REMARKS BY CAROLYN B. LAMM*

We could not discuss recent trends in investment arbitration without addressing the significant impact of recent ICSID annulment decisions. My observations focus on both the substance of those decisions and the statistics. In both respects, I see an emerging trend, and the question is whether it is "back to the future," so to speak.

Comparing the number of applications for ICSID annulments registered with the number of ICSID awards issued over the past several decades, one can see that the ratio has doubled from the 1990s, where it was only 17 percent, to 35 percent by the end of 2010. It seems we have not yet reached the 44 percent ratio of the 1980s, but it is important to keep in mind that only nine awards were rendered in the 1980s, so that the four annulment applications made during that decade resulted in an unusually high ratio. Moreover, those four annulment applications related to only three cases: two of the applications were made in *Klöckner v. Cameroon*, one in *Amco Asia v. Indonesia*,[1] and one in *MINE v. Guinea*. At the time, however, concern was expressed about the future of ICSID should such a high ratio of annulment proceedings persist. While the number of annulment applications decreased in the 1990s, of late we have seen it increase again, which is a cause for concern.

The numbers alone, though, do not concern me. With the most recent cases, it is the substance of ad hoc committees' decisions that concerns me, and that is what I want to analyze. In order to do so, we have to compare the relevant parts of the awards to how the ad hoc committees have addressed them. Although each of the recent ad hoc committee decisions begins with an almost ritualistic incantation of Article 52 of the ICSID Convention and its interpretation, and the invariable conclusion that the annulment standard is high, the ad hoc committees then fail to apply those high standards. This is a serious breach and presently irremediable.

I hold the firm view that ICSID does offer the best system of investment arbitration and, of course, a great secretariat, but both states and investors, when considering whether to turn to ICSID arbitration or another forum for arbitration, will have a hard time choosing ICSID if they know they are likely to be confronted with annulment proceedings before ad hoc committees that in fact apply broader set-aside standards or engage in an appellate-type review of the merits.

As the ICSID annulment standards are in fact lowered, so to speak, more parties will apply for annulment. If it is a "50/50 shot," which lawyer representing a non-prevailing client will not advise the client to file an application? Unless this trend is reversed, we will see an ever increasing number of parties seeking annulment and, I believe, a resulting erosion

[40] *Burlington*, *supra* note 13, para. 60.

* Partner, White & Case LLP.

[1] Additionally, in 1990, both parties filed applications for annulment of the second Award in *Amco Asia v. Indonesia*.

of the principle of finality of ICSID awards. This would not be a good direction for ICSID investment arbitration to take.

Indeed, in 2010, we see that one-half of the ad hoc committee decisions rendered resulted in annulment, which is incredible. In addition, we see "annulments" of reasons, but not of the resulting award, and we see ad hoc committee decisions harshly criticizing awards without, however, annulling them. Does that not represent the very exercise of an appellate function that everyone agrees is not within an ad hoc committee's purview? It is thus important to examine carefully the decisions of ad hoc committees, both in the cases where they have annulled the award, and in those cases where they have not annulled the award.

In 2010, five out of eight annulment decisions exceeded the narrow scope of review defined in Article 52 of the ICSID Convention. In contrast, we have recently seen national courts in so-called arbitration-friendly jurisdictions dismiss applications for set-aside of non-ICSID awards, where ad hoc committees have annulled parallel ICSID awards. I am seriously concerned that this in fact indicates a trend among ad hoc committees to exercise an appellate function.

Article 52 of the ICSID Convention does not authorize ad hoc committees to engage in a full review of awards, even if they disagree with the reasoning or the outcome. They are not courts of appeal or constitutional courts, and they have the very limited ability to annul an award, either in whole or in part, or not to annul it. It is well beyond the scope of their limited authority applying the high standards set by Article 52 to express criticism and commentary that does not support a decision to annul. Such gratuitous criticism creates the impression that ICSID awards rendered by legitimate tribunals are faulty, when they are not, and serves only to discredit the ICSID system as a whole. As there is no remedy against an ad hoc committee acting in excess of its power, all one can do in fact is to urge the Secretariat not appoint such members again.

Moreover, as we have seen in certain cases, where an ad hoc committee exceeds its narrow authority, the danger that it will make mistakes increases, and nothing can be done to correct such a faulty ad hoc committee decision. If a member of an ad hoc committee, or anyone else, believes an award should be criticized, I suggest they write an article.

Article 52 makes very clear exactly the kind of serious issue that must be present for an annulment to be sought. The grounds listed in Article 52 are much narrower than, for example, those enumerated in Article 34(2) of the UNCITRAL Model Law. They require a *serious* violation of a *fundamental* rule of procedure, and not only an improper procedure; a *manifest* excess of powers, and not only an excess of powers; or the absolute *failure* of an award to state the reasons on which it is based, not only that the award conflicts with national public policy. Yet that standard seems to elude some of the ad hoc committees. Certainly, eminent scholars in the area, such as Christoph Schreuer, have recognized that "[a]nnulment is only concerned with the *legitimacy of the process of decision*: it is not concerned with its *substantive correctness* . . . it is designed to provide *emergency relief* for *egregious violations of a few basic principles* while preserving the *finality* of the decision in most respects."[2]

Although ad hoc committees tend to state their agreement with this standard, that is not the standard they have in fact been applying in recent decisions. I will now address briefly each of those decisions.

[2] CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 901–03 (2d ed. 2009) (emphasis added).

In *Helnan v. Egypt*, the Tribunal dismissed the Claimant's treaty claims for lack of fair and equitable treatment essentially because of a lack of proof. In that context, the Tribunal observed that if the Claimant had gone to the Egyptian courts it could have developed the necessary evidence. Of course, the Claimant did not resort to the Egyptian courts because it was not required to do so under the ICSID Convention and the applicable bilateral investment treaty (BIT). For this reason, the Tribunal's observation was not really legitimate, and indeed the ad hoc Committee correctly observed that, under Article 26 of the ICSID Convention, a claimant cannot be required first to resort to the host state's courts. The ad hoc Committee, however, inexplicably annulled what is essentially that reasoning while leaving the Award's *dispositif* intact. In effect, by thus modifying only the Award's reasoning, the ad hoc Committee did not partially annul the Award, but rather acted as an appellate body.

In another case in which the Award was not annulled, *Vivendi v. Argentina II*, the ad hoc Committee in its Decision seriously criticized one of the arbitrators and embarked on a lengthy discussion of a number of issues concerning the arbitrator's conduct. The ad hoc Committee concluded, however, that none of this affected the outcome, and thus decided not to annul the Award. Attached to the ad hoc Committee's Decision was an Additional Opinion—not a diverging opinion—which went even further in criticizing the ICSID Secretariat as, among other things, acting as a fourth member of tribunals and ad hoc committees.

In the category of ad hoc committee decisions that did result in an annulment, the Decision in *Sempra v. Argentina* raises a serious concern. This is one of the many cases arising out of the Argentine economic crisis, in which Argentina raised a necessity defense under both the Argentina-U.S. BIT and under customary international law. As the BIT did not contain a definition of "necessity," the Tribunal proceeded to interpret its Article XI by looking to customary international law standards, and it found that the crisis did not meet those standards. The Tribunal then concluded that it did not need to undertake any further analysis of Article XI because it did not set out conditions that were different from customary international law in that regard, and the Tribunal entered an award for Sempra.

The ad hoc Committee annulled the Award on the ground that the Tribunal manifestly exceeded its powers for failure to apply Article XI. It found that customary international law on state of necessity differed materially from Article XI and could not guide its interpretation. It appears that the ad hoc Committee basically disagreed with the Tribunal's resort to customary international law. By definition, both treaties and customary international law are sources of international law, and so the Tribunal clearly did apply international law as it should. In this case, the ad hoc Committee in fact acted as an appellate body in reviewing the merits of the award and annulling it, which is wholly inappropriate. It is sad to see that the parties now can go back and spend another five or six years arbitrating their dispute again because the annulment resolves nothing.

In comparison, just a few weeks earlier, in *Argentina v. BG Group*, the U.S. District Court for the District of Columbia rejected Argentina's petition to vacate an Award obtained by BG Group under the Argentina-UK BIT. In that Award, the Tribunal addressed similar issues, including Argentina's necessity defenses under the Argentina-UK BIT and under customary international law, both of which the Tribunal rejected. The Court had supervisory jurisdiction because this was an UNCITRAL arbitration, not an ICSID arbitration, and it was seated in Washington, D.C. The Court made very clear that it deferred to the Tribunal's interpretation of the BIT finding that the Tribunal did not ignore the plain language of the BIT as Argentina had suggested, and that the Tribunal could not be said to have disregarded the applicable law, given that it provided a colorable justification for its interpretation of the BIT.

In *Enron v. Argentina*, the ICSID Tribunal made a similar Award relating to the necessity defense and interpretation of a BIT. The ad hoc Committee annulled the award on the ground of manifest excess of powers. It found that the Tribunal had only cursorily relied on economic expert reports to conclude that Argentina had contributed to the economic crisis, without first establishing the legal elements of necessity and applying them to the facts. The ad hoc Committee concluded therefore that the Tribunal had failed to apply customary international law on necessity and annulled the Award. Yet it did so in contrast with its own finding that the parties had not argued the legal elements of necessity before the Tribunal and that the Tribunal, therefore, was not required to address them. Again, the ad hoc Committee essentially reviewed this Award on the merits.

I will discuss only briefly the work of the *ad hoc* Committee in *Fraport v. Philippines*, where I was counsel. In its lengthy Award, the Tribunal in *Fraport* very carefully went through years of evidence and on that basis decided to dismiss the claim for lack of jurisdiction due to violation of host state law. The Tribunal reached this conclusion on the basis of one of two provisions of the so-called Anti-Dummy Law, a law requiring Philippine control, and at least 60 percent Philippine equity, of public utilities. Under that law, there are two ways for a foreign investor to exercise illegitimate control: (1) by equity ownership; and (2) by managerial or financial control. The Tribunal found that the investor had violated that law on the basis of illegitimate managerial control, and on that basis dismissed the claim.

After the hearing and the close of submissions in the original arbitration, but before the Tribunal issued its Award, a Philippines prosecutor made a decision in a then-ongoing investigation of violations of the nationality portion of the Anti-Dummy Law under the first of the two predicates—for illegitimate equity ownership. This was not the predicate upon which the Tribunal based its Award (which was managerial control) but, nonetheless, the ad hoc Committee found that there was a serious departure from a fundamental rule of procedure essentially because the Tribunal had not given the parties adequate opportunity to comment on the prosecutor's decision. The ad hoc Committee made that finding despite the facts that (1) it observed that a municipal decision was not binding on its decision applying international law; and (2) both parties for different reasons had argued in their correspondence with the Tribunal that there was no relevance to the prosecutor's decision and in fact had urged the Tribunal to close the proceedings. The ad hoc Committee also made various gratuitous remarks about other aspects of the Tribunal's Award. Again, this is a case of an ad hoc committee inappropriately engaging in the merits review of an ICSID award.

In contrast, for example, in *Mexico v. Feldman*, the Ontario Superior Court of Justice rejected Mexico's petition under Canada's Commercial Arbitration Code to set aside an ICSID Additional Facility Award rendered under NAFTA, Chapter 11. The Court properly found that "a high level of deference should be accorded to the Tribunal especially in cases where the Applicant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues of credibility, reliability and onus of proof."[3]

If left unchecked, this trend will cause parties to consider very seriously whether to choose ICSID with its ad hoc committees which annul freely—or to select other forums for arbitration of their investment disputes.

[3] United Mexican States v. Marvin Roy Feldman Karpa, Ottawa 03-CV-23500, at 77 (Ont. S.C. Dec. 3, 2003).