

2013

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### Recommended Citation

Tai-Heng Cheng, *The Role of Justice in Annuling Investor-State Arbitration Awards*, 31 BERKELEY J. INT'L LAW. 236 (2013).  
Available at: <http://scholarship.law.berkeley.edu/bjil/vol31/iss1/7>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38P93K>

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# The Role of Justice in Annuling Investor-State Arbitration Awards\*

Tai-Heng Cheng\*\*

## INTRODUCTION

The World Bank's International Center for the Settlement of Investment Disputes (ICSID) is shaking at its foundations. ICSID is the principal legal regime that protects corporations doing business overseas from interference by host governments, while preserving the ability of those governments to regulate their own countries without unreasonable concessions to foreigners. ICSID is meant to help balance the competing concerns of investors and host states by arbitrating their disputes under international law and rendering awards. Committees set up to review awards can only set them aside if the tribunal was improperly constituted, was corrupt, lacked authority to decide, violated fundamental due process, or did not give reasons for their decisions.<sup>1</sup> However,

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\* This paper was originally presented at a symposium held at the American Enterprise Institute in Washington, D.C., on June 4, 2012. The symposium was entitled "I Pledge Allegiance to the United . . . Nations? Global Governance and the Challenge to the American Constitution."

\*\* Partner, Quinn Emanuel Urquhart & Sullivan, LLP. Views expressed here do not necessarily reflect the views of the firm or its clients. Research assistance was provided by Edward Barrett, Kate Baxter, Michael Del Mauro, Michelle Ippolito, and Jason Richland. Prior versions of this article were presented at the NYU Investment Law Forum, the NYLS Global Law and Policy Roundtable, and the NYLS Global Law and Justice Colloquium. Comments were received from, among others, Jose Alvarez, Andrea Bjorklund, Kristen E. Boon, Christopher Borgen, Laura Dickinson, Martin Flaherty, Rob Howse, Julian Ku, Molly Land, Tom Lee, Julian Mortensen, Peter Spiro, Ruti Teitel, Ruth Wedgewood, Ralph Wilde, Ingrid Wuerth and John Yoo.

1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 52, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention]. See Aron Broches, *Observations on the Finality of ICSID Awards*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 352-353 (1995) ("Let me recall that Article 53 of the Convention states that ICSID awards are binding on the parties and are not subject to any appeal or any other remedy except those provided for in the Convention"); U.N. Secretariat, Background Paper on Annulment for the Administrative Council of ICSID 33-37 (Aug. 10, 2012) [hereinafter ICSID Annulment Report] (collecting dicta in annulment awards stating that review is not a remedy against incorrect decision; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 62 (July 3, 2002)).

some committees have been accused of acting like appellate courts, overturning awards because they disagreed with an award's findings of fact or determinations of law.<sup>2</sup> So long as the proper scope of arbitral review remains in flux,<sup>3</sup> investors and governments may lose confidence in ICSID. Billions of dollars of existing and potential investments are at issue, as are jobs that depend on corporations entering new markets overseas, and social and economic development in countries that need foreign expertise and capital to build roads, airports, power plants, schools and other key infrastructure projects. Although the systemic impact of annulment decisions on global capital flows may not be seen for a while, if ever, there is too much at stake to ignore criticisms of recent ICSID annulments. This article re-examines the ICSID system of annulment using theories of justice, which no prior article appears to have done in detail. Looking at annulments through the lens of justice brings into focus not only what the appropriate annulment standard ought to be, but also who should set or apply that standard.

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2. See Letter from Jose Anselmo I. Cadiz, Solicitor General, Republic of the Philippines, to the ICSID Administrative Council (June 27, 2011) (reproduced in ICSID Annulment Report, *supra* note 1, at Annex 2)

In addition to criticizing the [*Fraport*] Award on grounds for which the *Ad Hoc* Committee concluded there was no basis to annul and that were not relevant to its decision to annul, and thus signaling its apparent disagreement with the conclusions reached in the Award, as if its mandate included providing such purported corrective commentary, the *Ad Hoc* Committee decided to annul the Award *sua sponte* for reasons not advanced by either party and announced for the first time in the Annulment Decision itself.

See also Transcript of Am. Soc'y Int'l L. 105th Annual Meeting Panel 16 (2011) (Christoph Schreuer said, "I find most problematic, I must say, and I think the *Enron* case is perhaps symptomatic for this one, where the *ad hoc* committee tends to go over the entire award and check it through, so to speak, and see if it can find any flaws and decide whether these warrant annulment. . . . There are two more worries . . . One is a very expansive interpretation of some of the grounds for annulment . . . and another one is what I would call "hyperactivity" of some *ad hoc* committees, where *ad hoc* committees actively look for grounds of annulment, even beyond what the requesting party has put forward." Andreas Lowenfield responded, saying "I think Professor Schreuer's analysis of these cases confirms my uneasiness. You asked, [chairperson Andrea Meneker], is there something wrong with [these annulment decisions]. I think there is.") (copy on file with author); Mark H. Alcott & Nicole R. Duclos, *Foreign Investment Disputes: A Practitioner's Roadmap*, 18 INT'L L. PRACTICUM 147, 151 (2005). For summaries of recent annulment decisions, see Matthais Scherer, *ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure*, CZECH (& CENTRAL EUROPEAN) YEARBOOK OF INT'L ARB. 211 (2011); Promod Nair & Claudia Ludwig, *ICSID Annulment Awards: the Fourth Generation?*, 5(5) GLOBAL ARB. REV. (Feb. 2011). For discussions of earlier annulment decisions, see Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investor Awards Reasoned?*, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 1, 4-27 (G.A. Alvarez & W.M. Reisman eds., 2008); Christoph Scheurer, THE ICSID CONVENTION: A COMMENTARY 897-901 (2001) [hereinafter ICSID COMMENTARY].

3. ICSID Annulment Report, *supra* note 1, at 49 ("While there is agreement on the general standards for annulment, commentators sometimes disagree on whether a specific case has been decided correctly or incorrectly.").

The writing on annulments has tended to prioritize achieving finality in ICSID awards,<sup>4</sup> including, most recently, a 2012 report by the ICSID Secretariat on annulments.<sup>5</sup> Many of these writings have thus argued that awards should not be annulled easily to avoid undermining the finality of the awards.<sup>6</sup> Academic research and annulment decisions have justified their emphasis on finality with statements in the negotiating documents of the ICSID Convention that stressed the need for finality to encourage foreign investments.<sup>7</sup> It appears that the ICSID Convention favored finality of awards on the assumption that investors require final and binding protections for their foreign investments against the political risks of doing business in host countries.<sup>8</sup>

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4. ICSID Commentary, *supra* note 2, at 893 (“In international arbitration the principle of finality is often seen to take precedence over the principle of correctness.”); Promod Nair & Claudia Ludwig, *supra* note 2, at 4 (expressing concern that expansive annulments “will significantly lengthen ICSID disputes and seriously undermine confidence in the efficacy of the centre dispute resolution regime”); Eric Schwartz, *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, in ANNULMENT OF ICSID AWARDS 43, 85 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) [hereinafter ANNULMENT OF ICSID AWARDS] (“In the interest of efficiency and finality, Article 52 does not allow any appeal of ICSID awards.”).

5. ICSID Annulment Report, *supra* note 1, at 37-38 (collecting dicta from annulment decisions emphasizing finality).

6. *Maritime Int’l Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 4.10 (Dec. 22, 1989) (stating annulment application should be denied where annulment “would unjustifiably erode the binding force and finality of ICSID awards.”); *Amco Asia Corporation v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, ¶ 1.20 (Dec. 17, 1992) (stating that awards should not be annulled if that would “unwarrantably erode the binding force and finality of ICSID awards”).

7. ICSID Commentary, *supra* note 2, at 1078 (“During the Convention’s drafting there was little discussion on the substance of what ultimately became Art. 53. All drafts embodied the principles of finality and binding force. The later drafts also contained an explicit exclusion of any external appeal.”).

8. ARON BROCHES, *Settlement on Investment Disputes*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 162 (1963)

And there is no room for doubt that one of the most serious impediments to the flow of private capital is the fear of investors that their investment will be exposed to political risks, such as outright expropriation without adequate compensation, governmental interference . . . and non-observance by the host government of contractual undertakings on the basis of which the investment was made.

*See also* ICSID Annulment Report, *supra* note 1, at 7 (“A concern was raised by a legal expert from Germany that annulment posed a risk of frustrating awards and therefore the annulment provision should be made more restrictive.”); 1 ICSID TRAVAUX 2, II.1.4.1-2 (Note by the President to the Executive Directors (Eugene R. Black) on Dec. 28 1961)

Improved methods for the settlement of investment disputes would contribute to an improvement in the investment climate and would thereby tend to promote the flow of private foreign capital, an objective of special concern to the Bank . . . that once a State had voluntarily agreed to submit a specific dispute or group of disputes to the jurisdiction of the Center, this agreement would be a binding international obligation . . . .

*See also* 1 ICSID TRAVAUX 2, II.1.1.1,3 (Note by A. Broches, General Counsel, transmitted to the Executive Directors: “Settlement of Disputes between Governments and Private Parties” on Aug. 28,

The goal of finality, although important, may have been overemphasized in extant scholarship. Although the ICSID Convention has existed for almost half a century, there is still no concrete empirical evidence that delaying finality affects the volume of foreign investment.<sup>9</sup> The repetition in writings and awards that finality is the prime objective of ICSID arbitration does not, without more, make it a valid legal or policy claim. It simply establishes the goal of finality as folklore of the international arbitration community. Although the scholarship favoring finality is rich, in light of the unproven assumption that finality of awards promotes foreign investments, it may be time to explore the issue of ICSID annulments from some other perspective.

This article contributes to discussions of ICSID annulments by reframing the inquiry in terms of justice. Although largely unnoticed in other academic writings, the negotiating documents of the ICSID Convention are replete with references to concepts of justice.<sup>10</sup> For example, the framers of the ICSID Convention were also explicitly concerned that some aspects of natural justice were not violated in awards.<sup>11</sup> Thus, there is as much historical and legal basis to be concerned about justice as there is with finality in ICSID arbitration. Further, as a policy and normative matter, achieving justice for investors and the people of host states surely must be just as important as achieving finality.<sup>12</sup> Although the finality of arbitral decisions is one aspect of justice, it should not always displace other competing considerations of justice.

This article's justice-focused inquiry pays off in three principal ways. First, where justice requires finality in ICSID arbitrations, it provides an additional, and possibly stronger normative basis for favoring finality than simply relying on the unproven assumption that finality of arbitral awards promotes direct foreign investments. Where awards apply the law correctly, retributive justice requires that the awards be deemed final to promote the effectiveness of those awards.

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1961)

The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made. In many cases these studies have recommended the establishment of international arbitration and/or conciliation machinery. . . . The nature of the problem, as outlined above, suggests a solution along the following lines: . . . b) a recognition by States that agreements made by them with private individuals and corporations to submit such disputes to arbitration are binding international undertakings.

9. See *infra* Part III.

10. See *infra* Part IV.B.

11. See *infra* Broches at note 264.

12. Cf., BROCHES, *supra* note 8, at 354-55 (“[A]d hoc committees may be faced with the delicate final task of weighing the conflicting claims of finality of awards, on the one hand, and of protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1).”).

Second, where other conceptions of justice conflict with finality in certain situations, this article's justice-focused inquiry gives observers a framework to assess whether the current grounds for review are sufficiently broad. Where awards misapply the law, enforcing them would be retributively unjust. In some situations, injustice might be tolerated in order to promote the efficacy of the ICSID system generally and its ability to promote retributive justice in other disputes. However, in other situations, the substantive injustice of a particular award could be so grave that it would require nullifying the award as a moral matter, even though the award does not meet the annulment standard under Article 52.<sup>13</sup> Once the debate about ICSID annulment is reframed in terms of justice, it becomes clear that there could be some situations where awards misapply the law or facts in serious enough ways to result in a miscarriage of substantive justice that should be corrected. If those situations fall outside of the current scope of annulment, then Article 52 review should be expanded. Although the call for some sort of appellate mechanism is not new,<sup>14</sup> that view seems to have been drowned out recently by proponents of finality. This article provides a normative basis, grounded in justice, to refocus attention on when broader review might be desirable.

Third, where justice requires broader grounds for review than currently provided in the ICSID Convention, focusing on who ought to promote justice helps to clarify the different roles of arbitrators and government officials in the ICSID system. This article draws on the author's previously-developed

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13. See, e.g., William W. Burke-White & Andreas von Staden, *Investment Protections In Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. INT'L L. 307, 403 (2008)

Particularly in light of the *CMS* Annulment Decision, which reaffirms Argentina's obligations to pay hundreds of millions of dollars in compensation, despite the finding of 'errors' that 'could have had a decisive impact on the operative part of the award, the legitimacy of subjecting such core state policy decisions to ad hoc arbitration,' is questionable.

See also William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE L. J. 283, 284 (2010) ("Even from within the system, an annulment committee constituted under the ICSID Convention to review an award rendered by an ICSID tribunal against Argentina has scathingly critiqued the jurisprudential approach of the first-instance tribunal and raised larger questions about the system's legitimacy.").

14. Tarcisio Gazzini, *Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina*, 26 No. 3 J. ENERGY & NAT. RESOURCES L. 450, 467 (2008) ("Notwithstanding the sharp criticism expressed by the *ad hoc* Committee, the award almost entirely survived the annulment proceedings. However disappointing, such an outcome is due to the strictly limited jurisdiction of *ad hoc* Committees and may call for the introduction of an appeal system in investment arbitration."); Burke-White & von Staden, *Private Litigation*, *supra* note 13, at 300

In response to the growing perception of a legitimacy deficit in the ICSID system and the threat of state withdrawals from the Convention, commentators have suggested a range of reforms. Perhaps most prominent has been the call for the creation of a standing appellate mechanism with jurisdiction to review errors of law, rather than the far narrower grounds for annulment presently available under Article 52 of the Convention.

international legal theory that examines what different decisionmakers ought to do within their institutional roles, with a view to balancing ideals and what is realistically possible.<sup>15</sup>

Arbitrators have a special moral obligation to interpret and apply laws strictly, because investors and host states have allocated limited authority to them to resolve disputes according to laws and not according to what arbitrators might personally think is morally right.<sup>16</sup> It is thus generally not open to arbitrators to turn the review system into an appeals system by lowering the ICSID treaty standards for annulment. Adjustments to the ICSID system are best made by government officials under their authority to create appellate structures through treaties. Unlike arbitrators, officials are charged by the constituents who elect them to exercise their authority not just to apply the law but also to make it.<sup>17</sup> Government officials have a moral duty to serve the best interests of their constituents and promote the common good.<sup>18</sup> Officials acting for different countries also have the authority to create an appellate review structure with each other. Such appellate review may be used by their nationals who invest in foreign states and lose an arbitration concerning their investment,<sup>19</sup> as well as by their government when they lose an arbitration brought by a foreign investor.<sup>20</sup>

It is unrealistic to try to modify the ICSID Convention because of the difficulties of brokering multilateral consensus among the hundreds of signatory states. However, there is another way to create an appellate mechanism. Investor-state arbitrations are not created by the ICSID Convention alone. The Convention simply provides rules for arbitration if states choose to use the ICSID Convention. It does not mandatorily subject states to ICSID arbitration. States may consent separately to ICSID arbitration through bilateral investment treaties (BITs) that contain substantive laws about how they must treat foreign investments, and provide for ICSID arbitration should a dispute arise under the BIT. Thus, government officials may provide for the appeal of ICSID awards by inserting an appellate review provision into the dispute resolution clauses of their BITs. This would allow erroneous awards to be corrected within the framework of treaties to which states consented, without modifying the ICSID Convention.

These ideas are developed in the following order below. Part I explains why the ICSID arbitration is a key component of the global economy and takes stock of recent criticisms of ICSID annulments. Part II provides the legal history

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15. TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS 73-121 (2012).

16. *Id.* at 176-95.

17. *Id.* at 196-248.

18. *Id.* at 249-93.

19. *See, e.g.*, Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award (Aug. 16, 2007); Malaysian Historical Salvors SDN, BHD v. Gov't of Malay., ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007); Helnan Int'l Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Award, ¶ 13 (July 3, 2008).

20. *See, e.g.*, Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9.

and framework of the ICSID system. Part III reassesses empirical, historical, and policy bases for favoring finality in ICSID arbitrations. Part IV and V elaborates on the role of justice in ICSID arbitrations and the implications of a justice-based inquiry.

Having set out what this article does, it is useful to clarify also what it does not claim to do. This article does not address all forms of investor-state arbitration. Although scholarship has tended to focus on ICSID arbitration, in fact many investor state disputes are addressed through other forms of arbitration, such as arbitration under the United Nations Commission on International Trade (UNCITRAL),<sup>21</sup> or under other arbitral institutions such as the International Chamber of Commerce (ICC) in Paris or the Stockholm Chamber of Commerce (SCC).<sup>22</sup> However, it appears that the majority of investment disputes are addressed through ICSID arbitration.<sup>23</sup> Further, arbitrations under these other arbitral systems are private and their awards are not generally available to study.<sup>24</sup> In contrast, ICSID arbitration awards are often public,<sup>25</sup> providing an important glimpse into the otherwise secret world of investor-state arbitration and permitting scrutiny of this important form of arbitration.

This article also does not purport to address all criticisms of ICSID arbitration. For example, it does not address the criticism that awards are inconsistent and result in an incoherent jurisprudence.<sup>26</sup> This is an important

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21. See, e.g., *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877.

22. See, e.g., Alison Ross, *Under Scrutiny: the Changes at the ICC—An Interview with Jason Fry, Its Secretary General, plus Feedback from the Arbitration Community*, 4 GAR (Oct. 28, 2009), available at <http://www.globalarbitrationreview.com/news/article/19206/>; Kyriaki Karadelis, *Russian-Language ECT Award Enforced in Ukraine*, GAR, Aug. 22, 2012, available at <http://www.globalarbitrationreview.com/news/article/30774/russian-language-ect-award-enforced-ukraine/>.

23. See United Nations Conference on Trade and Development, Geneva, Apr. 2008, *Latest Developments in Investor-State Dispute Settlement*, International Investment Agreement Monitor No. 1, 1-2, UNCTAD Doc. UNCTAD/WEB/ITE/IIA/2008/3, available at [http://unctad.org/en/Docs/iteiia20083\\_en.pdf](http://unctad.org/en/Docs/iteiia20083_en.pdf), noting that in 2007, there were, cumulatively, 182 treaty-based cases under ICSID Rules, as compared to eighty UNCITRAL cases, fourteen SCC cases, five ICC cases, and five *ad hoc* cases.

24. For a comparison of the ICSID and UNCITRAL rules, see UNCITRAL Arbitration Rules (as revised in 2010) § IV art. 34, ¶ (5) (“An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.”).

25. See Stephen Jagusch & Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* 79, 96 (Michael Waibel et al. eds., 2010) (“Unlike UNCITRAL arbitration, the existence of an ICSID dispute is public and, as evidenced by the increase in *amicus curiae* applications in ICSID proceedings, NGOs and other groups have the opportunity to make submissions.”).

26. See, e.g., Burke-White & von Staden, *Investment Protections*, *supra* note 13, at 409 (“The



perspective, but there is no room here to consider whether the jurisprudence is actually incoherent or whether there is in place a system akin to precedent,<sup>27</sup> and whether coherence matters when different ICSID arbitrations apply the laws of different, but often similarly-worded, bilateral investment treaties. Thus, the proposal in this article for states to bilaterally agree on an appellate structure for investor-state arbitrations might meet the policy aim of correcting errors in awards, but it would not necessarily address the need for greater coherence, if there is such a need, in “ICSID jurisprudence” involving a web of different states and treaties.

## I.

### THE GLOBAL AND HUMAN DIMENSIONS OF ICSID ANNULMENTS

It is useful to explain why the topic of ICSID annulments is important. Criticisms about the ICSID annulment process must be taken seriously, because ICSID arbitration is crucial to the world economy. ICSID arbitration is a preeminent international venue to resolve foreign direct investment (“FDI”) disputes around the world,<sup>28</sup> which on a global scale amount to \$1.66 trillion annually.<sup>29</sup> In recent decades, there has been a dramatic increase in ICSID arbitrations as well as annulments. As shown in Figure 1, below, the number of ICSID awards has grown from four between 1971-1980, to ninety-six in the decade just past. In that decade there were twenty-six annulment decisions, roughly a quarter of the number of awards made. As of September 6, 2012, there were a total of 402 pending and concluded ICSID arbitrations.<sup>30</sup>

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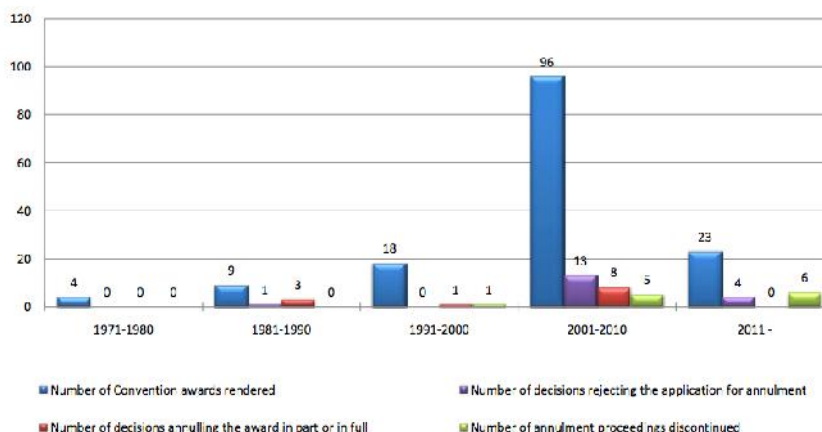
contradictory decisions in the four recently decided cases against Argentina and the CMS Annulment Decision noted above highlight the urgent need for a harmonized approach that is legally and theoretically justifiable.”); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 EUR. J. INT’L L. 769, 797 (2008) (“The frequent contradictions in the legal reasoning of arbitral awards hinders the development of an international ‘common law’ on investment protection.”); Bart Legum, *The Introduction on an Appellate Mechanism: the U.S. Trade Act of 2002*, in ANNULMENT OF ICSID AWARDS, *supra* note 4, at 289 (noting that some critics favor “modifications to the ICSID model” in order to achieve “coherence to the interpretations of investment provisions in trade agreements”).

27. See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT’L L.J. 1014 (2007).

28. See Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

29. UNCTAD, *Global FDI Outflows Continued to Rise in 2011 Despite Economic Uncertainties; However Prospects Remain Guarded*, in Global Investment Trends Monitor No. 9 (April 12, 2012), available at [http://unctad.org/en/PublicationsLibrary/webdiaeia2012d19\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaeia2012d19_en.pdf).

30. ICSID, List of Pending Cases, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending> (last updated Sept. 6, 2012); ICSID, List of Concluded Cases, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> (last updated Sept. 6, 2012).



**Figure 1: ICSID Awards and Annulment Decisions by Decade<sup>31</sup>**

The number of annulment applications is on the rise. As shown in Figure 1, there have been ten applications challenging annulments since 2011, a 93% increase in the annual average of applications from the previous ten years. David Caron reports that 22% of contested awards are annulled in whole or in part, and 40% of contested annulment decisions were granted in whole or in part.<sup>32</sup> Pressing questions about the scope of review in annulment proceedings must be addressed.

Although this caseload is miniscule compared to the U.S. federal court docket, many ICSID disputes concern major infrastructural projects crucial to the development of the country in which it was to take place. ICSID disputes involve dozens of countries, and relate to, *inter alia*, international airports to connect citizens to foreign countries,<sup>33</sup> highways to enable truck drivers to transport goods,<sup>34</sup> power plants and natural gas distribution networks to put an end to electricity shortages,<sup>35</sup> tourist resorts to revitalize towns,<sup>36</sup> and housing

31. The ICSID Caseload Statistics (Issue 2012-2) 15, <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English32>; see also ICSID Annulment Report, *supra* note 1.

32. David Caron, *Framing the Work of ICSID Annulment Committees*, 6 WORLD ARB. MEDIATION REV. 173, 180 (Jan. 2012) available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1151&context=david\\_caron](http://works.bepress.com/cgi/viewcontent.cgi?article=1151&context=david_caron).

33. See, e.g., *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007).

34. See, e.g., *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5.

35. See, e.g., *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19.

36. See, e.g., *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4.

for university students.<sup>37</sup> What is at stake is the ability of corporations to confidently make major investments in countries around the world, bringing development to millions of people, revitalizing economies,<sup>38</sup> and preserving the pensions of workers whose retirement accounts hold stock in these corporations. What is also at stake is the ability of national governments to regulate activities within their borders for the benefit of their citizens, including emergency measures to protect the economy and laws to control the import of toxic materials,<sup>39</sup> without having to use tax dollars to pay gigantic awards by international tribunals that misapply the law when judging these measures.<sup>40</sup>

Consider the following example. In 1990, the Filipino government determined as part of a master plan that it required a new international airport terminal in its capital, Manila.<sup>41</sup> The Philippines entered into a concession agreement with a joint venture company comprised of private Filipino and foreign investors to build such a terminal, which was to be called Terminal 3 of the Ninoy Aquino International Airport (NAIA-3).<sup>42</sup> The terminal was designed to handle thirteen million passengers annually,<sup>43</sup> helping connect Filipinos to the world and bring tourists and businessmen to the Philippines.

Fraport, the publicly held company that owns and operates Frankfurt Airport and other airports outside of Germany, became a business partner in the development of NAIA-3. It made a large investment and became a major shareholder in the local joint venture company, Philippines International Air Terminals Co., Inc. (PIATCO), which was set up to build and operate NAIA-3. This project was crucial to Fraport and its twenty-two thousand employees worldwide, given the hundreds of millions of dollars that Fraport invested.<sup>44</sup> In 2002, when President Macpagal-Arroyo cancelled the concession contract as “a test-case” of her administration’s “commitment to fight corruption” and “to free

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37. See, e.g., *Bosh Int’l, Inc. & B&P, LTD Foreign Invs. Enter. v. Ukraine*, ICSID Case No. ARB/08/11, Award (Oct. 25, 2012).

38. See, e.g., *RSM Prod. Corp. & others v. Grenada*, ICSID Case No. ARB/10/6, Award (Dec. 10, 2010); *Holiday Inns S.A. and others v. Morocco*, ICSID Case No. ARB/72/1.

39. See, e.g., *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, ¶ 82 (Aug. 30, 2000); *Ethyl Corp. v. the Government of Canada*, NAFTA/UNCITRAL Case, Award on Jurisdiction (June 24, 1998); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL Case, Final Award (Aug. 9, 2005).

40. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 146 (Sept. 25, 2007) (“[T]he Committee finds it necessary to observe that here again the Tribunal made a manifest error of law.”).

41. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007).

42. *Id.* ¶¶ 146-147.

43. *Id.* ¶¶ 91, 98.

44. Fraport AG, Annual Report 2011, p. 127, [http://www.fraport.com/content/fraport-ag/en/misc/binaer/investor\\_relations/annual\\_reports/annual-report-2011/jcr:content.file/Fraport%20Annual%20Report%202011.pdf](http://www.fraport.com/content/fraport-ag/en/misc/binaer/investor_relations/annual_reports/annual-report-2011/jcr:content.file/Fraport%20Annual%20Report%202011.pdf).

the state from the hold of any vested interest,”<sup>45</sup> Fraport had to write off its investment of €289.5 million, which was the principal cause of its overall loss for that year for the whole company, its employees and its shareholders of €120.8 million.<sup>46</sup>

Fraport then commenced ICSID arbitration against the Philippines on September 17, 2003, claiming that the Philippines had violated the Germany-Philippines bilateral investment treaty. The tribunal declined jurisdiction in 2007, holding that Fraport’s investment was void because Fraport had made secret agreements with local investors of PIATCO to give Fraport effective managerial control over PIATCO.<sup>47</sup> These secret deals violated Filipino constitutional and statutory law prohibiting foreign investors from controlling public utilities in the Philippines,<sup>48</sup> which are key sovereign interests. An *ad hoc* committee annulled the award, finding that the tribunal had departed from a fundamental rule of procedure by failing to allow Fraport to comment on key evidence that the Philippines introduced late in the hearings.<sup>49</sup> A new ICSID tribunal has been constituted to hear the dispute, which is hardly closer to final resolution than it was almost a decade ago. While the ICSID dispute continues, hundreds of millions of investment dollars remain out of reach for Fraport’s shareholders. As a result of the unresolved dispute, the international air terminal’s opening was delayed by half a decade. Even in 2012, it was not fully operational.<sup>50</sup>

As the *Fraport* dispute illustrates, and as ICSID annulment statistics reinforce, striking the right balance between finality of ICSID disputes and

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45. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Award, ¶ 192.

46. Fraport AG, Annual Report 2003, pp. 41, 57, [http://www.fraport.com/content/fraport-ag/en/misc/binaer/investor\\_relations/annual\\_reports/annual\\_report\\_2003/jcr:content.file/Fraport%20Annual%20Report%202003.pdf](http://www.fraport.com/content/fraport-ag/en/misc/binaer/investor_relations/annual_reports/annual_report_2003/jcr:content.file/Fraport%20Annual%20Report%202003.pdf).

47. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Award, ¶ 159; Fraport AG, Annual Report 2, 70, 82 (2002) (stating that Fraport was looking to increase its effective control over the airport project).

48. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Award, ¶ 142, 154, 160-61, 166-69.

49. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 244-47 (Dec. 23, 2010) (“[The tribunal] ought to have provided a further opportunity to the parties to submit evidence on Philippine law and to make submissions thereon relative to this specific question. Its failure to do so underscores the serious departure from a fundamental rule of procedure.”).

50. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Award, ¶ 59 (noting president said the airport would open at the end of 2002); *Ninoy Aquino International Airport Terminal 3 opens*, INQUIRER GLOBAL NATION (Aug. 11, 2008), <http://globalnation.inquirer.net/announcements/announcements/view/20080811-153904/Ninoy-Aquino-International-Airport-Terminal-3-opens>; *NALA Terminal 3 nears operation*, SUN.STAR MANILA (Mar. 12, 2012), <http://www.sunstar.com.ph/manila/local-news/2012/03/12/naia-terminal-3-nears-operation-210866>; Matthew Weiniger and Francesca Albert, *Investment Treaty Arbitration: Some Support For Fraport*, 6 GAR 2 (2011) (reporting on negative impact of the Fraport dispute on Philippines’ attempt to develop its airport).

rectification of errors in awards is crucial. The balance that was struck in the ICSID Convention, and how arbitrators have interpreted that balance, are described below.

## II.

### THE STRUCTURE OF ICSID ARBITRATION

#### A. *Why Arbitrate International Disputes?*

International arbitration is a basic strut of the international legal system and supports its goals. An overriding goal of the international legal system is to promote minimum public order. Minimum public order refers to the baseline requirements of stability in international relations without which reasonable international activities cannot take place.<sup>51</sup> It is necessary for the common good, which moral philosopher John Finnis described as the conditions for every actor to reasonably pursue his or her preferred values.<sup>52</sup> Internationally, minimum public order promotes the common good because it allows corporations, governments, and other decision makers to cooperate and compete with each other in the pursuit of values for their respective constituents.<sup>53</sup>

In international economic relations, corporations and governments engaging each other in cross-border or international activities are better able to deploy resources to pursue their interests when they can transact on the basis of shared expectations that their respective commitments will be carried out. Where any party deviates from its promises, there needs to be a mechanism to rectify that deviation. Rectification might end the errant conduct and provide compensation for the deviation so that the parties can proceed once again with their cooperative arrangement. It might, alternatively, restructure their relations moving forward, or terminate their economic relationship entirely with a transfer of sufficient values from the deviating actor to the wronged party to compensate him. In this fashion, economic actors are able to make decisions about who to work with internationally with an expectation that their arrangements will be carried out or, at a minimum, substituted for adequate compensation.

The mechanisms for rectification are not, however, self-evident. The international legal system assigns primary responsibility on a territorial basis.<sup>54</sup>

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51. See CHENG, *supra* note 15, at 74 (explaining minimum order); Steven Ratner, *Between Minimum World and Maximum World Public Order: An Ethical Path for the Future*, in LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, 195, 196 (M. Arsanjani et al. eds., 2011) (discussing the same).

52. See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 156 (1996) (discussing the concept of the common good).

53. See CHENG, *supra* note 15, at 101 (discussing relationship between minimum world order and common good).

54. Curtis A. Bradley, *Agora: Kiobel, Attorney General Bradford's Opinion and The Alien Tort Statute*, at 3 (June 7, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063921](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063921) ("When the ATS was enacted, prescriptive jurisdiction (the authority of a

Ultimate authority for the governance of territories is assigned to governments of nation states. Governments make decisions about what activities may take place within their territories. Aside from certain fundamental moral and legal norms, such as the prohibitions of torture and genocide, the decisions of governments about their territories are not generally subject to review by another government or non-state actor. In Europe, this territorial allocation of authority was formalized in the Peace of Westphalia in the seventeenth century.<sup>55</sup> While imperfect, this international design has much to commend to it. Given the difficulties of governing overly expansive lands and the variances in cultural preferences among different communities, it is appropriate for territorial communities that have sufficient resources, land, and people to each govern themselves and pursue their preferred values.

As a result of this territorial allocation of authority, however, the international legal system lacks a comprehensive centralized body to effectively settle disagreements between governments and foreign corporations that invest and carry out economic activities in territory of those governments. Taken to its logical extreme, the concept of state sovereignty subjects foreign investors to the decisions of host governments. Their investments and associated business activities continue only at the pleasure of host governments. This state of affairs would be contrary to minimum public order, because investors could hardly proceed with international transactions with any reasonable assurance that their agreements will be carried out over long periods of time in foreign countries. Ironically, therefore, the division of governing authority around the globe by territories that is so crucial for minimum public order also creates conditions that could undermine the very public order it is meant to promote.

Within this antinomy, international arbitration is one of the few mechanisms to rectify state conduct that deviates from shared international expectations of what agreements governments should abide by and how they ought to treat other actors in international activities. The essence of international arbitration is a privately sponsored system of dispute resolution. Actors from different states, such as two governments, a government and a corporation, or two corporations from different states, agree that they will submit their dispute to third party decisionmakers—a tribunal of arbitrators—to hear their dispute and make a decision about what should be done about it. The parties agree in advance that they will abide by the award of the arbitrators. When they follow

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nation to apply its laws to regulate conduct) was thought to be highly territorial. An influential Dutch scholar, Ulrich Huber, had written in the 1600s that the ‘laws of each state have force within the limits of that government and bind all subjects to it, but not beyond.’” (citing Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, cited and quoted in Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, 13 ILL. L. REV. 375, 376, 403 (1918-1919)).

55. See Treaty of Westphalia, Peace Treaty Between the Holy Roman Emperor and the King of France and their Respective Allies, § II (1648), available at [avalon.law.yale.edu/17th\\_century/westphal.asp](http://avalon.law.yale.edu/17th_century/westphal.asp).

their agreement, arbitration provides a method to identify and correct deviations from shared expectations of appropriate conduct and agreements between parties about how they will treat each other in international activities. Many investor-state disputes today are resolved by ICSID arbitration.

### B. ICSID Arbitration

ICSID arbitration is an elaborate system of dispute resolution whose structure was worked out systematically among states in advance and entered into force through the ICSID Convention in 1966.<sup>56</sup> The purposes of the ICSID Convention were to enhance international cooperation and private international investment in order to promote global economic development.<sup>57</sup> As its title suggests, the Convention sought to promote FDI by providing a facility for the settlement of international investment disputes between foreign investors and host states.<sup>58</sup> It established a conciliation procedure and a binding arbitration procedure.<sup>59</sup> Although the use of ICSID dispute settlement facilities was scant in the first few decades after the Convention went into force,<sup>60</sup> ICSID arbitration is now widely used when an investor-state dispute cannot be resolved without mandatory third-party settlement.<sup>61</sup>

Arbitrations under the auspices of ICSID perform a key function in resolving disputes between foreign investors and host states outside of national courts.<sup>62</sup> Mandatory and enforceable dispute resolution takes place under the framework of the ICSID Convention when investment contracts or bilateral

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56. CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* xi (Cambridge University Press ed., 2001); ICSID Convention, *supra* note 1.

57. ICSID Convention, *supra* note 1, pmb. (“Considering the need for international cooperation for economic development, and the role of private international investment therein . . .”).

58. See also Aron Broches, *Settlement of Financial and Economic Disputes between Governments and Private Individuals or Corporations*, in *HISTORY OF THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES* 1, 2 (Int’l Ctr. for the Settlement of Inv. Disputes ed., 1968) [hereinafter *ICSID History*] (stating that a key goal of the designing ICSID convention was to provide “direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments.”).

59. See ICSID Convention, *supra* note 1, art. 1(2), art. 28-35 (provisions on conciliation), art. 36-55 (provisions on arbitration).

60. Scheurer, *ICSID Commentary*, *supra* note 2, at xvii (“The use of the dispute settlement procedure created the ICSID Convention remained scant during its early years.”).

61. Susan B. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT’L L. 825, 840 (2011) (noting that there have been 325 arbitrations since the inception of the ICSID Convention and that in 2009 alone ICSID registered twenty-six arbitrations).

62. W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 46 (1992) (“One of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and to protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, with mandatory calls at each successive cubicle to rehear all or part of the case.”).

investment treaties provide for ICSID arbitration. This mechanism for addressing international disagreements provides the security of a neutral adjudicative forum to investors seeking protection from political and legal risks associated with deploying large sums of capital in foreign countries over long time horizons.<sup>63</sup> It also helps host states—whether from the developing or developed world—attract foreign investments in order to grow their national economies.<sup>64</sup>

Every ICSID arbitration proceeds within the four corners of the ICSID Convention. Arbitration is triggered when any treaty state or national of such a state (whether a person or corporation) files a request for arbitration with the ICSID Secretary-General.<sup>65</sup> In practice, a corporation or individual investor from an ICSID state who has made an investment in another ICSID state files that request. Because the ICSID Convention itself does not provide substantive standards governing the treatment of foreign investors by host states, the causes of action in the arbitration request must be based on another source of law. Most often, the investor alleges that the host state took actions that harmed the investment, in violation of its obligations under a bilateral investment treaty between the host state and the state in which the investor is a national,<sup>66</sup> or in violation of its contractual obligations under the project agreement or contract for the investment if that contract stipulated ICSID as the arbitral forum for dispute resolution.<sup>67</sup>

The host state and the foreign investor generally appoint a tribunal of their own choosing,<sup>68</sup> which usually comprises three arbitrators, with each side appointing one arbitrator and a chairperson appointed by agreement of the two

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63. See Aleks Vickovich, *South Sudan Joins ICSID as Armed Conflict Escalates*, COMMERCIAL DISPUTE RESOLUTION (April 25, 2012), <http://www.cdr-news.com/categories/icsid/south-sudan-joins-icsid-as-armed-conflict-escalates/> (“The signing of the Washington Convention by South Sudan is a very positive development,” says Winston & Strawn partner Mark Bravin. “In order to attract foreign investors, the government of this new nation has acknowledged the importance of consenting to the use of a neutral forum for resolving investor-state disputes.”).

64. Johanna Kalb, *Creating an ICSID Appellate Body*, 10 UCLA J. INT’L L & FOREIGN AFF. 179 (2005).

65. ICSID Convention, *supra* note 1, art. 36(1) (“Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.”).

66. See, e.g., *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 4 (May 12, 2005) (investment claims brought under U.S.-Argentina BIT).

67. See, e.g., *Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 15 (May 17, 2007) (investment claims brought under contract with host state).

68. ICSID Convention, *supra* note 1, art. 37(2).



parties.<sup>69</sup> Where, however, the parties are unable to agree on the arbitrators, the ICSID secretariat will appoint the arbitrators to fully constitute the tribunal.<sup>70</sup>

The tribunal is charged with issuing an award in writing that decides every question submitted to it by a majority vote,<sup>71</sup> explaining the reasons upon which the award is based.<sup>72</sup> Any member of the tribunal may append a separate or dissenting opinion.<sup>73</sup> The award must be based on the rules of law agreed upon by the parties,<sup>74</sup> which in practice refers to the governing law of the contract or treaty under which the arbitration is brought.<sup>75</sup> In the absence of such an agreement, however, the law of the host state applies together with applicable international laws.<sup>76</sup>

Unlike a domestic court decision, which is subject to appeal by a higher court, an ICSID award is not open to appeal. It is only subject to rectification, interpretation, revision or annulment, which are all different in nature from appeals.<sup>77</sup>

Within 45 days of the date of the award, either party may request rectification of the award on the narrowest of grounds: that there was a clerical, mathematical or other similar error.<sup>78</sup> Either party may also request interpretation or clarification of the meaning and scope of the award by submitting an application to the ICSID Secretary-General, which will attempt, as far as possible, to refer the question to the original tribunal. If the original tribunal cannot be reconvened, a new tribunal will be constituted.<sup>79</sup> Since

69. *Id.* art. 37(2)(b).

70. *Id.* art. 38; ICSID Additional Facility, Schedule C, art. 9.

71. ICSID Convention, *supra* note 1, art. 48(1)-(3).

72. *Id.* art. 48(3).

73. *Id.* art. 48(4). *See, e.g.*, *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Award (Aug. 16, 2007) (Cremades, dissenting); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment, additional opinion of J.H. Dalhuisen, dissenting (Aug. 20, 2007).

74. ICSID Convention, *supra* note 1, art. 42(1).

75. *See, e.g.*, *Malaysian Historical Salvors SDN, BHD v. Gov't of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶ 15 (May 17, 2007) (“Any dispute arising under this Contract shall be settled by Arbitration in accordance with the Arbitration Laws of Malaysia. The venue of the arbitration shall be Kuala Lumpur.”).

76. ICSID Convention, *supra* note 1, art. 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.”).

77. *See* Aron Broches, *Observations on the Finality of ICSID Awards*, in *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 311 (1995) (describing annulment, revision and interpretation).

78. ICSID Convention, *supra* note 1, art. 49. *See Soufraki* rectification; *Noble Ventures* rectification; *Luchetti* rectification; *Santa Elena* rectification; *Maffezini* rectification (all granting rectification of clerical errors); *Genin* rectification; *Vivendi I ad hoc* committee rectification (both denying request for rectification).

79. ICSID Convention, *supra* note 1, art. 50.

ambiguities may be discovered much later in the process, there is no time limit on when a party may request clarification.<sup>80</sup>

There are, however, strict time limits on attempts to revise the award. Within three years of the date of the award, if a party discovers some dispositive fact that it could not have reasonably known when the award was rendered, it has 90 days to request that the tribunal revise the award on the basis of that new fact.<sup>81</sup>

Either party may also make an application to annul the award within 120 days of receiving the award.<sup>82</sup> The Secretary-General then approaches an *ad hoc* committee of three arbitrators from the ICSID panel of arbitrators, to which each member state has designated four arbitrators and the Secretary-General has designated ten more.<sup>83</sup> If an award survives the annulment process, or if there is no request for annulment within 120 days of the date of the award, it is final and not subject to appeal. Each signatory state is obliged under the ICSID Convention to recognize the award as if it were a final judgment of a court in that state,<sup>84</sup> and the prevailing party in the arbitration may seek recognition or enforcement before domestic courts of signatory states.<sup>85</sup>

80. See Memorandum of the Meeting of the Committee of the Whole, Feb. 23, 1965, SID/65-6, in ICSID History, *supra* note 58, Vol. 2, Pt. 2, 982, 987 (“Mr. Broches explained that . . . [s]ince compliance with an award may extend over a number of years, no time limit was imposed for requests for interpretation.”).

81. ICSID Convention, *supra* note 1, art. 51.

82. See ICSID Commentary, *supra* note 2, at 881-1075 (discussing annulment under Article 52).

83. ICSID Convention, *supra* note 1, art. 4.

84. *Id.* art. 53. See *CMS Gas Transmission*, ICSID Case No. ARB/01/8, Annulment Decision, ¶ 15 (quoting the Argentine Republic’s 12 June 2006 written statement, issued in accordance with the Committee’s directions and signed by Dr. Osvaldo César Guglielmino, Argentina’s Attorney-General, stating that “[t]he Republic of Argentina hereby provides an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted.”).

85. ICSID Convention, *supra* note 1, art. 54. See also *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), ¶ 53 (Mar. 5, 2009)

The very fact that the Committee has found that Argentina is under a duty, unconditionally and in good faith, to “abide by and comply with” the Award according to Article 53, together with Argentina’s repeated and uncompromising affirmation that it has no such obligation in the absence of the award creditor submitting the award to a procedure within the State party’s domestic judicial system under Article 54, must necessarily lead to the conclusion that Argentina is not willing to comply with its obligations under Article 53 unless Sempra first seeks enforcement under Article 54. This is an important consideration to be weighed when determining the future of the present stay of enforcement of the Award.

Unlike an appeal from a domestic court decision, which can modify a lower court decision to correct it,<sup>86</sup> annulment of an ICSID award can only nullify it but not correct it.<sup>87</sup> An annulled award is void, and the claimant has to commence arbitration anew.<sup>88</sup>

### C. Standards for Annulment

The other key difference between an appeal and an annulment is the scope of inquiry. In an appeal of a court decision, the appeal can be sustained on errors of law or fact in the decision below.<sup>89</sup> In contrast, the grounds for annulment under the review standard of Article 52 of the ICSID Convention are much more narrowly confined.<sup>90</sup> The firestorm that threatens to engulf the ICSID annulment system and ICSID itself concerns annulment under Article 52, which states:

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
- (a) That the Tribunal was not properly constituted;
  - (b) That the Tribunal has manifestly exceeded its powers;
  - (c) That there was corruption on the part of a member of the Tribunal;
  - (d) That there has been a serious departure from a fundamental rule of procedure; or
  - (e) That the award has failed to state the reasons on which it is based.<sup>91</sup>

In practice, most annulment applications have claimed that the tribunal either manifestly exceeded its powers,<sup>92</sup> that there was a serious departure from

*See also* Argentina v. BG Group, 764 F.Supp.2d 21 (D.D.C. 2011).

86. Fed R. App. P. 4(a)(4) (West 2012).

87. *See* ICSID Convention, *supra* note 1, art. 52; Klöckner Industrie-Anlagen GmbH & others v. United Republic of Cameroon and Société Camerounaise des Engrais (ICSID Case No. ARB/81/2) (Annulment Decision) ¶ 179 (May 3, 1985); Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 258 (Dec. 23, 2010).

88. *See* Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Annulment, ¶ 70 (Aug. 20, 2007); Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶16 (May 10, 1988).

89. Fed. R. Civ. P. 59(e) (West 2012); Ross v. Marshall, 426 F.3d 745, 763 (5th Cir. 2005) (“A motion to alter or amend judgment must ‘clearly establish either a manifest error of law or fact or must present newly discovered evidence.’”).

90. ICSID Convention, *supra* note 1, art. 53(1) (“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.”). *See* ICSID Commentary, *supra* note 2, at 891 (explaining difference between ICSID annulment and appeal against a judicial decision); David Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.: FOREIGN INV. L. J. 21 at 35 (1992) (In short, Article 52 is a limited remedy in that (1) the ICSID review process is one of annulment, not appeal, and (2) the grounds for such annulment are “listed exhaustively” in Article 52(1).).

91. ICSID Convention, *supra* note 1, art. 52(1).

92. *See, e.g.*, Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 80 (April 16, 2009) (“It is its considered conclusion that the Tribunal exceeded its powers by failing to exercise the jurisdiction with which it

a fundamental rule of procedure,<sup>93</sup> or that the award failed to state the reasons on which it was granted.<sup>94</sup> It is less common for a party to claim that there was corruption on the part of a member of the Tribunal, or that the Tribunal was not properly constituted.<sup>95</sup>

Even a cursory glance at the three grounds on which awards tend to be challenged shows that the precise standards of review on the basis of text alone are unclear. The Vienna Convention on the Law of Treaties states that treaties are to be interpreted according to the ordinary meaning of words in light of the object and purpose of the treaty.<sup>96</sup> To determine that a tribunal manifestly exceeded its powers requires a determination of what the powers of a tribunal are, whether it has exceeded them or simply misapplied them, and if this excess was manifest. “Power,” “exceed,” and “manifest” are not defined terms in the ICSID Convention, and the ordinary meaning of those words does not provide sufficient specificity that they could be applied in an annulment proceeding without reasonable debate about how they apply to a tribunal’s award or conduct.<sup>97</sup>

Likewise, in considering whether there was a serious departure from a fundamental rule of procedure in the arbitral proceedings, an *ad hoc* committee will find no explicit guidance in the text of the ICSID Convention about the

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was endowed by the terms of the Agreement and the Convention, and that it ‘manifestly’ did so.”).

93. *E.g.*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment, ¶ 253 (2009) (“Argentina also contends that, by virtue of these conflicts of interest there has been a serious departure from a fundamental rule of procedure.”).

94. *See, e.g., id.* ¶ 296 (“Argentina also seeks annulment under Article 52(1)(e) of the ICSID Convention on the basis that the Tribunal failed to state reasons and/or issued contradictory reasons.”).

95. *See* Aron Broches, *Observations on the Finality of ICSID Awards*, in *SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 311 (1995) (omitting corruption and improper constitution of the tribunal when discussing the common claims for annulment applications). *But see* *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010) (invoking the grounds that the Tribunal was not properly constituted, among other reasons).

96. *See* Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 (stating that words in treaties should be interpreted in good faith according to their ordinary meaning in light of the objects and purposes of the treaty).

97. *See* *Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, dissenting opinion of Frank Berman, ¶ 4 (Sept. 5, 2007) (“There is obviously room for some discussion as to what the standard of ‘manifestness’ under Article 52(1) of the Washington Convention should be understood to mean. . .”). *See also* Carlos Ignacio Suarez Anzorena, *Vivendi v. Argentina: On the Admissibility of Requests for Partial Annulment and the Ground of Manifest Excess of Powers*, in *ANNULMENT OF ICSID AWARDS*, *supra* note 4, at 175 (“[I]t is impossible to reconcile the meaning that the *ad hoc* Committee assigns to the term ‘manifest’ with the ordinary meaning of that term.”); Statement of Mr. Loukur, World Bank Member from India, in *ICSID History*, *supra* note 58, at 851 (noting that he “failed to see” the meaning of the word “manifestly” in the provision of annulment); Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011) (Andreas Lowenfield, speaking) (on file with author) (“[T]he use of ‘manifest,’ if I may, is one of those fudge words.”).

meaning of “serious” or “fundamental,” and it is fairly obvious that the ordinary meanings of these words do not provide a bright line standard for when a departure is serious or not quite serious enough to trigger annulment, or when a rule of procedure is fundamental or important but not fundamental.<sup>98</sup>

A similar analysis applies to the annulment of awards for the failure to state reasons, which is another undefined standard in the ICSID Convention. As the author has explored in prior scholarship, it is unclear when the failure to state adequate reasons amounts to a failure to state reasons sufficient to trigger annulment, just as it is unclear when incongruent reasoning based on errors of law or fact amount to a failure to state reasons.<sup>99</sup>

However, interpreting the grounds for annulment in the context of the object and purpose of the ICSID Convention also fails to provide sufficient guidance in the interpretation of Article 52.<sup>100</sup> The preamble of the ICSID Convention indicates that the purpose of the Convention is to promote “international cooperation for economic development” and recognizes “the role of private international investment” in economic development.<sup>101</sup> It also recognizes the need to settle disputes through international arbitration rather than in national courts, if that is what the parties desire.<sup>102</sup>

It is not self-evident from the text of the preamble whether FDI and economic development would be promoted by interpreting the standards for annulment narrowly or broadly, or what the framers of the Convention thought about this question. Without more guidance from the text, one might speculate that investors and host states prefer narrower grounds of review to reduce the

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98. *Compare* *Industria Nacional de Alimentos and Indalsa Peru v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 125 (Sept. 5, 2007) (finding no serious departure from a fundamental rule of procedure justifying annulment, even though it refused to allow *Luchetti* to file a full memorial on the merits before its decision on jurisdiction that accepted on their factual assertions in a decree by respondent Peru), *with id.*, Dissenting Opinion of Sir Berman, ¶ 16 (concluding that there was a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention because the tribunal “failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent . . .”).

99. *See generally* Tai-Heng Cheng & Robert Trisotto, *Reasons, Reasoning, and Reasonableness*, 32 SUFFOLK TRANSNAT’L L. REV. 409 (2009). *Compare Industria Nacional de Alimentos*, ICSID Case No. ARB/03/4, Decision of the *ad hoc* Committee, ¶ 129 (holding that the failure of an award to “give a full picture of the various elements which should be taken into account for treaty interpretation” is insufficient to trigger annulment for failing to state reasons where the tribunal left no doubt as to “the legal or factual elements upon which the Tribunal based its conclusion”), *with id.* Dissenting Opinion of Sir Berman, ¶ 14 (concluding that the same award failed to state reasons because it insufficiently stated “a whole series of steps in the logical chain” of its reasoning). *See also* Pierre Lalive, *Concluding Remarks, in* Annulment of ICSID Awards, *supra* note 4, at 308 (“I agree with Christoph Schreuer that the place of this ground for annulment in the ICSID is ‘not entirely clear’—which is perhaps an understatement.”).

100. ICSID Convention, *supra* note 1, art. 53.

101. *Id.* pmb1. ¶ 1.

102. *Id.*

likelihood of annulment, and therefore narrower review would promote the purposes of the Convention of encouraging private international investments.

Alternatively, one might conjecture that investors and host states prefer wider grounds of review to increase the likelihood that awards were decided correctly according to law, and therefore wider review would promote the purposes of the Convention. A reasonable person might also hypothesize that different investors and host states have different preferences in this regard.

Accordingly, the Convention's purpose of promoting investments offers limited guidance about how to interpret the ambiguous standards for annulment. Article 52, on its face and in light of the stated purposes of the ICSID Convention, is unclear as to the precise standard for annulment.

#### D. Annulment Decisions

Although the text of Article 52 is ambiguous, annulment decisions seem to be trending towards a higher annulment standard. In international law, shared expectations of appropriate conduct are not shaped by text alone. The practices of authoritative decisionmakers and how their decisions are received by others in the international community also consolidate social beliefs about appropriate conduct.<sup>103</sup> The decisions of *ad hoc* committees and scholarly responses to those decisions have, over time, clarified that as a matter of social practice, the standard for nullification under Article 52 is much higher than an appellate standard.<sup>104</sup>

However, as the discussion of *ad hoc* decisions below shows, this constitutive process of arbitral decisionmaking in ICSID arbitration is volatile, and decisions will occasionally deviate from the higher annulment standard. A cluster of recent decisions applying a lower standard for annulment has provoked afresh anxieties about ICSID annulment.

##### 1. Failure to State Reasons

The first annulment decision in ICSID history is *Klöckner v. Cameroon*,<sup>105</sup> which was decided in October 1983. It interpreted Article 52 as imposing a low standard for annulment for the failure to state reasons. A West German

103. See generally, CHENG, *supra* note 15, at 73-121.

104. On this precedent-like process in investor state arbitration, see generally, Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III, REMEDIES IN INTERNATIONAL INVESTMENT LAW THE EMERGING JURISPRUDENCE OF INTERNATIONAL INVESTMENT LAW 147 (Bjorklund, Laird, & Ripinsky, eds., 2008).

105. *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Introductory Note, ¶ 1 (“In February of 1984, Klöckner applied to have the award annulled under Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). This was the first such application in ICSID’s history.”).

multinational company, Klöckner, initiated ICSID arbitration against Cameroon for payments guaranteed under a supply contract to provide a factory for SOCAMÉ, a fertilizer company, which proved unprofitable and unworkable. The tribunal decided in favor of Cameroon.<sup>106</sup> Klöckner filed an application for annulment for, *inter alia*, the failure to state reasons. The *ad hoc* committee accepted Klöckner's argument that the tribunal failed to account for Klöckner's arguments regarding contractual limitations of Klöckner's warranties and liabilities, Cameroon's unconditional acknowledgement of its debt, and applicable French law limiting a supplier's liability for hidden defects and time barring claims. The *ad hoc* committee concluded that consequently the award must be annulled in its entirety.<sup>107</sup>

The committee, chaired by Pierre Lalive, recommended a "searching and detailed examination of every aspect of the ICSID review process."<sup>108</sup> It also instructed that the reasons requirement could not be satisfied by "purely formal or apparent" reasons.<sup>109</sup> Instead, the tribunal must provide reasons "having some substance,"<sup>110</sup> based on identified sources of law and actual facts.<sup>111</sup> The committee believed an award should be annulled for a failure to state reasons when there is an absence of reasons "sufficiently relevant," that is, reasonably sustainable and capable of providing a basis for the decision."<sup>112</sup>

Scholars responded to *Klöckner* with a torrent of criticism.<sup>113</sup> They believed that *Klöckner* misinterpreted Article 52, and some even warned that the

106. *Klöckner Industrie-Anlagen GmbH*, ICSID Case No. ARB/81/2, Award, ¶ 428 (Oct. 21, 1983) ("The faults committed by Klöckner in the performance of their contractual obligations are enough to free the Cameroonian government from their financial investment.") (translation on file with author).

107. *Klöckner Industrie-Anlagen GmbH*, ICSID Case No. ARB/81/2, Annulment Decision, ¶ 179 ("The contested arbitral Award must therefore be annulled and, for the reasons given above, annulled in its entirety.").

108. MICHAEL REISMAN & GUILLERMO AGUILAR-ALVAREZ, THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION, 5 (2008).

109. *Klöckner Industrie-Anlagen GmbH*, ICSID Case No. ARB/81/2, Annulment decision, ¶ 119.

110. *Id.*

111. *Id.*

112. *Id.* ¶ 120.

113. Mark Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.-FILJ 85, 90-94, 97-110, (1987); Alan Redfern, *ICSID—Losing Its Appeal?*, 3 ARB. INT'L 98, 99 (1987) ("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."); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 64-65 (1992) ("Though the committee was at pains to distinguish this claim from a claim of an erroneous application (*error in iudicando*), it is difficult to escape the impression that the real thrust of the committee's concern was that the tribunal's legal conclusion of an obligation imposed on Klöckner *de tout reveler* constituted a mistake in law."); Ian Brownlie, 86 AM. SOC'Y INT'L L. PROC. 586, 593 (1992) ("A fairly pessimistic view does exist. Michael Reisman, in a brilliant lecture at Duke University in 1989, talked about the breakdown of the control mechanism. He pointed to the

entire legitimacy of ICSID arbitration was threatened.<sup>114</sup> The ICSID Secretariat put those fears to rest through the careful selection of arbitrators for the next two *ad hoc* committees.

The next *ad hoc* decision was *Amco Asia v. Indonesia*, issued on May 6, 1986. Amco Asia, a U.S. company, entered into an agreement with the government of Indonesia to manage and invest capital in a hotel. Amco Asia initiated ICSID arbitration after Indonesia forcefully removed Amco Asia's hotel management, seized the hotel, and revoked Amco Asia's license. The first tribunal issued an award in favor of Amco Asia.<sup>115</sup> In the annulment proceeding, the *ad hoc* committee, chaired by Ignaz Seidl-Hohenveldern, annulled the award in its entirety after a review of the facts and substance of the applicable law.<sup>116</sup> However, it also significantly raised the standard for annulment from *Klöckner*. The *Amco Asia* committee stated:

“There must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase ‘sufficiently pertinent reasons’ appears to this ad hoc Committee to be a simple and useful clarification of the term ‘reasons’ used in the Convention.”<sup>117</sup>

Unlike *Klöckner*, which explicitly stated that reasons were sufficiently relevant only if they were based on identified sources of law and actual facts, *Amco Asia* reformulated the requirement as “sufficiently pertinent reasons” without necessarily requiring pertinent reasons to have been derived from actual rules of law or facts.

The third *ad hoc* decision raised the threshold for annulment even further. *MINE v. Guinea* was decided in January 1988, almost five years after *Klöckner*. The *MINE* committee included Aron Broches, chief negotiator of the ICSID Convention, who had also served as an expert on international law for Amco in *Amco Asia*.<sup>118</sup> Mr. Broches's views strongly favoring finality were not fully adopted in *Amco Asia*, and now he had an opportunity to pronounce and apply his view as a key decisionmaker. The *MINE* decision held that that an award

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various problems arising from partial nullification of awards and what may be a questionable approach to the concept of *res judicata*.”); Pierre Lalive, *Concluding Remarks, in* Annulment of ICSID Awards, *supra* note 4, at 297, 298 (acknowledging, as the chair of the *Klöckner* ad hoc committee, that its decision “gave rise to interesting negative reactions”).

114. See generally W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 762 (1989).

115. *Amco Asia Corp. & others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 291 (Nov. 20, 1984).

116. This statement corrects a ministerial error in an earlier article. See Cheng & Trisotto, *supra* note 99, at 419 (stating that Rosalyn Higgins chaired the *ad hoc* committee. In fact, Judge Higgins chaired the second *Amco* tribunal.).

117. *Amco Asia Corporation*, ICSID Case No. ARB/81/1, Award, ¶ 129.

118. *Id.* (“Dr. Broches opined that ‘there is no justification for arbitrarily reading into the Convention a restriction on a party’s right to present claims or counterclaims other than the dispositive one of Arbitration Rule 55(3).’ In this context he referred to Article 46 of the Convention on the presentation of additional claims.”).



may be sufficiently reasoned if it is coherent. It explained that the reasons requirement “implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that.”<sup>119</sup> In other words, it must enable “one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or law.”<sup>120</sup>

Since *MINE*, most *ad hoc* committees have adopted its minimalist approach.<sup>121</sup> For example, in *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, MTD had entered into a contract with Chile regarding a mixed-use planned community on land that was currently zoned for agriculture. MTD initiated ICSID arbitration against Chile after Chile denied MTD required zoning changes on the alleged basis that MTD’s proposed plan was inconsistent with the government’s urban development policy. The tribunal held that Chile breached the fair and equitable treatment standard under Article 3(1) of the Chile-Denmark bilateral investment treaty (BIT).<sup>122</sup> Chile then filed an annulment application on the basis that, *inter alia*, the award failed to state the reasons upon which it was based. Chile argued that the tribunal failed to explain how it was in fact possible for MTD to have any expectations regarding its investment based on the approval of the project, and failed to specify the “urban policy” upon which the tribunal relied. The MTD *ad hoc* committee rejected this application for annulment. Although gaps existed among the facts, the tribunal’s reasoning from these facts was sufficiently clear such that an informed reader could understand the reasons given by the tribunal in reaching its conclusion.<sup>123</sup> Scholars and practitioners believed, for a time, that the issue had been put to rest.<sup>124</sup>

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119. Maritime International Nominees Establishment (*MINE*) v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision of the *ad hoc* Committee, ¶ 5.08 (Jan. 6, 1988).

120. *Id.* ¶ 5.09.

121. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 946-951; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment, ¶ 81 *et seq.* (Aug. 20, 2007); *CDC Group plc v. Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment, ¶ 32 *et seq.* (Dec. 17, 2003); *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Decision on Continued Stay of Execution, ¶ 24 *et seq.* (Jun. 1, 2005); *Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 64 *et seq.* (Sept. 5, 2007). *See also* ANNULMENT OF ICSID AWARDS, *supra* note 4, at 6 *et seq.* (stating that the *Wena* decision adopted “a balanced understanding of the scope of the review”). *But cf.*, *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award, ¶ 34 *et seq.* (Nov. 1, 2006) (annulling award under the low *MINE* standard).

122. *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, ICSID Case No. ARB/01/7, Award, ¶ 93 (May 25, 2004).

123. *MTD Equity Sdn Bhd and MTD Chile SA*, ICSID Case No. ARB/01/7, Decision on Continued Stay of Execution, ¶ 29 (Mar. 21, 2007).

124. ANNULMENT OF ICSID AWARDS, *supra* note 4, at 6 (noting that the *Wena* and *Vivendi I* annulment decisions, which were both decided in 2002, “deserve the credit for ending the controversy created by the first decisions rendered in the *Klöckner* and *Amco* matters,” which were

Recently, however, a string of decisions has once again raised questions about the proper annulment standard. This time, the interpretive issue has broadened to encompass other limbs of Article 52, namely that the tribunal either was not properly constituted, manifestly exceeded its powers, or seriously departed from a fundamental rule of procedure. Each of the key decisions concerning these limbs of annulment raises serious questions of law and policy, and is discussed in turn below.

## 2. *Improper Constitution of the Tribunal*

One of the key *ad hoc* decisions concerning the improper constitution of a tribunal is *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic* (“*Vivendi II*”). That dispute arose when Argentina cancelled a thirty-year concession contract between Compañía de Aguas del Aconquija, S.A. and the Argentinean Province of Tucumán.<sup>125</sup> After the first award was annulled,<sup>126</sup> the second tribunal decided that it had jurisdiction over the claims and dismissed the claims.<sup>127</sup> Argentina again applied to annul the second award, arguing that the tribunal was not properly constituted because one of the arbitrators, “lacked the requirements imposed by the ICSID Convention and should have been disqualified during the proceedings.”<sup>128</sup>

Argentina criticized the challenged arbitrator’s conduct, explaining that by accepting a directorship with the bank UBS, which had an interest in the dispute, she “created, objectively viewed, a conflict of interest which was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.”<sup>129</sup> However, the committee elected not to annul the award, reasoning that because the arbitrator was unaware of her conflict of interest until after she decided the award, her judgment could not have been impaired.<sup>130</sup> In so doing, the committee essentially inserted into Article 52 a harmless error defense,

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issued in 1986 and 1994 respectively). *But cf.*, Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the *Ad Hoc* Committee on the Application for Annulment, ¶ 131 (June 5, 2007) (rejecting annulment application for failure to state reasons, but appearing to apply the AMCO standard, explaining that although it “cannot look into [the] correctness” of reasons by an arbitration tribunal, the committee “has to verify the existence of reasons as well as their sufficiency—that they are adequate and sufficient reasonably to bring about the result reached by the Tribunal.”) (Florentino Felicano served on both the *AMCO* and *Soufraki ad hoc* committees); CMS v. Argentina, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 97 (annulling holding on umbrella clauses because reasoning was incoherent) (“In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point.”).

125. *See Vivendi*, ICSID Case No. ARB/97/3, Introductory Note.

126. *See Vivendi*, ICSID Case No. ARB/97/3, Award, Annulment.

127. *Vivendi*, ICSID Case No. ARB/97/3, Annulment, ¶ 119.

128. *Id.* additional opinion of J.H. Dalhuisen, dissenting, ¶ 19.

129. *Id.* ¶ 77.

130. *Id.* ¶ 234-238.

although nothing in Article 52 actually states that an application must show harm.

### 3. *Serious Departure from a Fundamental Rule of Procedure*

*Fraport* concerned annulment for, *inter alia*, a serious departure from a fundamental rule of procedure. Unlike *Vivendi II*, however, the *Fraport* committee was unconcerned with whether the error caused harm. As previously described, *Fraport* invested in PIATCO and contracted to build and operate an NAIA-3.<sup>131</sup> By late 2001, *Fraport* directly and indirectly owned 61.44 percent of PIATCO.<sup>132</sup> Additionally, *Fraport* entered into a confidential shareholder agreement to have managerial control over PIATCO. By the time the terminal was almost fully built, the Philippine Supreme Court decided that the concession agreement was null and void *ab initio* because it seriously violated Philippine law and public policy.<sup>133</sup> *Fraport* filed a claim with ICSID, alleging that the Republic of Philippines violated its obligation towards *Fraport* as an investor in the country.<sup>134</sup>

The tribunal issued a partial award stating that it did not have jurisdiction because *Fraport* had essentially exercised control over the airport project.<sup>135</sup> The investment treaty only protected investments that were in accordance with Filipino law. *Fraport*'s counsel was not in accordance with the Philippines's "Anti-Dummy" law. Therefore, the project was not an investment under the treaty. Although *Fraport* presented the tribunal with evidence that a Filipino prosecutor concluded that *Fraport* did not violate the Anti-Dummy Law,<sup>136</sup> the tribunal discounted that evidence because it determined that the prosecutor did not have access to the same evidence before the tribunal. Accordingly, the tribunal concluded it had no jurisdiction.<sup>137</sup>

*Fraport* filed an application for annulment, claiming, *inter alia*, that the tribunal seriously departed from a fundamental rule of procedure by failing to

131. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶¶ 14-15 (Dec. 23, 2010).

132. *Id.* ¶ 19.

133. *Id.* ¶ 24.

134. *Id.* ¶ 25.

135. *Id.* ¶ 30.

136. *Id.* ¶ 164 ("The Tribunal referred to . . . factual evidence from *Fraport*'s contemporaneous documents . . . and . . . evidence from the Prosecutor's file [dismissing the ADL complaint]"), ¶ 151 ("Philippines submitted to the Tribunal the Prosecutor's Resolution dismissing the criminal complaint under the ADL."). See also Jarrod Hepburn, *Fraport Files New Claim at ICSID Over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for New Hearing by Finding Breach of Investor's Right to be Heard*, INVESTMENT ARBITRATION REPORTER (Mar. 31, 2011), [http://www.iareporter.com/articles/20110331\\_7](http://www.iareporter.com/articles/20110331_7) (last visited Sept. 11, 2011) (Prosecutor determined the relevant fact for determining a breach of the ADL was the size of the shareholding held by a foreign investor and not the actual managerial control held by the foreigner).

137. *Fraport AG Frankfurt*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, ¶ 30.

provide an opportunity to rebut the Philippines' claim that the prosecutor did not have the evidence that was before the tribunal.<sup>138</sup> The *ad hoc* committee agreed and annulled the award.<sup>139</sup> It reasoned that Article 52(1)(d) was meant to control the integrity of the arbitral procedure and thus the right to be heard was a fundamental rule of procedure.<sup>140</sup> Because of the tribunal's treatment of new evidence in the original proceedings, it deprived Fraport of its right to be heard.<sup>141</sup>

This decision is inconsistent with the requirement in *Vivendi II* that an annulable error must have caused harm for an Article 52 application to succeed.<sup>142</sup> Even assuming that the tribunal departed from a basic rule of procedure by failing to give Fraport an opportunity to rebut the Philippines' claim that the prosecutor did not have the material evidence before the tribunal, this departure was harmless error. Even if the tribunal had given the Philippines that opportunity, there is no indication in the award that the tribunal would consequently have given the prosecutor's report sufficient weight to change the tribunal's conclusion.

#### 4. *Manifest Excess of Power*

Perhaps the most hotly debated limb of annulment today is the manifest excess of power. While it is accepted that errors of law do not provide a basis for annulment, when a tribunal fails to apply the law entirely it is deemed to have manifestly exceeded its limited authority to resolve the dispute according to law, and the decision must be annulled. However, the line between improperly applying the law and failing to apply the law entirely is neither clear in concept nor in practice.<sup>143</sup>

On one side of the line is the *CMS v. Argentina* annulment decision, which held, *inter alia*, that the tribunal had made errors of law in interpreting the necessity defense found in the U.S.-Argentina BIT, but that these errors did not amount to a manifest excess of power or a failure to state reasons.<sup>144</sup> In 1989, Argentina began privatizing "important industries and public utilities" to obtain

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138. *Id.* ¶ 120.

139. *Id.* ¶ 247.

140. *Id.* ¶¶ 180, 197.

141. *Id.* ¶ 218.

142. *Id.* ¶ 66.

143. *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, ¶ 164 (June 29, 2010) ("As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.").

144. *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ¶ 136 (Sept. 25, 2007).

foreign investments.<sup>145</sup> In 1992 Argentina privatized its natural gas industry.<sup>146</sup> The state-owned gas company, Transportadora de Gas del Norte (TGN), was opened to private investors, and CMS, a U.S.-based corporation, invested in the company.<sup>147</sup> At the end of the 1990s, Argentina experienced a severe economic crisis “which eventually had profound political and social ramifications.”<sup>148</sup> After the crisis, Argentina asked the natural gas companies to defer peso price increases that would have maintained the revenue of gas companies when calculated in U.S. dollars. The value of the Argentine peso fell dramatically. However, although TGN and Argentina had entered into an agreement that the “resulting income losses would be indemnified . . . it became apparent that the agreement would not be implemented.” CMS then filed for ICSID arbitration.<sup>149</sup>

CMS claimed that it made important investments in the gas transportation sector of Argentina and that it suffered a severe loss as a result of Argentina’s changes to its currency regime. Argentina claimed, *inter alia*, that its actions were excused under the necessity defense clause of the Argentina-U.S. bilateral investment treaty.<sup>150</sup>

After reviewing the parties’ claims, the tribunal rejected Argentina’s necessity defense and found that Argentina breached its obligations to accord the investor fair and equitable treatment guaranteed under Article II(2)(a) of the U.S.-Argentina bilateral investment treaty.<sup>151</sup> The tribunal awarded CMS over \$130 million.<sup>152</sup>

Argentina then filed for annulment, claiming that the tribunal manifestly exceeded its powers and failed to state the reasons on which the award was based.<sup>153</sup> The *ad hoc* committee partially annulled the portion of award concerning the umbrella clause in the U.S.-Argentina bilateral investment treaty.<sup>154</sup> But it left the other holdings intact, despite finding that the tribunal’s analysis of the necessity defense “contained manifest errors of law” and suffered from “lacunae and elisions.”<sup>155</sup> In particular, the committee faulted the tribunal for analyzing necessity only under customary international law and not under Article IX of the Argentina-U.S. treaty.<sup>156</sup> Ultimately, however, the committee concluded that under the Article 52 review standard, it could not “substitute its

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145. *Id.* ¶ 53.

146. *Id.* ¶ 54.

147. *Id.* ¶¶ 55, 58.

148. *Id.* ¶ 59.

149. *Id.* ¶ 61.

150. *Id.* ¶ 213.

151. *Id.* ¶ 84.

152. *Id.* ¶ 151.

153. *Id.* ¶ 1.

154. *Id.* ¶ 159.

155. *Id.* ¶ 158.

156. *Id.* ¶ 123.

own view of the law and its own appreciation of the facts,” and accordingly it left the award’s finding on necessity intact.<sup>157</sup>

On the other side of the line are two other disputes against Argentina: *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic* and *Sempra Energy Int’l v. Argentine Republic*.<sup>158</sup> Like *CMS*, both of these arbitrations concern similar facts. Both occurred during Argentina’s debt crisis and both were subject to the same U.S.-Argentina bilateral investment treaty. They also considered the necessity defense under its customary law elements, and, like the *CMS* tribunal, found that the necessity defense did not apply to excuse Argentina’s currency measures that damaged the U.S. investments.

In those two disputes, however, the *ad hoc* committees reached different conclusions from the *CMS* committee. The *Enron* committee reasoned that the *Enron* tribunal manifestly exceeded its powers by failing to consider the elements on necessity under the bilateral investment treaty or customary law, and by failing to give reasons.<sup>159</sup> The *Sempra* committee similarly reasoned that the *Sempra* tribunal manifestly exceeded its powers by failing to apply the correct law, applying customary international law instead of treaty law.<sup>160</sup>

Aside from these Argentina decisions, which some commentators have attempted to ignore as *sui generis*,<sup>161</sup> there are at least two other decisions annulling awards that misapplied the law, holding that such misapplication amounted to a manifest excess of power.

In *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*,<sup>162</sup> Malaysian Salvors brought a claim against the Republic of Malaysia regarding

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157. *Id.* ¶ 136.

158. *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (May 22, 2007); *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007).

159. *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision of the *ad hoc* Committee on the Application for Annulment, ¶ 169 (July 30, 2010).

160. *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, ¶ 207 *et seq.* (June 29, 2010); Steven Smith & Kevin Rubino, *Investors Beware: Enron and Sempra Annulment Decisions Bolster the State Necessity Defense While Sowing New Uncertainty Regarding the Finality of ICSID Arbitral Awards*, O’MELVENY & MYERS LLP, (Aug. 11, 2010), <http://www.omm.com/investors-beware—enron-sempra-annulment-decisions-bolster-state-necessity-defense-while-sowing-new-uncertainty-regarding-finality-of-icsid-arbitral-awards-08-09-2010/> (“The recent annulment of two ICSID arbitral awards [Sempra and Enron] have created new uncertainty regarding the scope of review in annulment proceedings under the ICSID Convention.”).

161. See generally Ignacio Suárez Anzorena, Robert Wisner, Jack J. Coe, Jr., Claudia T. Salomon & Kiera S. Gans, *International Commercial Dispute Resolution*, 40 INT’L LAW. 251 (2006). But see Robert M. Ziff, *The Sovereign Debtors Prison: Analysis of the Argentine Crisis Arbitrations and the Implications for Investment Treaty Law*, 10 RICH. J. GLOBAL L. & BUS. 345 (2011).

162. See *Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia*, ICSID Case No.

an alleged breach of contract. The parties entered into a contract on August 3, 1991 for Malaysian Salvors to locate and salvage the cargo of a sunken British ship, *The Diana*, which sank off the coast of Malacca in 1817. Malaysian Salvors was “required, among other things, to utilize its labor and equipment to carry out the salvage operation, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation, financial or otherwise.”<sup>163</sup> Malaysian Salvors brought an ICSID arbitration after it found a treasure and a dispute arose over the proceeds of the sale of the treasure.<sup>164</sup>

The sole arbitrator issued an award finding that the tribunal lacked jurisdiction because there was no investment within the meaning of Article 25(1) of the ICSID Convention.<sup>165</sup> In reaching this decision, he emphasized that the subject matter of the dispute was of a cultural and historical nature, and that Malaysian Salvors had spent little money.

Malaysian Salvors applied to annul the decision, claiming, *inter alia*, that the tribunal had manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention in finding that it lacked jurisdiction.<sup>166</sup> According to Malaysian Salvors, the tribunal applied an overly-restrictive definition of the term investment, elevated characteristic-based tests to the level of jurisdictional conditions, and improperly introduced a further jurisdictional requirement of “[c]ontribution to the [e]conomic [d]evelopment of the [h]ost [s]tate.”<sup>167</sup>

A majority of the *ad hoc* committee annulled the award, reasoning that the tribunal had manifestly exceeded its power by failing to account for the expansive definition of “investment” in applying the Malaysia-U.K. bilateral investment treaty, and by failing to consider the *travaux préparatoires* of the ICSID Convention, which show that the drafters rejected a monetary floor in the amount of an investment.<sup>168</sup>

A member of the committee dissented. The dissenting member, Judge Shahabuddeen, appended an opinion stating that he agreed with the arbitrator, Michael Hwang. Judge Shahabuddeen found that the “economic development of the host State is a condition of an ICSID investment.”<sup>169</sup> From this premise, he

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ARB/05/10, Award on Jurisdiction (May 17, 2007).

163. *Id.* ¶ 8.

164. *Id.* ¶ 3 (According to the terms of the agreement, Malaysian Salvors would collect seventy percent of the proceeds if the “appraised sum of the unsold artifacts and auction value of recovered items sold came to less than U.S. \$10 million.”).

165. *Id.* ¶ 49 (“[T]he Tribunal concludes that the Contract is not an “investment” within the meaning of Article 25(1) of the ICSID Convention. The Claimant’s claim therefore fails *in limine* and must be dismissed for want of jurisdiction.”).

166. Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 11 (Apr. 16, 2009).

167. *Id.* ¶ 29.

168. *Id.* ¶¶ 80-81.

169. Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, Dissenting Opinion of Judge Mohamed

reasoned that “the economic development . . . had to be substantial or significant,” and that Malaysian Salvors contract did “not promote the economic development of Malaysia in a substantial or significant manner.”<sup>170</sup> Accordingly, in Judge Shahabuddeen’s dissenting view there was no investment and the tribunal lacked jurisdiction over the dispute.<sup>171</sup>

In *Helnan International Hotels A/S v. The Arab Republic of Egypt*,<sup>172</sup> a Danish hotel management company contracted with a government tourism body to manage a five-star hotel in Cairo. The claimant, Helnan International Hotels A/S, filed an arbitration claiming that Egypt subjected it to unfair, discriminatory, and inequitable treatment by downgrading the status of the hotel from five stars to four as a way to terminate a long-term management contract with the Danish company. Helnan claimed that Egypt orchestrated a series of events that lead to downgrading the hotel, eventually evicting Helnan.

The tribunal agreed that the government had procedural irregularities in handling the situation, but did not find that these irregularities rose to the level of unfair or inequitable treatment.<sup>173</sup> The tribunal also held that although its jurisdiction was not affected by Helnan’s failure to pursue local remedies in Egypt, its failure to exhaust local remedies undermined its claims on the merits.<sup>174</sup>

Upon application for annulment, the *ad hoc* committee chaired by Judge Stephen Schwebel partially annulled the award, nullifying its holding that Helnan failed to establish a claim because it had not exhausted local remedies. The *ad hoc* committee determined that requiring exhaustion of local remedies could not bar a claimant from pursuing direct treaty claims.<sup>175</sup> However, the *ad hoc* committee left the rest of the award intact. Because the annulled portion of the award was not dispositive, the annulment did not change the outcome that Helnan did not prevail in its arbitration claim.

### III.

#### FINALITY IN ICSID ANNULMENTS

Jurists have asserted the importance of authoritative and neutral dispute resolution, through the ICSID Convention, to promote FDI.<sup>176</sup> They have also

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Shahabuddeen, ¶ 38 (Apr. 16, 2009).

170. *Id.* ¶ 48.

171. *Id.* ¶¶ 62-65.

172. *Helnan Int’l Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award (July 3, 2008).

173. *Id.* ¶ 169.

174. *Id.* ¶ 162.

175. *Helnan Int’l Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Annulment Proceeding, ¶ 53, (June 14, 2010).

176. *See* 1 ICSID TRAVAUX 2, II.1.4.3 (Note by the President to the Executive Directors



identified finality as crucial for the proper functioning of such a system of dispute resolution,<sup>177</sup> and have said that finality is necessary to support the objects and purposes of the ICSID Convention.<sup>178</sup> These objects and purposes, as stated in the preamble of the ICSID Convention, are to promote FDI for economic development.<sup>179</sup> Under this line of reasoning, the policy reason for finality is to promote FDI.

Accordingly, it is reasonable to inquire whether, in fact, delays in ICSID arbitration diminish foreign investments. If there is inconclusive evidence for this assumption, then the basis provided for criticizing the recent annulments of ICSID awards is similarly shaky. The law and economics scholarship on the relationship between foreign investment and bilateral investment treaties is

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(Eugene R. Black) on Dec. 28 1961) (“Improved methods for the settlement of investment disputes would contribute to an improvement in the investment climate and would thereby tend to promote the flow of private foreign capital . . .”); ICSID Travaux 2, II.1.1.1 (Note by Aron Broches, General Counsel, transmitted to the Executive Directors: “Settlement of Disputes between Governments and Private Parties” on Aug. 28, 1961) (“The many studies which have been undertaken in recent years concerning ways and means to promote private foreign investment have almost invariably discussed the problem of the settlement of disputes between foreign private investors or entrepreneurs and the Government of the country where the investment is made.”). See also, e.g., Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 658 (1998) (“Any single capital-importing country has an incentive to sign a BIT because such a treaty helps that country attract foreign investment.”); Joel C. Beauvais, *Regulatory Expropriations Under NAFTA: Emerging Principles & Lingering Doubts*, 10 N.Y.U. ENVTL. L.J. 245, 253 (2002) (“[T]he BIT revolution has been accompanied by a major shift in capital-importing countries’ regarding foreign direct investment” and “an explosion in capital imports to developing countries.”). When a dispute arises, among signatory states, pursuant to these BITs, the neutral venue to resolve the disputes is through ICSID. See Gabriel Egli, *Don’t Get Bit: Addressing ICSID’s Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions*, 34 PEPP. L. REV. 1045, 1058 (“The purpose of [ICSID] was to ‘provide proceedings’ for the conciliation and arbitration of investment disputes between contracting states and nationals of other contracting states.”).

177. Mark. B. Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 FOREIGN INVEST. L.J. 85, 85 (1987) (“One of the most persistent problem in international arbitration has been the difficulty of ensuring the finality of arbitral awards.”); Christopher Schreuer, *ICSID Annulment Revisited*, 30 LEGAL ISSUES OF ECON. INTEGRATION 103, 104 (2003) (“The desire to see a dispute settled is often regarded as more important than the substantive correctness of the decision.”).

178. Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, ¶ 3 (May 3, 1985) (“[A]pplication of the paragraph demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention.”) [unofficial translation from French by Edward Barrett]; Hussein Nuaman Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, ¶¶ 21-22 (June 5, 2007) (“Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty.”).

179. ICSID Convention, *supra* note 1, pmb. (“Considering the need for international cooperation for economic development, and the role of private international investment therein”).

voluminous and sophisticated.<sup>180</sup> The research tends to conclude that BITs are associated with higher levels of FDI. However, this research has not considered whether the length of time taken in resolving BIT disputes under the ICSID Convention affects FDI. It appears the closest inquiry into this question was conducted by Todd Allee and Clint Peinhardt in 2011, showing that filing an ICSID arbitration significantly reduces gains in FDI flows from signing BITs, and states that lose an ICSID arbitration experience an even greater loss of inbound FDI.<sup>181</sup> Allee and Peinhardt do not address, however, the effect that the length of time it takes to resolve an ICSID dispute has on FDI flows, or more specifically, whether delays in dispute resolution from annulments have any effect on FDI. Based on this existing research, it appears that there is insufficient evidence and analysis to validate the assumption that higher nullification standards and greater finality promote FDI.

It is reasonable to wonder whether finality in dispute resolution actually supports FDI. Some investors may prefer to have a second chance to win their arbitration by annulling a prior award against them, rather than to lose their disputes with finality once an adverse award is rendered. This view is borne out by the number of arbitral awards where the losing investor applied to set aside the award, such as the *Fraport* arbitration.<sup>182</sup> Based on this experience, a reasonable hypothesis could be that FDI is actually promoted by broader annulment standards, rather than finality, because investors want the opportunity to set aside a wrongly decided award in order to have another chance at winning their disputes with host states.

Skepticism about how much delays in finality due to annulments actually affect FDI is reinforced by another reasonable hypothesis that the level of FDI depends more on a range of macro-economic factors, such as the expected returns on investment in a country, its political climate, and its anticipated

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180. Ryan J. Bubb & Susan Rose-Ackerman, *Bits and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment*, 27 INT'L REV. L. & ECON. 291 (2007); Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67 (2005); Time Buthe & Helen V. Millner, *The Politics of Foreign Direct Investment into Developing Countries: Increasing FDI through International Trade Agreements?*, 52 AM. J. POL. SCI. 741 (2008); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?* 33 WORLD DEV. 1567 (2005); Badi H. Baltagi, Peter Egger & Michael Pfaffermayr, *Estimating models of complex FDI: Are there third-country effects?* 140 J. ECONOMETRICS 260 (2007); MARY HALLWARD-DREIMEIER, *DO BILATERAL INVESTMENT TREATIES ATTRACT FOREIGN DIRECT INVESTMENT?: ONLY A BIT . . . AND THEY COULD BITE* (2003).

181. Todd Allee & Clint Peinhardt, *Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment*, 65 INT'L ORG. 401, 402-403 (2011).

182. See e.g. *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Phil.*, ICSID Case. No ARB/03/25, Decision on the Application for Annulment (Dec. 23, 2010); ICSID Annulment Report, *supra* note 1, at Annex 6 (showing that of forty-two concluded annulment proceedings, sixteen were initiated by the host state, eleven were initiated by investors, three had both sides filing for annulment and twelve cases were discontinued).

economic growth, rather than on finality in resolving an investment dispute. Three short examples support this hypothesis.

#### A. Argentina

In the case of Argentina, there have been forty-eight ICSID cases filed against it. Of these forty-eight cases, thirteen were subject to annulment proceedings, beginning in 2001. As of September 6, 2011, the *Enron* and *Sempra* awards were annulled, five annulment applications were pending, and six were rejected by the *ad hoc* committee or withdrawn by the applicant.<sup>183</sup> Regressions might be able to isolate the annulment proceedings as the dependent variable in order to determine what effect delaying finality had on FDI, if any. However, from a practical standpoint, absent evidence that delaying finality of awards has a significant impact on FDI, policymakers might be more concerned about other established significant variables that contributed to Argentina's inbound FDI.

In 2001-2002, FDI flows into Argentina plummeted. Although there was one annulment proceeding during this time,<sup>184</sup> the IMF and World Bank did not attribute the fall in inbound FDI to delays in arbitral decisions. Instead, they attributed the decline in FDI to the economic downturn in Argentina.<sup>185</sup> In 2001, Argentina's economic growth fell and it faced a currency run, which in turn catalyzed a bank run. Consequently, Argentina suspended convertibility of their bank deposits, which limited cash withdrawals from bank accounts. This was followed by the devaluation of the peso and reprogramming of most bank deposits. As a result, investors withdrew their funds from Argentina and relocated them elsewhere.<sup>186</sup>

Starting in early 2003, economic growth began to pick up from the currency crisis in 2001-02 and outpaced expectations.<sup>187</sup> In fact, FDI inflows have been increasing at a nearly steady rate.<sup>188</sup> Although from 2003 onwards there were numerous annulment proceedings concerning Argentina, analyses of

183. ICSID List of Cases in Which Argentina is the Respondent, [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases\\_Home](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=Cases_Home) (follow "Search Cases" hyperlink; then follow "Advanced Search" hyperlink; search "Argentina" as respondent) (last viewed Sept. 6, 2012).

184. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Annulment, ¶ 62 (Aug. 20, 2007).

185. INT'L MONETARY FUND, LESSONS FROM THE CRISIS IN ARG. 3 (Timothy Geithner 2003).

186. MARINA HALAC & SERGIO L. SMUKLER, DISTRIBUTIONAL EFFECTS OF CRISES: THE ROLE OF FINANCIAL TRANSFERS (2003), available at [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/01/20/000160016\\_20040120172705/additional/130530322\\_20041117172611.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/01/20/000160016_20040120172705/additional/130530322_20041117172611.pdf)

187. INT'L MONETARY FUND, ARGENTINA: SECOND REVIEW UNDER THE STAND-BY ARRANGEMENT AND REQUESTS FOR MODIFICATION AND WAIVER OF PERFORMANCE CRITERIA 3 (John Dodsworth & G. Russell Kincaid, 2004).

188. United Nations Conference on Trade and Development, Foreign Direct Investment Statistics, <http://unctadstat.unctad.org/TableView/tableView.aspx?ReportId=88>.

Argentina's economy during that time did not identify these annulment proceedings as having any effect on the economy. Instead, economists concluded that the main factors influencing Argentina's FDI flows during that time were related to overall economic growth, domestic consumption, high profitability and additional competition.<sup>189</sup> The World Bank identifies Argentina's economic growth as coming from booming textile, automobile, and power industries,<sup>190</sup> alongside the opening of China's markets to certain commodities such as soy beans and crude oil, and an increased presence in the wine market.<sup>191</sup>

### B. *The Philippines*

The *Fraport* annulment did have any obvious effect on FDI in the Philippines, which has risen steadily. Indeed, Germany, the country of incorporation of Fraport,<sup>192</sup> has remained one of the major sources of FDI inflows to the Philippines.<sup>193</sup> The *Fraport* award was issued on August 16, 2007 and the annulment application was filed on December 6, 2007, which eventually led to annulment on December 23, 2010. During this period, FDI in the Philippines steadily increased.<sup>194</sup> Economists have attributed the government effort to privatize electric and water power as one of the major factors influencing FDI into the Philippines.<sup>195</sup> The World Bank identified overall

189. BEATRIZ NOFAL, CECILIA NAHON & CAROLINA FERNANDEZ, INWARD FDI IN ARGENTINA AND ITS POLICY CONTEXT, *Columbia FDI Profiles*, Vale Columbia Center on Sustainable International Investment, 12 (May 17, 2010), available at [http://www.vcc.columbia.edu/files/vale/documents/Argentina\\_FDI\\_Profiles\\_May\\_17\\_2010\\_Final\\_0.pdf](http://www.vcc.columbia.edu/files/vale/documents/Argentina_FDI_Profiles_May_17_2010_Final_0.pdf)

Between 2004 and 2008, rapid economic growth, increased domestic demand, high levels of profitability, and renewed competitiveness—combined with a favorable international environment—contributed to a vigorous expansion of FDI inflows . . . . The inward FDI stock rose steadily, to reach the 2001 level of US\$ 80 billion again in 2008, a level that placed Argentina among the leading FDI recipients in Latin America.

190. See World Bank, *Argentina Overview*, <http://www.worldbank.org/en/country/argentina/overview>.

191. *Id.*

192. *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 1.

193. See GERMAN-PHILIPPINE CHAMBER OF COMMERCE AND INDUSTRY, GERMAN INVESTMENT IN THE PHILIPPINES 1 (2012), available at <http://www.gpcci.org/home/wp-content/uploads/2012/05/Facts-about-German-Investments-in-the-Philippines-120509.pdf> (describing Germany as the Philippines' top European trading partner).

194. United Nations Conference on Trade and Development, *Inward and Outward Foreign Direct Investment Flows*, UNCTADSTAT (2011), <http://unctadstat.unctad.org/TableViewer/tableView.aspx?ReportId=88>.

195. OXFORD BUSINESS GROUP, THE REPORT: THE PHILIPPINES 2009 36 (2009) (“[A]most 35% of [FDI] funds had gone into electricity and water sector in 2007 due to the ongoing power privatisation process being pushed through by the government.”).

economic growth as a result of internal investments in human capital, infrastructure, and an improvement in the Philippines' investment climate and governance.<sup>196</sup> Accordingly, it is difficult to conclude that the delay in finality of the *Fraport* award had a significant impact on FDI.

### C. Cameroon

FDI flows in Cameroon similarly continued to rise during the period it was subject to the *Klöckner* ICSID proceedings.<sup>197</sup> The *Klöckner* award was issued in October 1983 and was annulled in May 1985.<sup>198</sup> During this period, Cameroon was experiencing an economic boom, largely due to an increase in oil production and revenue.<sup>199</sup> Though FDI flows decreased in 1986,<sup>200</sup> this decrease may have been related principally to macro-economic crisis caused by declines in value of the country's major exports—oil, coffee, and cocoa—and an appreciation of its exchange rate.<sup>201</sup>

In order to draw firmer conclusions about the impact of an annulment on FDI, the macro-economic and political variables discussed above would have to be controlled to isolate how much FDI can be said to diminish as a result of annulments. Nonetheless, even without quantifying the impact, if any, of annulments on FDI flows, policymakers may draw some practical lessons. Government officials may infer from this analysis that they may achieve their target rates of FDI by focusing on macroeconomic factors and specific incentives tailored to attract investors for concrete investment projects. These strategies may have a greater influence on inbound FDI than avoiding annulments of awards. Thus, until stronger proof is discovered that annulments negatively impact FDI flows, policymakers may question whether the desire for FDI provides an adequate basis to favor a high annulment threshold, especially when other strategies exist today to achieve high levels of FDI inflows.

## IV.

### JUSTICE IN ICSID ANNULMENTS

Given the lack of evidence at this time that delaying finality in ICSID disputes through annulment affects FDI, justice may provide an attractive

196. See World Bank, *Philippines Overview*, <http://www.worldbank.org/en/country/philippines/overview>.

197. United Nations Conference on Trade, *supra* note 194 (The reader is directed to view the "Inward and outward foreign direct investment flows, annual, 1970-2011" report through the UNCTAD site. Sort by country to see the increase in flows.).

198. See *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Introductory Note (1985).

199. Int'l Monetary Fund [IMF], *Private Investment and Endogenous Growth: Evidence from Cameroon*, 6, IMF Working Paper WP/97/165 (Dec. 1, 1997) (prepared by Dhaneshwar Ghura).

200. United Nations Conference on Trade, *supra* note 194.

201. See Ghura, *supra* note 199.

alternative basis for deciding on the appropriate level of scrutiny of awards. Both legal theory and the negotiating history of the ICSID Convention support taking justice into account in reviewing awards.

#### A. Scholarship

A review of the literature indicates that, although scholars and practitioners today seem to favor finality in ICSID arbitration, jurists have long wrestled with the competing goal of securing justice through the correct application of laws and promoting finality in awards.<sup>202</sup>

In 2011, a group of scholars and practitioners were impaneled at the Annual Meeting of the American Society of International Law to consider the proper balance between finality and justice in ICSID arbitration. They seemed to agree that finality was the preeminent policy concern. Christoph Schreuer, the author of the leading commentary on the ICSID Convention,<sup>203</sup> cautioned against an expansive interpretation of the grounds for annulment.<sup>204</sup> For these reasons, Professor Schreuer assessed the *Enron* decision as “most problematic.”<sup>205</sup>

Andreas Lowenfeld responded to Professor Schreuer with the following concurring statement:

I think there should be—and I think there was intended—a presumption that the tribunal, unless properly constituted—and put that aside—got it right. . . . I think ad hoc committees ought to be—I said maybe given guidelines or have a kind of general notion of the way to behave to say go easy, ask yourself do we really have to do this, do we have to go to every issue.<sup>206</sup>

Stanimir Alexandrov, a leading arbitration practitioner, stated in that same panel that he found the *Mitchell v. Congo* annulment decision “particularly objectionable.”<sup>207</sup> He also alluded to the *CMS* annulment decision and the

202. See ICSID Commentary, *supra* note 2, at 893 (“There are two potentially conflicting principles at work in the review process. One is the principle of finality; the other is the principle of correctness.”).

203. See generally ICSID Commentary, *supra* note 2.

204. Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011), 5 (Christoph Schreuer, speaking) (“There is [sic] two more worries that I have about some of the recent decisions. One is a very expansive interpretation of some of the grounds for annulment. Perhaps I can talk about that later on, and another one is what I would call “hyperactivity” of some ad hoc committees, where ad hoc committees actively look for grounds of annulment, even beyond what the requesting party has put forward.” Stanimir Alexandrov concurred, saying, at 7, “I agree with Christoph’s remarks.” Lowenfeld agreed, at 10, saying, “I think Professor Schreuer’s analysis of these cases confirms my uneasiness.” David Caron, at 17, said, “So, very basically, I was all on board [with the panelists’ comments] . . .”).

205. See Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16 (2011), at 6 (Christoph Schreuer, speaking).

206. *Id.*

207. *Id.* (Stanimir Alexandrov, speaking).

difficulties it posed for claimants because the *ad hoc* committee criticized the award but left it intact:

If you are the prime minister or the minister of finance or the president of a country and you have an award of, say, \$100 million against your country and there is—you seek annulment, your government, and the award is not annulled, so the government has to comply with the award and has to write a check for \$100 million, and yet . . . [i]n the annulment decision, there is severe criticism of the award, and essentially, the annulment decision says, “The tribunal essentially committed gross errors of fact in law and should have decided otherwise. Regrettably, because of the limited nature of annulment, we cannot annul,” you would be—let me phrase it as a question. Wouldn’t you be in a difficult position explaining to your constituents that your government has to write a check for \$100 million for an award that an annulment committee considers deeply flawed and essentially wrong, and how do you explain to your constituents the legal obligation to comply with your obligations under the ICSID Convention and the investment treaty question when your opposition in your parliament is waving this annulment decision against you and is telling you, “See, you have to pay \$100 million for an award that is deeply, deeply flawed?”<sup>208</sup>

Professor Loewenfeld agreed, stating, *obiter dicta*, that pointing out errors in an award but leaving the award intact is “overstepping a wise approach to how a committee should act.”<sup>209</sup> The views of these eminent scholars and practitioners represent a gestalt against recent *ad hoc* decisions that are perceived as overreaching the scope of review in Article 52.

However, other scholars have emphasized the need to ensure that awards were just, and that the quest for finality did not undermine justice.<sup>210</sup> After the United States began creating appellate mechanisms in dispute resolution under its free trade agreements,<sup>211</sup> scholars suggested that one reason for expanding or supplementing review with appeals was to have “a corrective mechanism in case an arbitration decision is made wrongly.”<sup>212</sup>

Going back a century, the choice between finality and justice was also not so obvious when the American Society of International Law convened a panel to

208. *Id.* at 27.

209. *Id.* at 6 (Christoph Schreuer, speaking). *See also* STEPHAN SCHILL, INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW (2010); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179 (2010).

210. Schwartz, *supra* note 4, at 85 (“In the author’s view, the decision in *Wena* reflects a concern for finality that has been pushed to the extreme, to the detriment of the process and the guarantees that it should be seen to offer.”).

211. U.S. Trade Act of 2002, § 2012 (b)(3)-(G)(iv), Pub. L. No. 107-210, 116 Stat. 995 (2002) (codified as 19 U.S.C. § 3802 (2011)). *See also* DEPT. OF STATE [DOS] & OFFICE OF THE U.S. TRADE REPRESENTATIVE [USTR], 2004 U.S. MODEL BIT, ANNEX D (POSSIBILITY OF A BILATERAL APPELLATE MECHANISM), at 40 (*superseded by* DEPT. OF STATE [DOS] & OFFICE OF THE U.S. TRADE REPRESENTATIVE [USTR], 2012 US MODEL BIT) *available at* <http://www.state.gov/documents/organization/117601.pdf> (providing that treaty parties shall consider whether to establish an appellate process).

212. Asif H. Querishi, *An Appellate System in International Investment Arbitration?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1154, 1157 (2008).

consider state-to-state arbitration. At the 1912 Annual Meeting, Mexican diplomat Joaquin D. Casasus said:

[T]he principle of arbitration will be discredited if the arbitration awards cannot be definite and the progress obtained by the efforts of the principal nations of the world will become useless and only diplomacy through its numberless resources could perhaps decide the international conflicts after long discussions which might last years.<sup>213</sup>

Frederic McKenney, who later served on the Executive Council of the Society, took exception to this analysis. McKenney argued that “[a]rbitration is only an instrumentality of peace because it is an instrumentality of justice.” He explained:

If arbitration is to exist as a compelling or even a corrective force in the intercourse of nations, it must justify its existence by its works. If arbitral tribunals are but insensate machines to be used without reference to considerations of reason or logic merely to put an end to disputes which nations happen to wage, then it would seem that there would be no real cause for their establishment, for the turn of a wheel, the flip of a coin or the roll of dice, by agreement between the contending nations, could be made to accomplish the desired result and to end the dispute with certainty and much less expense.<sup>214</sup>

Although these debates predated investor-state arbitration, it would seem that the policy discussions apply equally to ICSID arbitration.<sup>215</sup>

Indeed, the tension between finality and justice in international arbitration generally was recognized even in the formative century of modern international law.<sup>216</sup> Hugo Grotius, who is often thought of as the founding father of the modern law of nations, argued that appeals “cannot have place between Kings and peoples.” He explained: “For, in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.”<sup>217</sup> In Grotius’s view, international awards cannot countenance appeals because they would disrupt “the stability and orderliness of international society.”<sup>218</sup>

Likewise, Pufendorf argued that agreements to arbitrate should include commitments by the parties to comply with the award whether or not it was just. In the absence of an international appellate body, if awards were to be reviewed they would have to be scrutinized by merely another arbitral tribunal, whose

213. *Revision of Arbitral Awards*, 6 AM. SOC’Y INT’L L. PROC. 59, 63 (1912). See also W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS, 44-46 (1971) (discussing debate at the 1912 meeting).

214. *Revision of Arbitral Awards*, 6 AM. SOC’Y INT’L L. PROC. 59, 63 (1912).

215. Schwartz, *supra* note 4, at 85 (“The annulment mechanism in Article 52 of the ICSID Convention balances considerations of arbitral efficiency against considerations of justice.”).

216. REISMAN, NULLITY AND REVISION 22-33 (discussing classical views on arbitration).

217. *Id.* (quoting GROTIUS, DE JURE BELLII ET PACIS 350-51) (Whewell trans., 1853).

218. *Id.*



decision in turn could be scrutinized by yet another tribunal, and so on without end, undermining finality.<sup>219</sup>

However, jurists have also acknowledged that justice plays a role in international dispute resolution. Pufendorf recognized the need for justice, arguing that “when it is said that the parties ought to abide by the award of the Arbitrator, whether he has given it justly or not, that must be accepted with some reservation.”<sup>220</sup> For him, the policy of finality ought not to extend to situations where the arbitrator was corrupt.<sup>221</sup> Vattel took an even more expansive view of justice. He argued that any award that was “evidently unjust and unreasonable” ought to be invalid.<sup>222</sup>

Then, as now, the great jurists of international law recognized that international arbitral awards ought to be final, as well as just. Then, as now, the difficulty is prescribing the correct balance when the two policies conflict with each other. Vattel’s solution was to prescribe the following: “If the injustice is of little moment, it must be put up with for the sake of peace; and if it is not absolutely evident, it should be borne with as an evil to which the state voluntarily exposed itself.”<sup>223</sup> If these competing views are accepted, the issue in designing the review system in ICSID arbitration is not how best to promote finality at all costs. It is, instead, what balance to strike between finality and justice.

### B. Negotiating History

The Vienna Convention on the Law of Treaties instructs that where the meaning of text in light of the object and purposes of a treaty remains ambiguous, it is appropriate to turn to the negotiating history of the treaty, its *travaux préparatoires*, for interpretive guidance. In light of the textual ambiguity of Article 52 of the ICSID Convention, as demonstrated in Part II of this Article, it is appropriate to consult the *travaux préparatoires* of the Convention.<sup>224</sup>

Although the ICSID Secretariat’s report on annulment focused on the ICSID framer’s emphasis on finality in the *travaux*,<sup>225</sup> a more comprehensive

219. *Id.* at 22-23 (quoting Pufendorf).

220. *Id.* at 23 (citing Pufendorf).

221. *Id.* (“Yet the award of the Arbitrator will surely not be binding if it manifestly appears that he was in collusion with the other party, or was corrupted by a bribe from him or entered into an agreement for our detriment. For him who openly attaches himself to either side cannot any longer sustain the character of an Arbitrator.”).

222. *Id.* at 25 (citing Vattel).

223. *Id.*

224. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331. See Mahnouch H. Arsanjani and W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: “The Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT’L L. 597, 598 (2010) (recourse to *travaux* is appropriate where text is ambiguous).

225. ICSID Annulment Report, *supra* note 1, at 4-11.

review of the negotiating history of the ICSID Convention reveals that they were also concerned about justice and how to balance it with finality.

The General Counsel of the World Bank, Aron Broches, who was also the chief negotiator of the ICSID Convention, repeatedly emphasized the importance of effective dispute resolution to promote private foreign investment.<sup>226</sup> He favored finality of awards over obtaining the correct outcome in ICSID arbitrations, and chose to temper finality only with a review for the gravest injustice by *ad hoc* committees.<sup>227</sup> However, officials from several countries emphasized that justice was equally important. They also explained that finality should be viewed as a component of justice, and not merely as an instrument to promote foreign investments, which Part II has shown to be of dubious efficacy. Applying this view, the high annulment threshold in Article 52 is justified because it promotes finality—not in competition with justice—but as a requirement of justice. At the same time, it is reasonable to consider constructing an appellate system if it is now believed that the high threshold for annulment in Article 52 fails to rectify errors of law that are sufficiently serious to amount to miscarriages of justice.

Broches reported in 1961 to the World Bank Executive Directors that it was necessary to provide a forum for settling disputes between foreign investors and host states, in order to promote private international investment. He proposed that the World Bank consider establishing a facility to provide investors with direct access to an international tribunal to address such disputes.<sup>228</sup> At a meeting of the Executive Directors on March 13, 1962 to discuss Broches's proposal, the response of the directors was mixed. Nevertheless, there was

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226. Aron Broches, *Settlement of Disputes between Governments and Private Parties*, in ICSID History, *supra* note 58, vol. 2, 1 (Discussing the importance, as shown by recent studies, of the means to promote FDI and the problem of settlement disputes); Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole, in ICSID History, *supra* note 58, vol. 2, 75 (Fear of political risks is the biggest impediment to FDI in areas in need of capital); Summary Record of Proceedings, Consultative Meeting of Legal Experts, in ICSID History, *supra* note 58, vol. 2, 240 (International investment is crucially important for economic development.); Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Addis Ababa, Dec. 16-20, 1963, in ICSID History, *supra* note 58, vol. 2, 370 (The Chairman discussing the importance of economic development in underdeveloped countries and the impediments thwarting the effort); *id.* at 373 (The Chairman discussing the importance of economic development in underdeveloped countries and the impediments thwarting the effort); Settlement of Investment Disputes, Consultative Meeting of Legal Experts, Geneva, Feb. 17-22, 1964, in ICSID History, *supra* note 58, vol. 2, 540 (Summarizing the concern of the treaty on FDI).

227. Aron Broches, *Observations on the Finality of ICSID Awards*, in SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 354 (1995) (“Annulment is an essential but exceptional remedy. It is well understood that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled.”).

228. See Aron Broches, *Note to the Executive Directors, Settlement of Disputes between Governments and Private Parties* (Aug. 28, 1961), in ICSID History, *supra* note 58, vol. 2, 1, 2.

sufficient interest that Sir William Iliff, the acting chairman, directed Broches to provide a more detailed proposal for their review.<sup>229</sup>

Broches provided a proposal for the ICSID Convention three months later, on June 6, 1962. The stated purpose of the Convention was “to promote the resolution of disputes arising between Contracting States and nationals of other Contracting States by encouraging and facilitating recourse to international conciliation and arbitration.”<sup>230</sup> The reference to the resolution of disputes suggests that the primary objective of the Convention, even in its earliest draft form, was effective dispute resolution. Article VI corroborates this view, providing that an arbitral award rendered under the Convention is final and that each party “shall abide by and comply with the award immediately.”<sup>231</sup> Although it envisaged revision and clarification by the tribunal on narrow grounds and within a short period of time, it did not provide for any form of review or appeal.<sup>232</sup>

The Executive Directors decided to continue exploring the possibility of a convention, and after a series of meetings Broches presented the First Preliminary Draft on August 9, 1963.<sup>233</sup> The preamble text seemed to temper the desire to protect foreign investments with “a spirit of mutual confidence, with due respect for the principles of equal rights of States in the exercise of their sovereignty in accordance with international law.”<sup>234</sup> While not exactly even-handed in recognizing the interests of investors as well as states, the reference to sovereignty and equal rights suggests that ideas about justice had begun to appear in the Convention. Section 13 of the First Preliminary Draft included, for the first time, a provision for annulling an ICSID award if one of three grounds existed: (1) the tribunal exceeded its powers; (2) there was corruption by a member of the tribunal; or (3) there was a serious departure from a fundamental rule of procedure, including a failure to state reasons for the award.<sup>235</sup> The relevant comment to the article explains:

It was recognized in the Preamble as a corollary of the principle that an undertaking must be implemented in good faith, that the award of a tribunal must be complied with. As a general rule the award of the tribunal is final, and there is no provision for appeal. However, where there has been some violation of the fundamental principles of law governing the tribunal’s proceedings such as are listed in Section 13, the aggrieved party may apply to the Chairman for a declaration that the award is invalid. [. . .] It may be noted that this is not a

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229. Memorandum of Meeting of Executive Directors on the Subject of “Settlement of Investment Disputes,” Mar. 13, 1962, in ICSID History, *supra* note 58, vol. 2, 13, 19, ¶ 34.

230. Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, in ICSID History, *supra* note 58, vol. 2, 19, 21, art. I.

231. *Id.* art. VI (10).

232. *Id.* art. VI (11)-(12).

233. First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States, in ICSID History, *supra* note 58, vol. 2, 133.

234. *Id.* pmbl, ¶ 2.

235. *Id.* art. VI, §13(1).

procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one or other of the three grounds listed in Section 13(1).<sup>236</sup>

Broches then carried out a series of meetings with legal experts from World Bank member states in different regions of the world, thereby avoiding the difficulties of achieving consensus among all member states in one large forum. The first meeting was with African states at Addis Ababa in December 1963. At that meeting, most capital importing states welcomed the ICSID Convention. For example, the expert from Guinea said that “economic development could not be achieved without capital and that the developing countries would not obtain capital unless they provided adequate guarantees.”<sup>237</sup> They also supported finality of the award. The draft of the Convention before them proposed that applications for revision on the basis of a newly-discovered fact should be made within ten years of the award. Representatives from both Nigeria and Dahomey (now Benin) stated that this timeline was too long and ought to be reduced to two or three years.<sup>238</sup>

Likewise, at the meeting of Latin American countries in February 1964, the expert from Costa Rica stated that the time periods to revisit the award, including through an annulment application, “were too long.” Importantly, however, his reason for promoting finality was not to create a hospitable investment climate, but to promote justice. The Costa Rican expert stated that in “Costa Rica, it was a constitutional principle that justice should be executed promptly.”<sup>239</sup>

There was some interest in expanding the grounds for annulment to include “violation or unwarranted interpretation of principles of substantive law,” but Broches rejected that suggestion to avoid turning review of ICSID awards into an appellate procedure.<sup>240</sup>

The issue of annulment was also discussed at the meeting with European members in Geneva in June 1964. Broches revealed that he had received suggestions to expand the grounds for annulment to include “a serious departure from principles of natural justice,” or “a serious misapplication of the law.”<sup>241</sup> The notes of the meeting do not record any responses to these proposals, but

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236. *Id.* art VI § 15, cmt.

237. Summary Record of Proceedings, Consultative Meeting of Legal Experts, Addis Ababa, Dec. 16-20, 1963, in ICSID History, *supra* note 58, vol. 2, pt. 1, 236, 244.

238. *Id.* at 271.

239. Summary Record of Proceedings, Consultative Meeting of Legal Experts, Santiago, Feb. 3-7, 1964, in ICSID History, *supra* note 58, vol. 2, 298, 341.

240. *Id.* at 340.

241. Summary Record of Proceedings, Consultative Meetings of Legal Experts, Geneva, Feb. 17-22, 1964, in ICSID History, *supra* note 58, vol. 2, 367, 423.

records that the West German expert expressed concern that the section on annulment be drafted more restrictively to avoid frustrating awards.<sup>242</sup>

Annulment was also discussed at the meeting with Asian members in Bangkok in July 1964. In response to a question by the Lebanese expert about the French text, Broches explained that annulment for *excès de pouvoir* (excess of power), referred “to the case where a decision of the tribunal went beyond the terms of the compromise.”<sup>243</sup>

Once again, justice concerns were raised. The Indian expert favored clarifying that the narrow scope of annulment for departures from fundamental rules of procedure was to be “limited only to those breaches of procedural rules which would constitute a violation of the rules of natural justice” and that “[t]he award should not be challenged solely because conventional procedural rules had not been fully observed.”<sup>244</sup> Several representatives agreed with Broches that while excess of power included applying the wrong body of law, it did not extend to a mistake of law or fact.<sup>245</sup>

Based on all these consultative meetings, Broches prepared a report on the issues raised and suggestions made. That report of July 9, 1964 noted that there were “no controversial issues of policy” involved in the provision for annulment, and comments were merely of a technical nature.<sup>246</sup> It appears from this evidence that there was at least a loose consensus in favor of the finality of awards, but that finality ought to be delayed where a tribunal had committed an injustice through corruption, departing from fundamental procedures, or exceeding the scope of arbitral authority conferred by the parties.

In short order, on September 11, 1964, the draft ICSID Convention was produced. The provision on annulment, now numbered Article 55, provided five grounds for annulment, instead of three. In addition to the three grounds provided for in the preliminary draft, annulment would now be possible if the tribunal was not properly constituted. Further, the failure to state reasons was now a separate ground for annulment, rather than falling under the ground permitting annulment for serious departure from a fundamental rule of procedure.<sup>247</sup> The draft Convention provided that failure to state reasons would

242. *Id.*

243. Summary Record Proceedings, Consultative Meetings of Legal Experts, Bangkok, Apr. 27-May 1, 1964, in ICSID History, *supra* note 58, vol. 2, 458, 517.

244. *Id.*

245. *Id.* at 517-18 (“Mr. Ghanem (Lebanon) observed that if the parties had agreed to the application of a particular law and the tribunal had in fact applied a different law, the award would be *ultra petita* and could therefore be validly challenged.”); *Id.* at 518 (“Mr. Tsai (China) stressed that he had in mind the case just mentioned by the delegate from Lebanon and not merely a mistake in the interpretation or application of the applicable law.”).

246. Chairman’s Report on the Regional Consultative Meetings of Legal Experts on Settlement of Investment Disputes, ICSID History, *supra* note 58, vol. 2, 557, 573-74.

247. Draft Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 55, in ICSID History, *supra* note 58, vol. 2, 610, 635.

always be grounds for annulment unless the parties had previously stated that an award would not need to provide reasons.<sup>248</sup>

The responses of World Bank members to the draft Convention shed light on their intentions regarding the policies of the Convention. By letter dated October 27, 1964, the Ministry of Finance of Turkey objected to the possibility that parties could waive their right to a reasoned award, because “reasons are of such importance to the interested parties that it would be hardly conceivable that parties might willingly waive their right of knowing such reasons.”<sup>249</sup> At the meeting of the Legal Committee to discuss the draft convention, thirty-nine members voted in favor of rejecting the possibility of waiving a reasoned award, with none opposed.<sup>250</sup> This voting record suggests a strong consensus during the negotiation of the Convention that basic considerations of justice were so important that they could not be overridden by party consent.

However, various other proposals to amend the grounds for annulment were all defeated. A proposal to delete the word “manifestly” from the excess of power provision was defeated by twenty-three to eleven, a proposal to permit an application to annul only part of an award was defeated by twenty-nine votes to six, a proposal to lower the corruption standard for annulment to simply “misconduct” was defeated by twenty-three votes to three, and a proposal to replace the annulment provision of a serious departure from fundamental rule procedure with a requirement that both parties must have a fair hearing was defeated by eighteen votes to four.<sup>251</sup> These votes indicate a strong policy preference for finality of awards and correspondingly narrow grounds for appeal. The representative from the Netherlands, with the support of the United Kingdom representative, emphatically stated that he was “disturbed” by the proposals to relax the terms of annulment because “in the ordinary course of events the award should be treated as final.”<sup>252</sup>

The revised draft of the ICSID Convention was produced on December 11, 1964. Article 52 reflected the decision to delete the possibility of waiving the right to a reasoned award, but was otherwise unchanged from its earlier iteration.<sup>253</sup> On March 30, 1965, the Executive Directors of the World Bank approved the text of the ICSID Convention by a resolution.<sup>254</sup>

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248. *Id.*

249. Comments and Observations of Member Governments on the Draft, *in* ICSID History, *supra* note 58, vol. 2, 664.

250. Summary Proceedings of the Legal Committee Meeting, December 9, Afternoon, Jan. 4, 1965, *in* ICSID History, *supra* note 58, vol. 2, 853, 854.

251. *Id.* at 852-53.

252. *Id.* at 852.

253. Revised Draft of the ICSID Convention, Dec. 11, 1964, *in* ICSID History, *supra* note 58, vol. 2, 911, 926-27.

254. Approval of Resolution No. 65-14 approving the text of the Convention and of the Report of the Executive Directors, Mar. 30, 1965, *in* ICSID History, *supra* note 58, vol. 2, 1039.

The foregoing history of the ICSID Convention confirms that the framers of the Convention intended ICSID arbitration to protect the finality of awards, in order to promote private foreign investments and the growth it was thought to bring. At the same time, the policy goal of resolving disputes, even if the law was misapplied, was not unbounded. Where an award violated basic notions of justice, it would be nullified by an *ad hoc* committee, even if that meant delaying the resolution of investment disputes because the investor would have to file a new arbitration claim.

Considering that justice is embedded throughout the drafting of the ICSID Convention, and that legal theories of international dispute resolution always have taken justice into account, it seems reasonable in considering appropriate standards for the review of ICSID awards to apply conceptions of justice to ICSID arbitration and to clarify the complex relationship between justice and finality.

## V. JUSTICE APPLIED

Having shown why justice is historically, legally, and normatively appropriate as a baseline principle from which to design a review system for ICSID awards, it is now possible to elaborate on what such a review system would look like. There are at least three different conceptions of justice.<sup>255</sup> Each conception and its application to Article 52 (or lack thereof) is considered in turn.

Distributive justice refers to the fair allocation of values and other resources among individual members and groups in a community.<sup>256</sup> Although distributive justice is important in international law,<sup>257</sup> it is not the principal concern of the ICSID Convention. This is because the Convention does not

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255. See generally SERGE-CHRISTOPHE KOLM, *MODERN THEORIES OF JUSTICE* (2002); ROBERT C. SOLOMON & MARK C. MURPHY, *WHAT IS JUSTICE?* (1990).

256. JOHN RAWLS, *A THEORY OF JUSTICE*, 302 (1971) (Rawls' second principle of justice, part of his theory on how distributive justice can be achieved, says that "Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE 2* (1999) ("[I]n [the Christian] tradition, distributive justice meant the fair distribution of benefits among the members of various associations.");

257. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP*, ch. 5 (2006) (discussing distributive justice at the international level). See also RUTI TEITEL, *TRANSITIONAL JUSTICE* (2002) (discussing justice in the context of transitional states and communities). But see Thomas M. Franck, *Is Justice Relevant to the International Legal System*, 64 *NOTRE DAME L. REV.* 945 (1989) (expressing skepticism that justice has a role in international law because the international legal system must be concerned first with securing compliance); DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE*, ch. 14 (1999) (expressing skepticism about global distributive justice). See also generally, Charles Beitz, *International Liberalism and Distributive Justice: A Survey of Recent Thought*, *WORLD POLITICS* 51, 269 (1999); Thomas Pogge *On the Site of Distributive Justice: Reflections on Cohen and Murphy*, 29 *PHIL. PUB. AFF.* 137 (2000).

prescribe how to distribute values among peoples and nations. It simply provides a dispute resolution mechanism to address disagreements among investors and states about whether either party has kept to their bargain, under bilateral investment treaties and project agreements. In other words, to the extent distributive justice matters, the proper vehicles to promote that normative ideal are bilateral investment treaties and project agreements, or even human rights treaties.<sup>258</sup> In contrast, the ICSID Convention is concerned with ensuring that investment agreements are followed, without regard for either their impact on distributive justice or their content (unless they violate *jus cogens* norms).

Procedural justice refers to basic norms of fairness in adjudication. Jürgen Habermas has theorized that procedural justice “focuses exclusively on the procedural aspects of the public use of reason and derives the system of rights from the idea of its legal institutionalization. It can leave more questions open because it entrusts more to the process of rational opinion and will formation.”<sup>259</sup> In the context of third party adjudication, procedural justice includes principles that parties must have an adequate opportunity to present their case, that the adjudicator must not be corrupt, that the adjudicator’s decision is confined to subject matter over which it has authority to decide, and that the adjudicator must explain his reasons with sufficient detail so that parties can understand the basis for the decision and be able to check that the decision was made according to the legal framework and substantive rules that he was supposed to apply.<sup>260</sup> As ICSID arbitration is a form of third-party adjudication, it must be designed to promote procedural justice. It achieves this by codifying procedural justice norms in Article 52, and any deviation from these norms create injustices that should be rectified by nullifying the award pursuant to Article 52.

Retributive justice refers to the appropriate correction of behavior that deviates from community standards of acceptable conduct, whether expressed through criminal law, voluntarily created through contractual arrangements,<sup>261</sup>

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258. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS*, ch. 14 (1998) (discussing how BITs and other investment agreements promote fairness).

259. Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism*, 3 J. PHIL. 109, 131 (1995); but cf. JOHN RAWLS, *POLITICAL LIBERALISM: EXPANDED EDITION*, 421 *et seq.* (arguing that Habermas’ theory of procedural justice is also substantive).

260. See Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice,’* 19 EUR. J. INT’L L. 769, 769 (2008) (arguing, from Rawls, that justice requires the public use of reason for maintaining a stable and liberal society); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 127 (2010) (“Parties must perceive a tribunal as fair and unbiased before they will agree to submit their disputes to it.”); Alvarez & Reisman, *supra* note 2, at 2 (“[T]he reasons requirement, as a control mechanism in other sectors of arbitration, acquires a greater importance in international investment arbitration.”).

261. See generally IMMANUEL KANT, *DOCTRINE OF RIGHT* (1797); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1982); WILLIAM D. ROSS, *THE RIGHT AND*



or unilaterally assumed through conduct that gives rise to duties of care under law.<sup>262</sup> The term ‘retributive justice’ has several different meanings, and some of the ideas it expresses in the realm of criminal law have less relevance here. Thus, further discussion of the importance of retributive justice in the context of ICSID arbitration is necessary.

In the present context, retributive justice is used in Robert Nozick’s sense of promoting justice by rectifying violations of proper acquisition and transfers of property.<sup>263</sup> For the purposes of the ICSID Convention, what constitutes a proper transfer or acquisition of property does not depend on whether it was distributively just, because, as explained above, the vehicles to promote distributive justice in international investment law are substantive provisions of bilateral investment treaties. Instead, property is properly transferred or acquired when the transfer is done according to common rules that host states and investors have agreed upon in advance, i.e. the BIT and project agreement. This idea draws support from Hart’s principle of fairness, which states that “When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.”<sup>264</sup> Similarly, Rawls argues that “when a number of persons engage in a mutually advantageous cooperative venture . . . to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission.”<sup>265</sup>

Here, as BITs are designed to promote foreign investments to benefit both the host state and the investor, it is reasonable to conclude that the agreements are thought to yield advantages for all, or at least benefit the parties in the joint enterprise. This analysis sets aside questions of whether the people of the host state equally benefit from the foreign investment, since that is, generally speaking, a matter of the host state’s domestic law and politics. If one agrees that property is properly transferred and acquired when it is done according to the rules contained in BITs and project agreements, which the parties entered into voluntarily, and which benefits the parties involved, then it is retributively just to correct violations of BITs through the ICSID Convention. Such

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THE GOOD (1930); Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission’s Exercise in Abolitionism: A Reply*, 9 RUTGERS J. L. & PUB. POL’Y, 9, 27 (2007-2008) (“retributivists refuse to justify punishment by its future costs or benefits, resting justice—limited, proportional punishment—exclusively on a criminal’s past moral culpability.”).

262. See Ronen Perry *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 TENN. L. REV. 177, 220-21 (2006).

263. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA, 153 (1974) (“To turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles.”).

264. H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185 (1955).

265. JOHN RAWLS, A THEORY OF JUSTICE 96, 301 (1999).

retributive justice is promoted when arbitrators properly apply the applicable law to the facts according to the evidence when rendering an award.

A problem arises when the tribunal misapplies the law, thus failing to properly promote retributive justice. The difficult case is where the tribunal has reached a wrong conclusion, thereby undermining retributive justice, in spite of observing all the principles of procedural justice. Should a procedurally just award that misapplies the law be corrected to promote retributive justice?

A simple answer by those who favor finality of awards to promote foreign investments is that the award should not be corrected because finality overrides retributive justice. However, this article shows that such analysis is questionable for at least two reasons. First, there is insufficient evidence at this time that finality of awards actually promotes inbound foreign investment, and that, conversely, annulments of awards has a negative impact on foreign investment. Second, scholarship on international dispute resolution and the negotiating history of the ICSID Convention also emphasize justice, and it would be preferable, where possible, to harmonize finality with justice rather than to assert one over the other.

Accordingly, an alternative approach to the perceived conflict between finality and retributive justice is to study how the two principles are also complementary. To do so, it is necessary to consider the relationships between finality of award, effectiveness, and justice in international arbitration.

Finality of an award is not the same thing as its effectiveness,<sup>266</sup> albeit the former is a precondition of the latter.<sup>267</sup> The absence of any comprehensive centralized international body is a systemic feature of international arbitration as it is of other international arenas. There is nothing to coerce a state into complying with its arbitration agreement and an award issued by a tribunal. These risks are heightened in investor-state arbitrations under the ICSID Convention, because the losing host state can simply refuse to pay the award in violation of its treaty obligations,<sup>268</sup> and a court of a third party may refuse to enforce the award by seizing the assets of the host state that lost the arbitration on the basis that those assets are protected by sovereign immunity.<sup>269</sup>

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266. CHENG, *supra* note 15, at 16 (defining effectiveness generally and observing that international legal process scholars use the term “control” interchangeably with “effectiveness”).

267. Vladimír Balaš, *Review of Awards*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1125, 1148 (P. Muchlinksi et al. eds., 2008) (“[T]he arbitral award must be effective; the necessary prerequisite for its effectiveness is that it is final.”); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT’L L. 444, 445 (2006) (“The finality of ICSID awards is central to the Centre’s purpose of acting as a neutral venue providing an effective remedy for investors.”).

268. *Azurix Calls For Action Against Recalcitrant Argentina*, GLOBAL ARBITRATION REVIEW (Sept. 29, 2010), <http://www.globalarbitrationreview.com/news/article/28765> (describing Argentina’s refusal to pay and Azurix’s efforts to seek domestic remedy).

269. *See, e.g., AIG Capital Partners Inc. v. Kazakhstan*, [2005] EWHC (Comm) 2239, 1 W.L.R. 1420, available at <http://www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html> (holding that

It is instead hoped that governments will abide by their agreement to arbitrate because they voluntarily entered into that agreement, presumably after calculating whether the costs of prolonging the dispute outweigh any potential benefits that they might reap from continuing to press their position bilaterally with the government or non-state actor with which they are in disagreement.<sup>270</sup>

In order to meet the expectations of parties in arbitration that it will resolve their dispute, the arbitral tribunal must, within a reasonable time period, issue a final decision on the dispute and what rectification, if any, is necessary. If a system of arbitration permitted the parties to require the tribunal, or another third party, to reconsider the award without limitation, the arbitral process could never be effective in resolving the dispute. Such an arbitration system could not promote retributive justice, as its awards would be ineffective and make no practical difference in terms of correcting the conduct of foreign investors or host states when it deviates from standards contained in BITs and project agreements. Such an arbitration system will also soon cease to exist because actors will see no point in using that system to resolve their disputes.

In other words, although finality is in conflict with retributive justice when an award misapplies the law, finality is nonetheless necessary to secure retributive justice systemically in ICSID arbitration. It may be the case that an award that fails to promote retributive justice in its holdings but meets the requirements of procedural justice should nonetheless be deemed final in order to ensure that all other awards that apply the law correctly (and thus promote retributive justice) have a greater chance of effectiveness. Systemic concerns for effectively promoting retributive justice in the ICSID system generally provide reason to leave intact a minority of awards that misapply the law and do not achieve retributive justice.

The practical implications of this analysis are significant. It would provide a basis, in justice as well as law, to endorse the refusal by the *ad hoc* committee in *MINE* to annul the award even though the committee thought the tribunal made errors of law. It would also suggest that *Malaysian Salvors* ought not to have been annulled, because, even accepting that the tribunal misapplied the legal rules defining an “investment,” the award was only retributively unjust but not procedurally unjust. This would have supplemented the systemic importance of ensuring the efficacy of ICSID arbitration so that justice may be done in other disputes. Similarly, the portion of *Helnan* that misapplied the exhaustion of local remedies rule ought not to have been annulled because that misapplication of

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central bank property shall not be regarded as in use or intended for use for commercial purposes and that section 14(4) provides “complete immunity from the enforcement process in the UK courts”); *Liberian Eastern Timber Corp. v. Liberia*, 650 F.Supp 73, 77-78 (S.D.N.Y. 1986).

270. See Lee Kuan Yew, *Forward* to SHUMUGAM JAYAKUMAR & TOMMY KOH, PEDRA BRANCA: THE ROAD TO THE WORLD COURT xiii (2009) (“If a dispute cannot be resolved by negotiations, it is better to refer it to a third party dispute settlement mechanism, than to allow it to fester and sour bilateral relations.”).

law might have been retributively unjust, but it was not necessarily procedurally unjust because reasons were provided, even if they were wrong reasons.

This analysis also has implications for *ad hoc* committees that find violations of Article 52 in underlying awards. Operationally, justice is only done to persons if it makes a practical difference to the allocation of values or property. Thus, in an award that violates Article 52, if that violation made no difference to the outcome of the dispute, then it could be said that although the tribunal acted in a procedurally unjust manner, there is no procedural injustice visited upon the parties in that dispute. In such a case, the *ad hoc* committee should not sacrifice the efficacy of the award and the retributive justice it is designed to promote by annulling the award. Thus, the *Vivendi II ad hoc* committee was correct in refusing to annul the award after it found that one of the arbitrators may have created an inadvertent conflict but that conflict was harmless error because that arbitrator discovered it only after the award was rendered.

In contrast, in *Helnan*, because the holding found to be in error was not a dispositive holding, it did not affect the outcome of the dispute, and there was little practical point in annulling it. Likewise, the *Fraport* annulment committee perhaps went too far in annulling the award because there was no evidence that violation of Article 52 by the tribunal was dispositive in their holding, and thus there was no procedural injustice to correct. In technical legal terms, one might favor a harmless error defense in Article 52 applications.

This analysis of justice in ICSID arbitration, however, is not free from criticism. An observer may take a different view that a miscarriage of justice should never be enforced simply to promote the efficacy of ICSID arbitration and to achieve justice for other investors and host states in future ICSID disputes. Since sovereign interests and vast amounts of investor capital is often at stake in ICSID disputes, it may be more important to achieve a just result through multiple sequential arbitrations, if necessary, than to reach a final outcome quickly through a single arbitration that is not subject to appeal. This view may also find purchase in ideas that justice is incommensurable, or that the rights of a party in one ICSID dispute is incommensurable with the rights of other parties in different disputes. From these perspectives, it may not be appropriate to justify injustice against an investor or host state in a particular dispute with a desire to promote the efficacy of ICSID in general.

One could also argue that even if a procedural or substantive error is not unjust, such as if it made no difference to the disposition of the dispute in the award, such as in *CMS* and *Vivendi II*, the committee should nonetheless explain its analysis and even annul an award for its harmless error. This perspective might emphasize the expressive function of the *ad hoc* committee, both to criticize an unjust decision as an end in itself and to provide guidance for counsel and arbitrators in other disputes. However, a reasonable rejoinder is that claimants and host states should not have to pay for arbitrators to express their

view when it makes no difference to the dispute for which they were hired to resolve.

Even if one subscribes to the principle that individual injustice can be justified by the benefit of justice for others, if it turns out that ICSID awards make errors of law more often than they correctly apply the law, then the argument for preserving the efficacy of the system of ICSID arbitration through finality also breaks down. Without reasonable assurances that awards will be generally just, international actors will have no reason to participate in consensual arbitration and the entire mechanism will be reduced to an obsolete artifact with no practical application.<sup>271</sup>

If any of these criticisms prevail, then it may become necessary to consider creating alternative mechanisms for broader review in ICSID arbitration, in order to promote greater procedural and retributive justice even at the cost of delaying finality.

However, the innovations available to arbitrators are limited. As the author has explained in prior research, arbitrators have a strong moral obligation to apply the law strictly because their authority is derived from the limited consent of the parties to resolve a dispute according to the applicable law and the informal norms that the parties have come to accept.<sup>272</sup> Applying this analysis to ICSID arbitration here provides guidance that arbitrators should apply Article 52 strictly, which in terms sets high standards for annulments. Although the text of Article 52 is not free from ambiguity, there appears to be an ever-strengthening consensus that the standards for annulment in Article 52 are indeed high, as evidenced by the criticisms of *ad hoc* decisions that have applied a lower standard for annulment.<sup>273</sup> Like all international decision makers, arbitrators have a general moral obligation to promote minimum global order, which stabilizes international relations to allow actors to cooperate and compete for their preferred values. Since there seems to be a consensus that the text of Article 52 creates a high standard for annulment, arbitrators should abide by that informal shared expectation to promote the arbitral order that is predicated on those expectations.<sup>274</sup> It is thus not open to arbitrators to turn the review system into an appeals system by lowering the ICSID treaty standards for annulment.<sup>275</sup> When sitting on *ad hoc* committees, they may also consider avoiding *obiter*

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271. See W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 2-3 (1992) (“Much as lawyers cannot practice law without clients, international tribunals cannot decide disputes without litigants. Litigants come on an entirely voluntary basis and have no reason to come to an uncontrolled process.”).

272. CHENG, *supra* note 15, at 176-95.

273. See, e.g., note 113, *supra*.

274. *C.f.* CHENG, *supra* note 15, at 182-87 (discussing *Feliciano* case-study). See generally Reisman, *Breakdown of ICSID Arbitration*, *supra* note 114 (emphasizing importance of applying Article 52 strictly to promote minimum world order).

275. *Accord* Caron, *supra* note 32, at 194-95 (arguing it is not the task of *ad hoc* committees to amend the annulment standard).

*dictum* criticizing portions of underlying awards that they leave intact, when such comments would weaken confidence in the ICSID system and its systemic retributive power. They should also avoid such *dictum* when the award is generally retributively just, in spite of its errors, so that the losing party is encouraged to abide by the award.

There is nothing, however, in the ICSID Convention to stop arbitrators from circulating draft awards, providing the parties one final chance to comment on perceived errors and giving the tribunal an opportunity to correct errors, if any.<sup>276</sup> If tribunals give the parties fair warning in an early procedural order that they intend to circulate a draft award for comment, such a practice would not offend procedural justice. This is indeed the practice in some Energy Charter Treaty arbitrations, including those under ICSID.<sup>277</sup> This practice will give parties a final chance to address any issues they wish to address, and would avoid the perceived procedural injustice of the *Fraport* situation, where one party subsequently claims that it was not given a final opportunity to address findings of fact based on evidence on which the tribunal relied. It would also give parties a chance to make legal arguments about flaws in the tribunal's reasoning in an attempt to persuade the tribunal to change its mind. The tribunal, in turn, would have a chance to explain in its final award steps in its reasoning that were non-obvious, thereby shielding its award from claims later on that it failed to state reasons. If the parties comment that the draft award applies the

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276. *E.g.*, *Ltd. Liab. Co. AMTO v. Ukraine*, SCC Institute Arb. No. 080/2005, §13 (Mar. 26, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0030.pdf> (“On December 18, 2007 the Arbitral Tribunal submitted to the Parties a draft Recital to the Award”); *c.f.* Symposium, *Making the Most of International Investment Agreements: A Common Agenda* (Co-Organized by ICSID, OECD, and UNCTAD, Dec. 12, 2005), available at <http://www.oecd.org/investment/internationalinvestmentagreements/35808448.pdf>; American Arbitration Association, *Case Study Construction: Project Delay Leads to Terminated Contact, Complex Claims and Counter-Claims Resolved through Arbitration* (2012), available at [http://adr.org/aaa/ShowPDF?doc=ADRSTG\\_018407](http://adr.org/aaa/ShowPDF?doc=ADRSTG_018407) (advertising materials for AAA describing the procedure for draft awards available to parties: “The week after hearings were held the panel of three arbitrators issued a draft of the award. The parties then had an opportunity to submit a document responding to any perceived errors in the draft award . . .”).

277. *See Ltd. Liab. Co. AMTO*, SCC Arb. No. 080/2005, §13 (“On December 18, 2007 the Arbitral Tribunal submitted to the Parties a draft Recital to the Award”); *Petrobart Ltd. v. Kyrgyz Republic*, SCC Institute Arb. No. 126/2003, pp. 16-17 (Mar. 29, 2005)

On 14 October 2004, Petrobart accepted that the Arbitral Tribunal should render an award based solely upon the respective parties' written briefs, including attached exhibits and legal opinions, subject to certain conditions. These conditions, which were accepted by the Kyrgyz Republic on 16 October 2004, were: . . . (g) that the Arbitral Tribunal should draft and submit to the parties a recital to the award, including the undisputed facts of the case and the parties' argumentation; (h) that each party should be given one opportunity to comment in writing on the recital; and (i) that the Arbitral Tribunal should set final deadlines for the submissions, it being understood that a party's non-compliance with a deadline should be acknowledged as a waiver to make the relevant submission and that such non-compliance should not prevent the Arbitral Tribunal from rendering the award.

wrong law, or fails to consider an applicable body of law, the tribunal will also have a chance to address that in the final award. This will reduce the risk that an *ad hoc* committee will find that the tribunal manifestly exceeded its powers by applying the wrong law. The net effect of this process of circulating draft awards could be to protect awards from annulment by ensuring that tribunals respect procedural justice, thereby harmonizing and promoting the finality of procedurally just awards in ICSID arbitration.

If greater changes to the design of ICSID arbitration are necessary, that must come from government officials responsible for creating and adjusting international regulatory networks. Unlike arbitrators, regulators who negotiate treaties are not morally bound to reinforce the shared expectations codified in prior treaties. Instead, it is their moral obligation to shape expectations in the interests of their constituents and for the common good.<sup>278</sup> They achieve this by modifying treaties where they are obsolete or discovered not to promote the policy objectives of the treaties. While it is unlikely that all the hundreds of signatory states of the ICSID Convention will agree to change Article 52 any time soon, it is open to officials to create an appellate structure in their BITs, which would sit atop the ICSID arbitral process in the dispute resolution clauses of BITs. Such a legislative measure is consistent with Article 41 of the Vienna Convention on the Law of Treaties, which permits two parties to a multilateral treaty to amend the treaty as between themselves only.<sup>279</sup> Alternatively, a group of states could agree to amend the ICSID Convention to create an appellate mechanism, and, pursuant to Article 40 of the Vienna Convention on the Law of Treaties, only those states would be bound by the new appellate mechanism.<sup>280</sup>

Focusing on the option for states to bilaterally agree on an appeals system in their investment treaties also satisfies the concerns of libertarians and sovereigntists that states should not be subject to international processes without consent. When designing an appeals process, officials, as well as corporations that lobby their elected officials, can determine the scope of appeal and timelines, thereby permitting the parties most directly implicated in a dispute to determine for themselves, by agreement, the appropriate balance between finality and justice.

#### CONCLUSION

Law is a social institution designed to serve the needs of the communities that designed it. When social needs change, law must adjust as well. The original purpose of the ICSID Convention, to promote private foreign investment for developing countries, remains relevant today. However, global political and macroeconomic conditions today are not the same as they were in

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278. See generally CHENG, *supra* note 15, at 196-214 (2012).

279. Vienna Convention on the Law of Treaties, art. 41, May 23, 1969, 1155 U.N.T.S. 331.

280. *Id.* art. 40.

1965, when the ICSID Convention was designed. There are impressive shifts in economic power from the leading economies in 1965 to the BRIC countries of Brazil, Russian, India and China,<sup>281</sup> as well as more subtle signs of emerging power in other developing nations.<sup>282</sup> The necessity for incentives in the ICSID Convention to encourage private foreign investments, including the finality of awards, may become increasingly less important to promoting FDI than the tremendous opportunities for growth in BRIC and BRIC-like countries, especially as compared to the lower upside potential in developed economies. In this geo-economic context, it may be appropriate to reconsider the ICSID Convention through the lens of justice, rather than just promoting foreign investments. Notably, the changes explored here are neither pro-investor nor pro-host state, since both sides have brought annulment proceedings when they lose an ICSID arbitration.<sup>283</sup> The changes are also neither pro-developing country nor pro-developed country, because FDI is increasingly flowing regionally, from developing country to developing country,<sup>284</sup> or from developed country to developed country.<sup>285</sup> FDI is also flowing in reverse from Russia, China, and India to the United States and Europe. In light of these changing investment patterns, any changes to Article 52 or the practices of arbitrators can thus be made to promote justice for all.

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281. Paulo Roberto de Almeida, *The BRIC's role in the Global Economy*, in TRADE AND INTERNATIONAL NEGOTIATIONS FOR JOURNALISTS, 152 (2009), available at <http://www.pralmeida.org/05DocsPRA/1920BricsRoleEnglish.pdf>.

282. *Id.* See also Gregory C. Shaffer and Charles S. Sutton, *The Rise of Middle-Income Countries in the International Trading System, Law and Development in Middle Income Countries*, Minnesota Legal Studies Research Paper No. 12-51 (Randall Peerenboom & Thomas Ginsburg, eds., forthcoming 2012), available at <http://ssrn.com/abstract=2153911>.

283. ICSID, *Background Paper on Annulment For the Administrative Council*, ¶ 39 (Aug. 10, 2012), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11> (“The annulment remedy has been pursued by both claimants and respondents to ICSID proceedings. Approximately 57 percent of annulment proceedings were initiated by respondents (in all instances States) while 36 percent of the proceedings were initiated by claimants.”).

284. See United Nations Conference on Trade and Development, *supra* note 194 (third row showing increasing FDI from developing countries into developing economies.).

285. *Id.* (fifth row showing increasing FDI from developed countries into developed economies).