1, *supra* note 20, at 480. However, the delegates expressly considered and rejected a proposal to “refer specifically to a requirement that both parties must have a fair hearing.” HISTORY OF ICSID VOL. 2, PT. 2, *supra* note 19, at 853.

31. SCHREUER, *supra* note 29, at 970.

(iii) *Failure to State Reasons*

In the Preliminary Draft of the ICSID Convention,<sup>32</sup> the failure to state reasons for an award was included as an example of a serious departure from a fundamental rule of procedure. In subsequent drafts, it was listed as a separate ground. It appears to have been agreed that the requirement to give reasons was intended to include both factual and legal reasoning.<sup>33</sup>

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During periods of excessive annulment, *ad hoc* committees have found ways to justify their unauthorized appellate review. The explanation for this conduct cannot be attributed to either the language or the drafting history of Article 52.<sup>34</sup> Rather, ICSID's annulment history during its rabid phases shows that there is no language that is immune to manipulation, and no textual safeguard against ICSID-appointed international law experts bent on finding, against common sense, a textual justification for what they want to do.

B. HAVE ANNULMENTS DURING THE RABID PHASES  
BEEN THAT FREQUENT?

The answer to the question is: yes.

During the 1970s, there were four ICSID awards and there were no annulment proceedings.<sup>35</sup>

During the 1980s (the first viral phase), four of the nine ICSID awards led to annulment proceedings, and 33% of the total awards rendered were annulled, a shocking frequency.<sup>36</sup>

The 1990s was a calm period: of 18 awards, there were two annulment proceedings; one of these was discontinued and the other

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32. See generally HISTORY OF ICSID VOL. 1, *supra* note 17.

33. HISTORY OF ICSID VOL. 2, PT. 2, *supra* note 19, at 851.

34. See generally Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV. – FOREIGN INV. L. J. 321 (1991) (tracing the drafting of Article 52 from its origins in the International Law Commission's Draft Convention on Arbitral Procedure of 1953).

35. See ICSID, THE ICSID CASELOAD: STATISTICS (ISSUE 2012-1), at 15 (2012) [hereinafter ICSID CASELOAD], available at <http://icsid.worldbank.org/ICSID/Servlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>.

36. See *id.*

resulted in a rejection of the request.<sup>37</sup>

Since 2000, there has been a proliferation of both cases brought before ICSID and annulment proceedings. Of 96 rendered awards between 2001 and 2010, 26 annulment applications were registered.<sup>38</sup> In 2010 alone, there were eight *ad hoc* Committee decisions<sup>39</sup> and four of these annulled the award in whole or in part.<sup>40</sup> Thus, from 2001 to 2010, over one-quarter of the awards rendered by ICSID tribunals led to applications for annulment, and, of these requests, eight resulted in partial or total annulment of the award, another phase of shocking frequency.<sup>41</sup> The activist trend has continued in 2011: six annulment proceedings were registered during the first-half of the year.<sup>42</sup>

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37. *See id.*

38. *See id.*

39. *See, e.g., Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf>; *Sociedad Anónima Eduardo Vieira v. Chile*, ICSID Case No. ARB/04/7; Republic of Chile, ICSID Case No. ARB/04/7, Decision on Annulment (Dec. 10, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1851\\_Sp&caseId=C238](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1851_Sp&caseId=C238) [hereinafter *Sociedad Anónima Eduardo Vieira*]; *Enron*, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf>; *Sempra*, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550\\_En&caseId=C8](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8); *Helnan Int'l Hotels v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment (June 14, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631\\_En&caseId=C64](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631_En&caseId=C64) [hereinafter *Helnan Int'l Hotels*]; *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Annulment (May 11, 2010), 26 ICSID REV. 153 (2011); *Rumeli Telekom v. Republic of Kaz.*, ICSID Case No. ARB/05/16, Decision on Annulment (Mar. 25, 2010), <http://italaw.com/documents/RumeliAnnulment.pdf>; *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002), 6 ICSID REP. 340 (2004).

40. *Fraport I*, ICSID Case No. ARB/03/25, at 111; *Enron*, ICSID Case No. ARB/01/3, at 169; *Sempra*, ICSID Case No. ARB/02/16, ¶ 229; *Helnan Int'l Hotels*, ICSID Case No. ARB/05/19, ¶ 73(1).

41. *See* ICSID CASELOAD, *supra* note 35, at 15; *see also* UNCTAD, LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT 6 (2011), available at <http://www.unctad.org/en/docs/webdiaeia20113en.pdf> (mentioning the four annulments granted by ad hoc committees in 2010).

42. *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Annulment (Feb. 14, 2012); *Astaldi S.p.A. v. Republic of Hond.*, ICSID Case No. ARB/07/32, Decision on Annulment (June 15, 2011); *Commerce Group Corp. v. Republic of El Sal.*, ICSID Case No. ARB/09/17, Decision on Annulment (Mar. 14, 2011),

## II. MISAPPLICATION OF ANNULMENT GROUNDS

Parties requesting annulment usually invoke three of the five Article 52(1) annulment grounds: 52(1)(b), manifest excess of power; 52(1)(d), serious departure from a fundamental rule of procedure; and 52(1)(e), failure to state reasons.<sup>43</sup> In many cases, applicants will raise all three of these grounds in challenging a single provision of an award.<sup>44</sup>

This Section considers these three grounds as applied and misapplied during the two rapid phases of ICSID annulment.

### A. MANIFEST ABUSE OF MANIFEST EXCESS OF POWER AS A GROUND FOR ANNULMENT

Manifest excess of power is the most often-invoked and most controversial ground for annulment. *Every* publicly available decision includes an application for annulment on this ground.<sup>45</sup>

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[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1971\\_En&caseId=C461](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1971_En&caseId=C461); Malicorp Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/08/18, Decision on Annulment (Feb. 7, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1911\\_En&caseId=C461](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1911_En&caseId=C461); Nations Energy, Inc. v. Republic of Pan., ICSID Case No. ARB/06/19 (Nov. 24, 2010); AES Summit Generation Ltd. v. Republic of Hung., ICSID Case No. ARB/07/22, Decision on Annulment (Sept. 23, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1730\\_En&caseId=C114](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1730_En&caseId=C114).

43. Christoph Schreuer, *From ICSID Annulment to Appeal – Half Way Down the Slippery Slope*, 10 L. & PRAC. OF INT'L CTS. & TRIBUNALS 211, 214 (2011) [hereinafter Schreuer, *From ICSID Annulment to Appeal*].

44. Duke Energy Int'l Peru Inv. No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, ¶ 91 (Mar. 1, 2011), [http://italaw.com/documents/DukevPeruFinal\\_1Mar2011\\_Eng.pdf](http://italaw.com/documents/DukevPeruFinal_1Mar2011_Eng.pdf) [hereinafter *Duke Energy*] (noting that the “practice [of simultaneously invoking these three grounds] is entirely permissible within the framework of Article 52(1), which permits a party to request annulment ‘on one or more of the following grounds.’”).

45. See LUCY REED ET AL., GUIDE TO ICSID ARBITRATION, Annex 10, tbl. III(B) (2nd ed. 2011); see also *Sociedad Anónima Eduardo Vieira*, ICSID Case No. ARB/04/7, ¶ 57 (listing manifest excess of power as the first of three arguments for annulment); *Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶ 33 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf> (noting that manifest excess of power was one of the annulment grounds raised by the applicant); *Duke Energy*, ICSID Case No. ARB/03/28, ¶ 124 (explaining that Peru argued that the Tribunal manifestly exceeded its power); *Togo Electricité*, ICSID Case No. ARB/06/07, ¶ 9 (including manifest excess of power as one of two grounds for annulment raised by Togo);

The ICSID Convention departs from the New York Convention and UNCITRAL Model Law, which allow a court to refuse recognition or enforcement of an award when it deals with a difference falling outside the terms of the submission to arbitration or when it contains decisions on matters that exceed the scope of the arbitration application.<sup>46</sup> This ground is effectively identical to Article 52(1)(b)'s excess of powers, except that it does not require that the excess be "manifest." The mis-adventures of *ad hoc* committees arise from their mis-application of the word "manifest."

The problem is not what *ad hoc* committees recite that they should do in applying the term "manifest." All *ad hoc* committees are mindful to emphasize that the excess must be "manifest." Some have applied the professed standard faithfully; others have just recited what they should do and then ignored the common sense meaning of "manifest."

The interpretation of "manifest" is subject to some legitimate debate only insofar as there is a question whether the word "manifest" relates to the ease by which the excess is perceived and/or the gravity of the excess. In *Wena Hotels*, the *ad hoc* Committee observed that "the excess of power must be *self-evident* rather than the product of elaborate interpretations one way or the other," concluding that "[w]hen the latter happens the excess of power is no longer manifest."<sup>47</sup> Other committees have perceived the requirement

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*Continental Casualty Corp.*, ICSID Case No. ARB/03/9, Decision on Annulment, ¶ 78 (Sept. 16, 2011), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291En&caseId=C13> (noting Argentina's request for annulment based on manifest excess of powers and failure to state reasons).

46. New York Convention, *supra* note 20, art. V(1)(c) ("Recognition and enforcement of the award may be refused . . . [if] [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . ."); UNCITRAL MODEL LAW ON INT'L COM. ARB., *supra* note 15, art. 34(2)(iii) ("An Arbitral award may be set aside by the court . . . only if . . . the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration . . .").

47. *Wena Hotels.*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 25 (Feb. 5, 2002), 6 ICSID REP. 67 (2004); *see also* Repsol YPF Ecuador v. Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/01/10, Decision on Annulment, ¶ 36 (Jan. 8, 2007), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC617En&caseId=C203>

of “manifest excess” to relate to the *extent* and *seriousness* of the excess rather than its clarity.<sup>48</sup> The *ad hoc* Committee in *Soufraki* aptly reconciled these views:

[T]he Committee believes that a strict opposition between two different meanings of “manifest” – either “obvious” or “serious” – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.<sup>49</sup>

*Ad hoc* committees are therefore aware that decisions of Tribunals should be annulled only where a serious error has been committed and where such error is obvious. However, history shows that certain *ad hoc* committees have been unable to resist the temptation of re-trying cases. The path to error was paved by the *Amco I ad hoc* Committee.

(i) *Amco I*

The *Amco I ad hoc* Committee began by emphasizing that it did not intend to analyze whether the Tribunal erred in evaluating pertinent law or facts:

Such scrutiny is properly the task of a court of appeals, which the *ad hoc* committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal.<sup>50</sup>

However, when the *ad hoc* Committee came to consider the

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(finding that the excess must be “obvious by itself” and ascertainable “simply by reading the Award, that is even prior to a detailed examination of its contents. . . .”); *CDC*, ICSID Case No. ARB/02/14, Decision on Annulment, ¶ 41 (June 29, 2005), 11 ICSID REP. 206 (2007) (“[T]he excess must be plain on its face for annulment to be an available remedy. Any excess apparent in a Tribunal’s conduct, if susceptible of argument ‘one way or the other,’ is not manifest.”).

48. See *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 115 (July 3, 2002), 6 ICSID REP. 340 (2004) (declaring the excess of power “manifest” because of “the clear and serious implications of [the Tribunal’s] decision.”).

49. *Soufraki v. U.A.E.*, ICSID Case No. ARB/02/7, Decision on Annulment, ¶40 (June 5, 2007), <http://italaw.com/documents/SoufrakiAnnulment.pdf>.

50. *Amco I*, ICSID Case No. ARB/81/1, Decision on Annulment, ¶ 23 (May 16, 1986), 1 ICSID REP. 509 (1993).

substantive challenges made by Indonesia, it proceeded to do precisely what it had foresworn. It scrutinized the manner in which the Tribunal had assessed factual evidence and arrived at conclusions.

The Tribunal had held that Amco had invested approximately \$2.5 million in Indonesia in accordance with Indonesia's investment law.<sup>51</sup> The *ad hoc* Committee performed a detailed analysis of how the Tribunal had calculated this figure and determined that it was incorrect.<sup>52</sup>

The *ad hoc* Committee stated:

[I]t was firmly established, in the view of the *ad hoc* Committee, firstly that according to relevant provisions of Indonesian law, only investments recognized and definitely registered as such by the competent Indonesian authority (Bank Indonesia) are investments within the meaning of the Foreign Investment Law (Law No.1/1967). . . .

It was also clearly established at the Vienna hearings that PT Amco failed to obtain definitive registration with Bank Indonesia of all the amounts claimed to have been invested by it in the hotel project.<sup>53</sup>

The Committee then concluded that the Tribunal had failed "to seize the critical importance of PT Amco's duty to register its claimed inward investment" and that "[t]he evidence before the Tribunal showed that as late as 1977, Amco's investment of foreign capital duly and definitely registered with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US\$ 983,992."<sup>54</sup>

Absent from the *ad hoc* Committee's observations was any finding that the Tribunal had failed to apply, or not sought to apply, Indonesian law. It was undeniable that the Tribunal had applied Indonesian law, and had quoted Article 1 of the Foreign Investment Law in its award.<sup>55</sup> The *ad hoc* Committee nonetheless ruled that, in

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51. *See id.* ¶ 4.

52. *Id.* ¶¶ 90–98.

53. *Id.* ¶¶ 93–94.

54. *Id.* ¶¶ 95–96.

55. Amco Asia Corp. v. Republic of Indon., ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 96 (Nov. 20, 1984), 1 ICSID REP. 413 (1993) [hereinafter *Amco I Award*].

view of the Tribunal's failure to "to seize the critical importance of PT Amco's duty to register its claimed inward investment," the Tribunal had "clearly failed to apply the relevant provisions of Indonesian law" and thus had "manifestly exceeded its powers."<sup>56</sup>

The *ad hoc* Committee's conclusion was thus that the Tribunal had, in trying to apply Indonesian law, failed to understand it correctly, or at least not in the manner that the *ad hoc* Committee considered correct. It is not obvious that a failure correctly to apply individual provisions of the applicable law amounts to an "excess of powers" at all,<sup>57</sup> but even assuming that this was somehow an excess of powers, the *ad hoc* Committee made no attempt to explain, and surely could not have explained, why any such excess of powers should be considered "manifest."<sup>58</sup>

No subsequent *ad hoc* committee would have the imprudence to cite the *Amco I ad hoc* Committee as a model for the application of

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56. *Amco I*, ICSID Case No. ARB/81/1, ¶¶ 95–96. The *ad hoc* Committee also criticized the fact that the Tribunal had apparently included a loan in its calculations and concluded that this was evidence of a failure "to apply Article 2 of the Foreign Investment Law." *Id.* ¶ 97. A review of the Tribunal's award shows that it had in fact cited Article 2 of the Foreign Investment Law in two paragraphs of the decision. *See Amco I Award*, ICSID Case No. ARB/81/1, ¶¶ 228, 234. As Schreuer puts it, "To speak of a non-application that is distinguishable from an erroneous application in this context is not meaningful. The *ad hoc* Committee simply came to a different interpretation and described what it perceived as an erroneous application as a non-application." SCHREUER, *supra* note 29, at 950.

57. *See* SCHREUER, *supra* note 29, at 964 (distinguishing between failing to apply the law and an erroneous application of law, the former being an excess of power, while the latter is not, and noting that the question of whether failure to apply certain rules of international law amounts to excess of power is not yet resolved).

58. Another transgression by the *ad hoc* Committee in *Amco I* has received no attention, though it was even less justifiable than its conclusion that the Tribunal had manifestly exceeded its power by not applying Indonesian law correctly. The *Amco I* Tribunal held that the cancellation of the investor's investment license was unlawful due to due process violations regardless of the calculation of the amount invested by Amco. The Tribunal took pains to state explicitly that its due process holding was alternative to, and independent of, its holding on the amount invested. *See Amco I Award*, ICSID Case No. ARB/81/1, ¶ 201. Faced with this seemingly insuperable obstacle to resting annulment solely on its conclusion about the amount invested, the *ad hoc* Committee chose to read the Tribunal's award as not really meaning what it said about the due process ground being an alternative and an independent basis for finding that Indonesia had acted wrongfully. *See Amco I*, ICSID Case No. ARB/81/1, ¶¶ 81–83. It is difficult to see in this anything other than an *animus* to annul.

Article 52(1)(b). Yet, *Amco I's* unjustifiable application of Article 52(1)(b) was effectively resurrected 25 years later by the *ad hoc* Committees in *Sempra* and *Enron*.<sup>59</sup>

(ii) *Sempra*

In *Sempra*, the Tribunal had given in-depth consideration to Argentina's contentions that its actions were justified by Article XI of the US-Argentina BIT<sup>60</sup> (concerning measures necessary to deal with emergencies) and/or the customary international law defense of necessity (as set out in Article 25 of the International Law Commission Articles on State Responsibility<sup>61</sup>). The Tribunal analyzed the BIT, noting that "the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity"<sup>62</sup> and stating that "the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned."<sup>63</sup>

The Tribunal then spent ten paragraphs discussing expert evidence on whether Article XI of the BIT was self-judging, before concluding:

In the light of this discussion, the Tribunal concludes that Article XI is not self-judging and that judicial review is not limited in its respect to an examination of whether its invocation, or the measures adopted, were

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59. Also noteworthy from the new generation of annulment decisions are *Malaysian Historical Salvors v. Fed'n of Malay.*, ICSID Case No. ARB/05/10, Decision on Annulment (Apr. 16, 2009), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030\\_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247), and *Helnan Int'l Hotels*, ICSID Case No. ARB/05/19, Decision on Annulment (June 14, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631\\_En&caseId=C64](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631_En&caseId=C64). In both of these decisions, the *ad hoc* Committees disagreed with the tribunals' holding on jurisdiction and adopted an arguably expansive view of Article 52(1)(b) to annul or partially annul the awards. See Antonio Crivellaro, *Annulment of ICSID Awards: Back to the "First Generation"?*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 160–64 (Laurent Levy & Yves Derains eds., 2011).

60. Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992).

61. *Draft Articles on Responsibility of States for Intentionally Wrongful Acts, with commentaries*, 2001 Y.B. INT'L L. COMM'N, 80, art. 25. The International Law Commission is commonly referred to as the "ILC."

62. *Sempra Energy Int'l v. Arg. Rep.*, ICSID Case No. ARB/02/16, Award, ¶ 378 (Sept. 28, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet>.

63. *Id.* ¶ 376.

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taken in good faith. The judicial control must be a substantive one, and concerned with whether the requirements under customary law or the Treaty have been met and can thereby preclude wrongfulness. *Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.*<sup>64</sup>

The *ad hoc* Committee noted that “[a]s a general rule, a treaty will take precedence over customary international law”<sup>65</sup> and explained why it considered there to be differences between Article XI and the customary international law standard (and thus why it considered the Tribunal to be wrong when it equated the Treaty standard with customary international law). The Committee then seized upon the above highlighted passage as evidence that:

The Tribunal has held, in effect, that the substantive criteria of Article XI simply cannot find application where rules of customary international law – as enunciated in the ILC Articles – do not lead to exoneration in case of wrongfulness, and that Article 25 “trumps” Article XI in providing the mandatory legal norm to be applied. Thus, the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied, rather than Article XI of the BIT, and in so doing made a fundamental error in identifying and applying the applicable law.<sup>66</sup>

Despite the Tribunal having analyzed both Article XI and customary international law in a sub-section of the Award comprising 28 paragraphs and entitled “[t]he plea of necessity under Article XI of the Treaty,” the Tribunal’s “error”—in holding that the legal obligations under Article XI and customary international law were identical—was characterized by the *ad hoc* Committee as a failure to apply the applicable law rather than an error in the application of such law.<sup>67</sup>

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64. *Id.* ¶ 388 (emphasis added).

65. *Sempra*, ICSID Case No. ARB/02/16, Decision on Annulment, ¶ 176 (June 29, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550\\_En&caseId=C8](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1550_En&caseId=C8).

66. *Id.* ¶ 208.

67. *Id.* Although it appears that the *Sempra ad hoc* Committee would have been prepared to do away with the distinction entirely in appropriate circumstances, “[a]s a general proposition, this Committee would not wish totally

The *ad hoc* Committee then moved on to the question of whether the Tribunal's error was "manifest." The *ad hoc* Committee simply asserted that its conclusion regarding the Tribunal's supposed failure to apply the BIT was "obvious from a simple reading of the reasons of the Tribunal."<sup>68</sup>

Thus, the *Sempra ad hoc* Committee effectively: (i) disagreed with the Tribunal that the legal effect of Article XI of the BIT was the same as the test of necessity under customary international law; (ii) characterized that disagreement as a failure by the Tribunal to apply the BIT rather than an incorrect application of the BIT; and (iii) characterized that same error (or, rather, disagreement between the *ad hoc* Committee and the Tribunal) as a manifest excess of powers by the Tribunal.<sup>69</sup> In short, the *Sempra* Committee's approach was identical to that of the *Amco I* Committee: paying no more than lip service to the requirement that an excess of power be manifest.

(iii) *Enron*

In *Enron*, the *ad hoc* Committee went even further in eroding the distinction between failure to apply the applicable law (which amounts to an excess of power) and improper application of such law (which does not).<sup>70</sup>

The issue again was the Tribunal's treatment of the necessity defense.<sup>71</sup> In *Enron*, the *ad hoc* Committee agreed with the Tribunal that Article 25 of the ILC Articles states the relevant test for the defense of necessity under customary international law, *i.e.*, that it can be successfully invoked only if the act in question is "*the only way* for the State to safeguard an essential interest against a grave

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to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers." *Id.* ¶ 164.

68. *Id.* ¶ 218.

69. *See id.* ¶¶ 218–19, 229 (finding a manifest excess of power and annulling the Award based on the Tribunal's failure to apply BIT Article XI as the Committee deemed appropriate).

70. *See Enron*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 219 (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf>.

71. Interestingly, the *Enron* Committee did not find that the Tribunal had committed any annulable error by equating Article XI of the US-Argentina BIT with the customary international law standard of necessity in Article 25 of the ILC Articles. *Id.* ¶ 403.

and imminent peril.”<sup>72</sup>

However, the *ad hoc* Committee stated that the Tribunal had unquestioningly accepted the evidence of the Claimant’s expert (Professor Sebastián Edwards) that Argentina had not satisfied the “only way” requirement:

The Committee considers it sufficiently implicit that the Tribunal’s reasoning was that the Claimants (via the Edwards Report) had identified alternative ways in which Argentina could have sought to address the economic crisis, that the Tribunal was not satisfied that none of these alternatives would have been available to Argentina, and that the Tribunal was therefore not satisfied that the “*only way*” requirement in Article 25(1)(a) of the ILC Articles was satisfied . . . .

[A] reading of the cursory reasoning of paragraphs 300 and 308-309 of the Award clearly suggests that the Tribunal accepted the expert evidence of Professor Edwards over the conflicting expert evidence of Professor Nouriel Roubini, to the effect that Argentina had other options available to it for dealing with the economic crisis. From this, without any further analysis, the Tribunal immediately concluded, that the measures adopted by Argentina were not the “only way.”<sup>73</sup>

The *ad hoc* “Committee [found] that this reasoning of the Tribunal does not address a number of issues that are essential to the question of whether the ‘*only way*’ requirement was met”<sup>74</sup> and therefore concluded that the Tribunal:

did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances the Committee finds that this amounts to a failure to apply the applicable law, as ground of annulment under Article 52(1)(b) of the ICSID Convention.<sup>75</sup>

As Professor Schreuer has said:

This reasoning of the *ad hoc* Committee is truly baffling. The Tribunal had correctly identified the governing law. It had also correctly identified the relevant rule and had applied it. But the *ad hoc* Committee found an

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72. *Id.* ¶ 349 (emphasis added).

73. *Id.* ¶¶ 367, 376.

74. *Id.* ¶ 368.

75. *Id.* ¶ 377.

excess of powers because it disagreed with the way the Tribunal had interpreted that rule. More specifically, the *ad hoc* Committee found that the “process of reasoning” applied by the Tribunal was defective and that this constituted an excess of powers.<sup>76</sup>

Although the introductory section of the *Enron* decision contains the disclaimer that “the *ad hoc* committee will annul the decision only where the tribunal has *manifestly* exceeded its power,”<sup>77</sup> the 41 paragraphs of the Decision culminating in annulment of the Tribunal’s findings with respect to the necessity defense contain not a single reference to the requirement that the Tribunal’s excess of power be “manifest.”<sup>78</sup>

In each of *Amco I*, *Sempra* and *Enron*, despite protestations to the contrary, the *ad hoc* Committees effectively ignored the requirement that an excess of power must be “manifest” and exercised an appellate jurisdiction based on perceived errors of law or reasoning.

The recent decisions in *GDF*<sup>79</sup> and *Continental Casualty*<sup>80</sup> suggest a recognition that the *Sempra* and *Enron* Committees went too far towards allowing annulment for “error of law.” The *ad hoc* Committee in *Continental Casualty*<sup>81</sup> stated:

The Committee considers that erroneous application of principles of treaty interpretation is also in itself an error of law, rather than a manifest excess of powers, at least where the error relates to the substantive issue before the Tribunal for decision, rather than to an issue of the Tribunal’s jurisdiction.

In the Committee’s view, it will amount to a non-application of the applicable law for a tribunal to apply, for instance, the law of State X to

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76. Schreuer, *From ICSID Annulment to Appeal*, *supra* note 43, at 220.

77. *Enron*, ICSID Case No. ARB/01/3, ¶ 69.

78. *See id.* ¶¶ 355–95.

79. *Togo Electricité*, ICSID Case No. ARB/06/07, Decision on Annulment (Sept. 6, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2272\\_Fr&caseId=C75](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2272_Fr&caseId=C75).

80. *Continental Casualty Corp.*, ICSID Case No. ARB/03/9, Decision on Annulment (Sept. 16, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291\\_En&caseId=C13](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291_En&caseId=C13).

81. The *ad hoc* Committees in both *Enron* and *Continental Casualty* were presided over by Dr. Gavan Griffith QC. *Enron*; *Continental Casualty Corp.* It is notable that both *ad hoc* Committees retained the services of Dr. Christopher Staker (in each case with the consent of the parties) to act as expert assistant to the *ad hoc* Committee. *Id.*

determine a dispute when the applicable law is in fact the law of State Y or public international law. However, if the applicable law is the law of State X, and if the tribunal in fact applies the law of State X, it is not the role of an annulment committee to determine for itself whether the tribunal correctly identified all of the provisions of the law of State X that were relevant to the case before it, or whether the tribunal gave adequate consideration to each of those specific provisions and to the relationship between them, since this would be to venture into an enquiry into whether the tribunal applied the law correctly. Questions as to the relevance of particular provisions of the applicable law, and of their legal effect and interaction with other provisions of the applicable law, go to the substantive legal merits of the case and are within the power of a tribunal to decide. A tribunal's decision on such questions cannot amount to a manifest excess of power.<sup>82</sup>

*Continental Casualty* was another case where the validity of Argentina's "necessity" defense under Article XI of the US-Argentina BIT was at issue. In this case, the Tribunal had found the majority of Argentina's actions to be justified by Article XI and had thus found no breaches of the BIT.<sup>83</sup> The *ad hoc* Committee analyzed Continental's pleaded grounds for annulment in relation to Article XI at some length, but concluded that "[e]ven if it could be established by Continental that the Tribunal reached an erroneous interpretation of Article XI of the BIT . . . , that would amount only to an error of law, which is not a ground of annulment."<sup>84</sup>

#### B. MISAPPLICATION OF SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE AS A GROUND FOR ANNULMENT

This ground of annulment has been much less abused than "manifest excess of powers." Although it is almost invariably invoked by applicants, it has very rarely been accepted by *ad hoc* committees.<sup>85</sup> That said, certain worrying signs have emerged from

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82. *Continental Casualty Corp.* ¶¶ 90–91. *But see id.* ¶ 142 (declining expressly to decide whether "a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of power").

83. *But cf. id.* ¶¶ 63, 67 (noting that the Tribunal found a measure entered into in December 2004 (Decree 1735/04) was not justified by Article XI and thus breached the fair and equitable treatment standard).

84. *Id.* ¶ 133.

85. Article 52(1)(d) has been successfully invoked twice. *See Amco Asia Corp.*

recent case law.

The drafters of the ICSID Convention raised the bar high. First, the rule in question must be so essential that it can be qualified as a *fundamental* rule of procedure.<sup>86</sup> Second, the tribunal must have committed such a grave violation of a procedural rule that it constitutes a *serious* departure from that rule.<sup>87</sup>

The question of what amounts to a “fundamental rule of procedure” has been addressed by several *ad hoc* committees.<sup>88</sup> The accepted standard equates to what can be termed rules of “due process” or “natural justice” in the domestic law setting. Article 18 of the UNCITRAL Model Law, which provides that “the parties shall be treated with equality and each party shall be given full opportunity of presenting his case,” has been cited as an example of such a rule.<sup>89</sup>

In *Wena Hotels*, the *ad hoc* Committee stated:

[Article 52(1)(d)] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to state its claim or its defense and to produce all arguments and evidence in support of it. This fundamental right has to be ensured at an equal level, in a way that allows each party to respond adequately to the arguments and

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v. Rep. of Indon., ICSID Case No. ARB/81/1, Decision on Annulment (Dec. 3, 1992), 9 ICSID REP. 9, 55–57 (2006) [hereinafter *Amco II*] (annulling the Second Tribunal’s Decision on Rectification on the basis that it had been rendered on the request of one party without giving the other party the opportunity to file its observation); *Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶¶ 218, 244–47 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf> (annulling the award for a serious departure from the fundamental rule of procedure entitling the parties to be heard).

86. See *MINE*, ICSID Case No. ARB/84/4, Decision on Partial Annulment, ¶ 4.06 (Dec. 22, 1989), 4 ICSID REP. 79 (1997) (noting that the alleged erroneous action must also be a serious departure from the fundamental rules of procedure).

87. *Id.* *Ad hoc* Committees have been mindful to remind the parties that both of these requirements have to be met. See, e.g., *CDC*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 48 (June 29, 2005), 11 ICSID REP. 206 (2007); *Wena Hotels*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 56 (Feb. 5, 2002), 6 ICSID REP. 67 (2004); *MINE*, ICSID Case No. ARB/84/4, ¶ 4.06.

88. See, e.g., *MINE*, ICSID Case No. ARB/84/4, ¶ 5.06 (discussing the interpretation to be afforded the term “fundamental” and listing equality of parties and the opportunity to present a case as examples of fundamental rules).

89. *Id.*

evidence presented by the other.<sup>90</sup>

The *Wena Hotels ad hoc* Committee also addressed the question of what amounts to a “serious departure” by endorsing the formula in *MINE* that a departure is serious where it is “substantial and [is] such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>91</sup>

However, two recent decisions show that there remains a danger of this ground of annulment being interpreted more broadly.

(i) *Enron*

In *Enron*, the *ad hoc* Committee raised *sua sponte* the possibility that the Tribunal had violated a supposed fundamental rule of “party autonomy.” The Parties had agreed that “no further evidence would be submitted after conclusion of the written pleadings except in ‘extraordinary circumstances.’”<sup>92</sup> Subsequently, the claimants submitted and the Tribunal accepted evidence without advertent to any extraordinary circumstances.<sup>93</sup>

The *ad hoc* Committee accepted that a breach of the parties’ agreement on procedure would amount to a breach of the principle of “party autonomy” and stated that it had no doubt that “the principle of party autonomy is a fundamental rule of procedure.”<sup>94</sup>

As Schreuer has noted, there is a danger to elevating the concept of “party autonomy” to the status of a fundamental rule of procedure:

Any detail from a party agreement on procedure, no matter how trivial, could be seen as an expression of the fundamental rule of party autonomy. In a wider sense, the ICSID Arbitration Rules operate by agreement of the

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90. *Wena Hotels.*, ICSID Case No. ARB/98/4, ¶ 57; *see also Duke Energy*, ICSID Case No. ARB/03/28, ¶ 168 (Mar. 1, 2011), [http://italaw.com/documents/DukevPeruFinal\\_1Mar2011\\_Eng.pdf](http://italaw.com/documents/DukevPeruFinal_1Mar2011_Eng.pdf), [http://italaw.com/documents/DukevPeruFinal\\_1Mar2011\\_Eng.pdf](http://italaw.com/documents/DukevPeruFinal_1Mar2011_Eng.pdf) (affirming the definition of a fundamental rule of procedure as set forth by *Wena Hotels*); *Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶¶ 180–86 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf> (following the approach taken in *Wena Hotels* and *Duke Energy*).

91. *MINE*, ICSID Case No. ARB/84/4, ¶ 5.05.

92. *Enron*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 194 (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf>.

93. *Id.*

94. *Id.* ¶ 195.

parties and could hence be imported into this ground for annulment under the label of party autonomy. In fact, almost any procedural rule can somehow be traced back to one or another broader principle that may be described as fundamental. The inevitable consequence would be that any rule of procedure becomes fundamental.<sup>95</sup>

Professor Schreuer's concern is valid. While some departures from the parties' agreement on procedure may amount to violations of due process, others will not. Widely accepted concepts such as "the right to be heard"<sup>96</sup> or "principe de la contradiction"<sup>97</sup> are sufficient to deal with any genuine case of prejudice caused by a breach of the parties' agreement on procedure.

Ultimately, the *Enron* Committee chose not to annul on the basis of Article 52(1)(d). It found that any departure from the fundamental rule of "party autonomy" which may have occurred was not serious and did not justify annulment of the award.<sup>98</sup>

(ii) *Fraport*

Decided in December 2010, *Fraport* is the only *ad hoc* Committee decision to annul an award in its entirety on the basis of Article 52(1)(d).<sup>99</sup> Following the annulment, the claimant initiated another

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95. Schreuer, *From ICSID Annulment to Appeal*, *supra* note 43, at 221.

96. See *Helnan Int'l Hotels*, ICSID Case No. ARB/05/19, Decision on Annulment, ¶ 38 (June 14, 2010), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631\\_En&caseId=C64](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&DocId=DC1631_En&caseId=C64) ("The right to be heard does not require a tribunal to consider *seriatim* and evaluate expressly in its award every argument raised by each party.").

97. See, e.g., EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 947–48 (1999) (noting the importance of due process at the international and state levels of arbitration, and the inclusion of la *principe de la contradiction* in general due process).

98. See *Enron*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 197 (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf> ("The Committee is not satisfied that any departure from the principle of party autonomy was serious, or that Argentina has been deprived of the benefit that that principle was intended to provide.").

99. See *Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶¶ 180–86 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf> (emphasizing that "the object and purpose of the power to annul an award for 'a serious departure from a fundamental rule of procedure' is to control the integrity of the arbitral procedure" and stating that the concept of a fundamental rule of procedure was "restricted to the principles of natural justice.").

arbitration against the respondent.<sup>100</sup> As *Fraport* remains pending at the time of this paper (and as the author's law firm represents the Philippines), only limited comments can be made.

At issue in *Fraport* was the Philippines' Anti Dummy Law ("ADL") which required public utilities in the Philippines to have at least 60% Philippine equity ownership (Section 1)<sup>101</sup> and which prohibited intervention by non-Philippine entities in the administration, management, operation and control of Philippine public utilities (Section 2A).<sup>102</sup>

The Tribunal found that Fraport did not have more than 60% ownership of the concessionaire (PIATCO) and thus had not breached Section 1, but that it had entered into secret shareholders' agreements to control PIATCO in violation of Section 2A of the ADL.<sup>103</sup>

The Tribunal considered and rejected an argument that the Philippines had informally accepted the investment and thus waived the right to rely on such breach.<sup>104</sup> In so holding, the Tribunal analyzed a Resolution of the Philippines Public Prosecutor not to proceed with a prosecution of certain Fraport employees for breach of Section 1 of the ADL together with certain related documents (the "Prosecutor's Resolution"), which had been submitted after the proceedings had been closed.<sup>105</sup> The Tribunal concluded that the Prosecutor had no access to the secret shareholders' agreements.<sup>106</sup>

In its application for annulment, Fraport alleged that the Tribunal had breached its right to be heard by "admitting evidence [the Prosecutor's Resolution] and substantively relying upon it after the

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100. See *Fraport AG Frankfurt Airport Serv. Worldwide v. Rep. of the Phil.*, ICSID Case No. ARB/11/12 (resubmitted Apr. 27, 2011) [hereinafter *Fraport II*].

101. See CONST. (1987), art. XII (Phil.) (requiring at least 60% Philippine ownership before a public utility company may be certified).

102. An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises, or Privileges, Comm. Act. No. 108, § 2-A (1936) (Phil.).

103. *Fraport AG Frankfurt Airport Serv. Worldwide v. Rep. of the Phil.*, ICSID Case No. ARB/03/25, Award, ¶¶ 319–27, 401 (Aug. 16, 2008).

104. *Id.* ¶¶ 387, 401.

105. See *id.* ¶¶ 368, 382 (stating that the primary purpose of the Tribunal's analysis of the Prosecutor's Resolution and related documents was to assess whether the Prosecutor had been aware of the secret shareholders' agreements).

106. *Id.* ¶ 382.

close of proceedings without giving Fraport an opportunity to address the new material.”<sup>107</sup>

In its decision, the *ad hoc* Committee determined that the Prosecutor’s Resolution was relevant to the interpretation of the ADL and, in particular, the Tribunal’s conclusion that the ADL could be breached by evidence of managerial control over PIATCO.<sup>108</sup> The Committee concluded that the Prosecutor’s Resolution had “singular significance” to the outcome of the case.<sup>109</sup> From the face of the decision, it appears that this line of reasoning was developed by the Tribunal *sua sponte* rather than following submissions by Fraport (which had focused on the “waiver” issue referred to above).<sup>110</sup>

After endowing the Prosecutor’s Resolution with “singular significance,”<sup>111</sup> the *ad hoc* Committee concluded that the Tribunal should have re-opened the proceedings to allow further submissions on the proper construction of the ADL in light of the Prosecutor’s Resolution<sup>112</sup> and that its failure to do so constituted a serious departure from a fundamental rule of procedure, which justified annulment of the award.<sup>113</sup>

The Philippines set out its concerns with regard to the decision of the *ad hoc* Committee in a letter dated June 2011 to members of ICSID’s Administrative Council:

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

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107. *Fraport I*, ICSID Case No. ARB/03/25, Decision on Annulment, ¶ 129 (Dec. 23, 2010), <http://italaw.com/documents/Fraport-Annulment-Decision.pdf>.

108. *See id.* ¶ 211 (considering whether Section 2A could be breached by “an actual demonstration of managerial control” such that “the quantum of equity in the company is irrelevant”).

109. *Id.* ¶ 243.

110. *Id.* ¶ 133. Fraport’s submissions focused on the “waiver” issue referred to above and also included the subsidiary submission that “the Tribunal should have afforded Fraport an opportunity to be heard about the legal question of whether a finding by the Philippine Prosecutor bound the Tribunal.” *Id.*

111. *Id.* ¶ 243.

112. *Id.* ¶¶ 230–31.

113. *Fraport I*, ICSID Case No. ARB/03/25, ¶¶ 232, 245.

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 fundamental 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.<sup>114</sup>

### C. FAILURE OF COMMON SENSE IN APPLICATION OF FAILURE TO STATE REASONS AS A GROUND FOR ANNULMENT

Parties have regularly invoked failure to state reasons when seeking to annul ICSID awards. *Ad hoc* committees have rarely annulled on this basis.

The duty to state reasons refers to a minimum requirement. The *ad hoc* Committee in *Vivendi I* stated that "it is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an *ad hoc* committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e)."<sup>115</sup> The *ad hoc* Committee in *MTD v. Chile*

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114. Letter from the Office of the Solicitor General of the Rep. of the Phil. to Members of Admin. Council (June 27, 2011) [hereinafter Letter from the Office of the Solicitor General].

115. *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 64 (July 3, 2002), 6 ICSID REP. 340 (2004).

confirmed that there is a “consistent jurisprudence of annulment committees” in treating Article 52(1)(e) as addressing “an absence instead of inadequacy or brevity of reasoning.”<sup>116</sup>

If the tribunal’s reasons enable the committee to understand how the tribunal got from Point A to Point B, there is no failure to state reasons.<sup>117</sup> That sounds reasonable, but it is subject to abuse, because almost any error of reasoning can, at bottom, be shown to contain an absence of reasoning and can at bottom not enable the reader to follow the tribunal from A to B.

Again, the *Enron* decision is a case in point. As noted above, the *ad hoc* Committee annulled the Tribunal’s decision on the basis that it was not satisfied that Argentina’s actions were not “the only way for the State to safeguard an essential interest against a grave and imminent peril”<sup>118</sup> and hence, in the Committee’s opinion, the Tribunal had manifestly exceeded its powers. However, the Committee also went on to state:

even if the Tribunal did in fact satisfy itself that the “only way” requirement in Article 25(1)(a) was not met on the evidence before it, it is not apparent from the reasoning in the Award how or why the Tribunal came to that legal conclusion. Even if, contrary to all appearance, the Tribunal did apply the “only way” requirement in Article 25(1)(a), the Committee considers that the Tribunal failed to state reasons for its decision. This constitutes a ground for annulment under Article 52(1)(e) of the ICSID Convention.<sup>119</sup>

The *ad hoc* Committee reached this conclusion despite the fact that the Tribunal, composed of three experienced arbitrators, had devoted 55 paragraphs of the award to a discussion of the various aspects of the necessity defense, including the following statement:

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116. *MTD Equity Sdn. Bhd. v. Rep. of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 78 (Mar. 21, 2007), 13 ICSID REP. 500 (2008). This approach has not been followed by all *ad hoc* Committees. *See, e.g., Mitchell v. Dem. Rep. Congo*, ICSID Case No. ATB/99/7, Decision on Annulment, ¶ 41 (Nov. 1, 2006), <http://italaw.com/documents/mitchellannulment.pdf> (annulling for “a failure to state reasons, in the sense that the inadequacy of reasons is such that it seriously affects the coherence of the reasoning . . .”).

117. *MINE*, ICSID Case No. ARB/84/4, Decision on Partial Annulment, ¶ 5.09 (Dec. 22, 1989), 4 ICSID REP. 79 (1997).

118. *Enron*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 349 (July 30, 2010), <http://italaw.com/documents/EnronAnnulmentDecision.pdf>.

119. *Id.* ¶ 378.

It is thus quite evident that measures had to be adopted to offset the unfolding crisis. Whether the measures taken under the Emergency Law were the “only way” to achieve this result and no other alternative was available, is also a question on which the parties and their experts are profoundly divided, as noted above. A rather sad world comparative experience in the handling of economic crises, shows that there are always many approaches to address and correct such critical events, and it is difficult to justify that none of them were available in the Argentine case.

While one or other party would like the Tribunal to point out which alternative was recommendable, it is not the task of the Tribunal to substitute for the governmental determination of economic choices, only to determine whether the choice made was the only way available, and this does not appear to be the case.<sup>120</sup>

This constitutes the Tribunal’s reasoning on the question of whether Argentina satisfied the “only way” test. It may be brief and somewhat opaque, but to characterize it as non-existent is inappropriate.<sup>121</sup> Indeed, just two paragraphs before concluding that “the Tribunal failed to state reasons for its decision,” the Committee had itself characterized the Tribunal’s reasoning as “cursory.”<sup>122</sup> This is surely a more appropriate description.

*Ad hoc* committees have also deviated from the “absence of reasons” standard by equating failure to state reasons with the provision of contradictory reasons. The supposed justification for this conflation is that two contradictory reasons negate one another and thus constitute non-existent reasons.<sup>123</sup>

The potential for abuse is obvious. Arbitral awards running to several hundred pages will frequently contain minor contradictions in

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120. *Enron Corp. v. Arg. Rep.*, ICSID Case No. ARB/01/3, Award, ¶¶ 308–09 (May 22, 2007).

121. *See Enron*, ICSID Case No. ARB/01/3, ¶ 378 (“Even if, contrary to all appearance, the Tribunal did apply the ‘only way’ requirement in Article 25(1)(a), the Committee considers that the Tribunal failed to state reasons for its decision.”).

122. *Id.* ¶ 376.

123. *Klöckner*, ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 116 (Oct. 21, 1983), 1 ICSID REV. – FOREIGN INVESTMENT L.J. 90, 125 (“As for ‘contradiction of reasons,’ it is in principle appropriate to bring this notion under the category ‘failure to state reasons’ for the very simple reasons that two *genuinely* contradictory reasons cancel each other out. Hence the failure to state reasons.”).

their reasoning. There is also the risk that tribunals' attempts to balance conflicting considerations may be mistaken for contradictory reasons.<sup>124</sup>

*Amco I* again provides an example of overzealous review. The *ad hoc* Committee noted that, under Indonesian law, the amount of an investment was calculated by reference to "equity capital" and excluded any loans made to an investor.<sup>125</sup> The Committee also noted that the Tribunal had been aware of this requirement but nevertheless had apparently included a loan of US\$1,000,000 in its calculation of Amco's investment without providing an explanation of why it had done so.<sup>126</sup> The *ad hoc* Committee therefore held that the Tribunal had contradicted itself and thus annulled the Award for manifest excess of powers and failure to give reasons.<sup>127</sup>

This level of scrutiny might be appropriate for an appellate body, but it is inappropriate for an *ad hoc* committee to scour an award for inconsistencies and then to annul on the basis that the Tribunal's inconsistent reasoning amounts to a failure to give reasons.

In a welcome development, the recent decision in *Continental Casualty* points towards less intensive review in relation to contradictory reasons. The *ad hoc* Committee stated:

for genuinely contradictory reasons to cancel each other out, they must be such as to be incapable of standing together on any reasonable reading of the decision. An example might be where the basis for a tribunal's decision on one question is the existence of fact A, when the basis for its decision on another question is the non-existence of fact A. In cases where it is merely arguable whether there is a contradiction or inconsistency in the tribunal's reasoning, it is not for an annulment committee to resolve that argument. Nor is it the role of an annulment committee to express its own view on whether or not the reasons given by

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124. See *Vivendi I*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 65 (July 3, 2002), 6 ICSID REP. 340, 358 (2004) ("It is frequently said that contradictory reasons cancel each other out, and indeed if reasons are genuinely contradictory so they might. However, tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expressed in a tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations.").

125. *Amco I*, ICSID Case No. ARB/81/1, Decision on Annulment, ¶ 97 (May 16, 1986), 1 ICSID REP. 509, 535 (1993).

126. *Id.*

127. *Id.* ¶¶ 97–98.

the tribunal are logical or rational or correct.<sup>128</sup>

### III. CONSEQUENCES AND SOLUTIONS

#### A. CONSEQUENCES

One can wonder whether excessive annulments matter, especially to States, who are the sole parties to the ICSID Convention. Even though the States did not, by their drafting, expose ICSID arbitration to appellate review, it is States, more often than investors, who benefit from excessive annulment decisions. There may, moreover, be at least one virtue in the annulment threat: ICSID arbitral tribunals are on notice to be careful and comprehensive and coherent in their awards.

Exuberant annulments are, though, a problem for ICSID and for actual and prospective ICSID parties. States set up the ICSID system to assure foreign investors of an appropriate forum for investment disputes. To the extent that such forum becomes inappropriate in a way that contravenes the language of the Convention, the interests of States are disserved. Moreover, errors by ICSID arbitrators already are subject to a constraint: ICSID's transparency, which causes an ICSID tribunal to know that its award will likely be subject to public scrutiny whether or not there is an annulment.

The costs of excessive annulment include, quite apart from the millions of dollars in legal fees spent on annulment proceedings that violate the language and spirit of Article 52, (i) millions of dollars in compromised settlements agreed by parties out of fear of annulment proceedings, and (ii) valid ICSID claims forewent because the risk of a two-stage process tips the balance against bringing a claim.

Investment treaty arbitration engages the public interest in a manner that commercial arbitration does not, and there is special reason to promote consistent jurisprudence in investment arbitration.<sup>129</sup> In the absence of an appellate structure, *ad hoc*

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128. *Continental Casualty Corp.*, ICSID Case No. ARB/03/9, Decision on Annulment, ¶ 103 (Sept. 16, 2011), [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291\\_En&caseId=C13](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2291_En&caseId=C13).

129. See, e.g., Stephan W. Schill, *Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 408–409 (2010) (explaining the

committees may believe they have a role to play in promoting consistent jurisprudence, whether by annulling decisions they consider to be incorrect or criticizing the merits of decisions but leaving them intact.

Neither of these two options is desirable. Excessive annulment would again lead the ICSID arbitration system to resemble “an elaborate and expensive game of snakes and ladders,”<sup>130</sup> which is unattractive as a means of settling investment disputes. Even when *ad hoc* committees do not annul, they can do damage by excessive scrutiny of the merits. Several *ad hoc* committees in recent years have “proceeded to a microscopic dissection of the award; [they have identified] a number of problems with the award and [said] what the award should have done,” before concluding that the flaws were not sufficient for the committee to annul.<sup>131</sup> One must wonder what effect such dicta have on a State’s willingness to pay a substantial award which has been torn apart but not annulled by an *ad hoc* committee.

The excessive scrutiny in recent decisions threatens to undermine one of the attractions of ICSID arbitration. As recently as 2009, Professor Schreuer wrote:

The self-contained and exhaustive nature of review procedures under the ICSID Convention . . . serves the interest of finality of awards and provides a clear advantage over other arbitration mechanisms. Awards stemming from arbitration systems such as the ICC, the AAA or UNCITRAL are subject to potentially protracted and costly review procedures by the courts of the arbitration forum.<sup>132</sup>

In contrast, a 2010 survey of international experts<sup>133</sup> on the choices

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role of investment treaty arbitration as facilitating investment, creating jobs, and “domesticating” remedies for actions of foreign investors, and the need, therefore, for consistent arbitral jurisprudence).

130. Redfern, *supra* note 11, at 99.

131. Gaëtan Verhoosel, *Annulment and Enforcement Review of Treaty Awards: To ICSID or Not to ICSID*, in 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 14 ICCA CONGRESS SERIES 285, 306 (A.J. van den Berg ed., 2009).

132. SCHREUER, *supra* note 29, at 1103.

133. See M. Burgstaller & C.B. Rosenberg, *Challenging International Arbitral Awards: To ICSID or Not to ICSID?*, 27 ARB. INT’L 91, 93 (2011) (“In August 2010, we distributed the . . . questionnaire to 198 international arbitration experts based in England, France and the United States, as identified by the Global Arbitration Review’s ‘Who’s Who of Commercial Arbitration [2010].’”). Most

of forum in investment arbitration, received multiple responses to the effect that “ICSID annulment proceedings have become almost routine, are unpredictable, and go too far in the merits of the case.”<sup>134</sup> In the immediate aftermath of *Sempra* and *Enron*, the study’s findings were that “[o]nly a small minority of expert respondents favored ICSID procedures over domestic procedures: 16 per cent as compared to English law, and 10 per cent as compared to French or US law.”<sup>135</sup>

Although a snapshot survey does not tell us much about user preferences, unless the recent trend towards a two-stage process is checked, investors will inevitably be deterred from bringing valid claims to ICSID arbitration.

## B. SOLUTIONS

There is no easy solution to the problem of excessive annulments.

Amending Article 52 is not plausible. Under Article 66 of the ICSID Convention, any proposed amendment to the Convention will become effective only once “all Contracting States have ratified, accepted or approved the amendment.”<sup>136</sup> The prospects of achieving such unanimity are virtually nil.

Changing the way that *ad hoc* committees are constituted is unlikely. *Ad hoc* committees are, under the Convention, comprised from a list designated by States,<sup>137</sup> and as States are almost always the parties seeking annulment, the exuberance for annulment may partially be explained by the circumstances that lead to the appointment by ICSID of *ad hoc* Committee members.

The question we are left with is: how best can we deliver *ad hoc* committees from the temptation to exceed their jurisdiction under Article 52?

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respondents “had a negative view of the ICSID annulment procedures.” *Id.* at 94.

134. *Id.*

135. *Id.*

136. SCHREUER, *supra* note 29, at 1265.

137. See ICSID Convention, *supra* note 1, arts. 13, 52. Pursuant to Article 52(3) of the ICSID Convention, *ad hoc* Committee members must be selected from the Panel of Arbitrators. The Panel of Arbitrators consists of persons designated by Member States pursuant to Article 13(1) of the ICSID Convention. In addition, under Article 13(2), the Chairman of the Administrative Council (*i.e.*, the President of the World Bank) has the power to designate up to ten persons to the Panel of Arbitrators.

Looking back, we can observe that the first wave of rabid annulments subsided without ICSID taking any formal steps. One must wonder whether the Center acted to stop the first wave by conveying, by informal means, to certain *ad hoc* committee members, particularly the chairmen of such committees, that excessive annulments had to be curtailed and that the language and spirit of Article 52 had to be respected.<sup>138</sup> It is notable that Professor Sompong Sucharitkul was appointed as President of the *ad hoc* committees in *Klöckner II*, *Amco II*, and *MINE*. Those decisions are credited with stopping the first wave of excessive annulments.<sup>139</sup>

One option that has been proposed is the issuance of guidelines or an interpretive note by ICSID's Administrative Council emphasizing the limited nature of review under Article 52 and exhorting *ad hoc* committees not to annul except in exceptional cases of serious procedural injustice.<sup>140</sup> Following the *Fraport* annulment, the Philippines wrote to the Administrative Council suggesting that a special task force be established to make recommendations as to guidelines that could be issued by the Administrative Council to *ad hoc* committees.<sup>141</sup> The idea is attractive because it would allow ICSID formally to exert pressure on *ad hoc* committees to respect their limited jurisdiction.<sup>142</sup> The issuance of such guidelines would

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138. See Reisman, *Breakdown of the Control Mechanism in ICSID Arbitration*, *supra* note 11, at 207 ("It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the shortcomings against which it is meant to be a safeguard. This still seems to be the case, since the annulment procedure has only been invoked in three disputes before the Center. However, if parties dissatisfied with awards regularly seek annulment such a practice may put in doubt the features which make ICSID arbitration an attractive means of settling investment disputes—namely its speed, comparatively low cost, and its effectiveness.") (quoting IBRAHIM F. I. SHIHATA, REPORT OF THE SECRETARY GENERAL: TO THE ADMINISTRATIVE COUNCIL AT ITS TWENTY SECOND ANNUAL MEETING 3 (1988)). These remarks were interpreted by Michael Reisman as "jaw-boning," intended to have an "impact on subsequent members of *ad hoc* committees who are effectively appointed by the Secretary General." *Id.* at 208.

139. Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in ANNULMENT OF ICSID AWARDS 17–18 (Emmanuel Gaillard & Yas Banifatemi, eds., 2004).

140. See Jason Clapham, *Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?*, 26 J. INT'L ARB. 437, 464 (2009) (recommending that the interpretive note confirm that an award should be annulled only for the most limited and fundamental errors).

141. Letter from the Office of the Solicitor General, *supra* note 114.

142. It has been suggested that the Administrative Council has the power to

likely have an impact, at least over the medium-term. Over the longer-term, however, guidelines are as vulnerable to misapplication as is the language of Article 52.

Public criticism by members of the investment community has a sure impact. The criticism of *Klöckner I* and *Amco I* undoubtedly sensitized future *ad hoc* Committees to the undesirable consequences of substituting their own decisions on the merits for those of the Tribunal.<sup>143</sup> History shows, however, that over twenty-five years the heightened sensitivity wore off.

A new wave of criticism has arisen in the wake of the second wave of excessive annulments and the decisions in *GDF* and *Continental Casualty* suggest that a renewed cautious approach to annulment applications is already with us.<sup>144</sup> On the assumption that the second wave has subsided, the challenge will be to break the cycle and avoid a third wave.

Many ICSID parties (particularly Respondent States) will continue to invoke their remedies under Article 52.<sup>145</sup> If there is consistent commentary and renewed jurisprudence to the effect that annulment is to be granted only in exceptional circumstances of serious procedural injustice and if cost awards are made against parties submitting obviously unmeritorious applications, the number of unmeritorious annulment applications should diminish and the third wave, should it ever come, will be put off that much longer.

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issue such a note under Article 6(3) of the ICSID Convention, which states: "The Administrative Council shall also 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." ICSID Convention, *supra* note 1, art. 6(3).

143. See Reisman, *Breakdown of the Control Mechanism in ICSID Arbitration*, *supra* note 11, at 804 (discussing how the control problems stemming from *Klöckner* and *Amco* were recognized and that administrative steps were taken in response); see also Redfern, *supra* note 11, at 118 (stating that the effect of *Klöckner* and *Amco* "has been to raise considerable doubts as to the finality of an ICSID award and to show how readily such an award may be set aside, within the ICSID system itself.").

144. See generally, e.g., Crivellaro, *supra* note 59 (discussing the trend of *ad hoc* committees reverting back to the more interventionist approach to annulment decisions of the "first-generation" of such claims); Schreuer, *From ICSID Annulment to Appeal*, *supra* note 43 (criticizing the recent, expansive annulment approaches taken by many *ad hoc* committees).

145. Broches, *supra* note 34, at 376 (predicting this result).