



**ICSID**

INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

**Updated Background Paper on Annulment  
for the Administrative Council of ICSID\***

**May 5, 2016**

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## I. Purpose of Background Paper

1. This paper is an updated version of the [Background Paper on Annulment for the Administrative Council of ICSID dated August 2, 2012](#).<sup>1</sup> It provides new data and updated charts and tables concerning developments in case law on annulment from August 2, 2012 through April 15, 2016.<sup>2</sup> In particular, it considers 37 new annulment proceedings, 22 new annulment decisions and 19 new decisions on the stay of enforcement of an award issued since the original Background Paper was published.

## II. Introduction to the Annulment Mechanism in the ICSID Convention

2. 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.<sup>3</sup>
3. 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.<sup>4</sup> 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.
4. 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:
  - rectification (Article 49) – the Tribunal can rectify any clerical, arithmetical or similar error in its award;

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<sup>1</sup> The original background paper was prepared to assist Contracting States at the 45<sup>th</sup> Annual Meeting of the ICSID Administrative Council on September 23, 2011.

<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> ICSID Convention Article 53.

- 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 of 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.
5. 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**

6. 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.<sup>5</sup> As of April 15, 2016, there were 152 Contracting States to ICSID.

#### *A. The Origin of the Annulment Provision*

7. 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.<sup>6</sup> The ILC recognized that the finality of an award is an essential feature

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<sup>5</sup> 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.

<sup>6</sup> 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

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.”<sup>7</sup> It thus “sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.”<sup>8</sup> 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.”<sup>9</sup> An independent body, the International Court of Justice, would rule on whether a challenge should lead to the annulment of the award.<sup>10</sup>

8. 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.<sup>11</sup>

9. 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 would not.<sup>12</sup> 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.<sup>13</sup> The accompanying Report to the General Assembly stated that “[a]fter considerable

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Finality of ICSID Awards” in *Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 299 (1995).

<sup>7</sup> 1953 ILC Yearbook II, *supra* note 6, at 202.

<sup>8</sup> Broches, *supra* note 6, 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”).

<sup>9</sup> 1953 ILC Yearbook II, *supra* note 6, at 205.

<sup>10</sup> *Id.* at 211 (Article 31 of the Draft Convention on Arbitral Procedure).

<sup>11</sup> 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.

<sup>12</sup> 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 8, at 44.

<sup>13</sup> 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 6, at 205.

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.”<sup>14</sup>

B. *Preliminary Draft ICSID Convention – 1963*

10. 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

11. 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 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).<sup>18</sup>

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<sup>14</sup> 1953 ILC Yearbook II, *supra* note 6, at 205.

<sup>15</sup> History, *supra* note 5, at Vol. II, 19.

<sup>16</sup> *Id.* at 184 (October 15, 1963).

<sup>17</sup> *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).

<sup>18</sup> *Id.* at 218 & 219.

C. *Regional Consultative Meetings – 1964*

12. 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.<sup>19</sup> The specific grounds for annulment were discussed at a series of Regional Consultative Meetings.
13. During the first set of Regional Consultative Meetings, legal experts from various countries made suggestions for changes to the Preliminary Draft.<sup>20</sup> Among other things, a proposal was made that the grounds for annulment be set out in greater detail and modeled on commercial arbitration laws.<sup>21</sup> However, Aron Broches, then General Counsel of the World Bank and Chair of the Regional Consultative Meetings and the subsequent meetings of the Legal Committee, discouraged the comparison with commercial arbitration.<sup>22</sup> 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.”<sup>23</sup>
14. 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.<sup>24</sup> In the context of the discussions on the meaning of “excess of powers,” Chairman 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.<sup>25</sup>
15. 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.<sup>26</sup> 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.”<sup>27</sup> However, the legal expert from Lebanon observed

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<sup>19</sup> *Id.* at 573 & 574.

<sup>20</sup> These meetings were held in the period December 1963 through May 1964 in Addis Ababa, Santiago, Geneva and Bangkok. *Id.* at 236-584.

<sup>21</sup> *Id.* at 423.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*; Broches, *supra* note 6, at 303.

<sup>25</sup> History, *supra* note 5, at Vol. II, 517.

<sup>26</sup> *Id.* at 423 & 517.

<sup>27</sup> *Id.* at 518.



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.<sup>28</sup>

16. 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."<sup>29</sup> One proposal was to add the phrase "a serious departure from the principles of natural justice."<sup>30</sup> Another proposal was to replace the term by "fundamental principles of justice."<sup>31</sup> 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.<sup>32</sup>

D. *First Draft Convention – September 1964*

17. 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"),<sup>33</sup> 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;
  - (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.<sup>34</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 517.

<sup>30</sup> *Id.* at 271 & 423.

<sup>31</sup> *Id.* at 480.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 610 (September 11, 1964).

<sup>34</sup> *Id.* at 635 (Article 55(1)).

E. *Legal Committee Meetings – 1964*

18. 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.<sup>35</sup> 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.”<sup>36</sup> Two experts were in favor of deleting the ground of improper constitution but the majority of the Legal Committee decided to retain this ground.<sup>37</sup>

19. 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.<sup>38</sup> 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.<sup>39</sup>

20. Suggestions that the word “manifestly” be omitted were defeated by a majority of 23 to 11 votes.<sup>40</sup> 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.<sup>41</sup>

21. 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.<sup>42</sup> 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.<sup>43</sup>

22. 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

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<sup>35</sup> *Id.* at 850.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 852 & 853.

<sup>38</sup> *Id.* at 850.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 851 & 852.

<sup>41</sup> *Id.* at 853.

<sup>42</sup> *Id.* at 851.

<sup>43</sup> *Id.* at 851, 853 & 854.

“misconduct,”<sup>44</sup> “lack of integrity”<sup>45</sup> or “a defect in moral character.”<sup>46</sup> 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.”<sup>47</sup> These proposals were put to a vote and defeated by a large majority.<sup>48</sup>

23. 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.<sup>49</sup> 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.<sup>50</sup> Likewise, a specific reference noting that both parties must have a fair hearing was defeated.<sup>51</sup>

24. 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.<sup>52</sup> 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.<sup>53</sup>

#### F. *Revised Draft Convention – December 1964*

25. Following the Legal Committee’s meetings, a Revised Draft Convention on the Settlement of Investment Disputes (“Revised Draft”) was prepared.<sup>54</sup> 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:

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<sup>44</sup> *Id.* at 851.

<sup>45</sup> *Id.* at 852.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 851.

<sup>48</sup> *Id.* at 852.

<sup>49</sup> *Id.* at 853 & 854.

<sup>50</sup> *Id.* at 854.

<sup>51</sup> *Id.* at 853.

<sup>52</sup> *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.”

<sup>53</sup> *Id.* at 816.

<sup>54</sup> *Id.* at 911 (December 11, 1964).

- (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.<sup>55</sup>

26. Since the First Draft, the only modification made to the provision was to subsection (1)(e).<sup>56</sup> 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.

27. 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**

28. 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.

##### *A. Filing an Application for Annulment*

29. 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.<sup>57</sup> 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

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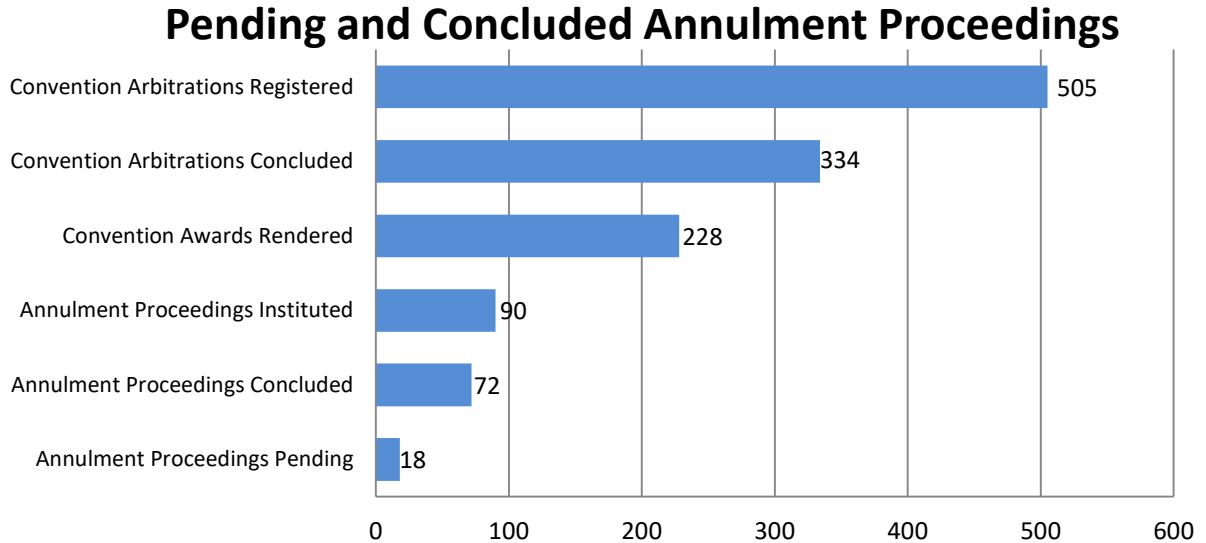
<sup>55</sup> *Id.* at 926 & 927.

<sup>56</sup> 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*."

<sup>57</sup> *See* Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Arbitration Rule 50(1). The fee for lodging an application for annulment is currently US\$25,000.

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.<sup>58</sup> The Secretary-General must refuse registration of an application for annulment that is not filed within the prescribed time limits.<sup>59</sup>

30. 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.<sup>60</sup> 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.<sup>61</sup>
31. Since the entry into force of the ICSID Convention in 1966, annulment proceedings have been instituted in 87 cases.<sup>62</sup> In 3 of those cases, annulment proceedings were instituted a second time after a resubmission proceeding, meaning 90 annulment proceedings have been instituted in total.



32. 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

<sup>58</sup> Arbitration Rule 50(3)(b); ICSID Convention Article 52(2).

<sup>59</sup> *Id.*

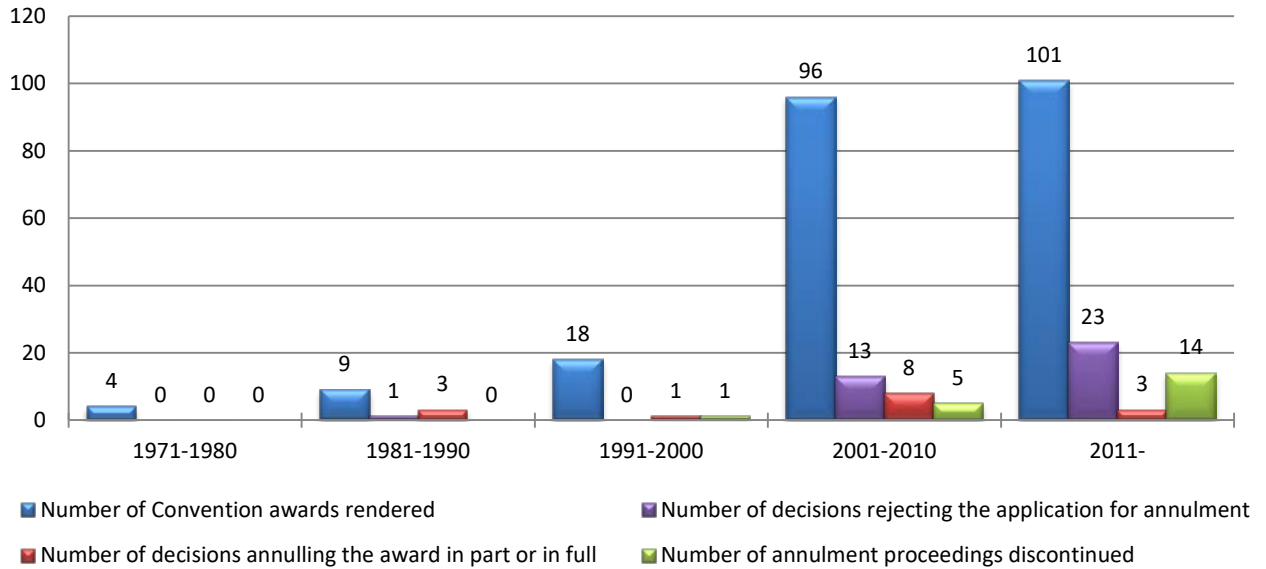
<sup>60</sup> See in particular ICSID Convention Articles 48-49 (addressing “the award”). Under the same principle, only the award is capable of enforcement under ICSID Convention Article 54. For enforcement purposes, ICSID Convention Article 53(2) provides that an “award” includes any decision interpreting, revising or annulling such award.

<sup>61</sup> Annulment applications in respect of decisions on jurisdiction in pending cases have consistently been refused registration. See Broches, *supra* note 6, at 302.

<sup>62</sup> See “Pending and Concluded Annulment Proceedings,” Annex 1.

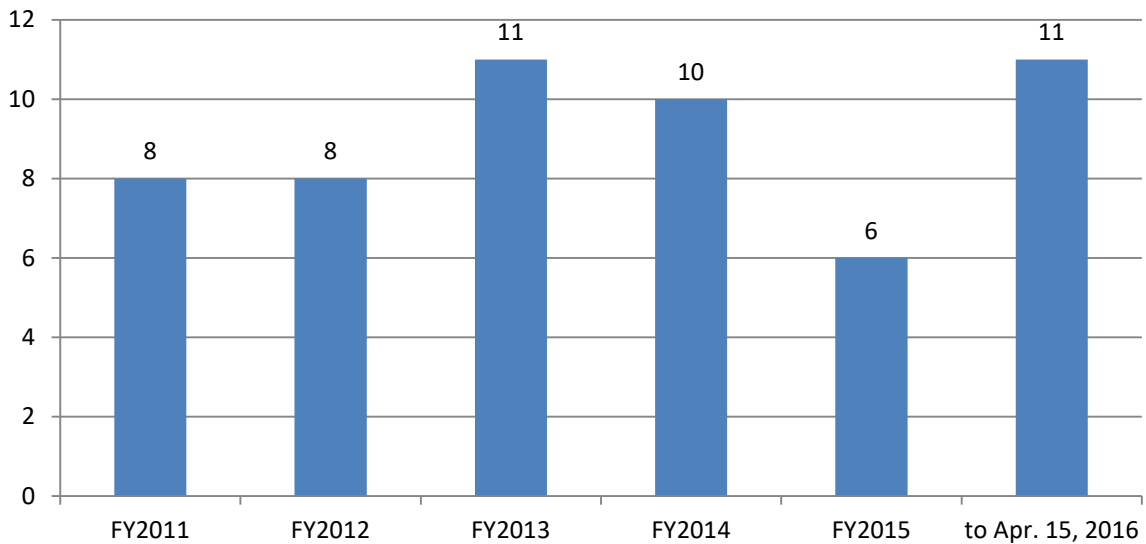
annulment.<sup>63</sup> The rate of annulment for 2011– present is 3 percent, while the rate of annulment for 1971 – 2000 was 13 percent and for 2001 – 2010 was 8 percent.<sup>64</sup>

### Annulment Proceedings under the ICSID Convention - Outcomes 1971 - Present



33. Fifty-two percent of all annulment applications have been registered since January 2011, at about an even level per year.

### Annulment Applications Registered by ICSID Fiscal Year 2011 - Present

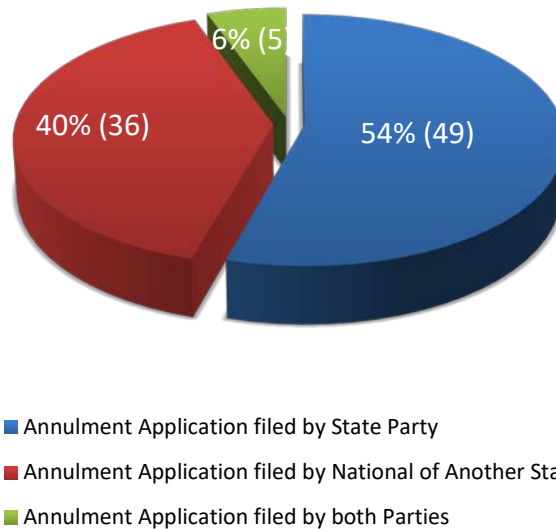


<sup>63</sup> See *infra* para. 68.

<sup>64</sup> The rate is based on the number of awards rendered and the number of partial and full annulments of awards.

34. The annulment remedy has been pursued by both claimants and respondents to ICSID proceedings. Approximately 54 percent of annulment proceedings were initiated by respondents (in all instances States or State entities) while 40 percent of the proceedings were initiated by claimants. In 5 cases (approximately 6 percent of all annulment proceedings), both parties filed an application for annulment.<sup>65</sup>

### Annulment Proceeding by Instituting Party



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

35. 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.<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

36. *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.<sup>69</sup> The ICSID Convention requires that Panel designees be “persons of high moral character and recognized competence in the fields of

<sup>65</sup> Fifteen applications sought partial annulment of the award. As noted in para. 67, applicant-Nationals of Another State and applicant-States have had a similar rate of success in annulment applications.

<sup>66</sup> Arbitration Rule 52(1); ICSID Convention Article 52(3).

<sup>67</sup> ICSID Convention Article 52(3).

<sup>68</sup> *Id.* at Article 52(6).

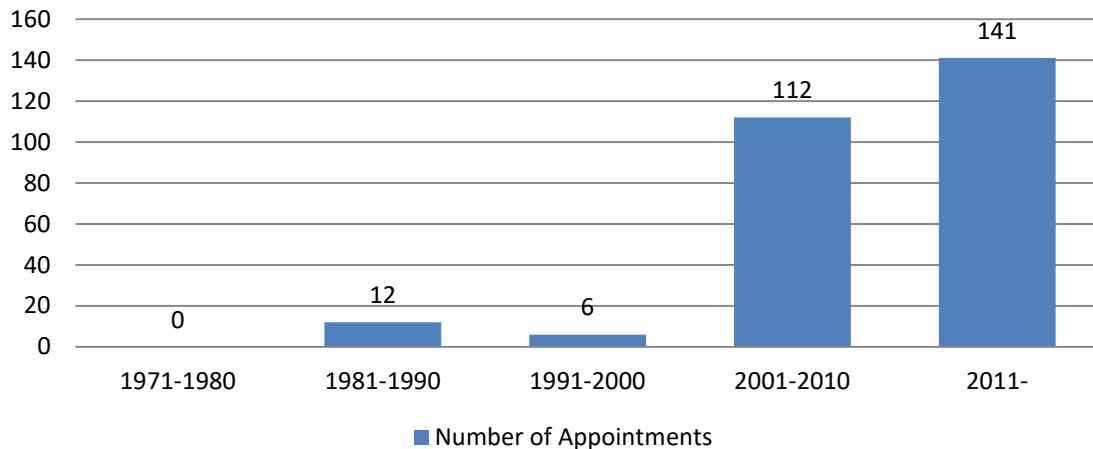
<sup>69</sup> *See id.* at Articles 12-16. Each Contracting State may designate up to four persons of any nationality to the Panel of Arbitrators, for renewable periods of six years.

law, commerce, industry or finance, who may be relied upon to exercise independent judgment.”<sup>70</sup> 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.

37. 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,<sup>71</sup> the Chairman of the Administrative Council is restricted to appointing *ad hoc* Committee members from persons on the Panel of Arbitrators.<sup>72</sup> Many persons on the Panel of Arbitrators have served as members of both Tribunals and Committees.

38. The Panel of Arbitrators currently consists of 424 persons designated by 117 of the 152 Member States and the Chairman of the Administrative Council of ICSID.<sup>73</sup> As of April 15, 2016, ICSID appointed 271 *ad hoc* Committee members from the Panel, 141 of whom were appointed since 2011.

**Appointments to ICSID *ad hoc* Committees by Decade**



39. In addition to the general qualifications required for designation to the Panel of Arbitrators (see above, paragraph 36), 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.<sup>74</sup> 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

<sup>70</sup> *Id.* at Article 14(1).

<sup>71</sup> 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.

<sup>72</sup> ICSID Convention Article 52(3); Arbitration Rule 52(1).

<sup>73</sup> Members of the Panels of Conciliators and Arbitrators, April 2016, Doc. ICSID/10, *available at* <http://icsid.worldbank.org>.

<sup>74</sup> ICSID Convention Article 52(3).



dispute or the State whose national is a party to the dispute.<sup>75</sup> Third, the member cannot have acted as a conciliator in the same dispute.<sup>76</sup> As a result, in each annulment proceeding there are usually 5 or more excluded nationalities.<sup>77</sup>

40. 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. The internal process usually involves consultations among counsel, case management Team Leaders and the Secretary-General. 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.
41. Unlike the process for appointment of Tribunal members,<sup>78</sup> 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;<sup>79</sup> 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.
42. The Centre makes its best effort to complete the appointment process as soon as possible after registration of the annulment application. In recent years, the average time to complete the process has been reduced to 8 weeks, and efforts are being made to further reduce that average. This includes the time spent corresponding with the parties.
43. Approximately 41percent of all Committee member appointments have been nationals of States which are classified by the World Bank Group as developing countries.<sup>80</sup> This corresponds to slightly more than one developing country national per case.<sup>81</sup> The number of women appointed to *ad hoc* Committees has historically been low (only 15 *ad hoc*

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> 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).

<sup>78</sup> ICSID Convention Articles 37-40.

<sup>79</sup> *Id.* at Articles 14(1) & 57.

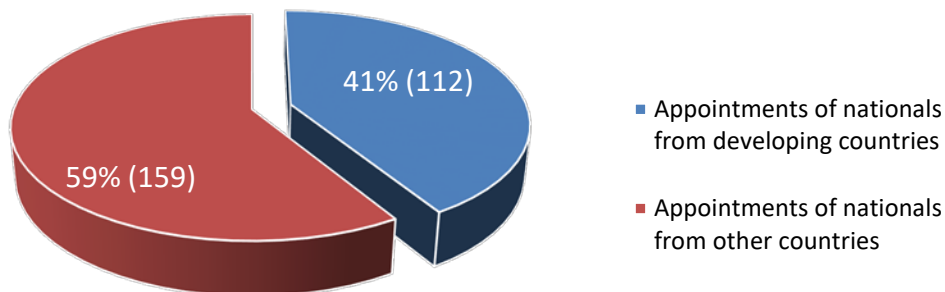
<sup>80</sup> See Economic Country Classification available at <http://data.worldbank.org/about/country-classifications/country-and-lending-groups>. Low- and middle-income economies are referred to as developing economies. The classifications are set each year on July 1.

<sup>81</sup> For the nationality of the members of *ad hoc* Committees and its classification at the time of appointment, see Annex 1.

Committee appointments involved women to date). This reflects the few women designated to the Panel of Arbitrators (approximately 13 percent of the members on the Panel of Arbitrators are women).<sup>82</sup>

44. Parties sometimes request that *ad hoc* Committee members meet specific criteria; for example that they have investment arbitration experience, they do not sit on any pending case with any of the members of the original Tribunal or that they have not decided any legal issue similar to that considered in the annulment proceeding. At the same time, there is a call for greater diversity in ICSID arbitration and for the expansion of the pool of arbitrators and *ad hoc* Committee members. ICSID endeavors to take all of these considerations into account as far as possible when considering candidates from the Panel of Arbitrators, with due regard to the nationality restrictions.

### Appointment to ICSID *ad hoc* Committees - Origin of Appointees



#### C. *The Proceeding*

45. Once the *ad hoc* Committee members have accepted their appointments,<sup>83</sup> 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.
46. A Secretary to the *ad hoc* Committee is appointed from among ICSID staff to assist the Committee and the parties. Where possible, the Secretary of the Committee is the same person as the Secretary of the Tribunal. This ensures the best possible assistance in view of the Secretary’s knowledge of the procedural history and submissions in the original proceeding. However, parties sometimes ask the Secretariat to appoint a different person, which the Secretariat is willing to do.

<sup>82</sup> In September 2011 the Chairman of the Administrative Council designated 3 women and 6 developing country nationals out of 10 designees to the Chairman’s list for the ICSID Panel of Arbitrators.

<sup>83</sup> 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.

(i) Applicable Provisions

47. The Arbitration Rules apply, *mutatis mutandis*, to the proceeding before the *ad hoc* Committee.<sup>84</sup> This means that the Rules will apply with the changes necessary to take into account the fact that the proceeding is an annulment proceeding.
48. 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>
49. With regard to the expedited procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding introduced with the 2006 Arbitration Rules (Arbitration Rule 41(5)), *ad hoc* Committees have confirmed that this procedure also applies in annulment proceedings, but that the standard to accept an objection made under this provision is higher in the context of an annulment.<sup>88</sup> With regard to non-disputing party submissions under Arbitration Rule 37(2), one *ad hoc* Committee rejected such an

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<sup>84</sup> Arbitration Rule 53.

<sup>85</sup> 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://icsid.worldbank.org>. The *ad hoc* Committee expressed doubts about its power to recommend provisional measures but rejected the request on other grounds. See also *Micula*, paras. 47-48, quoting from the *ad hoc* Committee's Decision on the Claimants' Request for Provisional Measures of August 18, 2014, para. 37: "Taking into consideration the limited scope of the annulment proceeding, at this stage of the annulment proceeding, as distinguished from the proceedings before the Tribunal, the rights of the Respondents on annulment relate mainly to the enforcement of the Award."

<sup>86</sup> See ICSID Convention Articles 57 & 58.

<sup>87</sup> *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.

<sup>88</sup> See *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision on Elsamex S.A.'s Preliminary Objections (January 7, 2014), paras. 124-125, available at <http://icsid.worldbank.org>; and *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (March 8, 2016), paras. 80-81, available at <http://icsid.worldbank.org>. In *Micula*, the *ad hoc* Committee dismissed the application because it found that the 2006 Arbitration Rules did not apply to that case. See *Micula*, paras. 14-20.

application,<sup>89</sup> while another Committee allowed a non-disputing party to file a written submission.<sup>90</sup>

(ii) The First Session

50. 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 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.<sup>91</sup> Nonetheless, the *ad hoc* Committee usually convenes a first session with the parties to discuss procedural matters, and it is not uncommon to vary certain 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 3 months per party for the first round and 2 months per party for the second round.

51. 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.<sup>92</sup>

(iii) Advances to ICSID

52. 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

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<sup>89</sup> *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Non-Disputing Party's Application to File a Written Submission (February 12, 2014), mentioned in *Iberdrola*, paras. 17 and 18.

<sup>90</sup> *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on the EC's Application to file a Written Submission (December 3, 2014), mentioned in *Micula*, paras. 61-64. The *ad hoc* Committee indicated that a request by a non-disputing party in annulment proceedings "must be dealt with in a more restrictive and circumscribed manner." *Id.*, para. 63. This proceeding was governed by the 2003 Arbitration Rules.

<sup>91</sup> See Note B to Arbitration Rule 53 of the annotated notes to the ICSID Regulations and Rules, 1968, Doc. ICSID/4/Rev. 1.

<sup>92</sup> 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).

paid.<sup>93</sup> Consequently, an Applicant must be prepared to fund the entire proceeding subject to the Committee's ultimate decision on costs.

53. The Costs of Proceeding for annulments concluded since July 2010 have averaged US\$388,000.<sup>94</sup> The fees and expenses of *ad hoc* Committee members represented 74 percent of these costs, while the hearing costs and ICSID administrative fee accounted for the other 26 percent of these costs.

(iv) Stay of Enforcement

54. 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.<sup>95</sup> The stay of enforcement could concern an award of damages, award of costs or some other form of relief ordered by the original Tribunal. The stay of enforcement may be either partial or full.<sup>96</sup> 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.<sup>97</sup>

55. 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.<sup>98</sup>

56. *Ad hoc* Committees take into account the specific circumstances of each case when considering requests for a continued stay of enforcement of the award.<sup>99</sup> Some have held that there is no presumption in favor of a stay of enforcement.<sup>100</sup> Circumstances considered have included the risk of non-recovery of sums due under the award if the award is annulled, non-compliance with the award if the award is not annulled, any history of non-

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<sup>93</sup> Administrative and Financial Regulation 14(3)(e); ICSID Convention Article 52(4). *See infra* para. 65.

<sup>94</sup> This includes one case in which such cost nearly exceeded US\$1 million. Excluding this case, the average cost of an annulment proceeding amounts to approximately US\$370,000.

<sup>95</sup> ICSID Convention Article 52(5); Arbitration Rule 54(1).

<sup>96</sup> For an example of a partial stay of enforcement of an award, *see Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award (February 29, 2016), available at <http://icsid.worldbank.org>.

<sup>97</sup> ICSID Convention Article 52(5); Arbitration Rule 54(2).

<sup>98</sup> 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.

<sup>99</sup> Arbitration Rule 54(4).

<sup>100</sup> *See e.g., Micula*, para. 33; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award (September 30, 2013), para. 47, available at <http://icsid.worldbank.org>; *Víctor Pey Casado and Fundación Presidente Allende v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Request for a Stay of Enforcement of the Unannulled Portion of the Award (May 16, 2013), para. 37, available at <http://www.italaw.com/cases/829>.

compliance with other awards or failure to pay advances to cover the costs of arbitration proceedings, adverse economic consequences on either party and the balance of both parties' interests.<sup>101</sup>

57. If a stay is granted, the *ad hoc* Committee may modify or terminate the stay at the request of either party.<sup>102</sup> 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.<sup>103</sup>

58. There have been a total of 43 requests for the stay of enforcement in the 90 registered annulments, 41 of which have led to Committee decisions.<sup>104</sup> Thirty-six decisions granted the stay of enforcement. In 22 of those instances where a stay was granted, it was conditioned upon the issuance of some type of security or written undertaking. In 11 of those 22 cases, the stay was terminated because the condition had not been satisfied.<sup>105</sup>

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<sup>101</sup> See e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (March 5, 2009), para. 24, available at <http://icsid.worldbank.org>; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award (February 29, 2016), para. 35, available at <http://icsid.worldbank.org>; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (October 7, 2008), paras. 46-53, available at <http://icsid.worldbank.org>.

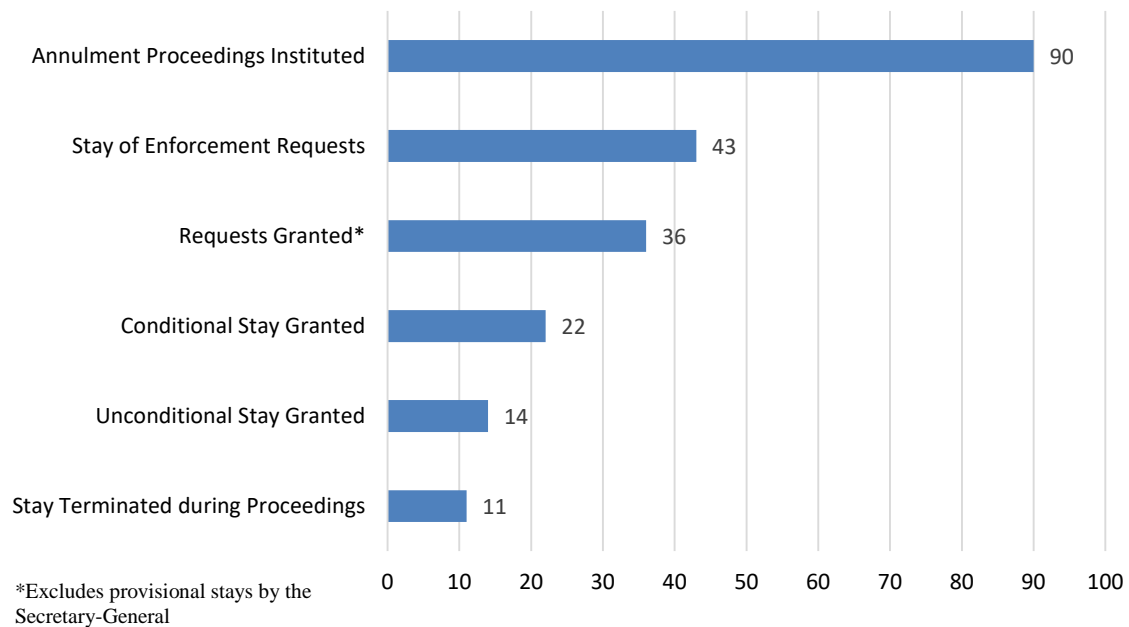
<sup>102</sup> Arbitration Rule 54(3).

<sup>103</sup> *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.

<sup>104</sup> 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.

<sup>105</sup> *Repsol*, para. 12; *Vivendi II*, para. 11; *CDC*, para. 16; *Sempra*, para. 29; *EDF*, para. 9; *Micula*, para. 37; *Kiliç*, para. 16; *Lahoud*, para. 17; *Lemire*, paras. 57 and 67 (stay terminated on April 2, 2012 and subsequently reinstated on December 21, 2012); *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Decision of the *Ad hoc* Committee to Terminate the Stay of Enforcement of the Award (January 19, 2011), para. 8, available at <http://icsid.worldbank.org>; *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Decision of the *Ad hoc* Committee on the Termination of the Stay of Enforcement of the Award (March 11, 2014), para. 35, available at <http://icsid.worldbank.org>.

## Decisions on Stay of Enforcement



## Decisions on the Stay of Enforcement of an Award in all ICSID Annulment Cases\*

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
1. <i>Amco v. Indonesia I</i> ARB/81/1	Indonesia	Granted	Security	May 17, 1985; Noted in 1 ICSID Rep. 509 (2003)
2. <i>Amco v. Indonesia II</i> ARB/81/1- Resubmission	Indonesia	Granted	Security	March 2, 1991; Available at 9 ICSID Rep. 59 (2006)
3. <i>SPP v. Egypt</i> ARB/84/3	Egypt	Stay agreed by the Parties	Security agreed by the Parties	September 29, 1992; Noted in 8 ICSID REV. – FILJ 264 (1993)
4. <i>MINE v. Guinea</i> ARB/84/4	Guinea	Granted	No condition	August 12, 1988; Available at 4 ICSID Rep. 111 (1997)
5. <i>Vivendi v. Argentina II</i> ARB/97/3 – Resubmission	Argentina	Granted	Written Undertaking	November 4, 2008; Noted in Decision on Annulment <a href="#">English</a>
6. <i>Pey Casado v. Chile</i> ARB/98/2	Chile	Granted	No Condition	August 5, 2008; <a href="#">French Spanish</a> May 5, 2010; <a href="#">English</a>
7. <i>Wena Hotels v. Egypt</i> ARB/98/4	Egypt	Granted	Security	April 5, 2001; Available at 18 (10) MEALEY'S INT'L ARB. REP. 33 (2003)
8. <i>Mitchell v. DRC</i> ARB/99/7	Democratic Republic of Congo	Granted	No condition	November 30, 2004; <a href="#">English</a> <a href="#">French</a>
9. <i>Enron v. Argentina</i> ARB/01/3	Argentina	Granted	No condition	October 7, 2008; <a href="#">English Spanish</a>
10. <i>MTD Equity v. Chile</i> ARB/01/7	Chile	Granted	No condition	June 1, 2005; <a href="#">English</a>

\* Excludes provisional stays by the Secretary-General

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
11. <i>CMS Gas v. Argentina</i> ARB/01/8	Argentina	Granted	Written Undertaking	September 1, 2006; Noted in Decision on Annulment <a href="#">English</a> <a href="#">Spanish</a>
12. <i>Repsol v. Petroecuador</i> ARB/01/10	Petroecuador	Granted	Security	December 22, 2005; <a href="#">Spanish</a>
13. <i>Azurix v. Argentina</i> ARB/01/12	Argentina	Granted	No condition	December 28, 2007; <a href="#">English</a> <a href="#">Spanish</a>
14. <i>CDC Group v. Seychelles</i> ARB/02/14	Seychelles	Granted	Security	July 14, 2004; Available at 11 ICSID Rep. 225 (2007)
15. <i>Sempra v. Argentina</i> ARB/02/16	Argentina	Granted	Security	March 5, 2009; <a href="#">English</a> <a href="#">Spanish</a>
16. <i>Continental Casualty v. Argentina</i> ARB/03/9	Argentina	Granted	No condition	October 23, 2009; Noted in Decision on Annulment <a href="#">English</a> <a href="#">Spanish</a>
17. <i>El Paso v. Argentina</i> ARB/03/15	Argentina	Granted	No Condition	November 14, 2012; Noted in Decision on Annulment <a href="#">English</a> <a href="#">Spanish</a>
18. <i>EDF v. Argentina</i> ARB/03/23	Argentina	Granted	Written Undertaking	July 18, 2013; Noted in Decision on Annulment <a href="#">English</a> <a href="#">Spanish</a>
19. <i>Duke Energy v. Peru</i> ARB/03/28	Peru	Granted	Written Undertaking	June 23, 2009; Noted in Decision on Annulment <a href="#">English</a>
20. <i>Total v. Argentina</i> ARB/04/1	Argentina	Rejected	N/A	December 4, 2014; Noted in Decision on Annulment <a href="#">English</a> <a href="#">Spanish</a>
21. <i>SAUR v. Argentina</i> ARB/04/4	Argentina	Information not publicly available	Information not publicly available	March 1, 2016
22. <i>Transgabonais v. Gabon</i> ARB/04/5	Gabon	Granted	Written Undertaking	March 13, 2009; Noted in Decision on Annulment 26 ICSID Rev.— FILJ 214 (2011) (French; excerpts)
23. <i>Rumeli v. Kazakhstan</i> ARB/05/16	Kazakhstan	Granted	Written Undertaking	March 19, 2009; Noted in Decision on Annulment <a href="#">English</a>
24. <i>Kardassopoulos / Fuchs v. Georgia</i> ARB/05/18; ARB/07/15	Georgia	Granted	Security	November 12, 2010; <a href="#">English</a>
25. <i>Micula v. Romania</i> ARB/05/20	Romania	Granted	Written undertaking	August 7, 2014; Noted in Decision on Annulment <a href="#">English</a>
26. <i>Togo Electricité v. Togo</i> ARB/06/7	Togo	Granted	No Condition	January 31, 2011; Noted in Decision on Annulment <a href="#">French</a>
27. <i>Libananco v. Turkey</i> ARB/06/8	Libananco	Granted	No Condition	May 7, 2012; <a href="#">English</a>
28. <i>Occidental v. Ecuador</i> ARB/06/11	Ecuador	Granted	No Condition	September 30, 2013; <a href="#">English</a> September 23, 2014; <a href="#">English</a>
29. <i>Lemire v. Ukraine</i> ARB/06/18	Ukraine	Granted	Security	February 14, 2012; Noted in Decision on Annulment <a href="#">English</a> (excerpts)
30. <i>RSM v. Central African Republic</i> ARB/07/2	RSM	Rejected	N/A	March 29, 2012; Noted in Decision on Annulment <a href="#">French</a> (excerpts)
31. <i>Venezuela Holdings v. Venezuela</i> ARB/07/27	Venezuela	Granted	Written undertaking	September 17, 2015; <a href="#">English</a>



Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
32. <i>SGS v. Paraguay</i> ARB/07/29	Paraguay	Rejected	N/A	March 22, 2013; <a href="#">English</a>
33. <i>Caratube v. Kazakhstan</i> ARB/08/12	Caratube	Granted	No Condition	March 14, 2013; Noted in Decision on Annulment <a href="#">English</a>
34. <i>Elsamex v. Honduras</i> ARB/09/4	Honduras	Granted	Written Undertaking	January 7, 2014; <a href="#">Spanish</a>
35. <i>Iberdrola v. Guatemala</i> ARB/09/5	Iberdrola	Stay agreed by the Parties	Security	October 28, 2013; Noted in Decision on Annulment <a href="#">Spanish</a>
36. <i>Dogan v. Turkmenistan</i> ARB/09/9	Turkmenistan	Granted	Security	November 24, 2014; Noted in Decision on Annulment <a href="#">English</a>
37. <i>Kılıç v. Turkmenistan</i> ARB/10/1	Kılıç	Granted	Security	June 5, 2014; Noted in Decision on Annulment <a href="#">English</a>
38. <i>Lahoud v. DRC</i> ARB/10/4	Democratic Republic of Congo	Granted	Security	September 30, 2014 <a href="#">French</a>
39. <i>Tidewater v. Venezuela</i> ARB/10/5	Venezuela	Partially granted	No Condition	February 29, 2016; <a href="#">English</a> <a href="#">Spanish</a>
40. <i>Flughafen v. Venezuela</i> ARB/10/19	Venezuela	Granted	Security	March 11, 2016; <a href="#">Spanish</a>
41. <i>Teco v. Guatemala</i> ARB/10/23	Guatemala	Granted	No Condition	February 10, 2015; Noted in Decision on Annulment <a href="#">English</a>
42. <i>Rizvi v. Indonesia</i> ARB/11/13	Rizvi	Information not publicly available	Information not publicly available	February 5, 2015
43. <i>OI European Group v. Venezuela</i> ARB/11/25	Venezuela	Rejected	N/A	April 4, 2016; <a href="#">English</a>

(v) Hearing and Post-Hearing Phase

59. 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.<sup>106</sup>

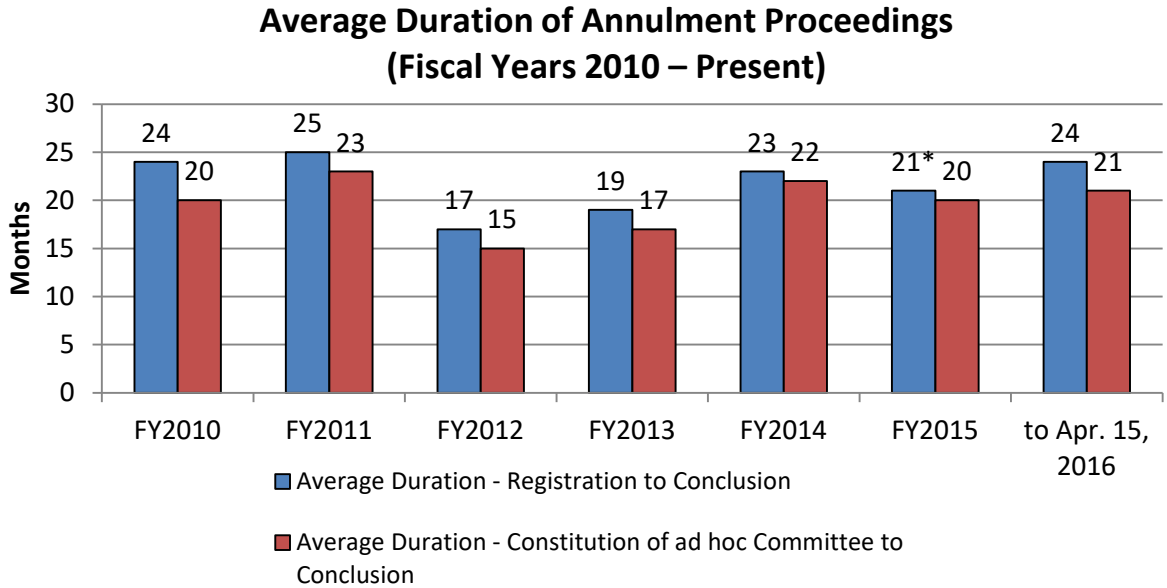
60. At the hearing or shortly thereafter, the *ad hoc* Committee invites the parties to file submissions on costs and sometimes also to file post-hearing briefs. The *ad hoc* Committee closes the proceeding once the presentation of the annulment case is concluded and the Committee has made progress in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

61. Of the 25 decisions on annulment issued since January 2011, 22 have been issued within one year of the hearing. The average time from the hearing to issuance of these 22 decisions

<sup>106</sup> *But see supra*, para. 51 & note 92.

<sup>107</sup> *See* Arbitration Rules 38(1) & 46.

was 7 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 24 months.<sup>108</sup> The overall average duration of all concluded annulment proceedings during the past 5 years is 22 months from the date of registration (20 months from the date of constitution of the *ad hoc* Committee).



\* This average excludes one case in which the constitution of the *ad hoc* Committee was suspended for over 6 years pursuant to an agreement by the parties.

D. *The Decision on Annulment*

62. 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 its discretion not to annul notwithstanding that an error has been identified.<sup>109</sup> 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.<sup>110</sup> Several annulment proceedings have been discontinued due to an Applicant’s

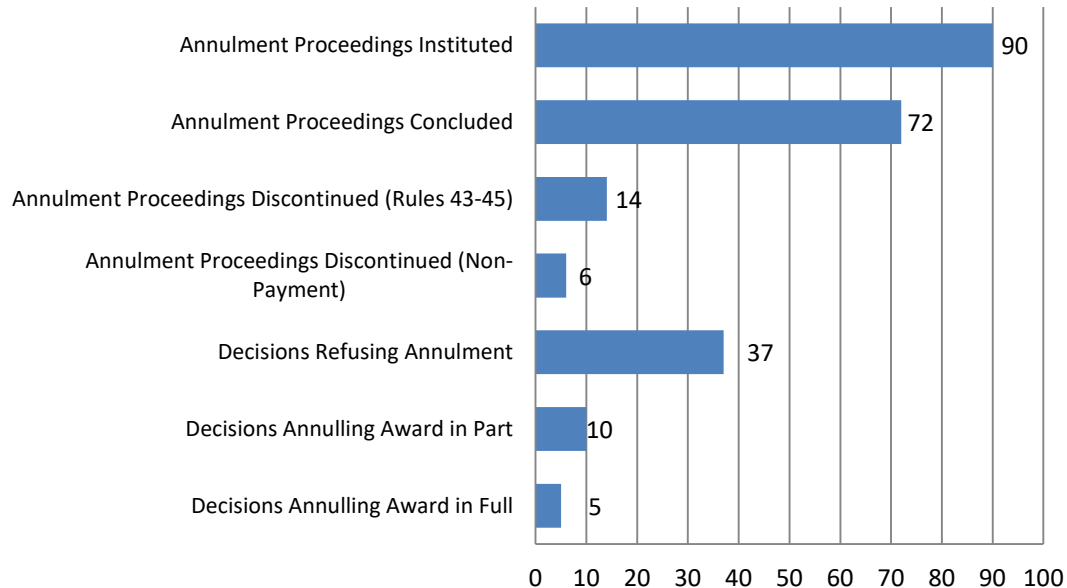
<sup>108</sup> This average excludes discontinued proceedings.

<sup>109</sup> ICSID Convention Article 52(3), *see infra*, para. 74(4).

<sup>110</sup> Arbitration Rules 43-45; Administrative and Financial Regulation 14(3)(d) & (e).

failure to pay the advances and the other party's unwillingness to make the outstanding payment.<sup>111</sup>

## Annulment Proceedings - Outcomes



63. 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.<sup>112</sup> Likewise, the decision must contain the elements required in an award.<sup>113</sup> Notably, the decision must include the reasons upon which it is based.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> Other *ad hoc* Committees examined all grounds raised, even where one of these grounds warranted full annulment.<sup>117</sup>

<sup>111</sup> See Annex 1. As noted in para. 52, 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.

<sup>112</sup> ICSID Convention Article 53(2).

<sup>113</sup> *Id.* at Articles 48 & 52(4); Arbitration Rules 47 & 53.

<sup>114</sup> ICSID Convention Articles 48(3) & 52(4); Arbitration Rules 47(1)(i) & 53.

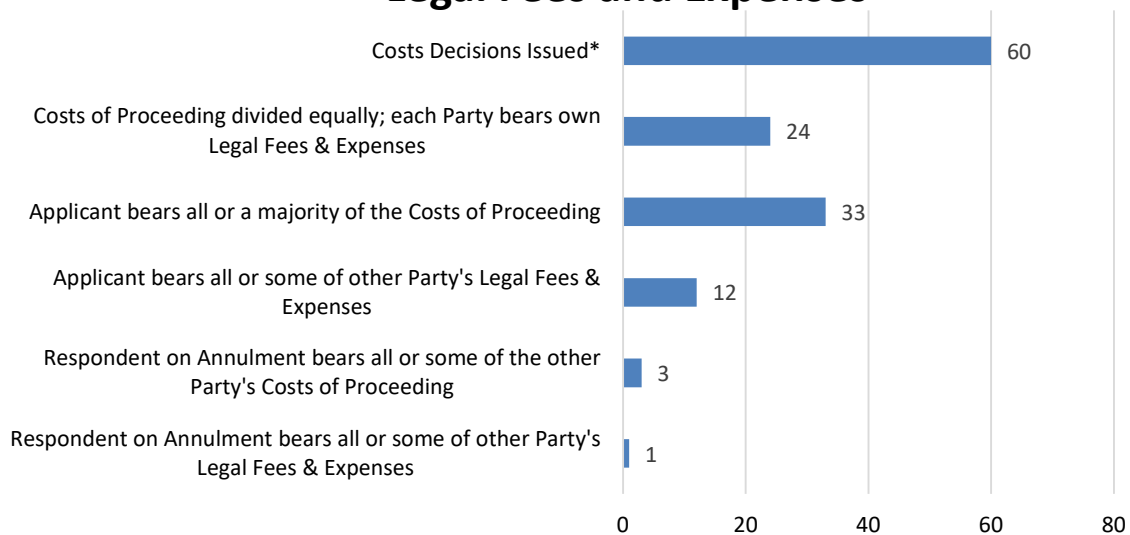
<sup>115</sup> See e.g., *Sempra*, para 78.

<sup>116</sup> See e.g., *MINE*, para. 6.109; *Vivendi I*, paras. 115 & 116; *Occidental*, para. 302; *TECO*, paras. 150, 159 & 167.

<sup>117</sup> See e.g., *Amco I*, para. 16; *Klöckner I*, para. 82.

64. 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.<sup>118</sup>
65. 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.<sup>119</sup> The Committee has discretion to decide how and by whom these costs should be paid, including each party's legal fees and expenses.<sup>120</sup> While *ad hoc* Committees in the past usually divided the Costs of Proceeding<sup>121</sup> equally between the parties and ruled that each party bear its own legal fees and expenses, in recent years, a majority of Committees have decided that the Applicant should bear all or a majority of the Costs of Proceeding when the application for annulment was unsuccessful. Some *ad hoc* Committees have also ruled that the losing party should bear the legal fees and expenses of the successful party, in most instances the defending party.<sup>122</sup>

### Allocation of Costs of Proceeding/ Legal Fees and Expenses



\*Including 7 Orders of Discontinuance which contained orders on costs and counting as two the separate decisions on cross-applications made in one decision on annulment.

<sup>118</sup> See, e.g., *Enron*, para. 340; *Azurix*, para. 362; *CDC*, para. 70; *Lucchetti*, para. 112; *AES*, para. 15; *Tza Yap Shum*, para. 81; *Duke Energy*, para. 99; *Dogan*, paras. 261-263.

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

<sup>120</sup> *Id.*

<sup>121</sup> See *supra*, para. 52.

<sup>122</sup> As noted in para. 63, 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).

## Decisions on Allocation of Costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
1. <i>Amco v. Indonesia I</i> ARB/81/1	Indonesia	Annulled in part	Divided equally	Each Party bears its own costs
2. <i>Amco v. Indonesia II</i> ARB/81/1- Resubmission	Both Parties	Annulment rejected	Divided equally	Each Party bears its own costs
3. <i>Klöckner v. Cameroon I</i> ARB/81/2	Klöckner	Annulled in full	Divided equally	Each Party bears its own costs
4. <i>Klöckner v. Cameroon II</i> ARB/81/2 – Resubmission	Both Parties	Annulment rejected	Divided equally	Each Party bears its own costs
5. <i>SPP v. Egypt</i> ARB/84/3	Egypt	Discontinued	Settlement – No order on costs	Settlement – No order on costs
6. <i>MINE v. Guinea</i> ARB/84/4	Guinea	Annulled in part <a href="#">English</a>	Divided equally	Each Party bears its own costs
7. <i>Vivendi v. Argentina I</i> ARB/97/3	Vivendi	Annulled in part <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
8. <i>Vivendi v. Argentina II</i> ARB/97/3 – Resubmission	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
9. <i>Pey Casado v. Chile</i> ARB/98/2	Chile	Annulled in part <a href="#">English</a> <a href="#">French</a>	Divided equally	Each Party bears its own costs
10. <i>Wena Hotels v. Egypt</i> ARB/98/4	Egypt	Annulment rejected <a href="#">English</a>	Divided equally	Each Party bears its own costs
11. <i>Gruslin v. Malaysia</i> ARB/99/3	Both Parties	Discontinued (Lack of Payment)	No order on costs	No order on costs
12. <i>Mitchell v. DRC</i> ARB/99/7	DRC	Annulled in full <a href="#">English</a>	Divided equally	Each Party bears its own costs
13. <i>RFCC v. Morocco</i> ARB/00/6	RFCC	Annulment rejected	Applicant	Each Party bears its own costs
14. <i>Enron v. Argentina</i> ARB/01/3	Argentina	Annulled in part <a href="#">English</a>	Divided equally	Each Party bears its own costs
15. <i>MTD Equity v. Chile</i> ARB/01/7	Chile	Annulment rejected <a href="#">English</a>	Divided equally	Each Party bears its own costs
16. <i>CMS Gas v. Argentina</i> ARB/01/8	Argentina	Annulled in part <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
17. <i>Repsol v. Petroecuador</i> ARB/01/10	Petroecuador	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Applicant
18. <i>Azurix v. Argentina</i> ARB/01/12	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
19. <i>LG&amp;E v. Argentina</i> ARB/02/1	Both Parties	Discontinued <a href="#">English</a> <a href="#">Spanish</a>	No order on costs	No order on costs
20. <i>Soufraki v. UAE</i> ARB/02/7	Soufraki	Annulment rejected <a href="#">English</a>	Divided equally	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
21. <i>Siemens v. Argentina</i> ARB/02/8	Argentina	Discontinued	Settlement – Divided equally	Settlement – Each Party bears its own costs
22. <i>CDC Group v. Seychelles</i> ARB/02/14	Seychelles	Annulment rejected <a href="#">English</a>	Applicant	Applicant
23. <i>Ahmonseto v. Egypt</i> ARB/02/15	Ahmonseto	Discontinued (Lack of Payment)	Applicant	Each Party bears its own costs
24. <i>Sempra v. Argentina</i> ARB/02/16	Argentina	Annulled in full <a href="#">English</a> <a href="#">Spanish</a>	Respondent on Annulment	Each Party bears its own costs
25. <i>Lucchetti v. Peru</i> ARB/03/4	Lucchetti	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
26. <i>MCI v. Ecuador</i> ARB/03/6	MCI	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
27. <i>Continental Casualty v. Argentina</i> ARB/03/9	Both Parties	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
28. <i>Joy Mining v. Egypt</i> ARB/03/11	Joy Mining	Discontinued <a href="#">English</a>	Settlement – no order on costs	Settlement – no order on costs
29. <i>El Paso v. Argentina</i> ARB/03/15	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
30. <i>EDF v. Argentina</i> ARB/03/23	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
31. <i>Fraport v. Philippines</i> ARB/03/25	Fraport	Annulled in full <a href="#">English</a>	Divided equally	Each Party bears its own costs
32. <i>Duke Energy v. Peru</i> ARB/03/28	Peru	Annulment rejected <a href="#">English</a>	Applicant	Each Party bears its own costs
33. <i>Total v. Argentina</i> ARB/04/1	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
34. <i>Transgabonais v. Gabon</i> ARB/04/5	Gabon	Annulment rejected	Applicant	Applicant
35. <i>Vieira v. Chile</i> ARB/04/7	Vieira	Annulment rejected <a href="#">Spanish</a>	Applicant	Applicant
36. <i>Daimler v. Argentina</i> ARB/05/1	Daimler	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
37. <i>MHS v. Malaysia</i> ARB/05/10	MHS	Annulled in full <a href="#">English</a>	Respondent on Annulment	Each Party bears its own costs
38. <i>RSM v. Grenada</i> ARB/05/14	RSM	Discontinued (Lack of Payment)	Applicant	Applicant
39. <i>Siag v. Egypt</i> ARB/05/15	Egypt	Discontinued	Applicant	Each Party bears its own costs
40. <i>Rumeli v. Kazakhstan</i> ARB/05/16	Kazakhstan	Annulment rejected <a href="#">English</a>	Divided equally	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
41. <i>Kardassopoulos / Fuchs v. Georgia</i> ARB/05/18; ARB/07/15	Georgia	Discontinued	Settlement – no order on costs	Settlement – no order on costs
42. <i>Helnan v. Egypt</i> ARB/05/19	Helnan	Annulled in part <a href="#">English</a>	Divided equally	Each Party bears its own costs
43. <i>Micula v. Romania</i> ARB/05/20	Romania	Annulment rejected <a href="#">English</a>	Applicant	Each Party bears its own costs
44. <i>Togo Electricité v. Togo</i> ARB/06/7	Togo	Annulment rejected <a href="#">French</a>	Applicant	Applicant
45. <i>Libananco v. Turkey</i> ARB/06/8	Libananco	Annulment rejected <a href="#">English</a> (excerpts)	Applicant	Each Party bears its own costs
46. <i>Occidental v. Ecuador</i> ARB/06/11	Ecuador	Annulled in part <a href="#">English</a> <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
47. <i>Lemire v. Ukraine</i> ARB/06/18	Ukraine	Annulment rejected <a href="#">English</a> (excerpts)	Applicant	Each party bears its own costs
48. <i>Nations v. Panama</i> ARB/06/19	Nations	Discontinued (Lack of Payment)	Information not publicly available	Information not publicly available
49. <i>RSM v. Central African Republic</i> ARB/07/2	RSM	Annulment rejected <a href="#">French</a> (excerpts)	Applicant	Each Party bears its own costs
50. <i>Shum v. Peru</i> ARB/07/6	Peru	Annulment rejected <a href="#">Spanish</a>	Divided with Applicant to bear 80% of the costs of the proceedings and Respondent 20%.	Each Party bears its own costs
51. <i>Toto v. Lebanon</i> ARB/07/12	Toto	Discontinued	Information not publicly available	Information not publicly available
52. <i>Impregilo v. Argentina</i> ARB/07/17	Argentina	Annulment rejected <a href="#">English</a> <a href="#">Spanish</a>	Applicant	Each Party bears its own costs
53. <i>AES Summit v. Hungary</i> ARB/07/22	AES Summit	Annulment rejected <a href="#">English</a>	Applicant	Applicant
54. <i>SGS v. Paraguay</i> ARB/07/29	Paraguay	Annulment rejected <a href="#">English</a>	Applicant	Each Party bears its own costs
55. <i>Astaldi v. Honduras</i> ARB/07/32	Honduras	Discontinued <a href="#">Spanish</a>	Settlement - no order on costs	Settlement - no order on costs
56. <i>ATA v. Jordan</i> ARB/08/2	Jordan	Discontinued <a href="#">English</a>	Respondent on Annulment	Respondent on Annulment
57. <i>Caratube v. Kazakhstan</i> ARB/08/12	Caratube	Annulment rejected <a href="#">English</a>	Applicant	Each Party bears its own costs
58. <i>Alapli v. Turkey</i> ARB/08/13	Alapli	Annulment rejected <a href="#">English</a>	Applicant	Applicant
59. <i>Malicorp v. Egypt</i> ARB/08/18	Malicorp	Annulment rejected <a href="#">English</a> <a href="#">French</a>	Applicant	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
60. <i>Karmer v. Georgia</i> ARB/08/19	Georgia	Discontinued	Information not publicly available	Information not publicly available
61. <i>Elsamex v. Honduras</i> ARB/09/4	Honduras	Discontinued <a href="#">Spanish</a>	Settlement – no order on costs	Settlement – no order on costs
62. <i>Iberdrola v. Guatemala</i> ARB/09/5	Iberdrola	Annulment rejected <a href="#">Spanish</a>	Divided equally	Each Party bears its own costs
63. <i>KT Asia v. Kazakhstan</i> ARB/09/8	KT Asia	Discontinued (Lack of payment)	Information not publicly available	Information not publicly available
64. <i>Dogan v. Turkmenistan</i> ARB/09/9	Turkmenistan	Annulment rejected <a href="#">English</a>	Applicant	Applicant
65. <i>Commerce Group v. El Salvador</i> ARB/09/17	Commerce Group	Discontinued (Lack of payment) <a href="#">English</a>	Applicant	Each Party bears its own costs
66. <i>Kılıç v. Turkmenistan</i> ARB/10/1	Kılıç	Annulment Rejected <a href="#">English</a>	Applicant	Each Party bears its own costs
67. <i>Lahoud v. DRC</i> ARB/10/4	DRC	Annulment rejected <a href="#">French</a>	Applicant	Applicant bears its own costs and half the costs incurred by Respondent on Annulment
68. <i>Levy de Levi v. Peru</i> ARB/10/17	Levy de Levi	Discontinued	Information not publicly available	Information not publicly available
69. <i>TECO v. Guatemala</i> ARB/10/23	Both Parties	Annulled in part <a href="#">English</a>	Divided equally (TECO's application); Applicant (Guatemala's application)	Each Party bears its own costs (TECO's application); Applicant bears 60% of legal fees and expenses (Guatemala's application)
70. <i>Rizvi v. Indonesia</i> ARB/11/13	Rizvi	Discontinued	Information not publicly available	Information not publicly available
71. <i>Tulip v. Turkey</i> ARB/11/28	Tulip	Annulment rejected <a href="#">English</a>	Applicant	Each Party bears its own costs

66. 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.<sup>123</sup> In practice, only 5 Committee members have partially or fully dissented from the majority's decision.<sup>124</sup>

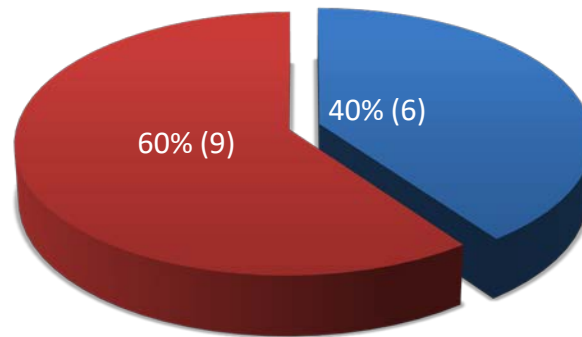
67. Where an award has been partially or wholly annulled, the prevailing Applicant on annulment was roughly evenly divided as between claimants (40%) and respondents (60%) in the Tribunal proceeding.

<sup>123</sup> ICSID Convention Articles 48(4) & 52(4); Arbitration Rules 47(3) & 53.

<sup>124</sup> See *Vivendi II*; *Soufraki*; *Lucchetti*; *MHS*; *Iberdrola*.



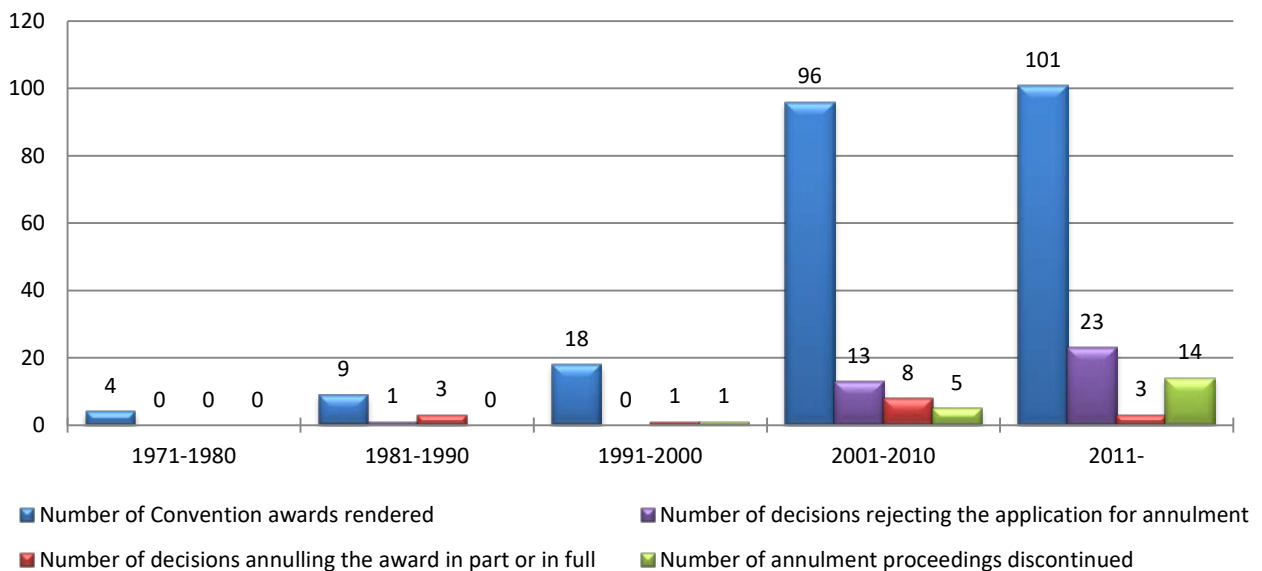
## Full and Partial Annulment - By Party



■ Annulment in Favor of Applicant-National of Another State  
 ■ Annulment in Favor of Applicant-State

68. The rate of annulment is low, with 2.8 percent of registered cases (6.6 percent of all awards) ending in full or partial annulment.<sup>125</sup> The ratio of annulments to awards fluctuates historically and has shown a downward trend over the decades. In the early years, during the period 1971 – 2000, the rate of annulment was 13 percent. During the period 2001–2010, this ratio decreased to 8 percent. Since January 2011, the ratio has further decreased to 3 percent.

## Annulment Proceedings under the ICSID Convention - Outcomes 1971 - Present



<sup>125</sup> *Amco I* (partial); *Amco II* (partial); *Klöckner I* (full); *MINE* (partial); *Vivendi I* (partial); *Victor Pey Casado* (partial); *Mitchell* (full); *Enron* (partial); *CMS* (partial); *Sempra* (full); *Fraport* (full); *MHS* (full); *Helnan* (partial); *Occidental* (partial); *TECO* (partial).

## E. *Resubmission Proceedings*

69. 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 to a newly constituted Tribunal to obtain a new award concerning the same dispute following annulment of the original award.<sup>126</sup> 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.<sup>127</sup> The new Tribunal is constituted by the same method as the original Tribunal<sup>128</sup> 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.<sup>129</sup>
70. There have been 7 resubmission proceedings registered to date,<sup>130</sup> 3 of which led to awards that were subject to a second annulment proceeding.<sup>131</sup> 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.<sup>132</sup>

## 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*

71. 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.”<sup>133</sup> The remedy has thus been characterized as one

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<sup>126</sup> 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.

<sup>127</sup> Arbitration Rule 55(1). The Secretary-General has no authority to refuse registration of a resubmitted dispute. Arbitration Rule 55(2).

<sup>128</sup> Arbitration Rule 55(2)(d).

<sup>129</sup> 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*.

<sup>130</sup> *Amco II*; *Klöckner II*; *MINE*; *Vivendi II*; *Enron* (pending); *Sempra*; *Victor Pey Casado* (pending).

<sup>131</sup> *See Amco II*; *Klöckner II*; *Vivendi II*.

<sup>132</sup> *Amco II*. The annulment is regarded as a partial annulment of an award for purposes of the tables contained in this paper.

<sup>133</sup> *See* comment to Section 13 of the Preliminary Draft, History, *supra* note 5, at Vol. II, 218 & 219.

concerning “procedural errors in the decisional process” rather than an inquiry into the substance of the award.<sup>134</sup>

72. 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].”<sup>135</sup> 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.<sup>136</sup>
73. 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.<sup>137</sup>
74. ICSID *ad hoc* Committees have also affirmed these principles in their decisions.<sup>138</sup> 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.

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<sup>134</sup> Broches, *supra* note 6, at 298.

<sup>135</sup> See comment to Section 13 of the Preliminary Draft, History, *supra* note 5, at Vol. II, 218 & 219.

<sup>136</sup> See *supra* para. 21.

<sup>137</sup> 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 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 6, at 354 & 355.

<sup>138</sup> 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*, *Transgabonais*, *Lemire*, and *RSM*.

**(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*, 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*, 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*, 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 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) [unofficial 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) [unofficial 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) [unofficial translation from French].
- “Indeed, Article 52(1) of the ICSID Convention limits annulment to five grounds, all of which concern the very integrity of the arbitral process.” *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, para. 32 (July 10, 2014).
- “Article 52(1) of the ICSID Convention sets out the five grounds on the basis of which a party may request annulment of an award. This is an exhaustive list.” *Víctor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, para. 89 (December 18, 2012).
- “[T]he Committee will review the allegations raised by Argentina corresponding to those which are exhaustively listed in Article 52 of the ICSID Convention; the remaining allegations, which do not refer to the grounds for annulment, will be rejected without any analysis.” *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 137 (September 22, 2014) (emphasis omitted).
- “The only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention... Thus the grounds for annulment should be interpreted as being exhaustive and restrictive.” *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, para. 118 (January 24, 2014).
- “As regards the general approach of Article 52, the annulment grounds referred therein are clearly exhaustive.” *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment of RSM Production Corporation, para. 76 (February 20, 2013) [unofficial translation from French].

- “The award may only be subject to annulment if an *ad hoc* committee finds that one or more of the five grounds for annulment established in Article 52(1) apply.” *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 47 (November 2, 2015).
- “Under the ICSID Convention, annulment provides relief for egregious violations of certain basic principles. Article 52(1) of the Convention circumscribes the reasons for annulment.” *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 39 (December 30, 2015).
- “[I]t is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds. Its function is not to consider whether or not it agrees with the reasoning or the conclusions of the tribunal but only to determine whether or not one or more of the five grounds has been made out.” *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 67 (February 5, 2016).
- “It is not disputed that the grounds for annulment provided by Article 52(1) of the ICSID Convention are exhaustive and are the only grounds under which an award may be annulled.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 163 (February 1, 2016).
- “Annulment is a remedy of limited scope. Article 53 provides for the finality of awards by stating that they shall not be subject to ‘any appeal or any other remedy except those provided for in this Convention’. Article 52 sets out the limits of that exception by listing the grounds on which a party may seek annulment. The list is exhaustive. The decision to annul cannot be based on a ground other than the five listed in Article 52(1). It is now well settled that this exhaustive list of grounds safeguards the integrity and not the outcome of the arbitration proceedings.” *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 28 (January 15, 2016).
- “An annulment committee’s mandate is strictly circumscribed by the five grounds for annulment listed under the ICSID Convention and it may not, under the guise of applying them, reverse an award on the merits.” *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, para. 73 (April 5, 2016).

**(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) [unofficial 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) [unofficial 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)[unofficial 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).
- “In the Committee’s view, and in light of the text of the Convention, annulment is a limited remedy with a strictly circumscribed role: to safeguard the fundamental fairness and integrity of the underlying proceeding.” *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, para. 32 (July 10, 2014).
- “The annulment procedure is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed, but a limited remedy meant to ensure the fundamental fairness of the arbitration proceeding.” *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, para. 232 (July 10, 2014).
- “[I]t follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal’s act or its failure to act has had, or at least may have had, serious consequences for a party.” *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, para. 102 (May 22, 2013).
- “Therefore, when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention.” *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment, para. 189 (January 7, 2015).
- “[T]he object and purpose of the ICSID annulment procedure is to control the integrity of the arbitral proceeding in all its aspects... [L]imiting the number of grounds for annulment also aims to reinforce the finality and the ‘stability’ of ICSID awards.” *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment



of RSM Production Corporation, paras. 73, 75 (February 20, 2013) (footnote omitted) [unofficial translation from French].

- “In the context of the ICSID Convention, the object of the review is, however, restricted by Article 52(1)(e) which provides only a limited scope for review, as confirmed by a series of *ad hoc* committees’ decisions.” *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, para. 112 (February 12, 2015) [unofficial translation from Spanish].
- “Article 52 of the ICSID Convention follows the model of a limited review. It represents a control mechanism that ensures that a decision has remained within the framework of the parties’ agreement to arbitrate and is the result of a process that was in accord with basic requirements of fair procedure. The main function of annulment is to provide a limited form of review of awards in order to safeguard the integrity of ICSID proceedings.” *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 41 (December 30, 2015).
- “Annulment is possible on a very limited number of grounds. In the case of the ICSID Convention, these are listed exhaustively in Article 52(1).” *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 43 (December 30, 2015).
- “As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed. Annulment under the ICSID Convention is a limited remedy.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 179 (February 1, 2016) (footnotes omitted).
- “[A]nnulment is an exceptional, narrowly circumscribed remedy, and the role of an *ad hoc* committee is limited.” *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, para. 108 (March 29, 2016) [unofficial translation from French].

**(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) [unofficial 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. 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) (footnote omitted) [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) [unofficial 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) [unofficial 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) [unofficial 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).
- “Article 52(1)(e) does not empower an *ad hoc* Committee to review the merits of a case. Indeed, such a review would amount to an appeal, which is an impermissible remedy pursuant to Article 53 of the ICSID Convention.” *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment, para. 197 (July 10, 2014).
- “If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal... and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal.” *Daimler Financial Services A.G. v. Republic of Argentina* ICSID Case No. ARB/05/1, Decision on Annulment, para. 186 (January 7, 2015).
- “The annulment proceeding is not an appeal and therefore, is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed.” *Daimler Financial Services A.G. v. Republic of Argentina* ICSID Case No. ARB/05/1, Decision on Annulment, para. 188 (January 7, 2015) (footnote omitted).
- “It is clear that Chile is here seeking in effect to appeal the Tribunal’s decision and is asking the Committee to substitute its decision for that of the Tribunal. As is well established, this is not the remit of an Annulment Committee. An *ad hoc* committee is not an appeal body.” *Víctor Pey Casado and Foundation “Presidente Allende” v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, para. 129 (December 18, 2012).

- “If the tribunal’s legal interpretation is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law, the award must stand – otherwise the annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention.” *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, para. 144 (February 21, 2014) (footnote omitted).
- “Article 52.1.e of the Convention is not a means by which a Committee may decide or influence the substance of the dispute. Indeed, this provision is no means of appeal, which is not disputed by the parties for that matter.” *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment of RSM Production Corporation, para. 92 (February 20, 2013) [unofficial translation from French].
- “Most committees have understood that this recourse of annulment must be clearly distinguished from an appeal. The difference between appeal and annulment is relevant in two ways. First, as to the result of the review procedure: an appeal can modify the award under review, whereas annulment can only invalidate it (fully or partially) or assert its validity, without being able to modify its content. Second, as has been recognized (among others) by the Committees in *Soufraki* and *Pey Casado* in the annulment decision it is not pertinent to rule on the substantive correctness of the award, because the annulment regime was designed to protect the integrity and not the result of ICSID arbitration proceedings; therefore, annulment refers only to the legitimacy of the decision process and not to its merit.” *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Request for Annulment of the Award Submitted by Iberdrola Energía, S.A., para. 74 (January 13, 2015) (footnotes omitted) [unofficial translation from Spanish].
- “It is the Arbitral Tribunal which must interpret the law. The Committee reiterates that it is not its function to act as an appeals tribunal.” *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, para. 156 (February 12, 2015) [unofficial translation from Spanish].
- “In essence, there is a unanimous agreement that annulment is distinct from appeal. The *ad hoc* committees are not courts of appeal and their task is not to harmonize ICSID’s jurisprudence[.]” *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, para. 105 (May 19, 2014) (footnote omitted).
- “Allowing annulment committees to overturn incorrect applications of the law was specifically rejected by the drafters of the ICSID Convention because some delegates feared that this would call into question the finality of awards. Incorrect application of the law is thus not a basis for annulment except in the most egregious cases[.]” *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, para. 97 (May 22, 2013) (footnote omitted).
- “[A]n examination of the reasons presented by a tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based. Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader

can understand how the tribunal arrived at its conclusion. Broadening the scope of Article 52(1)(e) to comprise decisions with inadequate reasons would transform the annulment proceeding into an appeal.” *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 66 (November 2, 2015).

- “Annulment is fundamentally different from appeal. The result of a successful application for annulment is the invalidation of the original decision. The result of a successful appeal is its modification. A decision-maker exercising the power to annul only has the choice between leaving the original decision intact or annulling it in whole or in part. An appeals body may substitute its own decision for the decision that it has found to be deficient. Under the ICSID Convention, an ad hoc committee only has the power to annul the award. The ad hoc committee may not amend or replace the award by its own decision on the merits. Article 53(1) of the Convention explicitly rules out any appeal.” *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 42 (December 30, 2015).
- “ICSID *ad hoc* committees have adamantly stressed the distinction between annulment and appeal. They have stated consistently that their functions are limited and that they do not have the powers of a court of appeal. A decision to annul has to be based on one of the five reasons listed in Article 52(1). *Ad hoc* committees cannot review an award’s findings for errors of fact or law.” *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 44 (December 30, 2015) (footnotes omitted).
- “[I]t is a well established principle that, as the *ad hoc* committee in *MTD Equity and MTD Chile v. Republic of Chile* put it – 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.” *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 64 (February 5, 2016) (footnote omitted).
- “Article 53 of the ICSID Convention provides for the fundamental features of an arbitration award and confirms the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties. The said article confirms also that the only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention and that no appeal is allowed.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 164 (February 1, 2016) (footnote omitted).
- “As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed. Annulment under the ICSID Convention is a limited remedy.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 179 (February 1, 2016) (footnotes omitted).
- “[I]t is not within the Committee’s remit to review the substantive correctness of the Award, either in fact or in law. However, the Committee must examine the legitimacy of the arbitration



proceedings resulting in the Award. This means that it is not the Committee's function to sit in appeal on the Award of the Tribunal. It must not substitute its views for those of the Tribunal." *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 29 (January 15, 2016).

- "It is not within an *ad hoc* committee's remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A tribunal's discretion in such matters of appreciation and evaluation of evidence is recognized by the ICSID system. An *ad hoc* committee cannot sit in appeal on a tribunal's assessment of the evidence. If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body. That is not a function envisaged for it by the ICSID Convention." *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 129 (January 15, 2016) (footnotes omitted).
- "The Committee notes that ICSID *ad hoc* committees have repeatedly held that the annulment mechanism is an exceptional and narrowly circumscribed remedy, and that it is not a remedy against an incorrect decision. As a result, committees have stressed the distinction between annulment and appeal, and stated that they cannot review the correctness of an award's findings on facts or law. The Committee agrees with *CMS v. Argentina* that a committee 'has only limited jurisdiction under Article 52 of the Convention' and 'cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.' The Committee will apply these general standards when considering each of the grounds for annulment pleaded in this case." *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, para. 122 (February 26, 2016) (footnotes omitted).
- "Unreasoned awards can be annulled, because parties should be able to ascertain to what extent a tribunal's findings are based on a correct interpretation of the law and on a proper evaluation of the facts. However, as long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground. Article 52(1)(e) does not permit any enquiry into the quality or persuasiveness of reasons." *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, para. 135 (February 26, 2016) (footnotes omitted).
- "[A]*d hoc* committees are not courts of appeal, and annulment is not a remedy against a decision deemed as incorrect. This principle has been repeatedly stated by *ad hoc* committees." *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, para. 111 (March 29, 2016) (footnote omitted) [unofficial translation from French].
- "It is nevertheless necessary to distinguish between the non-application by the arbitral Tribunal of the normally applicable law that constitutes a ground for annulment, and the misapplication of the applicable law, which does not constitute an excess of power and is therefore not a ground for annulment." *Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application

for Annulment of the Democratic Republic of the Congo, para. 119 (March 29, 2016) (footnotes omitted) [unofficial translation from French].

- “Within the carefully balanced system of remedies established by the ICSID Convention and the Arbitration Rules, annulment is concerned with ensuring the fundamental fairness and integrity of the underlying proceeding. As it has often been repeated, annulment is not an appeal and an annulment committee is not empowered to review the substantive correctness of the Award, either in fact or in law. An annulment committee may not, within the confines of an annulment proceeding, review the assessment of the factual record by a tribunal.” *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, para. 73 (April 5, 2016) (footnote omitted).

**(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 annulable 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 annulable] 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) [unofficial 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 annulable 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).
- “The fundamental goal of the ICSID system is to assure the finality of the ICSID arbitration award. In this respect, the Committee agrees with Claimant that the annulment proceeding concerns serious procedural irregularities in the decisional process rather than an appeal on the merits. The limited and exceptional nature of the annulment remedy provided by Article 52 of the ICSID Convention forbids an inquiry on the substance of the case, on the misapplication of the law or on mistakes in analyzing the facts.” *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine’s Application for Annulment of the Award, para. 233 (July 8, 2013) (footnotes omitted).
- “Article 53 sets out the fundamental features of an arbitration award, reiterating the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties... Given this framework this Committee concludes that in balancing these principles and interests, annulment is an exceptional recourse that should respect the finality of the award.” *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, para. 118 (January 24, 2014).
- “Article 52(3) of the ICSID Convention provides in part that ‘[t]he Committee shall have the authority to annul the award [...]’ Under the ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1). Decisions on applications for annulment confirm that, even if a ground listed in Article 52(1) exists, annulment will ensue only if the flaw has had a serious adverse impact on one of the parties.” *Tulip Real Estate and*

*Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 45 (December 30, 2015) (footnote omitted).

- “The Committee considers that the [final sentence of Article 52(3) of the ICSID Convention] clearly indicate[s] that committees were intended to have a degree of discretion. To say that a committee ‘shall have the authority to annul the award’ is very different from saying that a committee ‘shall annul the award’. Moreover, the Committee notes that other *ad hoc* committees have proceeded on the basis that annulment was not mandatory and that they enjoyed a discretion whether or not to annul the award under consideration. The Committee concludes that, even if an Article 52(1) ground is made out, it nevertheless retains a discretion as to whether or not to annul the award. That discretion is by no means unlimited and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether or not they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties.” *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 73 (February 5, 2016) (footnote omitted).
- “[I]t is also undisputed that an annulment committee should not review the merits. It is not the duty of an *ad hoc* committee under the ICSID Convention to revisit the merits of the case, or to comment on what it would have decided on the merits had it acted as an arbitral tribunal. Annulment is an exceptional recourse that should consider the finality of the award.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 165 (February 1, 2016).
- “Thus, the grounds for annulment should be interpreted as being exhaustive, considering their object and purpose, as an exceptional remedy, against an award that is otherwise considered final and binding.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 166 (February 1, 2016).

**(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) [unofficial 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).
- “[T]he Award shall be reviewed in light of the annulment grounds invoked by Iberdrola according to their genuine meaning, i.e. pursuant to an interpretation that is neither restrictive nor extensive, but limited to the scope and object of annulment.” *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Request for Annulment of the Award Submitted by Iberdrola Energía, S.A., para. 77 (January 13, 2015) (footnote omitted) [unofficial translation from Spanish].
- “ICSID *ad hoc* committees have affirmed in their decisions, and this Committee agrees, that (a) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (b) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* committee is limited; (c) *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; (d) *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; (e) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (f) 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.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 167 (February 1, 2016) (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*

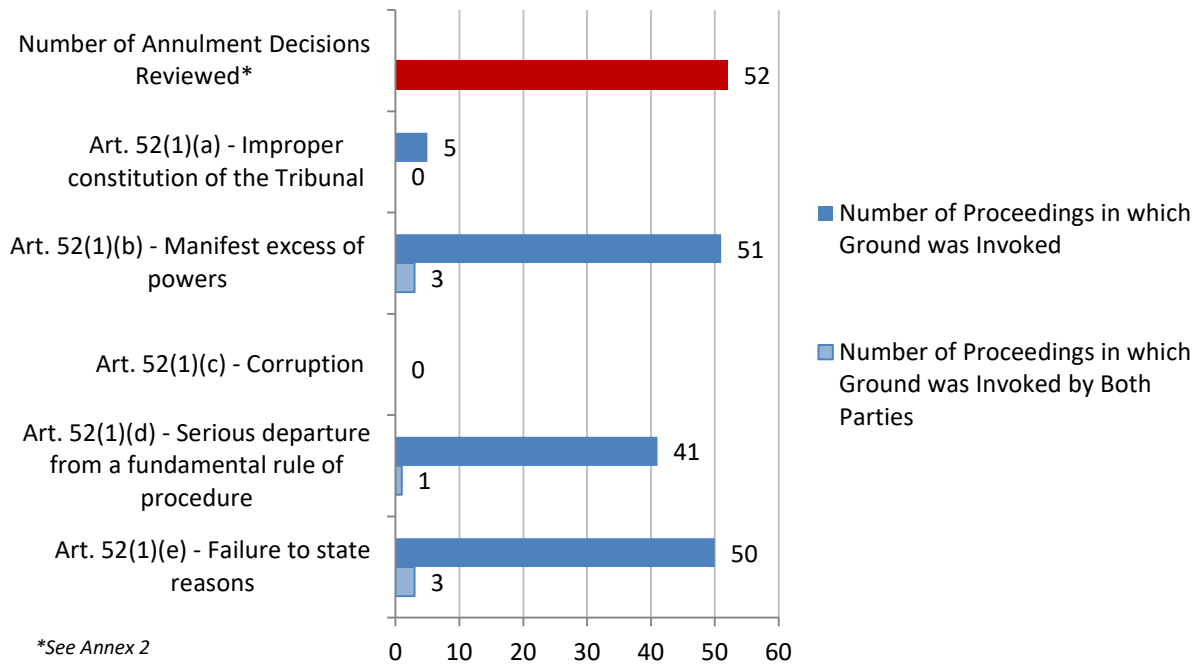
*International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.08 (December 22, 1989).

- “[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) [unofficial 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).
- “Awards can be annulled in their entirety ‘or any part thereof’ [Article 52 (3)]. Committees, however, are not empowered to amend or replace such awards, nor to review the merits of the dispute. Factual findings and weighing of evidence made by tribunals are, as a general rule, outside the remit of *ad hoc* committees.” *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 47 (November 2, 2015) (footnote omitted).
- “ICSID *ad hoc* committees have affirmed in their decisions, and this Committee agrees, that... 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.” *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 167 (February 1, 2016) (footnotes omitted).

B. *The Interpretation of Specific Grounds*

75. 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.<sup>139</sup>

### Grounds Invoked in Annulment Proceedings



76. 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 2 details the grounds invoked in annulment decisions, showing which were upheld and rejected.<sup>140</sup>

(i) *Improper Constitution of the Tribunal*

77. 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

<sup>139</sup> ICSID Convention Article 52(1) provides that a party may request annulment “on one or more” grounds.

<sup>140</sup> See “Annulment Grounds in Concluded Proceedings,” Annex 2.



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.<sup>141</sup>

78. 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, the appointment process, and the arbitrator's declaration of impartiality and independence.<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

79. Improper constitution of a Tribunal has been raised in only 5 annulment cases leading to decisions. Four rejected the allegation based on this ground.<sup>145</sup> In a fifth 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.<sup>146</sup>

80. The 5 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 does 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.<sup>147</sup> *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.<sup>148</sup>

(ii) Manifest Excess of Powers

81. 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

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<sup>141</sup> See *supra* para. 18.

<sup>142</sup> See Arbitration Rules 1-12 (which implement the provisions of ICSID Convention Articles 14(1), 37-40 & 56-58).

<sup>143</sup> 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.

<sup>144</sup> History, *supra* note 5, at Vol. II, 851 & 852.

<sup>145</sup> See Annex 2; *Vivendi II*; *Azurix*; *Transgobonais*; *EDF*.

<sup>146</sup> *Sempra*.

<sup>147</sup> *Azurix*, paras. 272-284.

<sup>148</sup> *Azurix*, para. 291; *Transgobonais*, paras. 129 & 130.

been submitted to it, or failed to apply the law agreed to by the parties.<sup>149</sup> 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.

82. 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.”<sup>150</sup> As a result, *ad hoc* Committees have identified two methodological approaches to determine whether there is an annulable 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.”<sup>151</sup> 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.”<sup>152</sup>

83. 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,<sup>153</sup> and which is discernable without the need for an elaborate analysis of the award.<sup>154</sup> 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.<sup>155</sup>

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<sup>149</sup> See *supra* paras. 14, 19-20.

<sup>150</sup> See *supra* paras. 14, 19-21.

<sup>151</sup> *Sempra*, para. 212; *Fraport*, para. 40; *AES*, para. 32; *Lemire* para. 240; *Occidental*, para. 57; *EDF*, para. 191; *Total*, para. 171; *Micula*, para. 123; *TECO*, para. 76.

<sup>152</sup> *Id.* One *ad hoc* Committee has stated that “‘manifest’ does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of power has in fact occurred.” *Occidental*, para. 267.

<sup>153</sup> *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”); *Malicorp*, para. 56 (“both obvious and serious”); *Tza Yap Shum*, para. 82 (“must be evident”); *SGS*, para. 122 (“textually obvious and substantively serious”); *Libananco*, para. 82 (“‘self-evident,’ ‘clear,’ ‘plain on its face’ or ‘certain’”); *Occidental*, para. 57 (“perceived without difficulty”); *Tulip*, para. 56 (“obvious, clear or easily recognizable”); *Micula*, para. 123 (“evident, obvious, clear or easily recognizable”); *Total*, para. 173; *Dogan*, para. 103; *Lahoud*, para. 128; *TECO*, paras. 77, 181.

<sup>154</sup> 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”); *El Paso*, para. 142 (“obvious, evident, clear, self-evident and extremely serious”).

<sup>155</sup> *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;

84. Manifest excess of powers has been invoked in every case but one leading to a decision on annulment.<sup>156</sup> There have been 9 instances of partial or full annulment on this basis.<sup>157</sup>

(a) Manifest Excess of Powers Relating to Jurisdiction

85. 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 requirements that must be fulfilled for a Tribunal to have jurisdiction.<sup>158</sup> 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.'<sup>159</sup> 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.<sup>160</sup>

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

87. *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,<sup>161</sup> or when the Tribunal exceeds the scope of its jurisdiction.<sup>162</sup> 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.<sup>163</sup>

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*Impregilo*, para. 128 ("obvious, self-evident, clear, flagrant and substantially serious"); *Libananco*, para. 102; *Total*, para. 308.

<sup>156</sup> The exception is *RSM v. Central African Republic*.

<sup>157</sup> *Amco I* (partial); *Klöckner I* (full); *Vivendi I* (partial); *Mitchell* (full); *Enron* (partial); *Sempra* (full); *MHS* (full); *Helnan* (partial); and *Occidental* (partial).

<sup>158</sup> ICSID Convention Article 25(1).

<sup>159</sup> *Id.*

<sup>160</sup> ICSID Convention Article 41(1).

<sup>161</sup> *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); *Occidental*, paras. 49-51; *Tulip*, para. 55; *EDF*, para. 191; *Total*, para. 242; *Dogan*, para. 105; *Micula*, para. 125; *Lahoud*, para. 118; *TECO*, para. 77.

<sup>162</sup> *Klöckner I*, para. 4; *Soufraki*, para. 42; *Occidental*, paras. 49-51; *Tulip*, para. 55; *Total*, para. 242; *Dogan*, para. 105; *Micula*, para. 125; *Lahoud*, para. 118; *TECO*, para. 77.

<sup>163</sup> *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; *Vivendi I*, para. 86); *Caratube*, para. 75 (quoting *Vivendi I*, para. 115; *MHS*, para. 80); *Tulip*, para. 55; *Dogan*, para. 105; *Micula*, para. 126.

88. 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.<sup>164</sup> 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."<sup>165</sup> 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.<sup>166</sup>

89. The issue of lack or excess of jurisdiction has been ruled on in 30 annulment decisions and has led to one full and one partial annulment.<sup>167</sup> In addition, the non-exercise of an existing jurisdiction has been decided in 13 decisions and has resulted in one full and 2 partial annulments.<sup>168</sup>

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

90. 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 annulable error, even if it is manifest.<sup>169</sup> 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.<sup>170</sup>

91. 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

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<sup>164</sup> *Enron*, para. 69 (citing *Azurix*, para. 67); *Azurix*, para. 67; *Soufraki*, para. 50; *SGS v. Paraguay*, para. 114; see also History, *supra* note 5, 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).

<sup>165</sup> See *supra* para. 19; *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; *SGS v. Paraguay*, para. 114; *Kılıç*, para. 56; *Total*, para. 176; *TECO*, para. 219.

<sup>166</sup> *Vivendi I*, paras. 72 & 86.

<sup>167</sup> 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. See *Occidental*, para. 590. The award in *Occidental* was partially annulled on this ground.

<sup>168</sup> *Vivendi I* (partial); *Helnan* (partial); *MHS* (full).

<sup>169</sup> See *supra* paras. 15 & 21.

<sup>170</sup> See *supra* para. 74.

its rules on the conflict of laws) and such rules of international law as may be applicable.<sup>171</sup>

92. 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.

93. *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.<sup>172</sup> 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,<sup>173</sup> while others have found that such an approach comes too close to an appeal.<sup>174</sup> Similarly, *ad hoc* Committees have discussed whether application of a law different from that purportedly applied by the Tribunal could be considered a manifest excess of powers.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

94. The failure to apply the proper law has been invoked in 44 out of 52 annulment decisions. It has led to two partial and two full annulments.<sup>178</sup>

(iii) Corruption on the Part of a Tribunal Member

95. The drafters of the ICSID Convention decided not to replace the word "corruption" with "misconduct," "lack of integrity" or "a defect in moral character."<sup>179</sup> They also decided not

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<sup>171</sup> ICSID Convention Article 42(1).

<sup>172</sup> *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); *Daimler*, para. 153; *Tulip*, para. 58; *EDF*, para. 191; *Total*, para. 195; *Dogan*, para. 98; *Micula*, para. 127; *Lahoud*, para. 118; *TECO*, paras. 283, 311.

<sup>173</sup> *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); *Caratube*, para. 81 (quoting *Soufraki*, para. 86); *Dogan*, para. 105; *Micula*, para. 130; *Lahoud*, para. 121.

<sup>174</sup> *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; *Impregilo*, para. 131; *El Paso*, para. 144; *Occidental*, para. 56.

<sup>175</sup> *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); *Occidental*, para. 55.

<sup>176</sup> *Klöckner I*, para. 60; *Enron*, paras. 68 & 220; *Azurix*, para. 47; *Iberdrola*, para. 98; *Dogan*, paras. 106-108.

<sup>177</sup> *Enron*; *CMS*; *Sempra*.

<sup>178</sup> *Amco I* (partial); *Klöckner I* (full); *Enron* (partial); *Sempra* (full).

<sup>179</sup> See *supra* para. 22.

to limit this ground to cases of corruption evidenced by a court judgment or a showing of “reasonable proof that corruption might exist.”<sup>180</sup>

96. When an arbitrator agrees 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.”<sup>181</sup> 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.

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

(iv) Serious Departure from a Fundamental Rule of Procedure

98. 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.<sup>182</sup> One such fundamental principle mentioned during the negotiations was the parties’ right to be heard.<sup>183</sup> The drafting history thus indicates that this ground is concerned with the integrity and fairness of the arbitral process.

99. 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.<sup>184</sup> *Ad hoc* Committees have thus consistently held that not every departure from a rule of procedure justifies annulment.<sup>185</sup> Examples of fundamental rules of procedure identified by *ad hoc* Committees concern: (i) the equal treatment of the parties;<sup>186</sup> (ii) the right to be heard;<sup>187</sup> (iii) an independent and impartial Tribunal;<sup>188</sup> (iv)

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<sup>180</sup> *Id.*

<sup>181</sup> *See* Arbitration Rule 6(2), which provides the standard form of the declaration.

<sup>182</sup> *See supra* para. 23.

<sup>183</sup> *See supra* para. 16.

<sup>184</sup> *Amco II*, para. 9.07; *MINE*, para. 4.06; *Wena*, para. 56; *CDC*, para. 48; *Fraport*, para. 180; *Malicorp*, para. 28; *Libananco*, para. 84. *See also Iberdrola*, para. 103 (recognizing these two cumulative requirements and noting that “although the qualifier of fundamental is not found in the Spanish version [of the ICSID Convention], it should equally be understood as incorporated”) [unofficial translation from Spanish]; *Occidental*, para. 62; *Tulip*, para. 70; *EDF*, paras. 199-200; *Micula*, paras. 131-134, 283; *TECO*, para. 81.

<sup>185</sup> *MINE*, para. 4.06; *CDC*, para. 48; *Fraport*, para. 186; *Tulip*, para. 71; *Total*, para. 312.

<sup>186</sup> *Amco I*, paras. 87 & 88; *Malicorp* para. 36; *Iberdrola*, para. 105; *Tulip*, paras. 72, 84, 145; *Total*, paras. 309, 314.

<sup>187</sup> *Amco II*, paras. 9.05-9.10; *Klöckner I*, paras. 89-92; *Wena*, para. 57; *CDC*, para. 49; *Lucchetti*, para. 71; *Fraport*, para. 197; *Víctor Pey Casado*, paras. 261-71; *Malicorp*, paras. 29, 36; *Iberdrola*, para. 105; *Occidental*, para. 60; *Tulip*, paras. 80, 145; *Total*, paras. 309, 314; *TECO*, para. 184.

<sup>188</sup> *Klöckner I*, para. 95; *Wena*, para. 57; *CDC*, paras. 51-55; *EDF*, paras. 123-125; *Total*, paras. 309, 314.

the treatment of evidence and burden of proof;<sup>189</sup> and (v) deliberations among members of the Tribunal.<sup>190</sup>

100. 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.<sup>191</sup>

101. The ground of serious departure from a fundamental rule of procedure has been pursued in 41 proceedings which led to annulment decisions. It resulted in the annulment in full of one award, the annulment in part of two further awards, and in the annulment of one decision on supplemental decisions and rectification.<sup>192</sup>

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

102. 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.”<sup>193</sup> 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.<sup>194</sup> 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 Tribunal, and shall state the reasons upon which it is based.”<sup>195</sup> 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.

103. 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.<sup>196</sup> Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the

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<sup>189</sup> *Amco I*, paras. 90 & 91; *Klöckner II*, para. 6.80; *Wena*, paras. 59-61; *Iberdrola*, para. 105; *Total*, paras. 309, 314.

<sup>190</sup> *Klöckner I*, para. 84; *CDC*, para. 58; *Daimler*, paras. 297-303; *Iberdrola*, para. 105; *Total*, paras. 309, 314.

<sup>191</sup> *Wena*, para. 58; *Repsol*, para. 81; *CDC*, para. 49; *Fraport*, para. 246; *Impregilo*, para. 164; *El Paso*, para. 269; *Iberdrola*, para. 104; *Dogan*, para. 208; *Micula*, para. 134; *TECO*, paras. 82-85. See also the analysis of the Annulment Committee in *Kılıç*.

<sup>192</sup> *Fraport* (partial); *Victor Pey Casado* (full); *Amco II* (supplemental decision and rectification); *TECO* (partial).

<sup>193</sup> See *supra* para. 8.

<sup>194</sup> See *supra* para. 24.

<sup>195</sup> *Id.*; ICSID Convention Article 48(3).

<sup>196</sup> History, *supra* note 5, at Vol. II, 849.

dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed.<sup>197</sup> 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.<sup>198</sup> Therefore, certain issues relating to the reasoning or lack of reasoning in an award can be heard by the Tribunal that rendered the award.<sup>199</sup>

104. 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.<sup>200</sup> *Ad hoc* Committees have also noted that such failure could amount to a serious departure from a fundamental rule of procedure.<sup>201</sup> A recent Decision on Annulment found that the failure to address certain evidence relevant to the determination of damages amounted to a failure to state the reasons.<sup>202</sup>

105. *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.<sup>203</sup> The correctness of the reasoning or whether it is convincing is not relevant.<sup>204</sup>

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<sup>197</sup> 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.

<sup>198</sup> *Id.* at Article 50(1). There is no time bar for a request to interpret an award under the ICSID Convention.

<sup>199</sup> *Wena*, para. 100; *Tulip*, para. 113.

<sup>200</sup> *Amco I*, para. 32; *Klöckner I*, para. 115; *MINE*, para. 5.13; *Soufraki*, para. 126; *Duke Energy*, para. 228; *Lemire*, para. 279; *EDF*, paras. 197-198. In *Alapli*, the Committee held that "it is for the Tribunal to determine the questions which are material to resolve the dispute between the parties and put these to vote." *Alapli*, para. 129.

<sup>201</sup> *Amco I*, para. 32; *Klöckner I*, para. 115.

<sup>202</sup> *TECO*, paras. 123-139. The *ad hoc* Committee stated: "While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory." *Id.*, para. 131. In view of the partial annulment on this ground, the *ad hoc* Committee did not deal with a similar argument under Article 52(1)(d) of the ICSID Convention.

<sup>203</sup> *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; *El Paso*, para. 220; *Kılıç*, para. 64; *Iberdrola*, para. 124; *Lemire*, para. 277; *Libananco*, para. 192; *Occidental*, para. 66; *Tulip*, paras. 98, 104; *Total*, para. 267; *Dogan*, paras. 261-263; *Micula*, paras. 136, 198; *Lahoud*, para. 131; *TECO*, paras. 87, 124.

<sup>204</sup> *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; *Caratube*, para. 185; *Impregilo*, para. 180; *SGS*, para. 121; *Iberdrola*, paras. 76-77; *Lemire*, para. 278; *Occidental*, para. 66; *Tulip*, paras. 99, 104; *EDF*, para. 328; *Total*, para. 271; *Micula*, para. 135; *TECO*, para. 124.



106. Some *ad hoc* Committees have suggested that “insufficient” and “inadequate” reasons could result in annulment.<sup>205</sup> However, the extent of insufficiency and inadequacy required to justify annulment on this basis has been debated.<sup>206</sup> 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.<sup>207</sup>

107. Finally, a majority of *ad hoc* Committees have concluded that “frivolous” and “contradictory” reasons are equivalent to no reasons and could justify an annulment.<sup>208</sup>

108. The ground of failure to state the reasons on which the award is based has been invoked by parties in 50 proceedings leading to decisions. The ground was upheld in 8 cases which resulted in 2 full and 6 partial annulments.<sup>209</sup>

## VI. Conclusion

109. 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.”<sup>210</sup>

110. While there is agreement on the general standards for annulment, commentators sometimes disagree on whether a specific case has been decided correctly or incorrectly.<sup>211</sup> The complexity of the task assigned to *ad hoc* Committees was summarized by Broches as follows:

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<sup>205</sup> *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”); *TECO*, paras. 248-250.

<sup>206</sup> *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”); *Iberdrola*, para. 94 (“this Committee considers that the annulment mechanism does not allow it to review the adequacy of the reasoning of the Award”) [unofficial translation from Spanish]; *Occidental*, para. 64; *TECO*, paras. 249-250.

<sup>207</sup> *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”).

<sup>208</sup> *Amco I*, para. 97; *Klöckner I*, para. 116; *MINE*, paras. 5.09 & 6.107; *CDC*, para. 70; *MCI*, para. 84; *Vieira*, para. 357; *Caratube*, paras. 185-86 & 245; *Tza Yap Shum*, para. 101; *El Paso*, para. 221 (“contradictory to a point to neutralize each other”); *Malicorp*, para. 45 (“an award must be upheld unless the logic is so contradictory as to be ‘as useful as no reasons at all’”); *RSM*, para. 86 (noting that the contradiction must be substantial); *Occidental*, para. 65; *Tulip*, paras. 109-112; *Total*, para. 268; *Lahoud*, paras. 133-135; *TECO*, paras. 90, 275, 278.

<sup>209</sup> *Amco I* (partial), *Klöckner I* (full), *MINE* (partial), *Mitchell* (full); *CMS* (partial), *Enron* (partial), *Victor Pey Casado* (partial); *TECO* (partial).

<sup>210</sup> *See supra* para. 71.

<sup>211</sup> 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 3 of this paper.

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 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.<sup>212</sup>

111. The task of an *ad hoc* Committee should also be assessed in the overall context of the ICSID case load. In its 50 year history, ICSID has registered 505 Convention arbitration cases and rendered 228 awards. Of these, 5 awards have been annulled in full and another 10 awards have been partially annulled. In other words, only 2 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.

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<sup>212</sup> Broches, *supra* note 6, at 354 & 355.

## Annulment Proceedings under the ICSID Convention – Overview

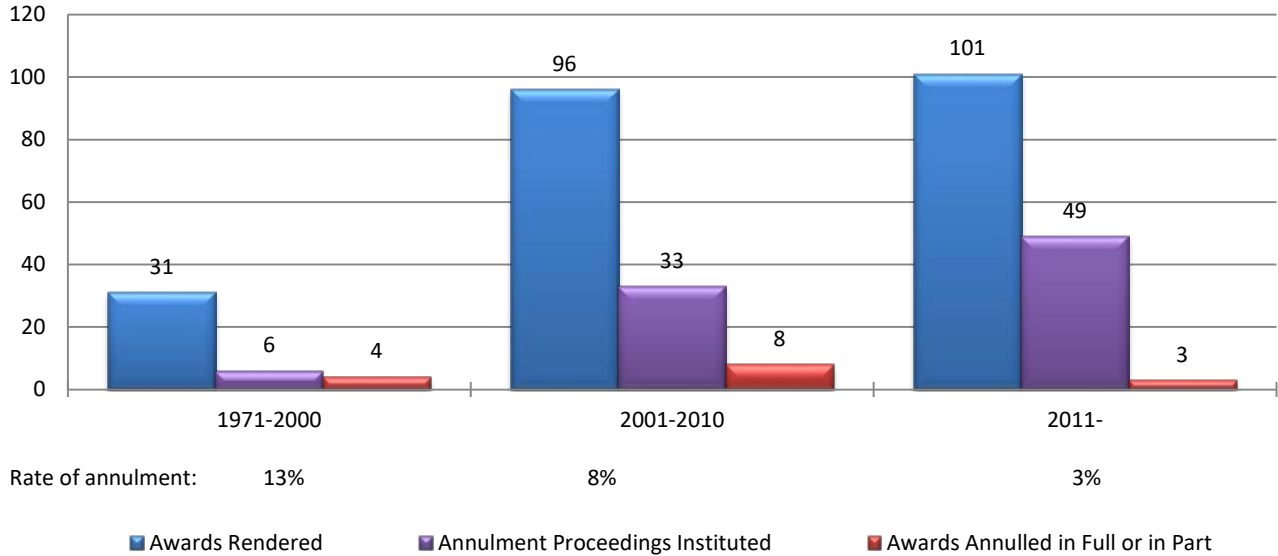


112. While the number of applications for annulment registered annually fluctuates, the increase in annulment applications in the last 5 years reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period. Since January 2011, 101 Convention awards were rendered, 49 annulment proceedings were instituted and 3 awards were partially annulled.<sup>213</sup> At the same time, the number of discontinued applications for annulment has increased substantially, with 14 discontinuances since 2011. By comparison, in the period 2001 – 2010, 96 Convention awards were rendered, 33 annulments instituted, 8 awards were annulled in full or in part and 5 annulment applications were discontinued. Between 1971 – 2000, 31 awards were rendered, 6 annulment proceedings were instituted, 4 awards were annulled in full or in part (13 percent of awards were annulled in part or in full) and one was discontinued. As a result, the rate of annulment for the period since January 2011 is 3 percent, while the annulment rate for the years 1971 – 2000 is 13 percent, and the rate for the decade 2001 – 2010 is 8 percent.

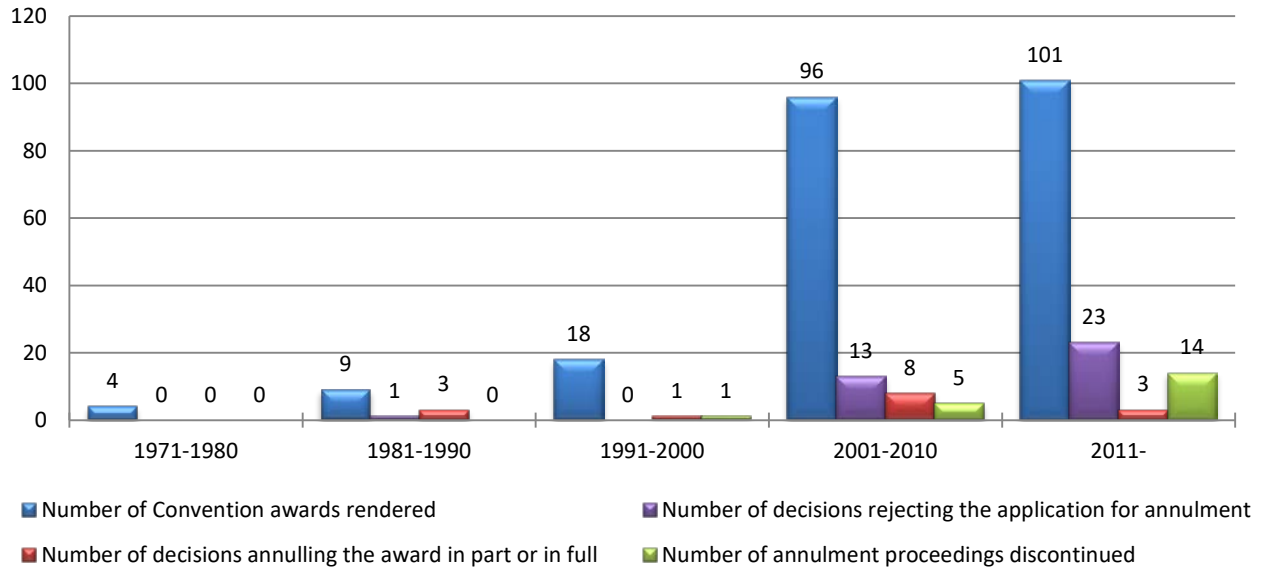
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<sup>213</sup> See *supra* paras. 31 & 32.

### Rate of Annulment 1971 - Present



### Annulment Proceedings under the ICSID Convention - Outcomes 1971 - Present



113. 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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