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"Internationalization of the Practice of Law and

Important Emerging Issues for Investor-State Arbitration"

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INTRODUCTION

Today, I will share my observations and reflections from the unique vantage point of a lawyer who has spent decades practicing international law and also has had the privilege of serving as President of the American Bar Association ("ABA").[1]

Today's rapid technological advances are irretrievably "altering the playing field," both for multinational business entities and for ordinary people, by spurring globalization. Globalization, in turn, is quickly erasing the relevance of borders and producing profound changes in the law and in the way that lawyers practice, creating both opportunities and challenges for the legal profession. Multijurisdictional practice is a new reality for a growing number of lawyers worldwide. Lawyers with cross-border practice must confront the national differences in lawyer governance and regulation including, *inter alia*, the rules governing conflicts of interest, maintaining client confidences and law practice ownership. In my capacity as ABA President, I led the ABA to create the Commission on Ethics 20/20 to study and better understand the implications of these issues on the future of the profession as well as to formulate

[1] Ms. Lamm served as President of the ABA from August 2009 to August 2010. *See* Press Release, American Bar Association, Carolyn Lamm, D.C.-Based International Lawyer, Takes ABA Presidency (Aug. 4, 2009), *available at* http://www.abanow.org/2009/08/carolyn-lamm-d-c-based-international-lawyer-takes-aba-presidency/.

a series of proposals for providing guidance to lawyers confronting the changes. Today, I would like to discuss a few of the most significant issues.

Globalized practice today requires an understanding of international law, comparative law and national laws. I will address briefly ways in which U.S. courts and other national courts have long sought to address the uncertain relationship between international issues and national law.

Another consequence of the globalization of business is the need for consistent legal disciplines and a reliable dispute resolution system. The system of bilateral and multilateral investment treaties offers this, particularly so the investor-State arbitration system. Whether under the *aegis* of the International Centre for Settlement of Investment Disputes ("ICSID") or before an *ad hoc* tribunal, investor-State arbitration gives rise to a confluence of both public and private international law, as well as national law. In some cases, the national laws of several different States may even be applicable to different aspects of a dispute.[2] In this regard, investor-State arbitration is a natural topic for this Opening Lecture, as it is situated at the intersection of the Academy's public and private international law sessions.

Two undeniably important aspects of our world's globalizing economy thus include the emerging central significance of international law, and the rise of international arbitration as the predominant form of dispute resolution for cross-border trade and investment.[3] Because cross-

[2] *See, e.g.*, ICSID Convention Article 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain; *see also* CHRISTOPH SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 602 (2nd ed. 2009) ("[T]he host State's conflict rules might refer the tribunal to another State's law for certain aspects of the dispute but not for others.").

[3] For example, in 2010, 793 requests for arbitration were filed with the International Chamber of Commerce and arbitral tribunals under its auspices rendered 479 awards, compared to just over 500 cases filed and approximately 300 awards rendered in 2000. This represents an increase of more than 50% over the past decade. *See* Int'l Chamber of Commerce, Facts and Figures on ICC Arbitration - 2010 Statistical Report (Feb. 2011) *available at* http://www.iccwbo.org/court/arbitration/index.html?id=41190; *see also* Int'l Chamber of Commerce, Facts and

border investment has increased dramatically, and States have concluded nearly 3,000 Bilateral Investment Treaties ("BITs") in three decades, international arbitration between foreign investors and host States has also grown exponentially.[4] In this regard, all parties (investors and States) seek the certainty of a stable and predictable dispute resolution system in which they are treated transparently and fairly. An essential aspect of any stable system of dispute resolution is finality. But, as I will explain, the finality of investor-State arbitral awards has been seriously undermined by a recent spate of ICSID annulments, which threaten to undermine the confidence of both investors and host States in the system, and indeed impair the flow of much-needed capital that the system was created to encourage. In my remarks today, I offer suggestions to address this.

I. BUSINESS IS GLOBAL, AND SO IS THE LEGAL PROFESSION

The proliferation of global, regional and bilateral trade agreements (many of which cover legal services, among others) and investment agreements provide the primary framework for the private international law of business and investment, and demonstrates the growing importance to each of our economies of bilateral and multilateral disciplines. Trade-flow statistics demonstrate the stark reality of our increasingly borderless world by highlighting the extent to which business is globalized. For instance, in 2010, the United States exported $2.5 trillion in

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Figures on ICC Arbitration - 2009 Statistical Report (Feb. 2010), *available at* http://www.iccwbo.org/court/arbitration/index.html?id=34704. The caseload of the International Centre for Dispute Resolution ("ICDR") increased by 44% from 580 filings in 2005 to 836 filings in 2009. ICDR Int'l Arb. Rep., Issue 1, at 1 (2011), *available at* http://www.adr.org/si.asp?id=6417.

[4] The total number of BITs rose from 385 in 1989 to 2,750 by 2009. Indeed, 93% of all disputes submitted to ICSID for arbitration since its inception in the early 1970's have been filed since 1992. *See* U.N. Conference on Trade and Dev. ("UNCTAD") Analysis of BITs, *available at* http://www.unctadxi.org/templates/Page____1007.aspx; UNCTAD World Investment Report (2010), *available at* http://www.unctad.org/en/docs/wir2010_en.pdf; *see also* ICSID Caseload - Statistics 2011-2, *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics.

goods and services, and imported $2.835 trillion.[5] In the same year, there were approximately $1.3 trillion in foreign-owned assets in the United States, and $1 trillion in U.S.-owned assets abroad. In 2008, the European Union's exports totaled €1.832 trillion and imports totaled €1.996 trillion.[6] In 2007, Japan's exports totaled €622.6 billion and imports totaled €569.9 billion.[7] The transactions necessary to create these import and export data necessarily required U.S., EU and Japanese business people—and their lawyers—to interact with the legal, ethical and cultural systems of countless foreign jurisdictions.

Data regarding cross-border trade in legal services and the establishment of cross-border law offices highlights this new reality. In 2009, the United States exported $7.3 billion in legal services and imported $1.7 billion, in significant part from Europe.[8] In 2008, the foreign offices of U.S. law firms provided $3.4 billion in legal services, and the U.S. offices of foreign law firms provided $117 million in legal services.[9] A 2011 study by TheCityUK, a London-based professional services organization, further indicates that more than one hundred U.S. law firms have offices in London, and that a similarly large number of UK and EU solicitors and firms are present in the United States.[10]

The globalization of the legal profession relates to more than just the needs of our business clients, of course. The flow of people across borders, both physically and virtually,

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[5] U.S. Dep't of Commerce, Bureau of Economic Analysis, U.S. Int'l Transactions Accounts Data (June 16, 2011), *available at* http://www.bea.gov/newsreleases/international/transactions/transnewsrelease.htm, and accompanying tables.

[6] European Comm'n, "Eurostat Yearbook 2010", at 467, 482 (Sept. 10, 2010), *available at* http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-CD-10-220.

[7] *Id*.

[8] In 2009, 49% of U.S. legal services imports were from Europe. U.S. Int'l Trade Comm'n, Recent Trends in U.S. Services Trade, *2011 Annual Report* (Pub. No. 4243), at 7-13, 7-16 (2011).

[9] *Id*. at 7-20.

[10] TheCityUK, *Legal Services 2011* (Feb. 2011), *available at* http://www.thecityuk.com/assets/Uploads/Legal-Services-2011.pdf.

creates demand for legal advice and advocacy regarding a wide range of issues. The increasing number of foreign-born residents of the U.S. and the EU inevitably need the services of lawyers with respect to their property, family and business relationships with their country of origin. U.S. and EU nationals are likely to have the same concerns when they take up residence in foreign countries.

Even for legal professionals whose practice areas have traditionally been considered "local," it appears that "localism has given way to globalism." Not many lawyers today practice without confronting some cross-border, international or foreign law issues, whether they represent clients with respect to dispute resolution, family law, estate planning or financial transactions, and regardless of whether they practice on Main Street or on Wall Street, in Manila, Paris or Washington, D.C.

II. REGULATION OF THE GLOBALIZED LEGAL PROFESSION

For lawyers, law firms and their clients, the rate at which our world continues to flatten shows no signs of slowing. Yet, despite the global evolution of the practice of law, the patchwork of ethical and legal rules governing our profession remain border-bound, even here in the European Union where lawyers have freedom of movement and establishment.[11] While

[11] *See* Council of Bars and Law Societies of Europe (CCBE), Charter of Core Principles of the European Legal Profession (1988, as amended) and Code of Conduct for European Lawyers (2006, as amended), *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf (the Charter containing a list of ten core principles that are common to the legal profession in Europe, and the Code setting out proposed rules to be applied to lawyers' cross-border activities, in addition to any applicable national or local ethical rules). The CCBE Code of Conduct has been adopted as such or in substantial part at the national level in Albania, Armenia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy. Latvia, Lithuania, Luxembourg, Macedonia, the Netherlands, Poland, Portugal, Sweden, Switzerland, the United Kingdom, and Ukraine. Adoption is expected to occur in the near future in Croatia, Liechtenstein, Malta, Montenegro, Serbia, Slovakia, Slovenia, Spain, and Turkey. *See* CCBE, Adoption of the CCBE Code of Conduct 2006, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/CoC_adoption_for_web1_1298021202.pdf (status chart as of Feb. 17, 2011).

some nations have done a better job at adjusting, none of our home countries is exempt.[12] For instance, in several jurisdictions, such as Australia, Canada, England and Wales, France, Scotland and Spain, consumer movements and legislatures have restructured the way that lawyers are regulated. In these counties, lawyers are governed by national boards of lawyers, lay people and judges. Some countries have allowed for incorporated, publicly-traded law firms without restrictions on who can own shares, whereas other countries require shareholders to pass a "fit to own" test. Many countries allow multidisciplinary practices or alternative business structures with lawyers and non-lawyer professionals offering joint services. The opposite is true in the United States where multidisciplinary practice generally is not permitted, except in the District of Columbia.[13]

Yet another trend demonstrating the increasingly globalized delivery of legal services is legal outsourcing. This development raises new issues involved in supervising non-lawyers; delivering legal work prepared by non-admitted and "non-regulated" lawyers; maintaining confidential information; and avoiding conflicts of interest.[14]

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[12] *See generally*, ABA Comm'n on Ethics 20/20, *Issues Paper Concerning Multijurisdictional Practice* (Mar. 29, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_issues_paper.authcheckdam.pdf (providing an overview of how various jurisdictions have addressed issues arising out of multijurisdictional practice and seeking comments).

[13] *Compare* ABA MODEL RULES OF PROF'L CONDUCT R. 5.4 (1983), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html, *with* D.C. RULES OF PROF'L CONDUCT R. 5.4 (B)(2007), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_five/rule05_04.cfm. *See generally*, ABA Comm'n on Ethics 20/20, *Issues Paper Concerning Alternative Business Structures* (Apr. 5, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper.authcheckdam.pdf (providing an overview of how various jurisdictions have addressed alternative business structures and seeking comments).

[14] *See*, *e.g.*, ABA Comm'n on Ethics 20/20 Initial Draft Proposal-Outsourcing (May 2, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/20110502_outsourcing.authcheckdam.pdf (reflecting initial proposals—subject to further consideration within the ABA—to amend the ABA Model Rules of Professional Conduct with the goal of providing clearer guidance to lawyers concerning their ethical obligations when using lawyers or non-lawyers outside of their firm, both domestically and internationally).

Many jurisdictions are raising the issue of how courts and tribunals may treat competing approaches to confidentiality in a single proceeding.[15] Different approaches to conflicts are also common.[16]

The Bar also needs to define and provide guidance on the extent of lawyers' responsibility for assuring client confidences in the on-line world in which we all live. Legal advice and information is dispensed increasingly through electronic media such as emails and text messages, and these communications cross national borders. Client confidences are no longer locked in file cabinets but are found on smart phones, iPads and computer clouds. What do lawyers have to do to protect client data and advice, and who is responsible for breaches?

International business often brings teams of lawyers together from around the globe to collaborate on a single matter. As such, lawyers must work across legal and ethical systems to produce results. This new reality generates an increased need for uniformity among Bars in their approach to regulating the profession.[17] How the profession is governed must keep pace with

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[15] *See generally*, Gary DiBianco and Matthew Cowie, *Navigating Rough Waters: Managing Multi-Jurisdictional Investigations*, INT'L COMPARATIVE LEGAL GUIDE SERIES, BUSINESS CRIME (2011); Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm"*, 18 GEO. J. LEGAL ETHICS 521 (2005); Edward J. Cleary, *Crossing State Lines: Multijurisdictional Practice*, BENCH & BAR OF MINN. (2000); s*ee also*, Hans-Jürgen Hellwig, *The Legal Profession in Europe: Achievements, Challenges and Chances*, 4 GERMAN L.J. 263, 268-9 (2003), *available at* http://www.germanlawjournal.com/pdf/Vol04No03/PDF_Vol04_No03_263-276_Legal_Culture_Hellwig.pdf (providing a practical example).

[16] *See, e.g.*, ABA Comm'n on Ethics 20/20, *Issues Paper: Choice of Law in Cross-Border Practice* (Jan. 18, 2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/20111801.authcheckdam.pdf; *see also Comments to ABA Conflicts of Interest, Uniformity and Choice of Law Working Group Issues Paper* (Mar. 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/rule_8_5_comments.authcheckdam.pdf.

[17] *See, e.g.*, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Responsibility, Report on Conflicts of Interest in Multi-Jurisdictional Practice: Proposed Amendments to New York Rules of Professional Conduct 8.5 (Disciplinary Authority and Choice of Law) and 1.10 (Imputation of Conflicts of Interest) (Mar. 2010), *available at* http://www.nycbar.org/pdf/report/uploads/20071895-ReportonConflictsofInterestinMulti-JurisdictionalPractice.pdf (proposing certain amendments to New York's ethics rules in order to rectify the anomalous "extra-territorial application of New York conflict-of-interest rules to lawyers who are neither licensed in New York nor engaged in matters with any nexus to New York"). *See also* Case C-550/07 P, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Comm'n*, Judgment (ECJ Grand Chamber, Judgment, Sept. 14, 2010), *available at*

our current reality and, to the extent possible, must anticipate new realities. That is why, as President of the ABA, I led the ABA to create the Commission on Ethics 20/20 to address needed changes and guidance for lawyers confronted with the huge impact of technology and globalization. Discussion drafts on each of the issues are available online[18] and we invite your observations.

III. INTERNATIONALIZATION OF LAW

As our clients' businesses and lives have become global, so too has the law applicable to their businesses. The advice lawyers must be prepared to provide therefore also must be based on international, comparative and national law. The growing interdependence of legal systems has significantly increased the relevance of private international law and the need for lawyers to acquire international and comparative law skills. With globalization, international law has also developed daily importance. As President Obama noted in his Nobel lecture at Oslo, "adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't."[19]

In the United States legal system, international law has always played an important role. From our earliest days, our lawmakers and courts have recognized the importance of respecting the rules of the system of States, especially for our emerging nation.[20] For instance, Article VI of

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http://curia.europa.eu (deciding that—unlike in the United States—the attorney-client privilege does not apply to in-house lawyers in the EU).

[18] *See* ABA Comm'n on Ethics 20/20 website, *available at* http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

[19] President Barack Obama, Remarks at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize.

[20] Harold Hongju Koh, *International Law as Part of Our Law*, AGORA: The United States Constitution and International Law, 98 AM. J. INT'L L. 43, 44 (2004); *see also* Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004), *and* Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004).

the U.S. Constitution (the Supremacy Clause) provides that U.S. treaties are to be the "supreme Law of the Land." This means that treaties preempt contrary state or local law.[21] In addition, as early as 1900, the U.S. Supreme Court recognized that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction …."[22] In 2004, the Supreme Court in *Sosa v. Alvarez-Machain* noted that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations" and interpreted the Alien Tort Statute to allow "private causes of action for certain torts in violation of the law of nations."[23] More broadly, a majority of the justices of the Court throughout the years have regularly considered international practice when interpreting U.S. law,[24] and many of our contemporary justices recognize the importance of foreign law in interpreting certain

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[21] In a recent case, *Medellin v. Texas*, 552 U.S. 491, 504 *et seq*., (2008), the U.S. Supreme Court drew a distinction between self-executing treaties that were law on ratification and treaties that required legislative action to be implemented.

[22] *The Paquete Habana*, 175 U.S. 677, 700 (1900).

[23] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723, 729 (2004) (citing, *inter alia*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("It is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances. . . .") (alterations omitted), and *The Nereide*, 13 U.S. 388, 423 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land")).

[24] For instance, in the 1804 *The Charming Betsy* case, the U.S. Supreme Court found that U.S. federal statutes should be construed so as to not conflict with international law. *See Murray v. The Charming Betsy*, 6 U.S. 64 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."). A century later, in *The Paquete Habana*, the Court asserted that customary international law is part of U.S. law. *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."). More recently, in 2003, the Supreme Court struck down a state criminal law finding, inter alia, that "[t]he right the petitioners seek in this case *has been accepted as an integral part of human freedom in many other countries*. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. *Lawrence v. Texas*, 599 U.S. 558, 577 (2003) (citing decisions of the European Court of Human Rights) (emphasis added). In 2005, the Supreme Court struck down a juvenile death penalty explaining that "*[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions*. . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (emphasis added).

provisions of the U.S. Constitution.[25] For instance, Justice Stephen Breyer and former Justice Sandra Day O'Connor recognize that "[i]nternational law is no longer a specialty . . . . It is vital if judges are to faithfully discharge their duties."[26]

Just as in the U.S., the courts of countries around the world increasingly refer to international legal standards as part of the law they apply. This is particularly true of course for the ever-increasing areas of primary and secondary EU law that the courts of EU Member States routinely apply as supranational law, super-imposed upon their national legal systems. It is also true for general international law.

Thus, for example, in an action brought against Argentina by holders of its defaulted bonds, the German Federal Constitutional Court looked to Article 25 of the International Law Commission's Articles on State Responsibility to evaluate whether Argentina could raise a defense based on the state of necessity under customary international law. Based on its analysis of the Articles, the Court found that this defense was not applicable to private law claims under the bonds.[27] Most recently, the Court voided as unconstitutional "all provisions" of the German

[25] Justices Breyer, Ginsburg, Kagan, Kennedy, Souter, and Stevens support the practice of considering international practice when interpreting U.S. law at least in some circumstances; Chief Justice Roberts and Justices Scalia and Thomas have criticized it. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 977 (1977) (Breyer, J., dissenting) ("Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. *But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.*") (emphasis added); Written Answers by Elena Kagan to Questions from Sen. Coburn (R-Okl) and Sen. Cornyn (R-Tex), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/KaganIndex.cfm#QFRs ("[T]he practices of other countries are not reviewed in determining whether 'objective indicia of consensus against' the sanction exist. For purposes of that question, the practices of the States and the federal government are what matters. The Court has instead referenced the practices of other nations to confirm the Court's independent evaluation about the acceptability of the sanction."). *But see* Justice Antonin Scalia, Debate on Foreign Law, American University (Jan. 13, 2005) ("What you're looking for are the standards of decency of American society. . . . What does an opinion of a wise Zimbabwe judge have to do with what Americans believe?"); (former Chief Justice) William Rehnquist, Constitutional Courts—Comparative Remarks (1989), *reprinted in* GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof & Donald Kommers eds. 1993).

[26] Speech at Georgetown Law School, Oct. 27, 2004, *available at* http://www.c-spanvideo.org/program/184183-1 ("International law is no longer a specialty. . . . It is vital if judges are to faithfully discharge their duties. Since September 11, 2001, we're reminded some nations don't have the rule of law or [know] that it's the key to liberty.").

[27] German Federal Constitutional Court, No. 2 BvM 1-5/03, ¶¶ 29, 36 (May 8, 2007).

Criminal Code and the Juvenile Court Act relating to preventive detention. The Court held that the German Constitution was to be interpreted in a manner that was "open to international law" and that decisions of the European Court of Human Rights "which contain new aspects for the interpretation of the Constitution" thus "are equivalent to legally relevant changes, which may lead to a dissolution of the final and binding effect of a decision of the Federal Constitutional Court."[28]

As a further example, the French *Cour de Cassation* recently relied on the U.N. Convention Against Corruption to broaden the scope of Article 2 of the French Code of Criminal Procedure beyond its clear and narrow language. Reading Article 2 in light of the U.N. Convention, the Court granted standing to Transparency International France to file a civil action for restitution of property and public funds allegedly misappropriated and embezzled by the ruling families of certain African countries.[29]

Needless to say, domestic lawmakers and national courts are not alone in having recognized the importance of international legal disciplines. At the global level, States have sought to protect international business through the conclusion of the many multilateral agreements that form our private international law. These include, for example: the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"),[30] the 1965 Hague Convention on the Service Abroad of Judicial and

[28] German Federal Constitutional Court, No. 2 BvR 2365/09, HN1, ¶ 82 (May 4, 2011), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rs20110504_2bvr236509.html; *see also* Mads Andenas and Eirik Bjorge, "*Preventive Detention*" [case note}, 105 AM. J. INT'L L. 768 (2011) (discussing this case).

[29] *See* French Supreme Court, Cass. crim., No. J 09-88.272 F-D (Nov. 9, 2010) (interpreting the U.N. Convention Against Corruption as conferring upon States parties the duty to enable and support NGOs to prosecute civil actions within the scope of their mission on behalf of civil society, without having to prove direct injury).

[30] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. 3.

Extrajudicial Documents in Civil and Commercial Matters,[31] the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,[32] the 1980 United Nations Convention on Contracts for the International Sale of Goods,[33] and the 1995 United Nations Convention on Independent Guarantees and Stand-by Letters of Credit.[34]

IV. INTERNATIONAL BUSINESS DEMANDS A STABLE, CERTAIN SYSTEM OF INTERNATIONAL DISPUTE RESOLUTION

Given the large number of international disciplines governing cross-border business, and the increased flow of cross-border trade and investment, transnational disputes invariably will arise. Most investment and trade agreements contain dispute resolution agreements consenting to resolve such trans-border disputes by international arbitration.

More than 55 years ago, under the auspices of the World Bank, countries from around the world recognized the importance of cross-border private investment flows for economic development, and the need to provide for a truly international system of dispute settlement related to such international investments.[35] To this end, and in order to ensure global consensus, the World Bank held a series of regional consultative meetings with government experts from eighty-six countries. This resulted in the adoption of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention") in

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[31] Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, The Hague, Nov. 15, 1965, 658 U.N.T.S. 9432.

[32] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague, Mar. 18, 1970, 847 U.N.T.S. 12140.

[33] U.N. Convention on Contracts for the Int'l Sale of Goods, Vienna, Apr. 11, 1980, 1489 U.N.T.S. 3.

[34] U.N. Convention on Indep. Guarantees and Stand-by Letters of Credit, New York, Dec. 11, 1995, 2169 U.N.T.S. 163.

[35] *See* CHRISTOPH SCHREUER *ET AL.*, THE ICSID CONVENTION—A COMMENTARY 5-6 (2nd ed. 2009) (discussing the advantages of international arbitration of cross-border investment disputes over resolution in national courts).

1965 and, based on that Convention, the creation of the International Centre for Settlement of Investment Disputes ("ICSID") as a specialized and self-contained forum for arbitration and conciliation of investor-State disputes that is independent from national courts.[36]

When submitting the draft ICSID Convention to Governments for their approval and signature, the World Bank's Executive Directors highlighted the following unique aspects, which should be kept in mind when analyzing ICSID arbitration:

> The creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward *stimulating a larger flow of private international capital* into those countries which wish to attract it. . . .
>
> While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a *careful balance between the interests of investors and those of host States*.[37]

One of the key differences between international arbitration and domestic litigation is an international arbitral award's finality and enforceability in almost all countries of the world under either the New York Convention[38] or the ICSID Convention.[39] In contrast, a domestic

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[36] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, done at Washington, Mar. 18, 1965, in force Oct. 14, 1966, 575 U.N.T.S. 159, (hereinafter, "ICSID Convention") Preamble ("Considering the need for international cooperation for economic development, and the role of private international investment therein; Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States; Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases; Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire; Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development . . . "). The New York Convention, which preceded the ICSID Convention by only a few years and likewise has garnered almost universal acceptance, addresses only the recognition and enforcement of "foreign" arbitral awards, and the enforcement of arbitration agreements, but does not provide for a comprehensive, self-contained system of international arbitral procedure as does the ICSID Convention. *See* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, 9-10 (1981) (discussing the history of the New York Convention).

[37] Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ¶¶ 9-13 (Mar. 18, 1965) (emphases added).

[38] *See* New York Convention, Art. V (allowing a court to refuse recognition and enforcement of a foreign arbitral award only on limited, enumerated grounds). At present, 146 States are parties to the New York Convention. U.N. Treaty Collection Status chart, *available at*

judgment is subject to review on the merits by appellate courts that may vacate, modify, remand, or confirm the lower court's decision. Outside Europe,[40] in the absence of any global convention mandating enforcement, a judgment creditor also is not guaranteed enforcement of a foreign judgment, but rather must rely only on principles of comity when seeking to have a judgment enforced in a foreign jurisdiction, and may have to re-litigate the dispute before the national court.[41] An international arbitral award, however, cannot be reviewed on its merits, modified or remanded. Review is limited to ensuring that the arbitral process conforms to certain enumerated principles.[42] The finality of an international arbitral award is of fundamental importance and must also mean that the award conclusively resolves the dispute such that the factual and legal matters determined in the award cannot be re-litigated. For international trade and investment to develop, finality is viewed as "indispensible to ensure an effective and independent dispute resolution mechanism."[43]

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http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last accessed Sept. 6, 2011).

[39] *See* ICSID Convention, Art. 53(1) (providing that an ICSID award "shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention"), and Art. 54 ("Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that State."). At present, 147 States are parties to the ICSID Convention. ICSID, List of Contracting States and other Signatories of the Convention (as of May 5, 2011), *available at* http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English (last accessed Sept. 6, 2011).

[40] *See* Council Regulation (EC) No. 44/2001 of Dec. 22, 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 12 of Jan. 16, 2001 (mandating recognition and enforcement within all European Union jurisdictions of judgments rendered in such a jurisdiction); *see also* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano, Sept. 16, 1988, O.J. L 319 of Nov. 25, 1988 (same for Iceland, Norway and Switzerland).

[41] *See, e.g.*, Carolyn B. Lamm, *Enforcement of Judgments*, in 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS 275, 323 *et seq.* (Robert L. Haig, ed. 2nd ed. 2005) (addressing the enforcement of foreign judgments in the U.S.).

[42] *See, e.g.*, UNCITRAL Model Law, Art. 34(2) (listing nine limited grounds upon which an international arbitral award may be set aside).

[43] Alexis Mourre & Luca Radicati di Brozolo, *Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back*, 23 J. INT'L ARB. 171 (2006).

Historically, the same principle has applied in arbitrations between States. Thus, the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes—the constitutive treaties for the Permanent Court of Arbitration—provided expressly that an agreement to arbitrate "implies an engagement to submit in good faith to the award."[44] In the practice of State-to-State arbitration, however, the non-prevailing State at times would decline to comply with the award, asserting that it was a nullity or void because the arbitral tribunal had exceeded its powers. In the absence of any review procedure, the losing party thus *de facto* was the final judge.[45]

Concern over the lack of finality international dispute resolution ultimately was an issue that led to intense debate within the U.N. International Law Commission during its efforts to draft a convention on arbitral procedure in the 1950s. While the Commission sought to preserve finality, and specifically rejected a suggestion to allow for appeal,[46] it proposed as a remedy the possibility to annul an award on the basis of excess of powers and a few other, very narrowly circumscribed grounds, as follows:

> 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 failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

[44] Hague Convention for the Pacific Settlement of Int'l Disputes, done Oct. 18, 1907, Art. 37 ("Le recours à l'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence"); Hague Convention for the Pacific Settlement of Int'l Disputes, done July 29, 1899, Art. 18 ("La convention d'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence arbitrale.").

[45] Aron Broches, *Observations on the Finality of ICSID Awards*, 6 ICSID REV.—FOREIGN INV. L.J. 321, 324 (1991).

[46] Int'l Law Comm'n, Summary Record of the 154th Meeting (July 1, 1952), U.N. Doc. A/CN.4/SR.154, *reprinted in* 1952 I Y.B.I.L.C. 93, 94.

> (d) That the undertaking to arbitrate or the *compromis* is a nullity.[47]

The International Law Commission's draft later served as the blueprint for the ICSID annulment provision. The resulting text of Article 52(1) of the ICSID Convention lists the following exclusive grounds for annulment:

> (a) The Tribunal was not properly constituted;
>
> (b) The Tribunal has manifestly exceeded its powers;
>
> (c) There was corruption on the part of a member of the Tribunal;
>
> (d) There has been a serious departure from a fundamental rule of procedure; or
>
> (e) The award has failed to state the reasons on which it is based.[48]

Additionally, Article 53 of the ICSID Convention expressly excludes any right to appeal an ICSID tribunal's award. In relevant part, Article 53 provides:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. …[49]

The fact that the ICSID annulment remedy was fashioned from a remedy developed for State-to-State arbitration and that it applies in disputes involving a sovereign party, rather than only private, commercial parties, explains in part why the ICSID annulment standards are significantly higher than the standards for setting aside an international commercial arbitral award in national courts. For instance, comparing Article 52(1) of the ICSID Convention with Article 34(2) of the UNCITRAL Model Law on International Commercial Arbitration (which is

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[47] Int'l Law Comm'n, Model Rules on Arbitral Procedure, Art. 35, Report of the Int'l Law Comm'n on the Work of its Tenth Session, U.N. Doc. A/3859, ¶ 22, *reprinted in* 1958 II Y.B.I.L.C. 78, 86.

[48] ICSID Convention, Art. 52(1).

[49] ICSID Convention, Art. 53(1).

the basis of most modern national laws on set-aside[50]), it is clear that the grounds for annulment under the ICSID Convention are fewer in number and more narrowly defined than the set-aside grounds under the UNCITRAL Model Law.[51]

Table 1: ICSID Annulment Grounds are Narrower

ICSID Convention, Art. 52(1) (emphases added)	**UNCITRAL Model Law, Art. 34(2)**
a) Improper constitution of the Tribunal	Incapacity of a party Invalidity of the arbitration agreement Improper composition of the Tribunal
b) **Manifest** excess of powers	Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or Contains decisions on matters beyond the scope of the arbitration agreement Lack of arbitrability of the subject matter
c) Arbitrator corruption	
d) **Serious** departure from a **fundamental** rule of procedure	Lack of proper notice Inability of a party to present its case Improper arbitral procedure
e) **Failure** of the award to state the reasons on which it is based	
	Award in conflict with the national public policy of the forum

[50] Legislation based on the UNCITRAL Model Law has been adopted in at least 66 jurisdictions. UNCITRAL, Status: 1985 – UNCITRAL Model Law on Int'l Commercial Arbitration, with amendments as adopted in 2006, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[51] *See* Table 1 (comparing the ICSID Convention's annulment grounds with the UNCITRAL Model Law's set-aside grounds).

For example, ICSID annulment requires not only an excess of powers, but also that the exercise of such power be "manifest." More than merely a procedural irregularity, annulment of an ICSID award requires that there be a "serious" departure from a rule of procedure, and that the affected rule be a "fundamental" one. The last annulment ground listed in Article 52(1), "that the award has failed to state the reasons on which it is based," speaks of "a 'failure to state' reasons, and not, for example, a mistake in stating reasons."[52] Unlike a set-aside under the UNCITRAL Model Law, ICSID annulment is not permissible on public policy grounds.

By excluding any national court review and providing an internal review mechanism on grounds that are even narrower than those applicable in international commercial arbitration, the ICSID Convention thus places a great emphasis on finality. As the *CDC v. Seychelles ad hoc* Committee noted,

> Parties use ICSID arbitration (at least in part) because they wish a more efficient way of resolving disputes than is possible in a national court system with its various levels of trial and appeal, or even in non-ICSID Convention arbitrations (which may be subject to national courts' review under local laws and whose enforcement may also be subject to defenses available under, for example, the New York Convention).[53]

It is important to keep this context in mind as we examine the recent trends in ICSID annulment decisions and the implications for the certainty and stability of the system if those trends are not addressed.

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[52] *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 (May 3, 1985) (hereinafter "Klöckner I Annulment") ¶ 3, 2 ICSID Rep. 95, 97.

[53] *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (June 29, 2005) (hereinafter, "CDC Annulment") ¶ 36, 11 ICSID Rep. 237, 249-50.

V. THE STANDARD OF REVIEW IN AN ICSID ANNULMENT

A. ICSID Annulment is Not an Appeal

Most fundamentally, an *ad hoc* committee's authority under Article 52(3) of the ICSID Convention is only to annul a tribunal's award in whole or in part, or to leave the award intact, and any annulment must be based exclusively on one or more of the five grounds enumerated in Article 52(1).[54] Unlike an appellate body, an *ad hoc* committee may not modify an award, replace it with its own decision, or remand it to the tribunal for a renewed decision. As Professor put it, an *ad hoc* committee "can destroy a *res judicata* but cannot create a new one."[55]

Additionally, unlike an appellate tribunal, an *ad hoc* committee cannot review an award for errors of fact; and, while completely failing to apply the applicable law is subject to

[54] *See* ICSID Convention, Art. 52(3) ("The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)."); *see also* Klöckner I Annulment ¶ 3, 2 ICSID Rep. at 97 ("[T]he remedy provided by Article 52 . . . permits each party in an ICSID arbitration to request the annulment of the award on one or more of the grounds listed exhaustively in the first paragraph of Article 52 of the Convention."); *Wena v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (Feb. 5, 2002) (hereinafter, "Wena Annulment") ¶ 17, 6 ICSID Rep. 129, 134, 41 I.L.M. 933, 938 ("These grounds for annulment are enumerated exhaustively."); *Compañia de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, ICSID Case No. ARB/97/3, Decison on Annulment (July 3, 2002) (hereinafter, "Vivendi I Annulment") ¶ 62, 6 ICSID Rep. 340, 357 ("[A]n *ad hoc* Committee['s] . . . competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention.").

[55] CHRISTOPH SCHREUER *ET AL*., THE ICSID CONVENTION: A COMMENTARY 901 (2nd ed. 2009) (observing that—in the event a dispute is resubmitted under Article 52(6) of the ICSID Convention—"[t]he new tribunal deciding the merits of the dispute in a resubmitted case is not bound by the reasons given by the *ad hoc* committee for annulling the original award."); *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Resubmitted Case), Decision on Jurisdiction (May 10, 1988), 1 ICSID Rep. 543, 552 ("If the present Tribunal were bound by 'integral reasoning' of the Ad Hoc Committee, then the present Tribunal would have bestowed upon the Ad Hoc Committee the role of an appeal court. The underlying reasoning of an Ad Hoc Committee could be so extensive that the tasks of a subsequent Tribunal could be rendered mechanical, and not consistent with its authority-as indicated in Article 52(6), which speaks of 'the dispute' being submitted to a new Tribunal."); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007) (hereinafter, "MTD Annulment") ¶ 54, 13 ICSID Rep. 500, 516 (an *ad hoc* committee "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. A more interventionist approach by committees on the merits of disputes would risk a renewed cycle of tribunal and annulment proceedings of the kind observed in *Klöckner* and *AMCO*.").

annulment, misapplying the applicable law is not.[56] Professor Caron has described the difference between an appeal and annulment as follows:

> … *appeal* generally focuses upon *both* the legitimacy of the process of decision and the substantive correctness of the decision. *Annulment*, on the other hand, and particularly in the case of arbitration, focuses not on the correctness of the decision, but rather more narrowly considers whether, regardless of errors in application of law or determination of fact, the decision resulted from a legitimate process.[57]

This distinction between an annulment and an appeal has been confirmed, at least in theory, by the constant jurisprudence of ICSID *ad hoc* committees over more than 25 years.[58] As the *ad hoc* Committee in *CDC v. Seychelles* pointed out:

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[56] *See, e.g.*, Klöckner I Annulment ¶ 128, 2 ICSID Rep. at 142 ("[T]he *ad hoc* Committee has no power to correct a mistaken application of law or '*error in judicando*' beyond the strict limits of Article 52."); *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986) (hereinafter, "Amco I Annulment") ¶ 23, 1 ICSID Rep. 509, 515-6 ("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. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention."); *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (Resubmitted Case), Decision on Annulment (Dec. 3, 1992) (hereinafter, "Amco II Annulment") ¶ 7.19, 9 ICSID Rep. 9, 39 (non-application of the applicable law may constitute a manifest excess of powers but incorrect interpretation or application of the law "normally" would not, unless it is "of such a nature or degree as to constitute objectively (regardless of the Tribunal's actual or presumed intentions) its effective non-application."); CDC Annulment ¶¶ 45, 46, 11 ICSID Rep. at 252-53 ("Regardless of our opinion of the correctness of the Tribunal's legal analysis, however, our inquiry is limited to a determination of whether or not the Tribunal endeavored to apply English law."); *Duke Energy Int'l Peru Invs. No. 1, Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment (Mar. 1, 2011) ¶ 96 ("a failure to apply the law chosen by the parties to the determination of the dispute (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers, a point also accepted by other annulment committees."); *Togo Electricité et GDF-Suez Energie Services v. République Togolaise*, ICSID Case No. ARB/06/7, Decision on Annulment (Sept. 6, 2011) (hereinafter, "Togo Annulment") ¶ 57("des erreurs dans l'application ou des omissions d'un tribunal lors de l'application des règles de droit prévues par l'article 42 de la Convention CIRDI ne peuvent constituer un « *excès de pouvoir manifeste* » que si le tribunal applique des règles de droit qui ne sont as celles prévues par cet article.").

[57] David D. Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.—FOREIGN INV. L.J. 21, 24 (1992) (emphases in original); *accord*, CHRISTOPH SCHREUER *ET AL.*, THE ICSID CONVENTION: A COMMENTARY 901 (2nd ed. 2009).

[58] Klöckner I Annulment ¶ 83, 2 ICSID Rep. at 126 ("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."); Amco I Annulment ¶ 43, 1 ICSID Rep. at 520 ("a full control and review of the reasoning followed by an ICSID tribunal would transform an annulment proceeding into an ordinary appeal"); *Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on

> The so-called "second" and "third" generation annulment decisions (*MINE*, *Vivendi*, and *Wena Hotels* are the published examples) have further crystallized the now apparently generally accepted proposition that "*annulment is not a remedy against an incorrect decision" alone…. ad hoc* Committees [are] reviewing arbitral proceedings only to the extent of ensuring their fundamental fairness, eschewing any temptation to "second guess" their substantive result.[59]

The *MINE ad hoc* Committee had earlier explained its limited role as follows:

Annulment (Dec. 22, 1989) (hereinafter, "MINE Annulment") ¶ 5.08, 4 ICSID Rep. 79, 88 ("A Committee might be tempted to annul an award because that examination disclosed a manifestly incorrect application of the law, which, however, is not a ground for annulment."); *id*. ¶ 6.53, 4 ICSID Rep. at 98 ("the Tribunal's finding … is supported by reasons which can be followed without great difficulty. Their substance is not subject to review by the Committee."); Wena Annulment ¶ 18, 6 ICSID Rep. at 134, 41 I.L.M. at 938 ("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."); Vivendi I Annulment ¶ 62, 6 ICSID Rep. at 357 ("[A]n *ad hoc* Committee is not a court of appeal. . . ."); CDC Annulment ¶ 35, 11 ICSID Rep. at 249 (quoted below); *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 1, 2006) (hereinafter, "Mitchell Annulment") ¶ 19 ("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."); *Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment (Jan. 8, 2007) ¶ 38 ("a request for annulment … must not be confused with an appeal, which is not available pursuant to Article 53 of the Convention."); MTD Annulment ¶ 52, 13 ICSID Rep. at 515 ("In every annulment decision so far, the *ad hoc* committee has proclaimed that it is not a court of appeal from the tribunal. This is obvious from the language of Articles 52 and 53 of the ICSID Convention as well as from its *travaux*."); *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment (June 5, 2007) (hereinafter, "Soufraki Annulment") ¶ 24 (quoted below); *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (Sept. 5, 2007) (hereinafter, "Lucchetti Annulment") ¶ 101 ("a request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award"); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (Sep. 25, 2007) ¶¶ 43, 44 (reiterating that "an *ad hoc* committee is not a court of appeal" and quoting MTD Annulment ¶ 54, 13 ICSID Rep. at 516); *id*. ¶ 85 ("The Committee has no jurisdiction to control the interpretation … given by the Tribunal to [Article II(2)(a) of the Argentina-U.S. BIT], still less to reconsider its evaluation of the facts."); *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment (Sept. 1, 2009) ¶ 41 ("[A]n *ad hoc* committee is … 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 n Article 52(1)."); *M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (Oct. 19, 2009) ¶ 24 ("It appears clearly from Article 53 of the Washington Convention that the only permissible remedies against an award are those provided for in the Convention, which include a request for annulment but not an appeal. *Ad hoc* committees are therefore not courts of appeal. Their mission is confined to controlling the legality of awards according to the standards set out expressly and restrictively in Article 52 of the Washington Convention. 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. This was reaffirmed by many committees, whose decisions are relied upon by the parties. Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness."); *Sociedad Anónima Eduardo Vieira v. República de Chile*, ICSID Case No. ARB/04/7, Decision on Annulment (Dec. 10, 2010) ¶¶ 234-35; Togo Annulment ¶ 50 ("L'article 52 exclut l'examen du fond de la Sentence dans la mesure où l'article 53(1) exclut toute possibilité d'appel.").

[59] CDC Annulment ¶ 35, 11 ICSID Rep. at 249 (emphasis added).

> Article 52(1) makes it clear that annulment is a limited remedy. This is further confirmed by the exclusion of review of the merits of awards by Article 53. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52.[60]

The *ad hoc* Committee in *Lucchetti v. Peru* likewise emphasized:

> … that it is no part of the Committee's functions to review the decision itself . . . 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.[61]

And, as the *CDC ad hoc* Committee noted:

> This mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID Convention's drafters' desire that Awards be final and binding, which is an expression of "customary law based on the concepts of *pacta sunt servanda* and *res judicata*," and is in keeping with the object and purpose of the Convention.[62]

Similarly, the *Soufraki ad hoc* Committee observed that the purpose of the limited annulment remedy is "to safeguard the integrity" of the tribunal, its procedure, and the resulting award, but "not the outcome:"[63]

> The three goals which the ICSID annulment mechanism seeks to secure – integrity of the tribunal, integrity of the procedure and integrity of the award – shape the annulment process itself and make it an important and serious matter. 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. It is true that one of the differences between annulment and appeal

[60] MINE Annulment ¶ 4.04, 4 ICSID Rep. at 85.

[61] Lucchetti Annulment ¶ 97 (emphasis added).

[62] CDC Annulment ¶ 36, 11 ICSID Rep. at 249-50 (footnotes omitted).

[63] Soufraki Annulment ¶ 20 (quoting L. REED, J. PAULSSON AND N. BLACKABY, GUIDE TO ICSID ARBITRATION 99 (2004)).

> lies in their outcome. In a successful appeal, the appellate tribunal can reverse the initial decision and correct the solution. In a successful application for an annulment, the result can only be the invalidation of the original decision, not its correction.[64]

This point also was emphasized by the *ad hoc* Committee in *MTD v. Chile*:

> 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.[65]

The *travaux préparatoires* of the ICSID Convention confirm that its drafters made a deliberate choice not to expand the grounds for annulment to include "violation or unwarranted interpretation of principles of substantive law."[66] Consulting the preliminary draft of the ICSID Convention with governmental legal experts, Dr. Broches pointed out that if the annulment grounds "were expanded to cover serious errors in the application of substantive law, it would be tantamount to providing for an appeal, a step which had not thus far been contemplated."[67]

B. The *ad hoc* Committee's Discretion

An *ad hoc* committee has discretion whether or not to annul when one of the grounds listed in Article 52(1) is present. This follows from the ordinary meaning of Article 52(3), which states, in relevant part, that "[t]he Committee shall have the authority to annul the award or any part thereof."[68] Notably, Article 52(3) does not state that the Committee is obligated to annul the award.[69] Although the first ICSID annulment decision, in *Klöckner v. Cameroon*, adopted a formalistic approach, determining that annulment was mandated whenever an *ad hoc* committee

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[64] Soufraki Annulment ¶ 24.

[65] MTD Annulment ¶ 31, 13 ICSID Rep. at 508.

[66] HISTORY OF THE ICSID CONVENTION Vol. II-1 at 340.

[67] *Id.*

[68] ICSID Convention, Art. 52(3).

[69] CHRISTOPH SCHREUER *ET AL.*, THE ICSID CONVENTION: A COMMENTARY 1035-36 (2nd ed. 2009).

found a ground for annulment to exist,[70] the subsequent jurisprudence of *ad hoc* committees over more than 25 years has rejected that "automatic technical discrepancy approach" in favor of a "material violation" approach,[71] under which the presence of one of the grounds enumerated in Article 52(1) should lead to annulment only if it causes a "material impact" on one of the parties.[72]

The *Amco I ad hoc* Committee, for example, in examining whether the Tribunal had manifestly exceeded its powers, declined to annul the Award where the Tribunal had reached the correct result even though it had applied the wrong legal system.[73] The *Amco I* Committee did, however, find that the Tribunal failed to apply the applicable Indonesian foreign investment law, resulting in an incorrect calculation of the foreign investment amount, and accordingly annulled the Award in part.[74]

After the first two annulment proceedings ever in the ICSID system, *Klöckner I* and *Amco I*, resulted in annulments, former ICSID Secretary General Ibrahim Shihata emphasized the exceptional nature of annulment in the 1988 ICSID Annual Report:

> [I]n keeping with the intention of the drafters of the ICSID Convention, recourse to this [annulment] procedure has remained exceptional. However, the ICSID system would obviously suffer

[70] Klöckner I Annulment ¶ 179, 2 ICSID Rep. at 162 ("Save under exceptional circumstances, … the Committee is inclined to consider that the finding that there is one of the grounds for annulment in Article 52(1) must in principle lead to total or partial annulment of the award, without the Committee having any discretion , the parties to the Washington Convention and the parties to an arbitration under the ICSID system having an absolute right to compliance with the Convention's provisions, and in particular with the provisions of Article 52.").

[71] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 780 (describing the "material violation approach" as one in which the *ad hoc* committee "tests claims of nullity not on the purely technical grounds of Article 52(1), but rather on grounds of whether the alleged nullification really makes any difference in the context of the case"); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INT'L ADJUDICATION & ARBITRATION 81 (1992) (same);W. Michael Reisman, *Repairing ICSID's Control System: Some Comments on Aron Broches' 'Observations on the Finality of ICSID Awards'*, 7 ICSID REV.—FOREIGN INV. L.J. 196, 200, 204 (1992) (same).

[72] CHRISTOPH SCHREUER *ET AL*., THE ICSID CONVENTION: A COMMENTARY 1040 (2nd ed. 2009).

[73] Amco I Annulment ¶¶ 103, 120, 1 ICSID Rep. at 537, 540.

[74] *Id*. ¶¶ 95-98, 1 ICSID Rep. at 535-36.

> if a trend emerges in future of unjustifiable recourse to the annulment procedure in the ICSID arbitral process. Should this become the case, the Administrative Council may . . . wish to consider ways in which to clarify the exceptional nature of the annulment procedure. . . .[75]

Dr. Shihata then appointed Dr. Aron Broches, the former General Counsel of the World Bank and the principal drafter of the ICSID Convention, to the next *ad hoc* Committee, in *MINE v. Guinea*. In *MINE*, relying on the text of Article 52(3), the Committee unequivocally stated that *ad hoc* committees are to exercise discretion even where a ground for annulment under Article 52(1) can be identified:

> Article 52(3) provides that an *ad hoc* Committee 'shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)'. The Convention does not require automatic exercise of that authority to annul an award whenever a timely application for its annulment has been made and the applicant has established one of the grounds for annulment ….
>
> 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.[76]

Due in part to the composition of the *MINE ad hoc* Committee and the merit of its conclusion, subsequent *ad hoc* committees have followed the discretionary approach. Despite the lack of *stare decisis*, the *MINE* Decision has remained an important reference to provide guidance for subsequent committees.

[75] ICSID, 1988 Annual Report at 4 (Sept. 1, 1988).

[76] MINE Annulment ¶¶ 4.09-10, 4 ICSID Rep. at 86.

For instance, in *Vivendi*, the *ad hoc* Committee stated that "even if an annullable error is found," a committee has "flexibility in determining whether annulment is appropriate in the circumstances" of the case.[77]

The *ad hoc* Committee in *CDC v. Seychelles* subsequently adopted and described this principle as follows:

> [W]e 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. The *Vivendi* Committee, for example stated that an award should be annulled in whole or in part only if annulment is "appropriate in the circumstances." We thus should "consider the significance of the [alleged annullable] error relative to the legal rights of the parties."[78]

The *ad hoc* Committee in *Soufraki v. UAE* similarly stated that, "even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances."[79] Quoting Professor Schreuer's Commentary on the ICSID Convention, the *Soufraki ad hoc* Committee concluded that "annulment is usefully reserved 'for egregious violations…of basic principles while preserving the finality in most other respects.'"[80]

VI. ANNULMENT OF ICSID AWARDS: RECENT TRENDS

One threat on the horizon for the ICSID system, which needs to be addressed, involves the recent almost reflexive action by losing parties seeking annulment, the growth in ICSID annulment decisions and, more importantly, the willingness of *ad hoc* Committees to lower or

[77] Vivendi I Annulment ¶ 66, 6 ICSID Rep. at 358.

[78] CDC Annulment, ¶ 37, 11 ICSID Rep. at 250 (quoting Vivendi I Annulment ¶ 66, 6 ICSID Rep. at 358).

[79] Soufraki Annulment ¶ 24.

[80] *Id*. ¶ 27 (quoting CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 892-93 (2001)).

disregard the high standard for annulment. I will turn first to the numbers before examining the issues involving the annulment standards.

A. The Numbers

Comparing the number of registered applications for annulment with the number of ICSID awards rendered over the past four decades, it is apparent that the ratio has doubled from the 1990s, where it was only 17 percent, to the decade ending in 2010, where it reached 35 percent. Furthermore, of the 8 *ad hoc* committee decisions issued in 2010, 50 percent resulted in annulments. Such high rates of annulment have not been seen since the 1980s, when 75 % of *ad hoc* committee decisions resulted in annulments.[81]

Table 2: Annulment Applications Registered vs. Awards Rendered: "Back to the Future"?

	Awards Rendered	Annulment Applications Registered	Annulment Applications Registered vs. Awards Rendered	Awards Annulled	Awards Annulled vs. Annulment Applications Registered
1971-1980	4	0	0 %	0	0 %
1981-1990	9	5	44 %	3.5	75 %
1991-2000	18	3	17 %	0	0 %
2001-2010	96	34	35 %	8	24 %
TOTAL	127	41	32 %	12	28 %

When considering the statistics from the 1980s, however, it is important to keep in mind that there were only nine awards rendered and four annulment applications registered during the

[81] *See* Table 2.

entire decade. Moreover, those four applications pertained to only three cases: two of the applications were made in *Klöckner v. Cameroon*,[82] one (the first of two) in *Amco Asia v. Indonesia*,[83] and one in *MINE v. Guinea*.[84] In all three cases, the original awards were annulled, and the second awards in *Klöckner* and *Amco* were resubmitted for second annulment proceedings.

At the time, serious concern was expressed about the future of ICSID should such a high ratio of annulment proceedings persist. For example, Professor Reisman commented that "[s]ince *Kloeckner*, no ICSID award can be assumed to be final."[85] Alan Redfern also noted:

> The decisions of three eminent arbitrators, appointed by or on behalf of the parties, have been wiped out by another three eminent arbitrators, appointed by the President of the World Bank, in what might seem like an elaborate and expensive game of snakes and ladders.[86]

These circumstances certainly exacerbated concerns about the ability of ICSID arbitration to resolve disputes with finality.[87]

Although the number of annulment applications, in both absolute and relative terms, decreased in the 1990s, we have seen of late a significant increase once again. Indeed, the ratio of annulment applications versus awards rendered has more than doubled, from 17 % to 35 %.[88]

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[82] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2 (annulment applications registered Feb. 16, 1984 and July 1, 1988).

[83] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 (annulment application registered Mar. 18, 1985). Additionally, in 1990, both parties filed applications for annulment of the second Award in that case. Those applications were registered on February 20, 1991.

[84] *Maritime Int'l Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4.

[85] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 785.

[86] Alan Redfern, *ICSID – Losing its Appeal?*, 3 ARB. INT'L 98, 98 (1987).

[87] *See, e.g.*, W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 785 ("The international arbitration bar, properly and quite professionally, has digested the opportunities presented by Article 52 procedures as construed by *Kloeckner* and has transformed ICSID arbitration into a sequence of two-phased proceedings.").

[88] *See* Table 2.

As Professor Schreuer has recently observed, it has in fact "become a routine step for losing parties in ICSID arbitrations to try to overturn award in annulment proceedings."[89]

Moreover, as Professor Schreuer has pointed out as well, it is not only the number of annulment requests that has risen; the recent inflationary trend also has taken hold of the number aspects of an award that are attacked in each request,[90] and the number of annulment grounds invoked with respect to each such aspect.[91] It is difficult to say generally whether such tactics in fact increase or decrease the chances that the award will be annulled. It is safe to say, however, that such tactics increase the risk that an *ad hoc* committee will be overwhelmed and may not analyze each point as carefully as it would if the annulment request were focused on a few truly strong points; or, the *ad hoc* committee may feel pressured to find a single ground for annulment if only to avoid having to analyze in detail the multitude of points advanced.[92]

Indeed, although only a single award was annulled during the 1990s, eight awards were annulled in the following decade, from 2001 to 2010.[93]

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[89] Christoph Schreuer, *From ICSID Annulment to Appeal—Half Way Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBS. 211, 213 (2011).

[90] Christoph Schreuer, *From ICSID Annulment to Appeal—Half Way Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBS. 211, 213-14 (2011) ("A typical request request for annulment lists a number of aspects each of which allegedly should lead to the award's annulment. Especially Argentina has developed the technique of attacking unfavourable awards on as many aspects as possible. … The Request in *Enron* listed more aspects of the Award that in Argentina's view deserved annulment than one can reasonably count – a veritable area bombardment.").

[91] Christoph Schreuer, *From ICSID Annulment to Appeal—Half Way Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBS. 211, 214 (2011) ("Not infrequently, the same aspect of the award is attacked with the help of several grounds for annulment simultaneously in a kind of shrapnel tactics.").

[92] Christoph Schreuer, *From ICSID Annulment to Appeal—Half Way Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBS. 211, 215 (2011).

[93] *See* Table 3.

Table 3: Annulments 2001-2010

ICSID Case	Date of Annulment Decision	Outcome
Vivendi v. Argentina I	July 3, 2002	Partially Annulled
Patrick Mitchell v. Congo	November 1, 2006	Annulled
CMS Gas Transmission Co. v. Argentina	September 25, 2007	Partially Annulled
Malaysian Historical Salvors v. Malaysia	April 16, 2009	Annulled
Helnan v. Egypt	June 14, 2010	"Partially annulled"
Sempra v. Argentina	June 29, 2010	Annulled
Enron v. Argentina	July 30, 2010	Annulled
Fraport v. Philippines	December 23, 2010	Annulled

Testimony to the growing trend, four of those eight annulments occurred in 2010 alone,[94] and within 2010, those four decisions represented one half of the *ad hoc* committee decisions rendered during that year.[95]

Table 4: Annulment Decisions Rendered in 2010: A "50/50 Shot"?

ICSID Case	Date of Annulment Decision	Outcome
Rumeli Telekom v. Kazakhstan	March 25, 2010	Not annulled
Chemin de Fer Transgabonais v. Gabon	May 11, 2010	Not annulled
Helnan v. Egypt	**June 14, 2010**	**"Partially annulled"**
Sempra v. Argentina	**June 29, 2010**	**Annulled**
Enron v. Argentina	**July 30, 2010**	**Annulled**
Vivendi v. Argentina II	August 10, 2010	Not Annulled
Vieira v. Chile	December 10, 2010	Not annulled
Fraport v. Philippines	**December 23, 2010**	**Annulled**

[94] *See* Table 3.

[95] *See* Table 4.

B. The Substance

It is not, however, the numbers that are most troubling—it is the substance of the *ad hoc* committee decisions: what the *ad hoc* committees did and how they did it. A careful review of the annulment decisions rendered in 2010 reveals a number of issues:

- It appears the *ad hoc* committee decisions in at least five out of the eight annulment proceedings concluded in 2010 exceeded the limited scope of review under Article 52 and were seemingly appellate in nature. Although the *ad hoc* committees' decisions resulting in annulment invariably articulate the high standard of Article 52, they disregard the standard and exceed the limited scope of their authority when proceeding to review the arbitral award.
- Annulment of the Award appears to be based more on the *ad hoc* Committee's disagreement with the Tribunal's analysis than on a careful application of the Article 52 standards;
- Annulment decisions include gratuitous criticism of the awards but decide that there is no basis to annul
- Annulment decisions contain general observations on the Award in the manner of a Constitutional Court; and
- Quality issues result from exceeding the bounds of Article 52

In short, Article 52 decisions have become unpredictable. Such decisions are not tolerable for the ICSID system. Together these decisions may well pose a real disadvantage to users of the system and may even undermine the benefits of facilitating foreign investment.

By failing to defer to the arbitral tribunals, *ad hoc* committees encourage endless re-arbitration. This stands in contrast to the practice of national courts that apply the lower UNCITRAL Model Law standards. It also disregards the *Klöckner v. Cameroon I* approach

followed by other *ad hoc* committees that involved a presumption in favor of validity of the award—and placed the burden on the challenging party.[96]

Moreover, as we have seen in recent 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.[97]

Already in 1986, former ICSID Secretary-General Dr. Ibrahim Shihata highlighted how lowering the annulment standards can undermine the effectiveness of ICSID arbitration: "[t]he danger exists that if parties, dissatisfied with an award, make it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of ICSID arbitration."[98] In 1989, Professor Reisman accurately predicted that "[f]uture losers in ICSID arbitrations will be hard-pressed not to exercise their option under Article 52. The very availability of the procedure, as it

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[96] *See* Klöckner I Annulment ¶ 52(e), 2 ICSID Rep. at 116 ("doubt or uncertainty … should be resolved '*in favorem validitatis sententiae*' and lead to rejection of the alleged complaint."); *see also, e.g.*, *Duke Energy International Peru Investments No. 1, Limited v. Republic of Peru*, Decision on Annulment (Mar. 1, 2011) ¶ 99 ("An ad hoc committee will not … annul an award if the tribunal's disposition on a question of law is tenable, even if the committee considers that it is incorrect as a matter of law. The existence of a manifest excess of powers can only be assessed by an *ad hoc* committee in consideration of the factual and legal elements upon which the arbitral tribunal founded its decision and/or award based on the parties' submissions. Without reopening debates on questions of fact, a committee can take into account the facts of the case as they were in the record before the tribunal to check whether it could come to its solution, however debatable. Is the opinion of the tribunal so untenable that it cannot be supported by reasonable arguments? A debatable solution is not amenable to annulment, since the excess of powers would not then be 'manifest.'") (citing Klöckner I Annulment ¶ 52); *see also* 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, 264 (E. Gaillard and Y. Banifatemi, eds. 2004) (*ad hoc* committees "should defer to the tribunal where the latter considers that the claimant has, as a matter of law, failed to present evidence in support of [a] theory. This same position would, of course, apply with respect to a line of defense that the tribunal finds, again as a matter of law, is not supported by the facts presented by the respondent.").

[97] *See* Christoph Schreuer, *From ICSID Annulment to Appeal—Half Way Down the Slippery Slope*, 10 L. & PRACTICE INT'L CTS. & TRIBS. 211, 215 (2011) (observing that in certain recent cases, "one cannot help the impression that the *ad hoc* Committees go so overwhelmed by the multitude of arguments that they lost track of the individual grounds for annulment listed in Article 52(1) of the ICSID Convention.").

[98] *See* Report of the Secretary-General to the Administrative Council of ICSID, ICSID Doc.No. AC 86/4 Oct. 2, 1986 Annex A, at 2; ICSID, 1986 Annual Report at 4 (Sept. 5, 1986) ("It can only be hoped that recourse to this remedy will remain, as it has been to the present, the exception).

has developed, virtually requires the professionally ethical counsel to recommend its vigorous exploitation."[99]

I hold the firm view that the "a-national" ICSID system offers the best means of investment arbitration. However, I have no doubt that parties, whether States or investors, will seriously consider alternative fora if they know they are likely to be confronted with annulment proceedings before *ad hoc* committees that in fact apply lower set-aside standards, or engage in an appellate-type review of the merits of the dispute, and provide no presumption of correctness or deference to the significant work of the party-selected arbitrators. Such actions cause disputes to be tried repetitively, and their final resolution to be delayed indefinitely and become prohibitively expensive.[100] Recall the annulment standard under Article 52 of the ICSID Convention, which Professor Schreuer summed up so succinctly: "[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."[101]

C. Recent Cases

To illustrate the substantive issues, I will now discuss in more detail the annulment decisions in *Helnan v. Egypt*, *Sempra v. Argentina*, *Enron v. Argentina*, *Vivendi II v. Argentina* and *Fraport v. Philippines*, each of which demonstrate excess in the application of the Article 52 standard by an *ad hoc* committee for which there is not any remedy. I will also contrast those

[99] W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 787.

[100] *See id*. ("If this situation continues, … it is doubtful that prudent counsel will continue to recommend to their clients a system of dispute resolution that no longer economically resolves disputes."). The ICSID Secretary-General, Dr. Ibrahim Shihata, voiced the same concern addressing the ICSID Administrative Council at its Annual Meeting in Berlin in 1988: "[I]f parties dissatisfied with awards regularly seek annulment such a practice may put in doubt the features which make ICSID arbitration an attractive means of settling investment disputes—namely its speed, comparatively low cost, and its effectiveness. 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." *Id*. at 804.

[101] CH. SCHREUER *ET AL*., THE ICSID CONVENTION – A COMMENTARY, 901-903 (2nd ed. 2009) (emphases added).

decisions with decisions of national courts on applications to set aside arbitral awards rendered in similar investment treaty disputes.

1. *Helnan v. Egypt* (ICSID)

a. Background

In this case, the Danish company Helnan International Hotels A/S managed the Shepheard Hotel in Cairo under a long-term contract with the hotel's owner, the Egyptian Organisation for Tourism and Hotels ("EGOTH"). The management contract required the Helnan to maintain a five-star ranking. Following several inspections, Egypt's Ministry of Tourism downgraded the hotel's ranking to four stars. EGOTH thereupon commenced commercial arbitration against Helnan demanding termination of the management contract on the basis of Helnan's alleged failure to maintain the hotel's five-star ranking. The arbitration was conducted before a commercial arbitral tribunal constituted pursuant to the arbitration agreement contained in the hotel management contract under the auspices of the Cairo Regional Center for International Commercial Arbitration (the "Cairo Tribunal").[102]

In an arbitral award entered in *amiable composition*, the Cairo Tribunal declared the management contract terminated because it had become "impossible to execute." The Tribunal awarded Helnan EGP 12.5 million in settlement of debts resulting from the performance of its management obligations, and otherwise dismissed the parties' claims. As a result, EGOTH paid Helnan the amount awarded, Helnan was evicted from the hotel, and EGOTH took over the hotel's management.[103]

[102] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (July 3, 2008) ¶¶ 3-6, 133.

[103] *Id*. ¶¶ 6-8.

b. The ICSID Arbitration

Helnan then commenced ICSID arbitration proceedings against Egypt alleging breaches of the Denmark-Egypt BIT. Helnan alleged that Egypt had breached its treaty obligations by failing to provide Helnan and its investments with fair and equitable treatment and full protection and security, and by expropriating Helnan's investments without fulfilling the applicable conditions under the BIT.[104]

The ICSID Tribunal dismissed Helnan's treaty claims essentially because of a lack of proof. The Tribunal observed that the Claimant had never attempted to challenge the Ministry of Tourism's downgrade decision in the Egyptian administrative courts, and if the Claimant had done so, it could have developed the necessary evidence of the State's participation in the alleged scheme.[105] Recognizing that Helnan was not required to exhaust local remedies prior to commencing the ICSID arbitration, the ICSID Tribunal nonetheless concluded that in this case Helnan had "disqualified" its treaty claims by failing to "test the validity" of the Ministry of Tourism's decision to downgrade the hotel.[106]

c. The Annulment

Helnan sought annulment of the ICSID Tribunal's Award on various grounds, including the Tribunal's finding that its claims were disqualified because it had not challenged the downgrade in the Egyptian courts.[107] The *ad hoc* Committee correctly observed that, under Article 26 of the ICSID Convention, a claimant cannot be required, even through "the back

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[104] *Id.* ¶ 51.

[105] *Id.* ¶¶ 148, 162.

[106] *Id.* ¶ 148 (quoting *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award (Sept. 9, 2003) ¶ 20.30).

[107] *Helnan Int'l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee (June 14, 2010) ¶ 8.

door" of an evidentiary requirement, first to resort to the host State's courts.[108] Inexplicably, however, the *ad hoc* Committee annulled the Tribunal's reasoning in this regard on the basis of "manifest excess of powers" while leaving the Award's *dispositif* intact.[109] In doing so, the *ad hoc* Committee acted as an appellate body by modifying the Award's reasoning without altering the outcome. Contrary to the *ad hoc* Committee's view,[110] this was not a partial annulment, but rather a substantive review of reasons. The *ad hoc* Committee thus exercised an appellate function exceeding the mandate of Article 52(3) of the ICSID Convention.

2. *Vivendi v. Argentina II* (ICSID)

In another case in which the Award was not annulled, *Vivendi v. Argentina II*, the *ad hoc* Committee seriously criticized one of the arbitrators and embarked on a lengthy discussion of a number of issues concerning the arbitrator's conduct.[111] The *ad hoc* Committee concluded, however, that none of this affected the outcome before the Tribunal, and thus decided not to annul the Award on this ground.[112]

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.[113]

Including this type of gratuitous criticism and commentary in an *ad hoc* committee's decision or related individual opinion is destructive and only serves to undermine confidence in the ICSID arbitration system. That is not to say that justified criticism or commentary should not

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[108] *Id*. ¶¶ 9, 47.

[109] *Id*. ¶¶ 9, 57, 73.

[110] *Id*. ¶ 72 ("the Award requires annulment only in respect of one part of the Tribunal's decision").

[111] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (Aug. 10, 2010) ¶¶ 217-32.

[112] *Id*. ¶¶ 233-42.

[113] *Id*., Additional Opinion of Professor JH Dalhuisen.

be voiced. I suggest, however, that this is not within the scope of authority of an *ad hoc* committee under the ICSID Convention and it should be done in the format of an article.

3. *Sempra v. Argentina* (ICSID)

In the category of *ad hoc* committee decisions that did result in an annulment, the Decision in *Sempra v. Argentina* raises a serious concern.[114] This is one of the many cases arising out of the Argentine economic crisis, in which Argentina raised a necessity defense under both the applicable BIT, in this case, Article XI of the Argentina-U.S. BIT, and under customary international law.[115] As the BIT did not contain a definition of "necessity," the Tribunal interpreted its Article XI by looking to customary international law standards, and found that the Argentine crisis did not meet those standards.[116] The Tribunal then concluded that it did not need to undertake any further analysis of Article XI, "given that this Article does not set out conditions different from customary international law."[117] On this basis, the Tribunal rejected Argentina's necessity defense and 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 because customary international law on the state of necessity differed materially from Article XI and could not guide its interpretation.[118] Although the *ad hoc* Committee found that the Tribunal "made a fundamental error in identifying and applying the applicable law,"[119] it in fact acted as an appellate body in reviewing

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[114] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010) (hereinafter, "Sempra Annulment").

[115] *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007) ¶¶ 98, 325, 333 *et seq*., 356 *et seq*.

[116] *Id*. ¶¶ 354-55, 375-78.

[117] *Id.* ¶ 388.

[118] Sempra Annulment ¶¶ 196-219.

[119] *Id*. ¶ 208.

the merits of the Award and annulling it because it disagreed with the Tribunal's interpretation of the law.[120]

Sempra has since submitted the dispute to a new Tribunal in accordance with Article 52(6) of the ICSID Convention.

4. Contrast: *Argentina v. BG Group* (U.S. District Court)

In comparison, just a few weeks earlier, in *Argentina v. BG Group*,[121] the U.S. District Court for the District of Columbia denied Argentina's motion to vacate an Award obtained by BG Group in an *ad hoc* arbitration under the UNCITRAL Arbitration Rules and the Argentina-UK BIT, which was seated in Washington, D.C. In its 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 applied the U.S. Federal Arbitration Act's standards for vacating an arbitral award (not Article 52 of ICSID), which allows for a court to vacate an award if the arbitrators exceeded their powers.[122]

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. Indeed, the Court explained clearly the limited review it was conducting:

> To be sure, under a more searching, appellate-style review, the arguments presented by Argentina in its Petition could very well have carried the day. But, because the Court in this circumstance

[120] *See id*. ¶¶ 197-99 (discussing and comparing the meaning of state of necessity under customary international law and Article XI of the BIT) and ¶ 195 (effectively conceding that the Tribunal did address "the scope and application of Article XI").

[121] *Republic of Argentina v. BG Group PLC*, 715 F.Supp.2d 108, 126 (D.D.C. 2010). The Court later confirmed the Award under the U.S. Federal Arbitration Act, 9 U.S.C. § 207, and the New York Convention rejecting Argentina's motion to refuse enforcement. *Republic of Argentina v. BG Group PLC*, 764 F.Supp.2d 21, 39 (D.D.C. 2011).

[122] 9 U.S.C. § 10(a).

> does not sit like "an appellate court does in reviewing the decisions of lower courts," the Court had no choice but to deny the relief sought by Argentina in its Petition.[123]

5. *Enron v. Argentina* (ICSID)

In *Enron v. Argentina*, the ICSID Tribunal entered an Award rejecting Argentina's state of necessity defense under both Article XI of the U.S.-Argentina BIT and customary international law finding that Argentina approach to resolving its economic crisis was not the only way available and that Argentina had contributed to its economic crisis.[124] The *ad hoc* Committee annulled the award on the ground that the Tribunal manifestly exceeded its powers because it failed to apply customary international law on "necessity." Although the Tribunal's Award contained a detailed analysis of the elements of Article 25 of the International Law Commission's Articles on State Responsibility,[125] which, as the Tribunal pointed out (and the parties agreed) "reflects the state of customary international law on the matter,"[126] the *ad hoc* Committee inexplicably found that analysis to be so "unclear" as to constitute a failure to state reasons.[127] The *ad hoc* Committee also found that the Tribunal's reliance on an economic expert report to conclude that Argentina had contributed to its economic crisis amounted to a failure to apply the applicable law.[128]

There is no doubt that the Tribunal applied its view of the law. The *ad hoc* Committee merely disagreed with and reconsidered the Tribunal's analysis. It found that the Tribunal had

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[123] *BG Group*, 715 F.Supp.2d at 126 (quoting *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175, 1178 (D.C.Cir. 1991)).

[124] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007) ¶¶ 308-13, 339.

[125] *Id*. ¶ 303-13.

[126] *Id*. ¶ 303.

[127] *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (July 30, 2010) ¶ 384.

[128] *Id*. ¶ 393.

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 under customary international law and applying them to the facts. Yet, the *ad hoc* Committee did so in contrast to its own finding that the parties had not argued all of the legal elements of necessity before the Tribunal, and that the Tribunal was therefore not required to address them.[129] The *ad hoc* Committee also ignored the fact that the Award nonetheless contained a detailed analysis of those legal elements. Essentially, the *ad hoc* Committee reviewed the Award on the merits and exercised an appellate function beyond the scope of its authority.

As in *Sempra*, the Claimants in this case have submitted the dispute to a new Tribunal under Article 52(6) of the ICSID Convention.

6. *Fraport v. Philippines* (ICSID)

I will discuss only briefly the work of the *ad hoc* Committee in *Fraport v. Philippines* on the basis of the published Decision[130] as I was, and continue to be, counsel for the Philippines in the arbitration proceedings that Fraport commenced following annulment of the original Award. In its Award covering almost 200 pages, the *Fraport* Tribunal very carefully evaluated years of submissions by the parties and evidence, and on that basis dismissed the claim for lack of jurisdiction due to a violation of host State law.[131] The Tribunal reached this conclusion after finding that Fraport's own documents evidenced that it had knowingly violated Commonwealth Act No. 108, otherwise known as the "Anti-Dummy Law" ("ADL"), in the making of its investment in the Philippines. The ADL is a Philippine law that implements constitutional nationality restrictions, such as the requirement that Philippine nationals own and control at least

[129] *Id*. ¶ 375.

[130] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (Dec. 23, 2010) (hereinafter, "Fraport Annulment").

[131] *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) (hereinafter, "Fraport Award") ¶¶ 396-404.

60% of public utilities, including the International Passenger Terminal 3 at the Ninoy Aquino International Airport (which was the subject of the arbitration). The ADL provides for two independent and autonomous offenses. Section 1 of the ADL prohibits and penalizes violations of the 60% nationality restrictions. Even if the quantitative nationality restrictions are met, Section 2-A of the ADL prohibits foreign intervention in the management, operation, administration or control of a public utility.[132] The Tribunal found that by means of secret shareholder and financing agreements, which Fraport had concluded contrary to advice it had received contemporaneously from its Philippine counsel,[133] Fraport had "knowingly and intentionally" violated Section 2-A the ADL on the basis of managerial control, and on that basis dismissed the claim.[134]

After the hearing and after the close of submissions in the original arbitration, but before the Tribunal issued its Award, a Philippine Department of Justice Prosecutor issued a resolution dismissing a then-ongoing investigation of violations of the ADL based on claims and evidence that were focused on the quantitative nationality restrictions. As pointed out in the Award, the Prosecutor's resolution focused on a different inquiry from what the Tribunal was focused on, and the Tribunal was also privy to additional evidence.[135] Acting upon a motion for reconsideration of his decision, the Philippine Prosecutor subsequently reversed his decision to dismiss the investigation.[136]

The *ad hoc* Committee annulled the Award for a serious departure from a fundamental rule of procedure, finding that the Tribunal had not permitted the parties to be heard on the

[132] *Id.* ¶¶ 354-56, 398.

[133] *Id.* ¶¶ 308-32, 398.

[134] *Id.* ¶ 401.

[135] *Id.* ¶¶ 366-82.

[136] *Id.* ¶ 379.

record of evidence before the Prosecutor[137] and the Prosecutor's resolution,[138] a reflection of the application of the Anti-Dummy Law which the *ad hoc* Committee determined was "central" to the Tribunal's analysis.[139]

Ironically, the *ad hoc* Committee itself never heard the parties on the issue of whether or not the Prosecutor's interpretation of the ADL in his resolution was indeed "central" to the Tribunal's analysis. The *ad hoc* Committee made that finding despite its acknowledgement that a single decision of a municipal authority could not become a rule of decision for an international tribunal,[140] and despite the fact that both parties had in fact had commented on the relevance of the Prosecutor's resolution and the evidence before him. Most fundamentally the *ad hoc* Committee itself was mistaken about the implications of the Prosecutor's resolution and effectively made a substantive finding in disregarding the Tribunal's assessment of relevance and materiality of the Resolution. The Prosecutor focused on an assessment of the level of equity investment and did not consider whether certain shareholder agreements and financial arrangements granted a foreign national managerial control of a public utility.[141] The *ad hoc* Committee also made various gratuitous critical remarks about other aspects of the Tribunal's Award, but determined that none of those provided grounds to justify annulment.[142]

In finding that the Prosecutor's resolution was of "central" relevance to the Tribunal's analysis, the *ad hoc* Committee inappropriately reviewed the merits of the Award, without according any deference to the Tribunal or presuming the correctness of the Award. As the

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[137] Fraport Annulment ¶¶ 218-34, 247.

[138] Fraport Annulment ¶¶ 218, 235-47.

[139] *Id*. ¶ 178.

[140] *Id*. ¶ 242. Indeed, the Tribunal did not regard it as such. Fraport Award ¶¶ 368, 390-91.

[141] Fraport Award ¶ 370.

[142] *See* Fraport Annulment ¶¶ 95-100, 112 (criticizing the Tribunal's methodology in interpreting the BIT but finding that the Tribunal's interpretation nonetheless "is not untenable.").

Prosecutor's resolution was premised on different claims and evidence than were before the Tribunal and, as the *ad hoc* Committee itself acknowledged, could not constitute a rule of decision of an ICSID award, this could not be a dispositive issue and there thus was no basis for the *ad hoc* Committee to find a "serious" departure from a fundamental rule of procedure.

In a parallel International Chamber of Commerce arbitration in Singapore against the Government of the Philippines, Fraport's domestic Philippine partner, PIATCO, alleged contractual breaches and sought to recover from the Government under the NAIA Terminal 3 Concession Agreements (which were found to be null and void *ab initio* by the Philippine Supreme Court). After nearly seven years of proceedings and a lengthy hearing, the ICC Tribunal on July 22, 2010 also dismissed the Claimant's claims on the basis of violations of the ADL. Specifically, the Claimant's claims were inadmissible due to illegality in the performance of the concession as a result of a violation of Section 2-A of the ADL for allowing Fraport to intervene in the management, operation, administration or control of the Terminal.[143] The High Court of Singapore on November 15, 2011 dismissed PIATCO's application to set aside the Award in a swift decision firmly rejecting the notion that a Tribunal's alleged errors of fact or law could even be considered. The Court specifically found that there was no reason to review the merits of the ICC Tribunal's determination of inadmissibility of a claim that arose out of illegal performance of a contract.[144]

[143] *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines*, ICC Case No. 12610/TE/MW/AVH/JEM/MLK, Award (July 22, 2010).

[144] *Philippine International Air Terminals Co., Inc. v. The Government of the Republic of the Philippines*, No. OS 1129/2010 (SGHC, Nov. 15, 2011).

7. Contrast: *Mexico v. Feldman*, *Mexico v. Bayview* and *Mexico v. Cargill* (Ontario, Canada)

In contrast, in a series of cases over the past decade, the Superior Court of Justice of Ontario, Canada, has taken a very deferential stance toward ICSID Additional Facility Awards rendered under NAFTA, Chapter 11. Applying the UNCITRAL Model Law standard, the Court has consistently declined to set aside such treaty-based awards, demonstrating the greater reliability of national court review if the parties choose the proper *situs*.

For example, in *Mexico v. Feldman Karpa*, 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."[145]

In *Bayview v. Mexico*, the Court confirmed that standard, adding:

> The Court is not permitted to engage in a hearing de novo on the merits of the Tribunal's decision or to undertake a review such as that conducted by a court in relation to a decision of a domestic tribunal. *A high degree of deference is accorded on review by a court.*
> […]
> The standard of review of a domestic court of a decision of an international commercial arbitral award is high. In the interest of comity among nations, predictability in decisions and respect for autonomy of the parties' chose panel, it is *only in exceptional circumstances that an arbitral decision will be set aside.*[146]

In *Mexico v. Cargill*, the Court again confirmed that standard. The Court rejected Mexico's argument that the standard of review concerning the Tribunal's jurisdiction should be correctness, and added that: "the court's approach should be one of restraint and deference and

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[145] *United Mexican States v. Marvin Roy Feldman Karpa*, No. 03-CV-23500, ¶ 77 (Ont. S.C.J. Dec. 3, 2003), *aff'd*, No. C41169 (Ont. C.A. Jan. 11, 2005) (herinafter, *Feldman Karpa*) (emphasis added).

[146] *Bayview Irrigation District #11, et al. v. United Mexican States*, No. 07-CV-340139-PD2, ¶¶ 11, 13 (Ont. S.C.J. May 5, 2008) (citing *Feldman Karpa)* (emphasis added).

that standard of review in considering whether the tribunal has exceeded its jurisdiction is one of reasonableness."[147] On appeal, the Court of Appeal for Ontario recently disagreed with that standard, holding that under Article 34(2)(a)(iii) of the Model Law the standard of review on jurisdictional questions is correctness.[148] At the same time, the Court cautioned that this standard "does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals. To the contrary, courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction."[149] Applying the standard of correctness, however, the Court dismissed the appeal finding, among other things, that Mexico's submission sought "to expand the jurisdictional question into issues that go to the merits of the case."[150]

8. Contrast: *Czech Republic v. Nreka* (Cour d'Appel de Paris)

Similarly, rejecting the Czech Republic's application to set aside an UNCITRAL award rendered in Paris on the basis of the Croatia-Czech Republic BIT, the Court of Appeal of Paris, France, recently re-affirmed that:

> *it is not for the court to second-guess the conditions under which the arbitrator determines and applies the rule of law applied*, or to exercise control over the rules of law applicable to the matter … [and that] to pronounce on the arbitrators' reasoning and the merits of their decision [would be] a process that cannot be that of the annulment judge without engaging in the path of a revision.[151]

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[147] *United Mexican States v. Cargill, Inc.*, 2010 ONSC 4656, ¶ 55 (citing *Feldman Karpa).*

[148] *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, ¶¶ 42-43 (citing *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan*, [2011] 1 A.C. 763 (UKSC)).

[149] *Id*. ¶ 44.

[150] *Id*. ¶ 66.

[151] La *République Tchèque v. M. Pren Nreka*, No. 2007/4675, Cour d'Appel de Paris, Judgment (Court of Appeal of Paris, Sept. 25, 2008), at 7 ("Considérant par ailleurs *qu'il n'appartient pas à la cour de contrôler les conditions de détermination et de mise œuvre par l'arbitre de la règle de droit retenue* ou d'exercer un contrôle sur les règles de droit applicables à la cause, que l'invitation de la recourante à censurer la sentence parce que les arbitres auraient contredit l'appréciation souveraine des juges tchèques sur l'annulation du contrat de bail revient à se prononcer sur la motivation des arbitres et le fond de leur décision, une démarche qui ne peut être celle du juge de l'annulation sans s'engager dans la voie de la révision.") (emphasis added).

9. Contrast: *Lebanon v. France Télécom* (Swiss Federal Supreme Court)

Furthermore, rejecting an application to set aside an UNCITRAL award rendered in Geneva on the basis of the France-Lebanon BIT, the Swiss Federal Supreme Court held that in the context of its determination whether an arbitral award should be set aside for violation of public policy, it is not for the supervisory court "to inquire whether the arbitrator has correctly interpreted a contractual clause, and whether it represents the actual intent or the hypothetical intent of the parties."[152]

V. CONCLUSION AND PROPOSAL

The recent annulment trend reflects a recurring and serious problem that must be addressed affirmatively. If left unchecked, this trend effectively denies the parties the protection of the high standards set by Article 52 of the ICSID Convention and will cause parties to consider very seriously whether to choose ICSID with *ad hoc* committees who annul freely applying a very low threshold under Article 52, or other fora, to arbitrate investment disputes. For ICSID to remain a credible selection under BIT dispute resolution clauses that provide a choice of arbitration fora, ICSID must address this serious problem.

To this end, as the Government of the Philippines urged, the ICSID Administrative Council should issue guidelines to clarify and reaffirm the applicable annulment standards based on their proper interpretation.[153] Indeed, similar action was taken ten years ago in the context of Chapter 11 of the North-American Free Trade Agreement ("NAFTA") when uncertainty arose

[152] *La République du Liban v. France Télécom Mobiles Int'l S.A. et FTML S.A.L.*, No. 4P.98/2005/svc (Swiss Federal Supreme Court, Nov. 10, 2005), ¶ 5.2.1 ("Il convient encore de préciser que, dans le cadre de l'examen d'une violation de l'ordre public au sens de l'art. 190 al. 2 let. e LDIP, le Tribunal fédéral n'a pas à rechercher si l'arbitre a interprété correctement une clause contractuelle, qu'il s'agisse de déterminer la volonté réelle ou la volonté hypothétique des parties").

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

about the proper interpretation of the guarantee of the minimum standard of treatment provided in its Article 1105. In that instance, the NAFTA Free Trade Commission, a NAFTA treaty body composed of representatives of the NAFTA States parties, issued Notes of Interpretation clarifying the scope of Article 1105 and thereby contributing to a consistent application of that provision by arbitral tribunals.[154]

The guidelines to be issued by the ICSID Administrative Council should, for example: reaffirm the limited scope and high threshold of Article 52 annulment; reaffirm that an *ad hoc* committee's authority is limited to the application of the Article 52 standards; reaffirm that as such, annulment is limited to the most serious and egregious cases, providing a specific definition of Article 52 standards, including the meaning of "serious"; mandate that the parties be heard on all issues on which the *ad hoc* committee considers basing its decision; and confirm that it is not within the mandate of an *ad hoc* committee to offer critical or corrective commentary on tribunal awards for which there is no basis to annul.

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

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

ICSID should further encourage the appointment of appropriately experienced persons to *ad hoc* committees. Committee appointees should have substantial ICSID experience as tribunal

[154] NAFTA Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), *available at*: http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d (clarifying, among other things, that the "fair and equitable treatment" and "full protection and security" standards provided in NAFTA Chapter 11 "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.").

members or counsel, and at least one member of an *ad hoc* committee should have developing country or emerging economy knowledge by virtue of nationality or experience.