ICSID
International Centre for Settlement of Investment Disputes
WORLD BANK GROUP

BACKGROUND PAPER

Updated Background Paper on Annulment

March 2024

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ANNEXES

*This paper does not constitute legal advice. The information in this paper is current to December 31, 2023.

I. Purpose of the Background Paper

1. This paper is an updated version of the Background Paper on Annulment for the Administrative Council of ICSID dated April 15, 2016.[1] It provides new data and updated charts and tables concerning developments in case law on annulment from April 16, 2016 through December 31, 2023.[2] In particular, it considers 104 new annulment proceedings, 73 new annulment decisions and 78 new decisions on the stay of enforcement of an award issued since the previous version of the Background Paper was published. These cases all arise under the 2006 ICSID Arbitration Rules. As of the date of the publication of this paper, there have been no annulment proceedings instituted under the 2022 ICSID Arbitration Rules.

2. The data included in the charts and tables were compiled cumulatively, offering a comprehensive overview of annulment proceedings spanning the entire history of ICSID.

II. Introduction to the Annulment Mechanism in the ICSID Convention

3. One of the unique features of the ICSID system is its autonomous nature. ICSID arbitration is known as a self-contained, or de-localized, system because local courts in any particular State have no role in the ICSID proceeding. Instead, the ICSID Convention and rules contain all provisions necessary for the arbitration of disputes, including provisions addressing the institution of proceedings, jurisdiction, procedure, the award to be rendered by the Tribunal, post-award remedies, and recognition and enforcement of the award.[3]

4. An important aspect of the self-contained nature of the system is the remedies available to the parties after an award has been rendered. ICSID awards are binding on the disputing parties, may not be appealed, and are not subject to any remedies except those provided for in the Convention.[4] As a result, unlike other international arbitral awards, ICSID awards cannot be challenged before national courts. Challenges to ICSID awards must be brought within the framework of the Convention and pursuant to its provisions.

5. The choice of remedies offered by the ICSID Convention reflects a deliberate election by the drafters of the Convention to ensure finality of awards. The only way to review an

[1] The original background paper was published in August 2012, and was later updated on April 15, 2016.

[2] The ICSID Secretariat takes no position in this paper as to whether a specific decision of an ICSID *ad hoc* Committee is correct or is within the proper scope of review allowed by Article 52 of the ICSID Convention. Please note that, unless otherwise stated, shortform references to cases refer to Decisions on Annulment. Annex 1, which is attached to this paper, lists all annulment cases, including the full and short form citations, members of the Tribunals and *ad hoc* Committees, and the outcome in each case.

[3] In accordance with Article 54 of the ICSID Convention, an award must be recognized by all ICSID Contracting States and pecuniary obligations imposed by an award are enforceable as a final judgment of the courts of a Contracting State.

[4] ICSID Convention Article 53.

award is pursuant to the five specific remedies provided by the Convention. These remedies are:

- rectification (Article 49) – the Tribunal can rectify any clerical, arithmetical or similar error in its award;

- supplementary decision (Article 49) – the Tribunal may decide any question it omitted to decide in its award;

- interpretation (Article 50) – the Tribunal may interpret its award where there is a dispute between the parties as to the meaning or scope of the award rendered;

- revision (Article 51) – the Tribunal may revise its award on the basis of a newly discovered fact of such a nature as to decisively affect the award; and

- annulment (Article 52) – an *ad hoc* Committee may fully or partially annul an award on the basis of one or more of the following grounds: (a) the Tribunal was not properly constituted; (b) the Tribunal manifestly exceeded its powers; (c) there was corruption on the part of a Tribunal member; (d) there was a serious departure from a fundamental rule of procedure; or (e) the award failed to state the reasons on which it is based.

6. The following sections focus on the annulment remedy. Section III describes the drafting history of the annulment provisions in the Convention, Section IV outlines the conduct of an annulment proceeding before ICSID, and Section V describes the general standards and the grounds for annulment invoked in ICSID case law.

III. The Drafting History of the Annulment Provisions in the ICSID Convention

7. The approval of the ICSID Convention by the Executive Directors of the World Bank in 1965 was preceded by five years of negotiation and consultation among government officials and international legal experts. It involved preparatory work by World Bank staff and Executive Directors in 1961 and 1962, a series of Regional Consultative Meetings of Experts convened by the World Bank in 1963 and 1964, and meetings of a Legal Committee consisting of representatives of all interested States, held at the end of 1964. The final text was approved by the Executive Directors on March 18, 1965, and came into force on October 14, 1966.[5] As of December 31, 2023, there were 158 Contracting States to ICSID.

[5] For a summary of steps in drafting the Convention, *see* ICSID, *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* Vol. I-IV (1970) ("History"), Vol. I, 2-10.

A. *The Origin of the Annulment Provision*

8. The grounds for annulment in the ICSID Convention derive from the 1953 United Nations International Law Commission Draft Convention on Arbitral Procedure ("ILC Draft"), which was an effort to codify existing international law on arbitral procedure in State-to-State arbitration.[6] The International Law Commission ("ILC") recognized that the finality of an award is an essential feature of arbitral practice, but also recognized that there was a need for "exceptional remedies calculated to uphold the judicial character of the award as well as the will of the parties as a source of the jurisdiction of the tribunal."[7] It thus "sought to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice."[8] During its deliberations, the ILC decided that no appeal against an arbitral award should be allowed, but that the validity of an award might be challenged "within rigidly fixed limits."[9] An independent body, the International Court of Justice, would rule on whether a challenge should lead to the annulment of the award.[10]

9. The provision in the ILC Draft read as follows:

> (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) That the tribunal has exceeded its powers;
>
> (b) That there was corruption on the part of a member of the tribunal;
>
> (c) That there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[11]

10. During its deliberations, the ILC debated the scope of specific grounds, including whether an excess of jurisdiction might warrant annulment, while misapplication of the law would

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[6] *See* Documents of the Fifth Session Including the Report of the Commission to the General Assembly, [1953] 2 *Yearbook of the International Law Commission* 211, U.N. Doc. A/CN.4/SER.A/1953/Add.1 ("1953 ILC Yearbook II") (Article 30 of the Draft Convention on Arbitral Procedure); Aron Broches, "Observations on the Finality of ICSID Awards" *in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law* 299 (1995).

[7] 1953 ILC Yearbook II, *supra* note 6, at 202.

[8] Broches, *supra* note 6, at 298; *see also* comments by the ILC's special rapporteur, Mr. Georges Scelles, Summary Records of the Fifth Session, [1953] 1 *Yearbook of the International Law Commission* 46, U.N. Doc. A/CN.4/SER.A/1953 ("1953 ILC Yearbook I").

[9] 1953 ILC Yearbook II, *supra* note 6, at 205.

[10] *Id.* at 211 (Article 31 of the Draft Convention on Arbitral Procedure).

[11] The ILC adopted the Model Rules on Arbitral Procedure in 1958. The provision on annulment, Article 35, remained the same as to grounds (a) and (b), but ground (c) was phrased "failure to state the reasons for the award or a serious departure from a fundamental rule of procedure" and an additional ground was added: "(d) that the undertaking to arbitrate or the *compromis* is a nullity." Documents of the Tenth Session Including the Report of the Commission to the General Assembly, [1958] 2 *Yearbook of the International Law Commission* 86, U.N. Doc. A/CN.4/SER.A/1958/Add.1. Interestingly, the drafters of the ICSID Convention chose to model the ICSID annulment provision on the 1953 ILC Draft and not on the final provision adopted by the ILC in 1958.

not.[12] Ultimately, the ILC Draft made no attempt to define what conduct each ground would cover, with the exception of the express reference to the "failure to state the reasons for the award" as an example of a serious departure from a fundamental rule of procedure.[13] The accompanying Report to the General Assembly stated that "[a]fter considerable discussion [the ILC] decided, having regard to the paramount requirement of finality, not to amplify - subject to one apparent exception [the failure to state the reasons for the award] - the grounds on which the annulment of the award may be sought."[14]

B. *Preliminary Draft ICSID Convention – 1963*

11. The ICSID Convention's earliest draft, an internal World Bank document entitled "Working Paper in the Form of a Draft Convention" of June 5, 1962, made no provision for annulment.[15] However, a text on annulment identical to the 1953 ILC Draft was included in the Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States ("Preliminary Draft") in 1963.[16] The Preliminary Draft was a second working paper prepared by World Bank staff for consideration at the regional consultative meetings of experts. Section 13(1) read as follows:

> (1) The validity of an award may be challenged by either party on one or more of the following grounds:
>
> (a) that the Tribunal has exceeded its powers;
>
> (b) that there was corruption on the part of a member of the Tribunal; or
>
> (c) that there has been a serious departure from a fundamental rule of procedure, including failure to state the reasons for the award.[17]

12. The comment accompanying Section 13 explained the purpose of the provision:

> […] As a general rule the award of the Tribunal is final, and there is no provision for appeal. Sections 11 and 12, however, provide for interpretation and revision of the award, respectively. In addition, where there has been some violation of the fundamental principles of law governing the Tribunal's proceedings such as are listed in Section 13, the aggrieved party may apply to the Chairman [of the Administrative Council

[12] Summary Records of the Fourth Session, [1952] 1 *Yearbook of the International Law Commission* 84, U.N. Doc. A/CN.4/SER.A/1952; 1953 ILC Yearbook I, *supra* note 8, at 44.

[13] Documents of the Fourth Session Including the Report of the Commission to the General Assembly, [1952] 2 *Yearbook of the International Law Commission* 66, U.N. Doc. A/CN.4/SER.A/1952/Add.1; 1953 ILC Yearbook II, *supra* note 6, at 205.

[14] 1953 ILC Yearbook II, *supra* note 6, at 205.

[15] History, *supra* note 5, at Vol. II, 19.

[16] *Id.* at 184 (October 15, 1963).

[17] *Id.* at 217 (Article IV, Section 13 of Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States).

> of ICSID] for a declaration that the award is invalid. Under that section the Chairman is required to refer the matter to a Committee of three persons which shall be competent to declare the nullity of the award. It may be noted that this is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one or other of the three grounds listed in Section 13(1).[18]

C. *Regional Consultative Meetings – 1964*

13. The inclusion of a provision on annulment in the ICSID Convention does not appear to have been questioned or debated, nor is there any account of discussion concerning the general purpose and scope of annulment in the drafting history of the Convention. Indeed, a summary report of the meetings by the General Counsel of the World Bank concluded that no controversial issues of policy were raised by the draft annulment provision, but that a considerable number of detailed suggestions of a technical character had been raised.[19] The specific grounds for annulment were discussed at a series of Regional Consultative Meetings.

14. During the first set of Regional Consultative Meetings, legal experts from various countries made suggestions for changes to the Preliminary Draft.[20] Among other things, a proposal was made that the grounds for annulment be set out in greater detail and modeled on commercial arbitration laws.[21] However, Aron Broches, then General Counsel of the World Bank and Chair of the Regional Consultative Meetings and the subsequent meetings of the Legal Committee, discouraged the comparison with commercial arbitration.[22] He recalled that "it had been fully recognized that only limited recourse had been provided and that acceptance of the binding character of the award went beyond what was normally expected in respect of an arbitral tribunal."[23]

15. A concern was raised by a legal expert from Germany that annulment posed a risk of frustrating awards and therefore the annulment provision should be made more restrictive. To that effect, this expert proposed a requirement that an excess of powers be "manifest" to warrant annulment.[24] In the context of the discussions on the meaning of "excess of powers," Chairman Broches confirmed that the intention was to cover the situation where a decision of the Tribunal went beyond the terms of the parties' arbitration agreement.[25]

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[18] *Id.* at 218 & 219.

[19] *Id.* at 573 & 574.

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

[21] *Id.* at 423.

[22] *Id.*

[23] *Id.*

[24] *Id.*; Broches, *supra* note 6, at 303.

[25] History, *supra* note 5, at Vol. II, 517.

16. Other suggestions were to add the words "a serious misapplication of the law" or "including the failure to apply the proper law" to the ground concerning excess of powers.[26] In this connection, Chairman Broches remarked that "a mistake in the application of the law would not be a valid ground for annulment of the award," stating that "[a] mistake of law as well as a mistake of fact constituted an inherent risk in judicial or arbitral decision for which appeal was not provided."[27] However, the legal expert from Lebanon observed that if the parties had agreed to apply a particular law and the Tribunal in fact applied a different law, the award would violate the parties' arbitration agreement and could be annulled.[28]

17. A further suggestion sought to clarify that "departure from a fundamental rule of procedure" excluded challenges on the basis of inobservance of ordinary arbitration rules, as opposed to "breaches of procedural rules which would constitute a violation of the rules of natural justice."[29] One proposal was to add the phrase "a serious departure from the principles of natural justice."[30] Another proposal was to replace the term by "fundamental principles of justice."[31] Chairman Broches subsequently explained that "fundamental rule of procedure" was to be understood to have a wider connotation, and to include under its ambit the so-called principles of natural justice. As an example, he mentioned the parties' right to be heard.[32]

D. *First Draft Convention – September 1964*

18. In light of the discussions at the Regional Consultative Meetings, World Bank staff prepared a further Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "First Draft"),[33] for consideration by the Legal Committee. This Committee was composed of experts representing member governments of the World Bank. The annulment provision in the First Draft read as follows:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (a) that the Tribunal was not properly constituted;
>
> (b) that the Tribunal has manifestly exceeded its powers;

[26] *Id*. at 423 & 517.

[27] *Id.* at 518.

[28] *Id.*

[29] *Id.* at 517.

[30] *Id.* at 271 & 423.

[31] *Id.* at 480.

[32] *Id.*

[33] *Id.* at 610 (September 11, 1964).

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.[34]

E. *Legal Committee Meetings – 1964*

19. The Legal Committee held a series of meetings in November and December 1964, chaired by Broches. At the meetings, clarification was sought by an Ethiopian Committee member regarding the meaning of the additional ground of improper constitution of the Tribunal.[35] It was explained that this expression was "intended to cover a variety of situations such as, for instance, absence of agreement or invalid agreement between the parties, the fact that the investor was not a national of a Contracting State, that a member of the Tribunal was not entitled to be an arbitrator, etc."[36] Two experts were in favor of deleting the ground of improper constitution but the majority of the Legal Committee decided to retain this ground.[37]

20. The Ethiopian Committee member also asked whether there was a contradiction in providing that a Tribunal is the sole judge of its competence and at the same time providing for excess of power as a ground of annulment.[38] Chairman Broches replied that:

> …the expression 'manifestly exceeded its powers' concerned the cases […] where the Tribunal would have gone beyond the scope of agreement of the parties or would have thus decided points which had not been submitted to it or had been improperly submitted to it. […] the *ad hoc* Committee would limit itself to cases of manifest excess of those powers.[39]

21. Suggestions that the word "manifestly" be omitted were defeated by a majority of 23 to 11 votes.[40] A proposal to include as a ground of annulment that the Tribunal had made a decision beyond the scope of the submissions was also defeated on a vote.[41]

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[34] *Id.* at 635 (Article 55(1)).

[35] *Id.* at 850.

[36] *Id.*

[37] *Id.* at 852 & 853.

[38] *Id.* at 850.

[39] *Id.*

[40] *Id.* at 851 & 852.

[41] *Id*. at 853.

22. Chairman Broches confirmed during the meetings that failure to apply the proper law could amount to an excess of power if the parties had agreed on an applicable law.[42] One proposal suggested adding the "manifestly incorrect application of the law" by the Tribunal as a ground of annulment, but it was defeated by a vote of 17 to 8.[43]

23. In regard to the ground concerning corruption on the part of a member of the Tribunal, there were suggestions by various legal experts to replace "corruption" with "misconduct,"[44] "lack of integrity"[45] or "a defect in moral character."[46] There were further suggestions that the ground be limited to cases where the corruption was evidenced by a judgment of a court, or in instances where there was "reasonable proof that corruption might exist."[47] These proposals were put to a vote and defeated by a large majority.[48]

24. The ground for annulment relating to a serious departure from a fundamental rule of procedure had become a stand-alone ground under the First Draft. A discussion was held about whether to add the words "or substance" after the words "rule of procedure," but the proposal was seen as confusing.[49] A further suggestion to replace the word "rule" by "principle" was also rejected because the reference to "fundamental" rules of procedure was considered to be a clear reference to principles.[50] Likewise, a specific reference noting that both parties must have a fair hearing was defeated.[51]

25. The last ground, failure to state reasons, also became a stand-alone ground in the First Draft. The possibility of raising this ground of annulment was subject to the parties' agreement on whether reasons for the award would have to be stated. The rationale for this discretion was to reconcile it with another provision which allowed the parties to agree that the award need not state the reasons.[52] However, during one of the Legal Committee's meetings, it was decided to remove the parties' discretion in this regard and, as a consequence, the discretion was also removed from the ground for annulment.[53]

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[42] *Id.* at 851.

[43] *Id.* at 851, 853 & 854.

[44] *Id.* at 851.

[45] *Id.* at 852.

[46] *Id.*

[47] *Id.* at 851.

[48] *Id.* at 852.

[49] *Id.* at 853 & 854.

[50] *Id.* at 854.

[51] *Id.* at 853.

[52] *Id.* at 633. Article 51(3) of the First Draft provided: "Except as the parties otherwise agree: (a) the award shall state the reasons upon which it is based."

[53] *Id.* at 816.

F. *Revised Draft Convention – December 1964*

26. Following the Legal Committee's meetings, a Revised Draft Convention on the Settlement of Investment Disputes ("Revised Draft") was prepared.[54] Article 52 of the Revised Draft read as follows:

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
>
> (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.[55]

27. Since the First Draft, the only modification made to the provision was to subsection (1)(e).[56] As explained above, the ground was no longer subject to the parties' agreement that reasons need not be stated and, therefore, the words "unless the parties have agreed that reasons need not be stated" were deleted.

28. The Revised Draft was submitted for consideration by the Executive Directors of the World Bank. While further changes were subsequently made to other provisions of the Revised Draft, Article 52 remained the same and thus became the text of the ICSID Convention.

IV. The Conduct of an Annulment Proceeding

29. In addition to stipulating the grounds for annulment, Article 52 of the ICSID Convention sets out the general procedural framework for an annulment proceeding. It is implemented by the ICSID Arbitration Rules, which apply to all ICSID Convention arbitration proceedings and govern ICSID post-award remedy proceedings. ICSID Arbitration Rules 50 and 52 through 55 implement the annulment remedy in the Convention, including the institution of annulment proceedings, the appointment of an *ad hoc* Committee to decide

[54] *Id.* at 911 (December 11, 1964).

[55] *Id.* at 926 & 927.

[56] As to ground (d), in the French version of the Revised Draft, the word "*dérogation*" was replaced by "*inobservation*" and in the Spanish version the words "*grave apartamiento*" were replaced by "*quebrantamiento.*"

the application, and stays of enforcement of the award while the annulment application is pending. The various steps in an annulment proceeding are described below.[57]

A. *Filing an Application for Annulment*

30. Either disputing party may initiate an annulment proceeding by filing an application for annulment with the ICSID Secretary-General. The application must: (i) identify the award to which it relates; (ii) indicate the date of the application; (iii) state in detail the grounds on which it is based pursuant to Article 52(1) of the ICSID Convention; and (iv) be accompanied by the payment of a fee for lodging the application.[58] It must be filed within 120 days after the date on which the award (or any subsequent decision or correction) was rendered, except that, in the case of corruption on the part of a Tribunal member, the application may be filed within 120 days after discovery of the corruption, and in any event within three years after the date on which the award was rendered.[59] The Secretary-General must refuse registration of an application for annulment that is not filed within the prescribed time limits.[60]

31. The application for annulment must concern an ICSID award, which is the final decision concluding a case. Since there can be only one award in the ICSID system, the parties must wait until that award is rendered before initiating any post-award remedies.[61] A decision issued prior to the award (*e.g.,* a decision on a challenge, a provisional measure, or a decision upholding jurisdiction) cannot be the subject of an application for annulment before it becomes part of the eventual award, even if it raises issues that may constitute the basis for an annulment application.[62]

32. Since the entry into force of the ICSID Convention in 1966 and as of December 31, 2023, annulment proceedings have been instituted in 189 cases.[63] In 5 of those cases, annulment proceedings were instituted a second time after a resubmission proceeding, meaning 194 annulment proceedings have been instituted in total.

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[57] The corresponding rules governing the annulment proceeding under the 2022 ICSID Arbitration Rules are Rule 69 to Rule 74.

[58] *See* Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Arbitration Rule 50(1); 2022 Arbitration Rule 69(2). The fee for lodging an application for annulment is currently US$25,000.

[59] ICSID Convention Article 52(2); Arbitration Rule 50(3)(b); 2022 Arbitration Rule 69(5)(a) and (b).

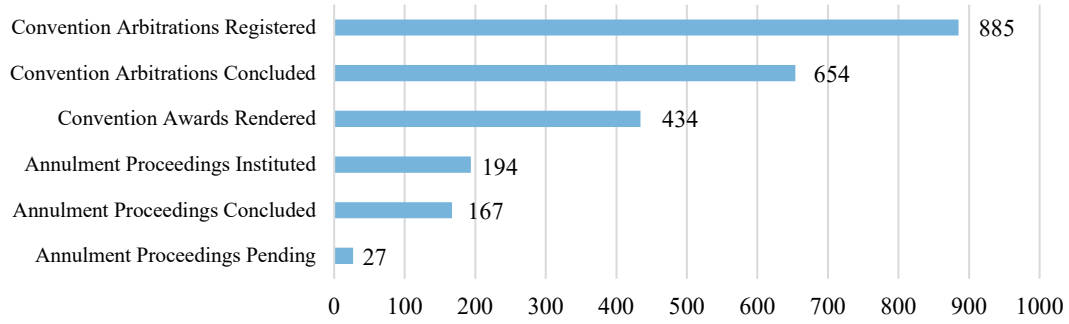
[60] *Id.*

[61] *See in particular* ICSID Convention Articles 48-49 (addressing "the award"). Under the same principle, only the award is capable of enforcement under ICSID Convention Article 54. For enforcement purposes, ICSID Convention Article 53(2) provides that an "award" includes any decision interpreting, revising or annulling such award.

[62] Annulment applications in respect of decisions on jurisdiction in pending cases have consistently been refused registration. *See* Broches, *supra* note 6, at 302.

[63] *See* "Pending and Concluded Annulment Proceedings," Annex 1.

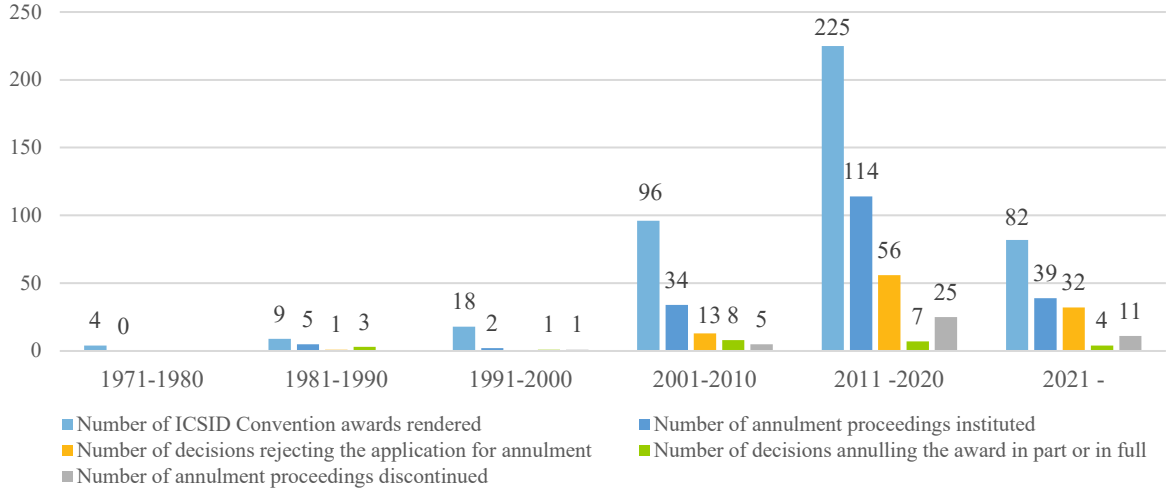
Convention Arbitrations and Annulment Proceedings Instituted and Concluded (as of December 31, 2023)



33. The rate of annulment, that is, the percentage of awards that were fully or partially annulled during a specific period, is 5 percent for the period 2021 - 2023, 3 percent for the period 2011-2020, 8 percent for the period 2001-2010, and 13 percent for the period 1971-2000.[64] When looking at all registered arbitrations under the ICSID Convention as of December 31, 2023, the rate of annulment is low at 2.6 percent (5 percent of all awards) ending in full or partial annulment.[65]

34. Seventy-nine percent of all annulment proceedings have been instituted since January 2011, with an average of 12 annulment proceedings instituted each year in the period comprised between January 2011 and December 2023. These numbers reflect the increase in the number of awards rendered since January 2011, as can be seen in the chart below.

ICSID Annulment Proceedings Instituted and Outcomes (as of December 31, 2023)

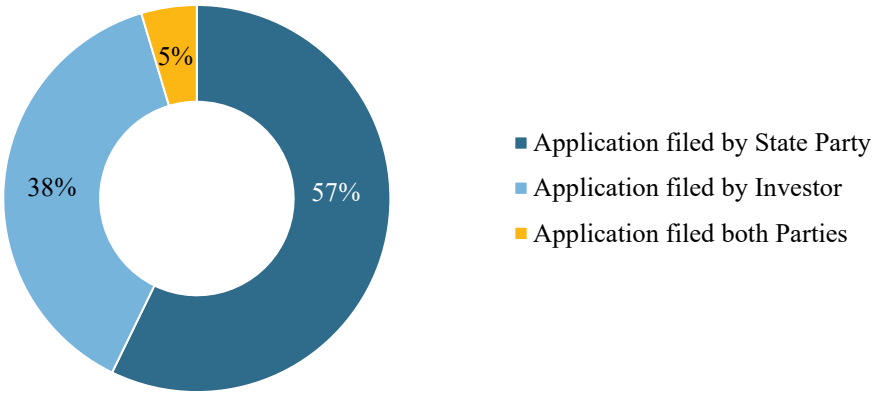


[64] The rate is based on the number of awards rendered and the number of partial and full annulments of awards.

[65] As of December 31, 2023, there were 874 original arbitrations and 11 resubmissions registered under the ICSID Convention and Tribunals had issued 434 awards under the ICSID Convention.

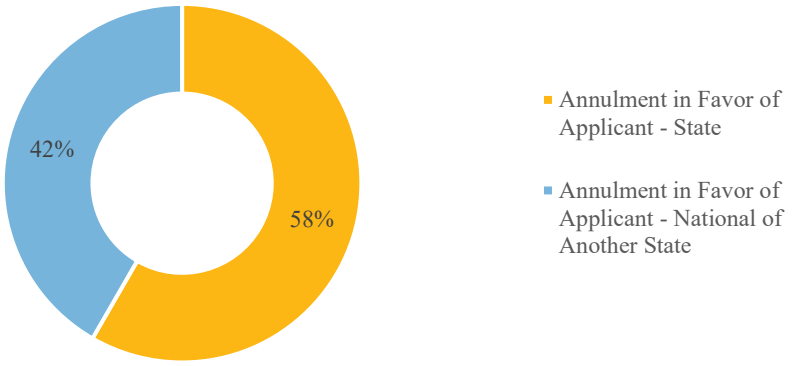
35. The annulment remedy has been pursued by both claimants and respondents to ICSID proceedings. Fifty-seven percent of annulment proceedings were initiated by respondents (in all instances States or State entities) while 38 percent of the proceedings were initiated by claimants. In 9 cases (5 percent of all annulment proceedings), both parties filed an application for annulment.[66]

Annulment Proceedings by Instituting Party



36. Where an award has been partially or wholly annulled, the prevailing Applicant on annulment was divided as between claimants (42%) and respondents (58%) in the Tribunal proceeding.

Full and Partial Annulment - by Party



[66] Forty applications sought partial annulment of the award, *see* Annex 2 (this number includes proceedings in which both parties filed an application for annulment, as well as proceedings in which a party seeks partial annulment as an alternative relief to full annulment). As noted in para. 36, applicant-Nationals of Another State and applicant-States have had a similar rate of success in annulment applications.

B. *Constitution of an ad hoc Committee*

37. Once an application for annulment is registered, the Chair of the Administrative Council must appoint an *ad hoc* Committee of three members to decide the application.[67] The function of an *ad hoc* Committee is either to reject the application for annulment or to annul the award or a part thereof on the basis of the grounds enumerated in Article 52.[68] The Committee does not have the power to rule on the merits of the parties' dispute if it decides to annul; that is the task of a new Tribunal should either party resubmit the dispute following annulment, or partial annulment, of the award.[69]

38. *Ad hoc* Committee members are appointed from the ICSID Panel of Arbitrators, which consists of persons designated by ICSID Contracting States and ten designees named by the Chair of the Administrative Council.[70] The ICSID Convention requires that Panel designees be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[71] Like arbitrators, *ad hoc* Committee members are expected to be independent and impartial, and to decide the case solely on the basis of the facts before them and the applicable law.

39. Unlike the Centre's appointment of Tribunal members, which may in certain circumstances be made from outside of the Panel of Arbitrators,[72] the Chair of the Administrative Council is restricted to appointing *ad hoc* Committee members from persons on the Panel.[73] Many persons on the Panel of Arbitrators have served as members of both Tribunals and Committees.

40. The ICSID Panel of Arbitrators currently consists of 723 persons designated by 135 of the 158 Member States and the Chair of the Administrative Council of ICSID.[74] As of

[67] ICSID Convention Article 52(3); Arbitration Rule 52(1); 2022 Arbitration Rule 71(1).

[68] ICSID Convention Article 52(3).

[69] *Id.* at Article 52(6).

[70] *See id.* at Articles 12-16. Each Contracting State may designate up to four persons of any nationality to the ICSID Panel of Arbitrators, for renewable periods of six years.

[71] ICSID Convention Article 14(1).

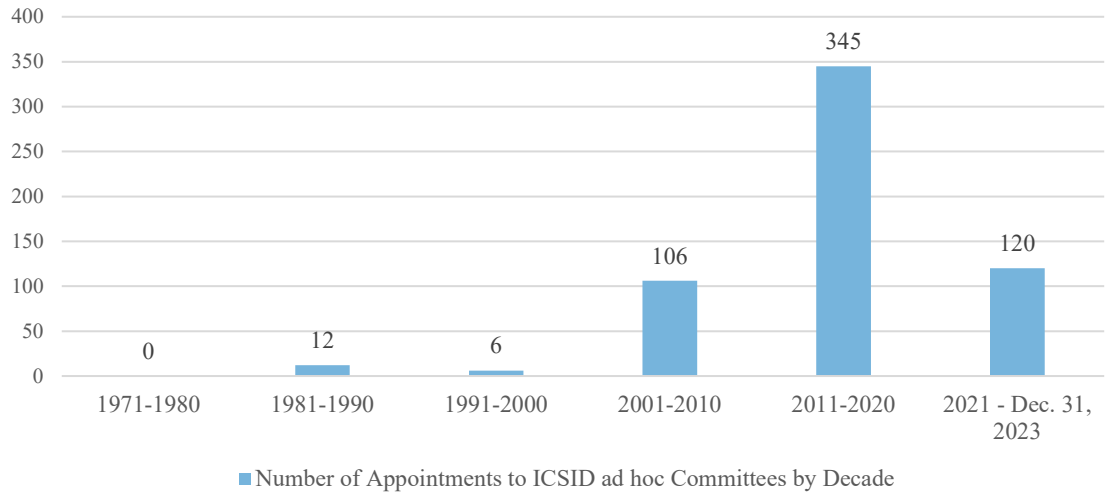
[72] ICSID appoints Tribunal members either by agreement of the parties or under the default rule in ICSID Convention Article 38, which can be invoked by either party if the Tribunal has not been constituted within 90 days from registration of the case. *Id.* at Article 38; *see also* Arbitration Rule 4; 2022 Arbitration Rule 18.

[73] ICSID Convention Article 52(3); Arbitration Rule 52(1); 2022 Arbitration Rule 71(1).

[74] Members of the Panels of Conciliators and Arbitrators, December 2023, Doc. ICSID/10, *available at* http://icsid.worldbank.org. This is an increase of 343 members on the Panel of Arbitrators since the original Background Paper on Annulment was published.

December 31, 2023, ICSID had appointed 589 *ad hoc* Committee members from the Panel, 465 of whom were appointed since 2011.

Appointments to ICSID *ad hoc* Committees by Decade



** This chart reflects the number of appointments and not the number of individuals.*

41. In addition to the general qualifications required for designation to the Panel of Arbitrators (see above, paragraph 38), a member of an *ad hoc* Committee must meet specific requirements prescribed by the ICSID Convention. First, the member of the *ad hoc* Committee cannot have been a member of the Tribunal which rendered the award or be of the same nationality as any of that Tribunal's members.[75] Second, the member cannot have the same nationality as the disputing parties (State and National of Another State) and cannot have been designated to the Panel of Arbitrators either by the State party to the dispute or the State whose national is a party to the dispute.[76] Third, the member cannot have acted as a conciliator in the same dispute.[77] As a result, in each annulment proceeding there are usually 5 or more excluded nationalities.[78]

42. A number of case-specific factors are considered, in addition to the formal requirements for appointment to an *ad hoc* Committee established by the ICSID Convention. For example, the languages used in the Tribunal proceeding and likely to be used before the *ad hoc* Committee are relevant, as is the experience of each candidate, including their past and current appointments. The process for the appointment of *ad hoc* Committee members by the Chair usually involves consultations among ICSID counsel, case management Team

[75] ICSID Convention Article 52(3).

[76] *Id.*

[77] *Id.*

[78] These requirements cannot be modified by agreement of the parties in annulment proceedings. This contrasts with Tribunal proceedings, where an arbitrator of an excluded nationality may be appointed, in accordance with Arbitration Rule 1(3); *see also* 2022 Arbitration Rule 13(2).

Leaders and the Secretary-General. Before the name of the candidate is proposed to the parties, the Centre researches whether there are any conflicts of interest and, if none are found, the candidate is asked to confirm that he/she is free of any conflicts, has time to dedicate to the proceeding, and is willing to act as a member of the *ad hoc* Committee.

43. Unlike the process for appointment of Tribunal members,[79] the ICSID Convention imposes no obligation on the Chair to consult the parties about *ad hoc* Committee appointments. Nonetheless, before *ad hoc* Committee members are appointed, ICSID informs the parties of the proposed appointees and circulates their *curricula vitae*. This gives the parties an opportunity to submit comments indicating that there might be a manifest lack of the qualities required for serving as a Committee member,[80] for example that there is a conflict of interest which the Centre or the candidate was unaware of. In exceptional circumstances, a proposed candidate is withdrawn and replaced by another person.

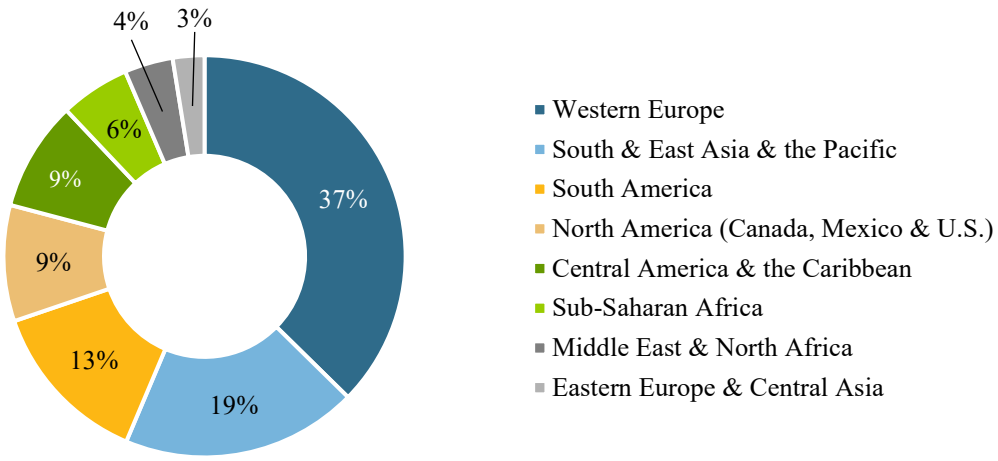
44. The Centre makes its best effort to complete the appointment process as soon as possible after registration of the annulment application. ICSID continues to make efforts to reduce the average time to complete the process, which is currently at 9 weeks. This includes the time spent corresponding with the parties.

45. The Chair considers diversity as a relevant factor in making *ad hoc* Committee appointments. This commitment to diversity encompasses not only nationality but also legal traditions, professional backgrounds, and gender. In parallel, the Chair adheres to the nationality restrictions prescribed by the ICSID Convention. These restrictions serve as a crucial safeguard against potential biases and conflicts of interest, ensuring that committee members do not possess the same nationality as the disputing parties, thereby maintaining the integrity and impartiality of the proceedings.

[79] ICSID Convention Articles 37-40.

[80] *Id.* at Articles 14(1) & 57.

Appointments to *ad hoc* Committees by Geographic Region



46. The number of women appointed to *ad hoc* Committees was historically low. However, since the publishing of the updated annulment paper in April 2016, the number of appointments of women to *ad hoc* Committees has increased significantly, showing a positive trend in the appointment of women to the Panel of Arbitrators (to date, 126 *ad hoc* Committee appointments involved women, compared to 15 appointments at the time of publication of the annulment paper in 2016).[81]

C. *The Proceeding*

47. Once the *ad hoc* Committee members have accepted their appointments,[82] the Secretary-General of ICSID notifies the parties of the constitution of the Committee. The party requesting annulment of the award is usually referred to as the "Applicant," and the other party is usually the "Respondent" or "Respondent on Annulment." A claimant in the Tribunal proceeding may thus become the respondent in the annulment proceeding.

48. A Secretary to the *ad hoc* Committee is appointed from among ICSID staff to assist the Committee and the parties. Where possible, the Secretary of the Committee is the same person who served as the Secretary of the Tribunal. This ensures the best possible assistance in view of the Secretary's knowledge of the procedural history and submissions in the original proceeding. However, the Secretariat will appoint a different person as Committee Secretary upon request of a party.

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[81] *See* para. 43 of the Annulment Background Paper of 2016. In September 2017, the Chair of the Administrative Council designated 10 individuals to the ICSID Panel of Arbitrators. Of these: i) five were women; and ii) eight were nationals from Sub-Saharan Africa, Eastern Europe and Central Asia, the Middle East and North Africa, South America and South and East Asia and the Pacific.

[82] The members of the *ad hoc* Committee must sign a declaration in a form analogous to that specified in Arbitration Rule 6(2) for Tribunal members; *see also* 2022 Arbitration Rule 19(3).

(i) Applicable Provisions

49. The Arbitration Rules apply, *mutatis mutandis*, to the proceeding before the *ad hoc* Committee.[83] This means that the Rules will apply with the changes necessary to take into account the fact that the proceeding is an annulment proceeding.

50. In addition, Article 52(4) of the ICSID Convention provides that Articles 41-45, 48, 49, 53 and 54 apply *mutatis mutandis* before the *ad hoc* Committee.

51. As a result, for example, it has been disputed whether Article 47 of the ICSID Convention concerning a Tribunal's power to recommend provisional measures applies to annulment proceedings.[84] Similarly, it has been argued that Article 52(4) does not allow a member of an *ad hoc* Committee to be challenged for a manifest lack of the qualities required by Article 14(1) of the Convention, suggesting that an *ad hoc* Committee member could not be disqualified.[85] However, this interpretation has been rejected in two annulment proceedings in which the *ad hoc* Committees found that they had the power to rule on disqualification but dismissed the requests.[86]

52. *Ad hoc* Committees have also confirmed that the procedure to dispose of unmeritorious claims at the preliminary stage of a proceeding introduced with the 2006 Arbitration Rules (Arbitration Rule 41(5)), also applies in annulment proceedings. However, the standard to accept an objection made under this provision is higher in the context of an annulment.[87]

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[83] Arbitration Rule 53; 2022 Arbitration Rule 72(1).

[84] *See Libananco Holdings Co. Limited v. Republic of Türkiye*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for Provisional Measures (May 7, 2012). The *ad hoc* Committee expressed doubts about its power to recommend provisional measures but rejected the request on other grounds. *See also Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (February 26, 2016), paras. 47-48, quoting from the *ad hoc* Committee's Decision on the Claimants' Request for Provisional Measures of August 18, 2014, para. 37: "Taking into consideration the limited scope of the annulment proceeding, at this stage of the annulment proceeding, as distinguished from the proceedings before the Tribunal, the rights of the Respondents on annulment relate mainly to the enforcement of the Award." *See also Bernhard Friedrich and Rüdiger von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on the Applicant's Application for Provisional Measures (March 17, 2016), paras. 30-32. Although the Committee refrained from deciding on this issue, it observed that "the omission of Article 47 from the list of relevant provisions in Article 52(4) suggests that the power of ICSID annulment committees to recommend provisional measures has been intentionally excluded". However, the Committee noted the parties' references to the possibility of an inherent power to recommend provisional measures necessary to protect the integrity of the proceeding.

[85] *See* ICSID Convention Articles 57 & 58.

[86] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Challenge to the President of the Committee (October 3, 2001); *Nations Energy, Inc. and others v. Republic of Panama*, ICSID Case No. ARB/06/19, Decisión sobre la Propuesta de Recusación del Dr. Stanimir A. Alexandrov (September 7, 2011). In *Nations*, the parties did not dispute the power of the *ad hoc* Committee to rule on the request for disqualification.

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

In a recent decision, an *ad hoc* Committee partially upheld objections for the first time under Arbitration Rule 41(5).[88] With regard to non-disputing party submissions under Arbitration Rule 37(2), one *ad hoc* Committee rejected such application,[89] while another Committee allowed a non-disputing party to file a written submission.[90]

(ii) The First Session

53. The procedure before an *ad hoc* Committee normally corresponds to the procedure before a Tribunal. *Ad hoc* Committees must afford both parties the right to be heard and must respect the equality of the parties. There is an assumption that the parties' procedural agreements in the original proceeding will remain the same in the annulment proceeding, for example with respect to the choice of procedural language, the number and sequence of written pleadings, and the parties' representatives.[91] Nonetheless, the *ad hoc* Committee usually convenes a first session with the parties to discuss procedural matters, and it is not uncommon to vary certain arrangements, for example concerning the applicable rules, procedural language and place of proceedings. In most cases, the parties agree on a timetable involving two rounds of pleadings on the application for annulment (Memorial, Counter-Memorial, Reply and Rejoinder) and an oral hearing. The time allowed for written pleadings rarely exceeds 3 months per party for the first round and 2 months per party for the second round.

54. The parties typically file the factual and legal evidence from the original proceeding that they wish to rely on in the annulment proceeding with their written pleadings. The record before the *ad hoc* Committee is usually limited to the factual evidence before the original

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matter but found it unnecessary to rule on it, *see Von Pezold*, Decision on Annulment (November 21, 2018), paras. 30-33.

[88] *Nachingwea U.K. Limited, Ntaka Nickel Holdings Limited and Nachingwea Nickel Limited v. United Republic of Tanzania*, ICSID Case No. ARB/20/38, Decision on Claimants' Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5) (February 2, 2024), available at https://jusmundi.com/en/document/decision/en-nachingwea-u-k-limited-ntaka-nickel-holdings-limited-and-nachingwea-nickel-limited-v-united-republic-of-tanzania.

[89] *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Non-Disputing Party's Application to File a Written Submission (February 12, 2014), mentioned in *Iberdrola*, Decision on Annulment (January 13, 2015), paras. 17-18.

[90] *Micula*, Decision on the EC's Application to file a Written Submission (December 3, 2014), mentioned in *Micula,* paras. 61-64. The *ad hoc* Committee indicated that a request by a non-disputing party in annulment proceedings "must be dealt with in a more restrictive and circumscribed manner." *Id.*, para. 63. This proceeding was governed by the 2003 Arbitration Rules. *BayWa r.e. AG v. Kingdom of Spain,* ICSID Case No. ARB/15/16, Procedural Order No. 3 on the EC's Application to file a written submission pursuant to ICSID Arbitration Rule 37(2) (December 20, 2021); *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the EC's Application for Leave to Intervene as a Non-Disputing Party (November 13, 2019).

[91] *See* Note B to Arbitration Rule 53 of the annotated notes to the ICSID Regulations and Rules, 1968, Doc. ICSID/4/Rev. 1. *See* 2022 ICSID Arbitration Rules, where pursuant to Rule 72(2), "[t]he procedural agreements and orders on matters addressed at the first session of the original Tribunal shall continue to apply to an interpretation, revision or annulment proceeding, with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise."

Tribunal. However, new factual evidence could potentially be admitted, particularly expert reports dealing with certain questions of law which have been filed in some cases.[92]

(iii) Advances to ICSID

55. Unlike in Tribunal proceedings, only the Applicant is responsible for paying all advances requested by ICSID in an annulment proceeding, unless the parties agree otherwise. These advances cover the hearing expenses such as transcription, translation and interpretation, ICSID's administrative fee as well as the fees and expenses of the *ad hoc* Committee members ("Costs of Proceeding"). The payments are made without prejudice to the power of the *ad hoc* Committee to decide how and by whom the costs should be ultimately paid.[93] Consequently, an Applicant must be prepared to fund the entire proceeding subject to the Committee's ultimate decision on costs. Pursuant to Regulation 15(1)(a) of the 2022 ICSID Administrative and Financial Regulations, which apply to all annulment proceedings that have been instituted since July 1, 2022, the Applicant must advance a first payment upon registration of the annulment application.

56. The Costs of Proceeding for annulment proceedings concluded over the past decade has remained stable with an average of US$400,000 since April 2016. The fees and expenses of *ad hoc* Committee members represented 73 percent of these costs, while the hearing costs and ICSID's administrative fee accounted for the remaining 27 percent.

(iv) Stay of Enforcement

57. An Applicant may in its application for annulment, or either party may at any time during the proceeding, request a stay of enforcement of all or part of the award.[94] The stay of enforcement could concern an award of damages, award of costs or some other form of relief ordered by the original Tribunal. The stay of enforcement may be either partial or full.[95] If the request for a stay is made in the application for annulment, the Secretary-General of ICSID must inform the parties of the provisional stay of enforcement when the application is registered.[96]

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[92] *See e.g.*, *Sempra Energy International v. Argentine Republic,* ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010), para. 74; *Antin*, Decision on Annulment (July 30, 2021), para. 44; *RENERGY S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/14/18; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Annulment of June 10, 2022; *see also* Pierre Mayer, "To What Extent Can an *Ad Hoc* Committee Review the Factual Findings of an Arbitral Tribunal," *in Annulment of ICSID Awards* 243 (Emmanuel Gaillard & Yas Banifatemi eds., 2004); Peter D. Trooboff, "To What Extent May an *Ad Hoc* Committee Review the Factual Findings of an Arbitral Tribunal Based on a Procedural Error," *in Annulment of ICSID Awards* 251 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).

[93] ICSID Convention Article 52(4); 2022 Administrative and Financial Regulation 15(5). *See infra* para. 72.

[94] ICSID Convention Article 52(5); Arbitration Rule 54(1); 2022 Arbitration Rule 73(1).

[95] For an example of a partial stay of enforcement of an award, *see Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/10/5, Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award (February 29, 2016).

[96] ICSID Convention Article 52(5); Arbitration Rule 54(2); 2022 Arbitration Rule 73(2).

58. The provisional stay remains in place until the *ad hoc* Committee, on a priority basis, rules on the request after having given each party an opportunity to present their observations.[97] Several *ad hoc* Committees have held that there is no presumption in favor of a stay of enforcement, and that the stay is an exception to the general enforceability of ICSID awards.[98]

59. *Ad hoc* Committees have discretion to decide whether or not to grant a stay.[99] When exercising this discretion, they take into account the specific circumstances of each case.[100] Circumstances considered have included the risk of non-recovery of sums due under the award if the award is annulled,[101] prospects of compliance with the award if the award is not annulled,[102] any history of non-compliance with other awards or failure to pay advances to cover the costs of arbitration proceedings,[103] adverse economic consequences on either

[97] Arbitration Rule 54(1) & (4). An expedited ruling may be requested, requiring the *ad hoc* Committee to decide within 30 days whether to continue the stay. The stay is automatically terminated if either party has requested an expedited ruling and the Committee does not continue the stay within 30 days of the request.

[98] *See*, *e.g.*, *BayWa*, Procedural Order No. 2 on the Stay of Enforcement of the Award (December 20, 2021), paras. 70, 73; *Burlington Resources Inc v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award (August 31, 2017), para. 73; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Applicant's Request to Continue the Stay of Enforcement of the Award (November 2, 2020), para. 33; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on the Continuation of the Provisional Stay of Enforcement of the Award (April 17, 2020), paras. 121, 127.

[99] *See*, *e.g.*, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Stay of Enforcement of the Award (March 12, 2018), para. 46; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Procedural Order No. 3 on the Decision on the Kingdom of Spain's Request for a Continuation of the Stay of Enforcement of the Award (May 20, 2020), para. 55; *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20, Decision on the Request for the Continued Stay of Enforcement of the Award (February 10, 2020), para. 70.

[100] Arbitration Rule 54(4); 2022 Arbitration Rule 73(3).

[101] *See, e.g.*, *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on Stay of Enforcement of the Award (June 28, 2021), para. 56; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on the Continuation of the Stay of Enforcement of the Award (August 26, 2020), para. 59; *RREEF*, Decision on Stay of Enforcement of the Award (October 28, 2020), para. 64

[102] *See*, *e.g.*, *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award (October 18, 2019), paras. 54-64; *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Applicant's Request for a Continued Stay on Enforcement of the Award (April 12, 2017), paras. 62-67; *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Stay of Enforcement of the Award (February 21, 2020), paras. 69-70.

[103] *See*, *e.g.*, *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Venezuela's request for the continued stay of enforcement of the award (February 23, 2018) ("*Tenaris II*"), paras. 140-143; *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on the Stay of Enforcement of the Award (August 18, 2022), para. 99; *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay's Request for the Continued Stay of Enforcement of the Award (March 22, 2018), paras. 95-99.

party and the balance of both parties' interests.[104] The merits of the application for annulment generally have not been considered relevant for purposes of deciding on a stay.[105]

60. *Ad hoc* Committees may impose conditions for a stay, or for lifting a stay, such as the issuance of some type of security or written undertaking.[106]

61. If a stay is granted, the *ad hoc* Committee may modify or terminate the stay at the request of either party.[107] A Committee may terminate a stay if the party requesting the stay of enforcement failed to fulfill a condition for the stay ordered by the Committee (*e.g.,* the provision of adequate financial security in respect of the amount due under the award). If a stay is not terminated during the proceeding, it terminates automatically upon the issuance of the *ad hoc* Committee's decision on annulment.[108]

62. In the 2022 ICSID Arbitration Rules the stay of enforcement is governed by Rule 73, which codifies practice, clarifies procedure and addresses efficiency of process. This Rule provides that the party requesting the stay must establish the circumstances that require the stay (Rule 73(3)(a)). Once a request for a stay is received, the Committee shall fix time limits for submissions on the request (Rule 73(3)(b)). If a stay is requested before the constitution of the *ad hoc* Committee, the Secretary-General will establish a schedule of submissions so that the Committee can rule on the request promptly upon constitution (Rule 73(3)(c)). The Rule simplifies the procedure by providing for only one procedure to decide all stay of enforcement requests. Under this procedure, the *ad hoc* Committee must decide on the stay within 30 days after the later of the constitution of the Committee or the last submission on the request (Rule 73(3)(d)). The *ad hoc* Committee may impose conditions for the stay, or for lifting the stay, in view of all relevant circumstances (Rule 73(4)). The Rule also addresses the subsequent alteration of a stay of enforcement and

[104] *See*, *e.g.*, *STEAG GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/4, Decision on the Stay of Enforcement of the Award (August 18, 2022), para. 66; *Quiborax SA & Non-Metallic Minerals SA v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decisión sobre la solicitud para poner término a la suspensión provisional de la ejecución del laudo (February 21, 2017), para. 62; *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/21, Decision on Stay of Enforcement of the Award (September 17, 2020), paras. 136, 157-160, 179.

[105] *See*, *e.g.*, *Cube,* Decision on the Continuation of the Provisional Stay of Enforcement of the Award (April 17, 2020), para. 139; *Antin*, Decision on the Continuation of the Provisional Stay of Enforcement of the Award (October 21, 2019), para. 83; *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award (March 24, 2017) ("*Tenaris I*"), para. 78.

[106] *See*, *e.g.*, *Tethyan*, paras. 209-210; *Standard Chartered*, para. 86; *Perenco*, Decision on Annulment (May 28, 2021), para. 80.

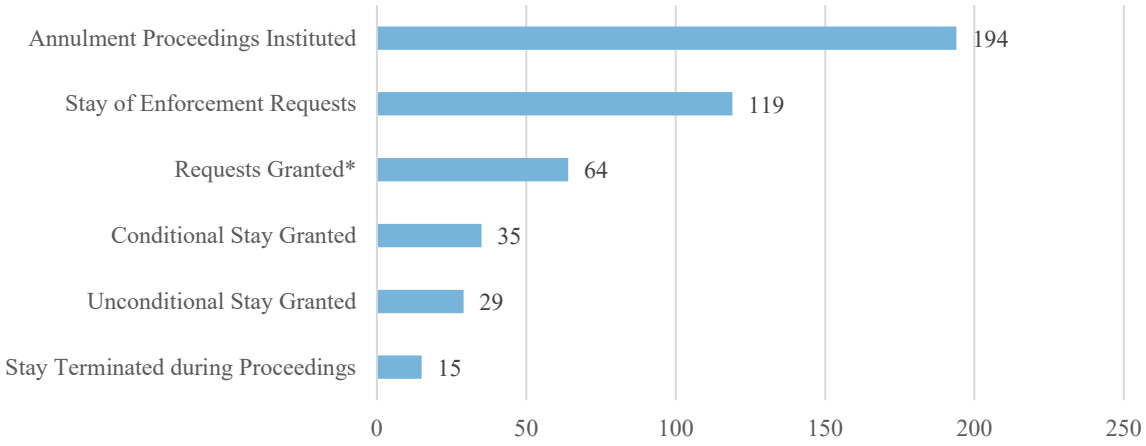
[107] Arbitration Rule 54(3); 2022 Arbitration Rule 73(6).

[108] *Id.* If an *ad hoc* Committee annuls part of an award, it may at its discretion "order the temporary stay" of the part it has not annulled. This enables the Committee to consider any advantage that the partial annulment may confer given that the annulled portion might be reconsidered by a new tribunal under ICSID Convention Article 52(6). If a Tribunal is reconstituted following a partial annulment, a party may request the stay of enforcement of the not annulled portion of the award until the date of the new tribunal's award. *See* Arbitration Rule 55(3). Although there have been several partial annulments with resubmissions, this situation has not yet occurred.

provides that the parties shall disclose any change in the circumstances upon which the enforcement was stayed (Rule 73(5)). A stay of enforcement may be modified or terminated on the *ad hoc* Committee's own initiative or upon a party's request (Rule 73(6)).[109]

63. There have been a total of 136 requests for the stay of enforcement in the 194 annulment proceedings that have been registered until December 31, 2023,[110] of which 119 have led to Committee decisions.[111] Sixty-four decisions granted the stay of enforcement.[112] In 35 of these instances where a stay was granted, it was conditioned upon the issuance of some type of security or written undertaking. In 15 of those 35 cases, the stay was terminated because the condition had not been satisfied.[113]

Decisions on Stay of Enforcement



*Excludes provisional stays by the Secretary-General

[109] 2022 Arbitration Rule 73.

[110] Requests for the stay of enforcement filed in the same proceeding have been counted separately. Reconsideration requests of stay of enforcement decisions and requests to terminate a stay have not been counted for these purposes.

[111] The decision of the *ad hoc* Committee on the stay of enforcement of the Award in *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, *Ron Fuchs v. Georgia*, ICSID Case No. ARB/07/15 and *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ARB/12/40 have each been counted as one decision for these purposes. Stays agreed by the parties have not been counted.

[112] Only publicly available information has been taken into account. Decisions granting a partial stay of the enforcement of the award have been counted for these purposes. Stays agreed by the parties are not included.

[113] Specifically, within the time period covered by this Annulment Paper (*i.e.*, April 16, 2016, to December 31, 2023), there have been 93 requests for the stay of the enforcement of the award in the 104 annulment proceedings instituted within this time frame, of which 78 have led to Committee decisions. Twenty-eight decisions granted the stay of enforcement. In 12 of these instances where a stay was granted, it was conditioned upon the issuance of some type of security or written undertaking. In 4 of those 12 cases, the stay was terminated because the condition had not been satisfied.

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

*Excludes provisional stays
**Cases with multiple requests for stay

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
1. ***Amco v. Indonesia I*** **ARB/81/1**	Indonesia	Granted	Security	May 17, 1985; Noted in 1 ICSID Rep. 509 (2003)
2. ***Amco v. Indonesia II*** **ARB/81/1- Resubmission**	Indonesia	Granted	Security	March 2, 1991; Available at 9 ICSID Rep. 59 (2006)
3. ***SPP v. Egypt*** **ARB/84/3**	Egypt	Stay agreed by Parties	Security agreed by the Parties	September 29, 1992; Noted in 8 ICSID REV. – FILJ 264 (1993)
4. ***MINE v. Guinea*** **ARB/84/4**	Guinea	Granted	No Condition	August 12, 1988; Available at 4 ICSID Rep. 111 (1997)
5. ***Vivendi v. Argentina II*** **ARB/97/3 – Resubmission**	Argentina	Granted	Written Undertaking	November 4, 2008; Noted in Decision on Annulment English
6. ***Pey Casado v. Chile*** **ARB/98/2**	Chile	Granted	No Condition	May 5, 2010; English
7. ***Pey Casado v. Chile*** **ARB/98/2 - Resubmission**	Pey Casado	Granted in part	No Condition	March 15, 2018; English | French
8. ***Wena Hotels v. Egypt*** **ARB/98/4**	Egypt	Granted	Security	April 5, 2001; Available at 18 (10) MEALEY'S INT'L ARB. REP. 33 (2003)
9. ***Mitchell v. DRC*** **ARB/99/7**	Democratic Republic of Congo	Granted	No Condition	November 30, 2004; English | French
10. ***Enron v. Argentina*** **ARB/01/3**	Argentina	Granted	No Condition	October 7, 2008; English | Spanish
11. ***MTD Equity v. Chile*** **ARB/01/7**	Chile	Granted	No Condition	June 1, 2005; English
12. ***CMS Gas v. Argentina*** **ARB/01/8**	Argentina	Granted	Written Undertaking	September 1, 2006; English | Spanish
13. ***Repsol v. Petroecuador*** **ARB/01/10**	Petroecuador	Granted	Security	December 22, 2005; Spanish
14. ***Azurix v. Argentina*** **ARB/01/12**	Argentina	Granted	No Condition	December 28, 2007; English | Spanish
15. ***CDC Group v. Seychelles*** **ARB/02/14**	Seychelles	Granted	Security	July 14, 2004; Available at 11 ICSID Rep. 225 (2007)
16. ***Sempra v. Argentina*** **ARB/02/16**	Argentina	Granted	Security	March 5, 2009; English | Spanish
17. ***Continental Casualty v. Argentina*** **ARB/03/9**	Argentina	Granted	No Condition	October 23, 2009; Noted in Decision on Annulment English | Spanish
18. ***El Paso v. Argentina*** **ARB/03/15**	Argentina	Granted	No Condition	November 14, 2012; Noted in Decision on Annulment English | Spanish
19. ***EDF v. Argentina*** **ARB/03/23**	Argentina	Granted	Written Undertaking	July 18, 2013; Noted in Decision on Annulment English | Spanish
20. ***Duke Energy v. Peru*** **ARB/03/28**	Peru	Granted	Written Undertaking	June 23, 2009; Noted in Decision on Annulment English
21. ***Total v. Argentina*** **ARB/04/1**	Argentina	Rejected	N/A	December 4, 2014; Noted in Decision on Annulment English | Spanish
22. ***SAUR v. Argentina*** **ARB/04/4**	Argentina	Granted	Written Undertaking	March 1, 2016; Noted in Decision on Annulment French | Spanish
23. ***Transgabonais v. Gabon*** **ARB/04/5**	Gabon	Granted	Written Undertaking	March 13, 2009; Noted in Decision on Annulment 26 ICSID Rev.— FILJ 214 (2011) French (excerpts)

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
24. ***Rumeli v. Kazakhstan*** **ARB/05/16**	Kazakhstan	Granted	Written Undertaking	March 19, 2009; Noted in Decision on Annulment English
25. ***Kardassopoulos / Fuchs v. Georgia*** **ARB/05/18; ARB/07/15**	Georgia	Granted	Security	November 12, 2010; English
26. ***Micula v. Romania*** **ARB/05/20**	Romania	Granted	Written Undertaking	August 7, 2014; Noted in Decision on Annulment English
27. ***Togo Electricité v. Togo*** **ARB/06/7**	Togo	Granted	No Condition	January 31, 2011; Noted in Decision on Annulment French
28. ***Libananco v. Turkey*** **ARB/06/8**	Libananco	Granted	No Condition	May 7, 2012; English
29. ***Occidental v. Ecuador*** **ARB/06/11**	Ecuador	Granted	No Condition	September 30, 2013; English
30. ***Lemire v. Ukraine*** **ARB/06/18**	Ukraine	Granted	Security	February 14, 2012; Noted in Decision on Annulment English (excerpts)
31. ***RSM v. Central African Republic*** **ARB/07/2**	RSM	Rejected	N/A	March 29, 2012; Noted in Decision on Annulment French (excerpts)
32. ***Venezuela Holdings v. Venezuela*** **ARB/07/27**	Venezuela	Granted	Written Undertaking	September 17, 2015; English
33. ***SGS v. Paraguay*** **ARB/07/29**	Paraguay	Rejected	N/A	March 22, 2013; English
34. ***Caratube v. Kazakhstan*** **ARB/08/12**	Caratube	Granted	No Condition	March 14, 2013; Noted in Decision on Annulment English
35. ***Elsamex v. Honduras*** **ARB/09/4**	Honduras	Granted	Written Undertaking	January 7, 2014; Spanish
36. ***Iberdrola v. Guatemala*** **ARB/09/5**	Iberdrola	Stay agreed by Parties	Security	October 28, 2013; Noted in Decision on Annulment Spanish
37. ***Dogan v. Turkmenistan*** **ARB/09/9**	Turkmenistan	Granted	Security	November 24, 2014; Noted in Decision on Annulment English
38. ***Kılıç v. Turkmenistan*** **ARB/10/1**	Kılıç	Granted	Security	June 5, 2014; Noted in Decision on Annulment English
39. ***Lahoud v. DRC*** **ARB/10/4**	Democratic Republic of Congo	Granted	Security	September 30, 2014; French
40. ***Tidewater v. Venezuela*** **ARB/10/5**	Venezuela	Partially granted	No Condition	February 29, 2016; English | Spanish
41. ***Flughafen v. Venezuela*** ** **ARB/10/19**	Venezuela Venezuela	Granted Rejected	Security N/A	March 11, 2016; Spanish October 18, 2018; Noted in Decision on Annulment Spanish
42. ***Teco v. Guatemala*** **ARB/10/23**	Guatemala	Granted	No Condition	February 10, 2015; Noted in Decision on Annulment English
43. ***Teco v. Guatemala*** **ARB/10/23 - Resubmission**	Guatemala	Granted	No Condition	May 17, 2021; English | Spanish
44. ***Rizvi v. Indonesia*** **ARB/11/13**	Rizvi	Information not publicly available	Information not publicly available	February 5, 2015
45. ***OI European Group v. Venezuela*** ** **ARB/11/25**	Venezuela Venezuela	Rejected Rejected	N/A N/A	April 4, 2016; English September 24, 2018; Noted in Decision on Annulment; English

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
46. ***Suez v. Argentina*** **ARB/03/17**	Argentina	Rejected	N/A	June 21, 2017; Noted in Decision on Annulment English | Spanish
47. ***Suez v. Argentina*** **ARB/03/19**	Argentina	Rejected	N/A	June 7, 2016; Noted in Decision on Annulment English | Spanish
48. ***Mobil v. Argentina*** **ARB/04/16**	Argentina	Granted	No Condition	January 18, 2017; Spanish
49. ***Quiborax v. Bolivia*** **ARB/06/2**	Bolivia	Granted	No Condition	February 21, 2017; Spanish
50. ***Vestey Group v. Venezuela*** **ARB/06/4**	Venezuela	Stayed agreed by Parties	N/A	February 6, 2017; Noted in Decision on Annulment English | Spanish
51. ***ConocoPhillips v. Venezuela*** **ARB/07/30**	Venezuela	Rejected	N/A	November 2, 2020; English
52. ***Hochtief v. Argentina*** **ARB/07/31**	Argentina	Information not publicly available	Information not publicly available	March 23, 2018
53. ***Burlington v. Ecuador*** **ARB/08/5**	Ecuador	Rejected	N/A	August 31, 2017; English
54. ***Perenco v. Ecuador*** **ARB/08/6**	Ecuador	Granted	Written Undertaking	February 21, 2020; English
55. ***Carnegie v. The Gambia*** **ARB/09/19**	The Gambia	Granted	No Condition	October 18, 2018; English
56. ***Bernhard von Pezold v. Zimbabwe*** **ARB/10/15**	Zimbabwe	Rejected	N/A	April 24, 2017; English
57. ***Niko Resources et al v. Petrobangla & Bapex*** **ARB/10/18**	Petrobangla & Bapex	Granted	Written Undertaking	July 19, 2022; Noted in Decision on Annulment English
58. ***Standard Chartered Bank v. Tanzania Electric Supply Company Limited*** **ARB/10/20**	Tanzania Electric Supply Company Limited	Granted	Security	April 12, 2017; English
59. ***Border Timbers v. Zimbabwe*** **ARB/10/25**	Zimbabwe	Rejected	N/A	April 24, 2017; English
60. ***Koch Minerals v. Venezuela*** **ARB/11/19**	Venezuela	Rejected	N/A	April 1, 2019; English
61. ***Tenaris v. Venezuela*** **ARB/11/26**	Venezuela	Rejected	N/A	March 24, 2017; English | Spanish
62. ***Tethyan v. Pakistan*** **ARB/12/1**	Pakistan	Granted	Security	September 17, 2020; English
63. ***Saint-Gobain v. Venezuela*** **ARB/12/13**	Venezuela	Rejected	N/A	October 24, 2018; English
64. ***Churchill Mining & Planet Mining v. Indonesia*** **ARB/12/14 & ARB/12/40**	Churchill Mining & Planet Mining	Granted	Security	June 27, 2017; English
65. ***Blue Bank v. Venezuela*** **ARB/12/20**	Blue Bank	Granted	No Condition	June 27, 2018; Noted in Decision on Annulment Spanish
66. ***Tenaris v. Venezuela*** **ARB/12/23**	Venezuela	Rejected	N/A	February 23, 2018; English
67. ***UAB E energija v. Latvia*** **ARB/12/33**	Latvia	Stay agreed by Parties	N/A	November 13, 2018; Noted in Decision on Annulment English
68. ***Orascom v. Algeria*** **ARB/12/35**	Orascom	Granted	Security	March 12, 2018; Noted in Decision on Annulment English | French

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
69. ***Karkey v. Pakistan*** ** **ARB/13/1**	Pakistan Pakistan	Rejected Information not publicly available	N/A Information not publicly available	February 22, 2018; English July 2, 2018
70. ***Valores Mundiales v. Venezuela*** **ARB/13/11**	Venezuela	Rejected	N/A	September 6, 2018; Spanish
71. ***Caratube & Devincci Salah Hourani v. Kazakhstan*** **ARB/13/13**	Caratube & Devincci Salah Hourani	Granted	No Condition	December 12, 2019; English
72. ***RREEF Infrastructure et al v. Spain*** **ARB/13/30**	Spain	Granted	No Condition	October 28, 2020; English
73. ***Infrastructure Services et al (formerly Antin et al) v. Spain*** **ARB/13/31**	Spain	Rejected	N/A	October 21, 2019; English
74. ***UP and C.D Holding Internationale v. Hungary*** **ARB/13/35**	Hungary	Rejected	N/A	December 27, 2019; Noted in Decision on Annulment English
75. ***Eiser Infrastructure et al v. Spain*** **ARB/13/36**	Spain	Rejected	N/A	March 23, 2018; English
76. ***Fouad Alghanim et al v. Jordan*** **ARB/13/38**	Foud Alghanim et al	Information not publicly available	Information not publicly available	October 15, 2018
77. ***Masdar v. Spain*** **ARB/14/1**	Spain	Rejected	N/A	May 20, 2020; English
78. ***NextEra v. Spain*** **ARB/14/11**	Spain	Granted	Written Undertaking	April 6, 2020; English
79. ***InfraRed et al v. Spain*** **ARB/14/12**	Spain	Rejected	N/A	October 27, 2020; English
80. ***RENERGY v. Spain*** **ARB/14/18**	Spain	Information not publicly available	Information not publicly available	May 12, 2023
81. ***Sodexo v. Hungary*** **ARB/14/20**	Hungary	Rejected	N/A	February 10, 2020; English
82. ***Albaniabeg v. Albania*** **ARB/14/26**	Albania	Granted	No Condition	August 10, 2021; English
83. ***Casino Austria et al v. Argentina*** **ARB/14/32**	Austria	Information not publicly available	Information not publicly available	January 13, 2023
84. ***RWE Innogy v. Spain*** **ARB/14/34**	Spain	Rejected	N/A	November 22, 2021; English
85. ***Baymina v. Boru Hatları ile Petrol Taşıma Anonim Şirketi*** **ARB/14/35**	Boru Hatları ile Petrol Taşıma Anonim Şirketi	Information not publicly available	Information not publicly available	June 25, 2018
86. ***Unión Fenosa Gas v. Egypt*** **ARB/14/4**	Egypt	Granted	Security and written undertaking	October 18, 2019; English
87. ***9REN Holding v. Spain*** **ARB/15/15**	Spain	Granted	No Condition	November 19, 2021; English
88. ***BayWa et al v. Spain*** **ARB/15/16**	Spain	Rejected	N/A	December 20, 2021; English
89. ***Cube Infrastructure et al v. Spain*** **ARB/15/20**	Spain	Rejected	N/A	April 17, 2020; English
90. ***JGC Holdings v. Spain*** **ARB/15/27**	Spain	Information not publicly available	Information not publicly available	November 23, 2022
91. ***Hydro et al v. Albania*** **ARB/15/28**	Albania	Rejected	N/A	March 13, 2020; Noted in Decision on Annulment English

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
92. ***Cortec Mining v. Kenya*** **ARB/15/29**	Cortec Mining	Granted	Security	August 23, 2019; Noted in Decision on Annulment English
93. ***Abed El Jaouni v. Lebanese Republic*** **ARB/15/3**	Abed El Jaouni	Information not publicly available	Information not publicly available	October 26, 2021
94. ***OperaFund et al v. Spain*** **ARB/15/36**	Spain	Rejected	N/A	November 16, 2020; English
95. ***SolEs Badajoz v. Spain*** **ARB/15/38**	Spain	Granted	No Condition	August 26, 2020; English
96. ***STEAG GmbH v. Spain*** **ARB/15/4**	Spain	Granted	Security	August 18, 2022; English
97. ***Hydro Energy v. Spain*** **ARB/15/42**	Spain	Rejected	N/A	March 26, 2021; English
98. ***Watkins Holdings et al v. Spain*** **ARB/15/44**	Spain	Granted	No Condition	June 28, 2021; English
99. ***Aktau Petrol Ticaret v. Kazakhstan*** ** **ARB/15/8**	Kazakhstan Kazakhstan	Information not publicly available Information not publicly available	Information not publicly available Information not publicly available	June 13, 2018 January 24, 2019
100. ***Dominion Minerals v. Panama*** **ARB/16/13**	Panama	Granted	No Condition	July 21, 2022; English
101. ***Sun-Flower Olmeda v. Spain*** **ARB/16/17**	Spain	Rejected	N/A	April 29, 2022; English
102. ***Raymond Charles Eyre and Montrose Developments v. Sri Lanka*** **ARB/16/25**	Raymond Charles Eyre and Montrose Developments	Granted	Written Undertaking	July 16, 2020; Noted in Excerpts of Decision on Annulment English (excerpts)
103. ***Viaduct d.o.o. Portorož et al v. Bosnia and Herzegovina*** **ARB/16/36**	Bosnia and Herzegovina	Information not publicly available	Information not publicly available	December 2, 2022
104. ***ESPF Beteiligungs GmbH et al v. Italy*** **ARB/16/5**	Italy	Rejected	N/A	July 9, 2021; English
105. ***Glencore International v. Colombia*** **ARB/16/6**	Colombia	Granted	No Condition	April 28, 2020; English
106. ***Attila Doğan v. Oman*** **ARB/16/7**	Attila Doğan	Information not publicly available	Information not publicly available	December 23, 2021
107. ***Rockhopper Italia et al v. Italy*** **ARB/17/14**	Italy	Information not publicly available	Information not publicly available	April 24, 2023
108. ***(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Madagascar*** **ARB/17/1**	Madagascar	Stay agreed by Parties	N/A	January 27, 2021; Noted in Decision on Annulment English | French
109. ***Mera Investment v. Serbia*** **ARB/17/2**	Serbia	Information not publicly available	Information not publicly available	November 24, 2021
110. ***Magyar Farming Company et al v. Hungary*** **ARB/17/27**	Hungary	Information not publicly available	Information not publicly available	September 11, 2020
111. ***EcoDevelopment and EcoEnergy v. Tanzania*** **ARB/17/33**	Tanzania	Information not publicly available	Information not publicly available	September 15, 2022

Case	Applicant	Stay of Enforcement	Condition for Stay	Decision on Stay and Source of Publication
112. ***Edmond Khudyan and Arin Capital & Investment v. Armenia*** **ARB/17/36**	Edmond Khudyan and Arin Capital & Investment	Information not publicly available	Information not publicly available	April 8, 2023
113. ***Almasryia v. Kuwait*** **ARB/18/2**	Almasryia	Information not publicly available	Information not publicly available	August 20, 2021
114. ***Agroinsumos Ibero-Americanos et al v. Venezuela*** **ARB/16/23**	Venezuela	Information not publicly available	Information not publicly available	July 18, 2023
115. ***Gardabani et al v. Georgia*** **ARB/17/29**	Georgia	Granted	No Condition	August 8, 2023; English
116. ***Rizzani de Eccher et al v. Kuwait*** **ARB/17/8**	Rizzani de Echer et al	Information not publicly available	Information not publicly available	October 11, 2023
117. ***Rasia FZE et al v. Armenia*** **ARB/18/28**	Rasia FZE et al	Information not publicly available	Information not publicly available	October 16, 2023
118. ***BRIF TRES et al v. Serbia*** **ARB/20/12**	BRIF TRES et al	Information not publicly available	Information not publicly available	September 11, 2023
119. ***Nachingwea et al v. Tanzania*** **ARB/20/39**	Tanzania	Granted	Written Undertaking	October 31, 2023; English
120. ***LSK-KEB Holdings et al v. Korea*** **ARB/12/37**	Korea	Granted	No Condition	December 15, 2023; English

(v) Hearing and Post-Hearing Phases

64. The filing of written pleadings is followed by an oral hearing which generally lasts one to two days. The hearing is usually limited to the parties' oral arguments and, in some cases, to examination of legal experts whose opinions were submitted by the parties in the annulment proceeding. Because an *ad hoc* Committee does not reexamine the facts of the dispute, factual witnesses usually do not have any role in the process.[114]

65. At the hearing or shortly thereafter, the *ad hoc* Committee invites the parties to file submissions on costs and sometimes also to file post-hearing briefs. The *ad hoc* Committee closes the proceeding once the presentation of the annulment case is concluded and the Committee has made progress in the deliberations. It must issue the decision on annulment within 120 days from the date of closure.[115]

66. Under the 2022 Arbitration Rules, the closure of the proceeding is no longer required and as such, the time limit of 120 days to issue a decision on annulment is calculated from the date of the last submission on the annulment application.[116]

67. Of the 73 decisions on annulment issued since the publishing of the last paper (*i.e.*, April 16, 2016), 54 have been issued within one year of the hearing. The average time from the

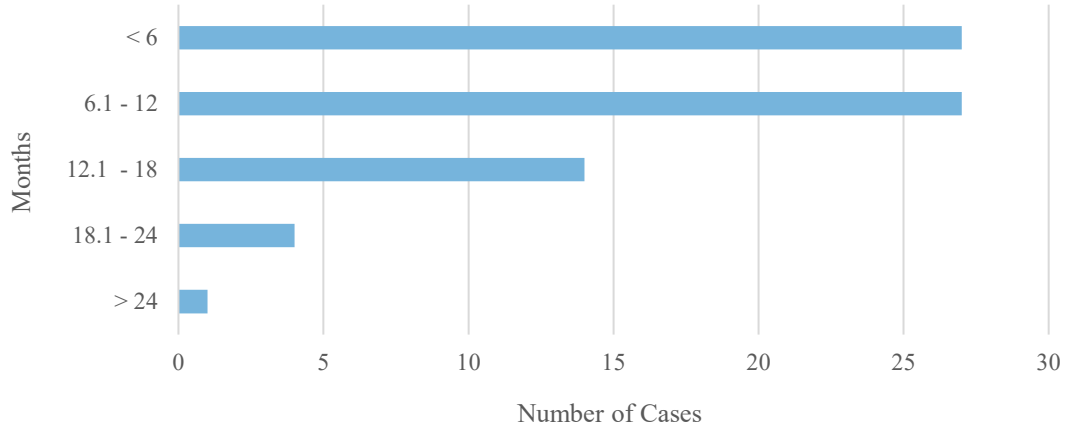
[114] *But see supra*, para. 54 & note 92.

[115] *See* Arbitration Rules 38(1) & 46.

[116] *See* 2022 Arbitration Rule 72(5).

hearing to issuance of these 73 decisions was 9 months. During the same period, the average time for an annulment proceeding from the registration of the application for annulment until the issuance of the decision was 28 months.[117] The average duration of all annulment proceedings that concluded between April 16, 2016, and December 31, 2023,[118] is 26 months from the date of registration (24 months from the date of constitution of the *ad hoc* Committee[119]).

Duration of Annulment Proceedings from the Date of Registration (April 16, 2016 - December 31, 2023)



D. *The Decision on Annulment*

68. The proceeding ends with the *ad hoc* Committee's decision on annulment. The Committee may: (i) reject all grounds for annulment, meaning that the award remains intact; (ii) uphold one or more grounds for annulment in respect of a part of the award, leading to a partial annulment; (iii) uphold one or more grounds for annulment in respect of the entire award, meaning that the whole of the award is annulled; or (iv) exercise its discretion not to annul notwithstanding that an error has been identified.[120]

69. The proceeding may also be discontinued before the Committee issues a final decision because the parties agree on a settlement, a party does not object to the other party's request for discontinuance, due to nonpayment of the advances requested by ICSID to cover the Costs of Proceeding, or because the parties fail to take any steps in the proceeding during six consecutive months.[121] Several annulment proceedings have been discontinued due to

[117] This average excludes discontinued proceedings.

[118] This average includes all annulment proceedings concluded including discontinued proceedings.

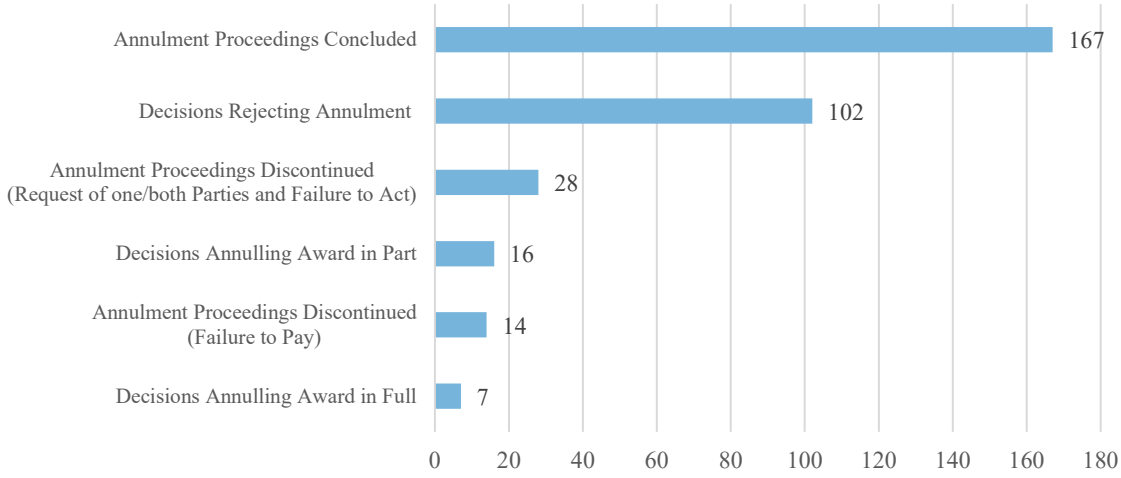
[119] This average excludes two proceedings that were discontinued before constitution of the *ad hoc* Committee.

[120] ICSID Convention Article 52(3), *see infra*, para. 80(4).

[121] Arbitration Rules 43-45; 2022 Arbitration Rules 54-57; 2022 Administrative and Financial Regulation 16(2)(c).

an Applicant's failure to pay the advances and the other party's unwillingness to make the outstanding payment.[122] Discontinuance of an annulment proceeding occurs in approximately 25% of all annulment proceedings.

Annulment Proceedings - Outcomes



70. The *ad hoc* Committee's decision on annulment is not an award and is not subject to any further annulment proceeding, although it is equated to an award for purposes of its binding force, recognition and enforcement.[123] Likewise, the decision must contain the elements required in an award.[124] Notably, the decision must include the reasons upon which it is based.[125] As to the requirement to deal with every question, two *ad hoc* Committees have opined that once an award is annulled in full on any ground, it is unnecessary to examine whether other grounds may also lead to annulment.[126] Similarly, some *ad hoc* Committees which partially annulled an award based on one ground did not see the need to examine alternative grounds for annulment of the same portion of the award that had been

[122] *See* Annex 1. As noted in para. 52, the Applicant is solely responsible for the advance payments to ICSID in annulment proceedings. Under the 2022 Administrative and Financial Regulation 16(2)(a) through (c), if an Applicant fails to make an advance, the Secretary-General informs both parties of the default and gives an opportunity to either of them to make the outstanding payment within 15 days. If neither party makes the payment, the Secretary-General may, after giving notice to the parties and the *ad hoc* Committee, suspend the proceeding and eventually discontinue it after 90 consecutive days.

[123] ICSID Convention Article 53(2).

[124] *Id.* at Articles 48 & 52(4); Arbitration Rules 47 & 53; 2022 Arbitration Rules 59 & 72(1).

[125] *Id.* at Articles 48(3) & 52(4); Arbitration Rules 47(1)(i) & 53; 2022 Arbitration Rules 59(1)(i) & 72(1).

[126] *See e.g.*, *Sempra*, para 78 and *Eiser,* para. 256.

annulled.[127] Other *ad hoc* Committees examined all grounds raised, even where one of these grounds warranted full annulment.[128]

71. Nothing in the ICSID Convention or rules expressly prohibits an *ad hoc* Committee from stating its opinion on any issue addressed by the award. However, some decisions have stated that an *ad hoc* Committee should not pronounce upon aspects of the award that are not essential to its decision.[129]

72. The decision on annulment must also contain the *ad hoc* Committee's determination on the allocation of costs incurred by the parties in connection with the annulment proceeding.[130] The Committee has discretion to decide how and by whom these costs should be paid, including each party's legal fees and expenses.[131] The observations articulated in the 2016 Annulment Paper regarding the evolving approach of *ad hoc* Committees in determining costs and fees remain pertinent and are increasingly corroborated by recent case law.[132] There is a continuing trend of *ad hoc* Committees deciding that the Applicant should bear all or a majority of the Costs of Proceeding when the application for annulment was

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[127] *See e.g.*, *MINE v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision of the *ad hoc* Annulment Committee (December 22, 1989), para. 6.109; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) ("*Vivendi I*"), paras. 115-116; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award (November 2, 2015), para. 302; *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (April 5, 2016) ("*TECO I*"), paras. 150, 159 & 167.

[128] *See e.g.*, *Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco respectively for Annulment and Partial Annulment of the Arbitral Award of June 5, 1990, and the Application by Indonesia for the Annulment of the Supplemental Award of October 17, 1990 (December 17, 1992) ("*Amco I*"), para. 16; *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case ARB/81/2, Decision on the Application for Annulment submitted by Klöckner against the Arbitral Award rendered on October 21, 1983 (May 3, 1985) ("*Klöckner I*"), para. 82.

[129] *See, e.g., Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010), para. 340; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Application for Annulment of the Argentine Republic (September 1, 2009) para. 362; *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (June 29, 2009), para. 70; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (September 5, 2007), para. 112; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the ad hoc Committee on the Application for Annulment (June 29, 2012), para. 15; *Tza Yap Shum v. Republic of Peru*, Decision on Annulment (February 12, 2015), para. 81; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on Annulment (March 1, 2011), para. 99; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (January 15, 2016), paras. 261-263; *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on Annulment (June 22, 2020), para. 86; *Sodexo*, Decision on Annulment (May 7, 2021) para. 93; *TECO I*, para. 78.

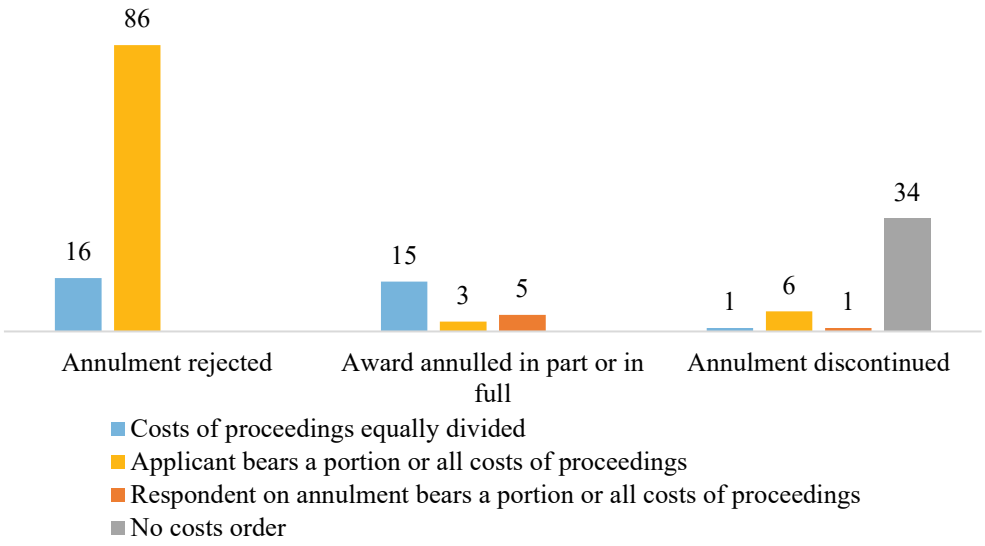
[130] ICSID Convention Articles 52(4) & 61(2); Arbitration Rules 47(1)(j) & 53; Administrative and Financial Regulation 15(2); 2022 Arbitration Rule 59(1)(j) & 72(1).

[131] *Id.*

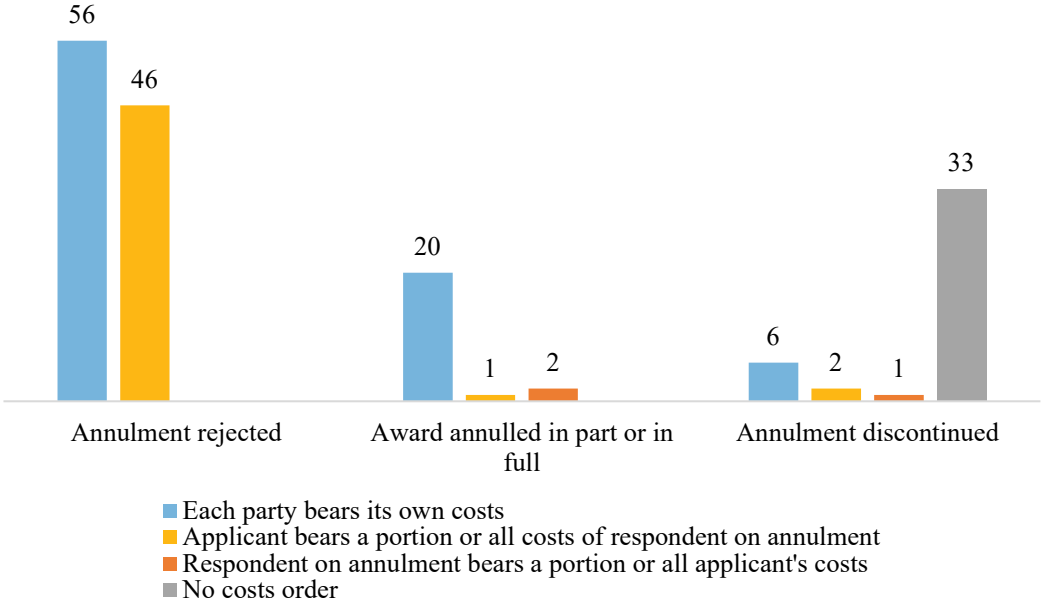
[132] *See* 2016 Annulment Paper, para. 65.

unsuccessful. Some *ad hoc* Committees have also ruled that the losing party should bear the legal fees and expenses of the successful party.[133]

Allocation of Costs of the Annulment Proceedings
(as of December 31, 2023)



Allocation of Parties' Own Costs in Annulment Proceedings
(as of December 31, 2023)



[133] As noted above, a decision on the allocation of costs in a decision on annulment is enforceable in the same manner as an ICSID award. ICSID Convention Article 53(2).

Decisions on Allocation of Costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
1. ***Amco v. Indonesia I*** ARB/81/1	Indonesia	Annulled in part	Divided equally	Each Party bears its own costs
2. ***Amco v. Indonesia II*** ARB/81/1 - Resubmission	Both Parties	Annulment rejected English	Divided equally	Each Party bears its own costs
3. ***Klöckner v. Cameroon I*** ARB/81/2	Klöckner	Annulled in full English	Divided equally	Each Party bears its own costs
4. ***Klöckner v. Cameroon II*** ARB/81/2 – Resubmission	Both Parties	Annulment rejected	Divided equally	Each Party bears its own costs
5. ***SPP v. Egypt*** ARB/84/3	Egypt	Discontinued	Settlement – No order on costs	Settlement – No order on costs
6. ***MINE v. Guinea*** ARB/84/4	Guinea	Annulled in part English	Divided equally	Each Party bears its own costs
7. ***Vivendi v. Argentina I*** ARB/97/3	Vivendi	Annulled in part English | Spanish	Divided equally	Each Party bears its own costs
8. ***Vivendi v. Argentina II*** ARB/97/3 – Resubmission	Argentina	Annulment rejected English | Spanish	Divided equally	Each Party bears its own costs
9. ***Pey Casado v. Chile*** ARB/98/2	Chile	Annulled in part English | French	Divided equally	Each Party bears its own costs
10. ***Pey Casado v. of Chile (2nd Annulment)*** ARB/98/2	Pey Casado	Annulment rejected English | French	Applicants	Each Party bears its own costs
11. ***Wena Hotels v. Egypt*** ARB/98/4	Egypt	Annulment rejected English	Divided equally	Each Party bears its own costs
12. ***Gruslin v. Malaysia*** ARB/99/3	Both Parties	Discontinued (Lack of Payment)	No order on costs	No order on costs
13. ***Mitchell v. DRC*** ARB/99/7	DRC	Annulled in full English	Divided equally	Each Party bears its own costs
14. ***RFCC v. Morocco*** ARB/00/6	RFCC	Annulment rejected	Applicant	Each Party bears its own costs
15. ***Enron v. Argentina*** ARB/01/3	Argentina	Annulled in part English	Divided equally	Each Party bears its own costs
16. ***MTD Equity v. Chile*** ARB/01/7	Chile	Annulment rejected English	Divided equally	Each Party bears its own costs
17. ***CMS Gas v. Argentina*** ARB/01/8	Argentina	Annulled in part English | Spanish	Divided equally	Each Party bears its own costs
18. ***Repsol v. Petroecuador*** ARB/01/10	Petroecuador	Annulment rejected English | Spanish	Applicant	Applicant
19. ***Azurix v. Argentina*** ARB/01/12	Argentina	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
20. ***LG&E v. Argentina*** ARB/02/1	Both Parties	Discontinued English | Spanish	No order on costs	No order on costs
21. ***Soufraki v. UAE*** ARB/02/7	Soufraki	Annulment rejected English	Divided equally	Each Party bears its own costs
22. ***Siemens v. Argentina*** ARB/02/8	Argentina	Discontinued	Settlement – Divided equally	Settlement – Each Party bears its own costs
23. ***CDC Group v. Seychelles*** ARB/02/14	Seychelles	Annulment rejected English	Applicant	Applicant
24. ***Ahmonseto v. Egypt*** ARB/02/15	Ahmonseto	Discontinued (Lack of Payment)	Applicant	Each Party bears its own costs
25. ***Sempra v. Argentina*** ARB/02/16	Argentina	Annulled in full English | Spanish	Respondent on Annulment	Each Party bears its own costs
26. ***Lucchetti v. Peru*** ARB/03/4	Lucchetti	Annulment rejected English | Spanish	Divided equally	Each Party bears its own costs
27. ***MCI v. Ecuador*** ARB/03/6	MCI	Annulment rejected English | Spanish	Divided equally	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
28. ***Continental Casualty v. Argentina*** ARB/03/9	Both Parties	Annulment rejected English | Spanish	Divided equally	Each Party bears its own costs
29. ***Joy Mining v. Egypt*** ARB/03/11	Joy Mining	Discontinued English	Settlement – no order on costs	Settlement – no order on costs
30. ***El Paso v. Argentina*** ARB/03/15	Argentina	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
31. *Suez v.* ***Argentina*** ARB/03/17	Argentina	Annulment rejected English	Each Party bears its own costs	Each Party bears its own costs
32. *Suez v.* ***Argentina*** ARB/03/19	Argentina	Annulment rejected English	Applicant	Each Party bears its own costs
33. ***EDF v. Argentina*** ARB/03/23	Argentina	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
34. ***Fraport v. Philippines*** ARB/03/25	Fraport	Annulled in full English	Divided equally	Each Party bears its own costs
35. ***Duke Energy v. Peru*** ARB/03/28	Peru	Annulment rejected English	Applicant	Each Party bears its own costs
36. ***Total v. Argentina*** ARB/04/1	Argentina	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
37. ***SAUR v. Argentina*** ARB/04/4	Argentina	Annulment rejected Spanish | French	Applicant	Each Party bears its own costs
38. ***Transgabonais v. Gabon*** ARB/04/5	Gabon	Annulment rejected French (excerpts)	Applicant	Applicant
39. ***Vieira v. Chile*** ARB/04/7	Vieira	Annulment rejected Spanish	Applicant	Applicant
40. ***Mobil v. Argentina*** ARB/04/16	Argentina	Annulment rejected Spanish	Divided equally	Each Party bears its own costs
41. ***Daimler v. Argentina*** ARB/05/1	Daimler	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
42. ***MHS v. Malaysia*** ARB/05/10	MHS	Annulled in full English	Respondent on Annulment	Each Party bears its own costs
43. ***RSM v. Grenada*** ARB/05/14	RSM	Discontinued (Lack of Payment)	Applicant	Applicant
44. ***Siag v. Egypt*** ARB/05/15	Egypt	Discontinued	Applicant	Each Party bears its own costs
45. ***Rumeli v. Kazakhstan*** ARB/05/16	Kazakhstan	Annulment rejected English	Divided equally	Each Party bears its own costs
46. ***Kardassopoulos / Fuchs v. Georgia*** ARB/05/18; ARB/07/15	Georgia	Discontinued	Settlement – no order on costs	Settlement – no order on costs
47. ***Helnan v. Egypt*** ARB/05/19	Helnan	Annulled in part English	Divided equally	Each Party bears its own costs
48. ***Micula v. Romania*** ARB/05/20	Romania	Annulment rejected English	Applicant	Each Party bears its own costs
49. ***Quiborax v. Bolivia*** ARB/06/2	Bolivia	Annulment rejected Spanish	Applicant	Each Party bears its own costs
50. ***Vestey Group v. Venezuela*** ARB/06/4	Venezuela	Annulment rejected English | Spanish	Applicant	Applicant
51. ***Togo Electricité v. Togo*** ARB/06/7	Togo	Annulment rejected French	Applicant	Applicant
52. ***Libananco v. Turkey*** ARB/06/8	Libananco	Annulment rejected English (excerpts)	Applicant	Each Party bears its own costs
53. ***Occidental v. Ecuador*** ARB/06/11	Ecuador	Annulled in part English | Spanish	Divided equally	Each Party bears its own costs
54. ***Lemire v. Ukraine*** ARB/06/18	Ukraine	Annulment rejected English (excerpts)	Applicant	Each party bears its own costs
55. ***RSM v. Central African Republic*** ARB/07/2	RSM	Annulment rejected French (excerpts)	Applicant	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
56. ***Tza Yap Shum v. Peru*** ARB/07/6	Peru	Annulment rejected Spanish | English	Divided with Applicant to bear 80% of the costs of the proceedings and Respondent 20%.	Each Party bears its own costs
57. ***Impregilo v. Argentina*** ARB/07/17	Argentina	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
58. ***AES Summit v. Hungary*** ARB/07/22	AES Summit	Annulment rejected English	Applicant	Applicant
59. ***Venezuela Holdings v. Venezuela*** ARB/07/27	Venezuela	Annulled in part English | Spanish	Divided equally	Each Party bears its own costs
60. ***SGS v. Paraguay*** ARB/07/29	Paraguay	Annulment rejected English	Applicant	Each Party bears its own costs
61. ***Astaldi v. Honduras*** ARB/07/32	Honduras	Discontinued Spanish	Settlement – no order on costs	Settlement – no order on costs
62. ***ATA v. Jordan*** ARB/08/2	Jordan	Discontinued English	Respondent on Annulment	Respondent on Annulment
63. ***Burlington v. Ecuador*** ARB/08/5	Ecuador	Discontinued	Information not publicly available	Information not publicly available
64. ***Perenco v. Ecuador*** ARB/08/6	Ecuador	Annulled in part English	Divided with Applicant to bear 90% of the costs of the proceedings and Respondent on Annulment 10%.	Each Party bears its own costs
65. ***Caratube v. Kazakhstan*** ARB/08/12	Caratube	Annulment rejected English	Applicant	Each Party bears its own costs
66. ***Alapli v. Turkey*** ARB/08/13	Alapli	Annulment rejected English	Applicant	Applicant
67. ***Malicorp v. Egypt*** ARB/08/18	Malicorp	Annulment rejected English | French	Applicant	Each Party bears its own costs
68. ***Teinver v. Argentina*** ARB/09/1	Argentina	Annulment rejected English	Applicant	Applicant bears more than 75% of the legal fees incurred by Respondent on Annulment
69. ***Elsamex v. Honduras*** ARB/09/4	Honduras	Discontinued Spanish	Settlement – no order on costs	Settlement – no order on costs
70. ***Iberdrola v. Guatemala*** ARB/09/5	Iberdrola	Annulment rejected Spanish	Divided equally	Each Party bears its own costs
71. ***KT Asia v. Kazakhstan*** ARB/09/8	KT Asia	Discontinued (Lack of payment)	Information not publicly available	Information not publicly available
72. ***Dogan v. Turkmenistan*** ARB/09/9	Turkmenistan	Annulment rejected English	Applicant	Applicant
73. ***Commerce Group v. El Salvador*** ARB/09/17	Commerce Group	Discontinued (Lack of payment) English	Applicant	Each Party bears its own costs
74. ***Carnegie v. Gambia*** ARB/09/19	Gambia	Annulment rejected English	Divided equally	Each Party bears its own costs
75. ***Kılıç v. Turkmenistan*** ARB/10/1	Kılıç	Annulment Rejected English	Applicant	Each Party bears its own costs
76. ***Lahoud v. DRC*** ARB/10/4	DRC	Annulment rejected French	Applicant	Applicant bears its own costs and half the costs incurred by Respondent on Annulment
77. ***Tidewater v. Venezuela*** ARB/10/5	Venezuela	Annulled in part English | Spanish	Respondent on Annulment bears 30% of the Applicant's costs of proceedings	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
78. ***Bernhard von Pezold v. Zimbabwe*** ARB/10/15	Zimbabwe	Annulment rejected English	Applicant	Applicant bears its own costs and 1/2 the Respondent on Annulment's legal fees
79. ***Flughafen Zürich v. Venezuela*** ARB/10/19	Venezuela	Annulment rejected Spanish	Applicant	Each Party bears its own costs
80. ***Standard Chartered Bank v. Tanzania Electric Supply Company Limited*** ARB/10/20	Tanzania	Annulment rejected English	Applicant	Each Party bears its own costs
81. ***TECO v. Guatemala*** ARB/10/23	Both Parties	Annulled in part English | Spanish	Divided equally (TECO's application); Applicant (Guatemala's application)	Each Party bears its own costs (TECO's application); Applicant bears 60% of legal fees and expenses (Guatemala's application)
82. ***Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*** ARB/10/18	Petrobangla and Bapex	Annulment rejected English	Applicant	Each Party bears its own costs
83. ***Highbury International v. Venezuela*** ARB/11/1	Claimants	Annulment rejected Spanish (excerpts)	Applicant	Applicant bears its own costs and half of the Respondent on Annulment's costs and legal fees.
84. ***OI EG v. Venezuela*** ARB/11/25	Venezuela	Annulment rejected English	Applicant	Applicant
85. ***Tenaris v. Venezuela*** ARB/11/26	Venezuela	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
86. ***Tulip v. Turkey*** ARB/11/28	Tulip	Annulment rejected English	Applicant	Each Party bears its own costs
87. ***Gambrinus v. Venezuela*** ARB/11/31	Gambrinus	Annulment rejected English	Applicant	Each Party bears its own costs
88. ***RSM v. Saint Lucia*** ARB/12/10	RSM Production	Annulled in part English	Applicant bears 2/3 of the costs of the proceeding and Respondent on Annulment bears 1/3	Applicant bears its own legal costs and 1/3 of Respondent on Annulment
89. ***Churchill Mining & Planet Mining v. Indonesia*** ARB/12/14 & 12/40	Churchill Mining	Annulment rejected English	Applicant	Each Party bears its own costs
90. ***Blue Bank v. Venezuela*** ARB/12/20	Blue Bank	Annulment rejected Spanish	Applicant	Applicant bears their own legal fees and 80% of the Respondent on Annulment's legal fees
91. ***Fábrica de Vidrios Los Andes v. Venezuela*** ARB/12/21	Fábrica de Vidrios Los Andes	Annulment rejected English | Spanish	Applicant	Each Party bears its own costs
92. ***Venoklim v. Venezuela*** ARB/12/22	Venoklim Holding	Annulment rejected Spanish	Applicant	Applicant
93. ***Tenaris v. Venezuela*** ARB/12/23	Venezuela	Annulment rejected English	Applicant	Each Party bears its own costs
94. ***UAB E energija v. Latvia*** ARB/12/33	Latvia	Annulment rejected English	Applicant	Each Party bears its own costs

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
95. ***Orascom v. Algeria*** ARB/12/35	Orascom TMT	Annulment rejected English | French	Applicant	Each Party bears its own costs
96. ***Poštová banka, and Istrokapital v. Greece*** ARB/13/8	Poštová banka, and Istrokapital	Annulment rejected English	Applicant	Each Party bears its own costs
97. ***Valores Mundiales v. Venezuela*** ARB/13/11	Venezuela	Annulment rejected Spanish	Applicant	Applicant
98. ***Cementos La Union v. Egypt*** ARB/13/29	Cementos La Union	Annulment rejected English (extracts)	Applicant	Applicant
99. ***RREEF v. Spain*** ARB/13/30	Spain	Annulment rejected English	Applicant	Applicant
100. ***Infrastructure Services et al (formerly Antin et al) v. Spain*** ARB/13/31	Spain	Annulment rejected English	Applicant	Applicant
101. ***UP and C.D Holding v. Hungary*** ARB/13/35	Hungary	Annulment rejected English	Applicant	Applicant shall bear about half of the costs of the Respondent on annulment
102. ***Eiser v. Spain*** ARB/13/36	Spain	Annulled in full Spanish | English	Respondent on Annulment	Respondent on Annulment
103. ***Blusun v. Italy*** ARB/14/3	Blusun	Annulment rejected English	Applicant	Applicant
104. ***CEAC v. Montenegro*** ARB/14/8	CEAC	Annulment rejected English	Applicant	Applicant
105. ***NextEra v. Spain*** ARB/14/11	Spain	Annulment rejected English	Applicant	Applicant bears its own costs and almost all of the Respondent on Annulment's legal fees
106. ***InfraRed v. Spain*** ARB/14/12	Spain	Annulment rejected Spanish | English	Applicant	Applicant bears its own costs and half of Respondent on Annulment's legal fees
107. ***Cyprus Popular Bank v. Greece*** ARB/14/16	Greece	Annulment rejected English (excerpts)	Applicant	Each Party bears its own costs
108. ***9REN v. Spain*** ARB/15/15	Spain	Annulment rejected English	Applicant	Applicant bears its own costs and 75% of Respondent on Annulment's legal fees
109. ***BayWa. v. Spain*** ARB/15/16	Spain	Annulment rejected English	Applicant	Applicant bears its own costs and 85% of Respondent on Annulment's legal fees
110. ***Capital Financial Holdings v. Cameroon*** ARB/15/18	Capital Financial Holdings	Annulment rejected French	Applicant	Each Party bears its own costs
111. ***Cube Infrastructure v. Spain*** ARB/15/20	Spain	Annulment rejected English	Applicant	Applicant
112. ***Hydro v. Albania*** ARB/15/28	Albania	Annulment rejected English	Applicant	Applicant bears its own costs and 2/3 of Respondent on Annulment's legal fees and expenses
113. ***Cortec Mining v. Kenya*** ARB/15/29	Cortec Mining	Annulment rejected English	Applicant	Each Party bears its own costs
114. ***OperaFund v. Spain*** ARB/15/36	Spain	Annulment rejected English	Applicant	Applicant
115. ***SolEs Badajoz v. Spain*** ARB/15/38	Spain	Annulment rejected English	Applicant	Applicant
116. ***Hydro Energy v. Spain*** ARB/15/42	Spain	Annulment rejected English	Applicant	Applicant

Case	Applicant	Outcome	Who bears the Costs of Proceeding	Who bears the Legal Fees and Expenses
117. ***Watkins Holdings et al v. Spain*** ARB/15/44	Spain	Annulment rejected English	Divided equally	Each Party bears its own costs
118. ***ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*** ARB/16/5	Italy	Annulment rejected English	Applicant	Applicant
119. ***Glencore v. Colombia*** ARB/16/6	Colombia	Annulment rejected Spanish | English	Applicant	Applicant
120. ***Global Telecom Holding v. Canada*** ARB/16/16	Both	Annulment rejected English	Divided equally	Each Party bears its own costs
121. ***Raymond Charles v. Sri Lanka*** ARB/16/25	Raymond Charles	Annulment rejected English (excerpts)	Applicant	Applicant bears its own costs and £40,000 of Respondent on Annulment's legal fees and expenses
122. ***(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Madagascar*** ARB/17/18	Madagascar	Annulment rejected English | French	Applicant	Each Party bears its own costs

73. Similar to an award, the *ad hoc* Committee's decision on annulment may be accompanied by the individual opinion of a member of the Committee.[134] In practice, only 8 Committee members have partially or fully dissented from the majority's decision.[135] There have also been concurring opinion in two cases.[136]

E. *Resubmission Proceedings*

74. The effect of annulment is that the award or a part thereof becomes a nullity, meaning that the binding force of the annulled portion of the award is terminated. However, the decision on annulment does not replace the award or substitute any of the reasoning in the award. A party is entitled to resubmit the dispute to a newly constituted Tribunal to obtain a new

[134] ICSID Convention Articles 48(4) & 52 (4); Arbitration Rules 47(3) & 53; 2022 Arbitration Rules 59(3) & 72(1).

[135] *See Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB /97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007 (August 10, 2010) ("*Vivendi II*"); *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 (June 5, 2007); *Lucchetti*; *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (April 16, 2019)*; Iberdrola; Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/18, Decision on Annulment (October 12, 2023)*; SolEs*, Decision on Annulment (March 16, 2022).

[136] *See Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award (July 8, 2013) and *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ARB/98/2, Decision on Annulment (January 8, 2020) ("*Pey Casado II*").

award concerning the same dispute following annulment of the original award.[137] Either party may start this process by filing a request for resubmission of the dispute, identifying the original award, and explaining in detail which aspects of the dispute are to be submitted to the new Tribunal.[138] The new Tribunal is constituted by the same method as the original Tribunal[139] and is not bound by the reasoning of the *ad hoc* Committee. It is, however, bound by the unannulled portions of the original award in cases of partial annulment.[140]

75. There have been 11 resubmission proceedings registered up to December 31, 2023,[141] 5 of which led to awards that were subject to a second annulment proceeding.[142] The applications for annulment in those second annulment proceedings were rejected by the *ad hoc* Committees with the exception of the *Amco II* case, where the *ad hoc* Committee annulled the Tribunal's Decision on Supplemental Decisions and Rectification and *TECO II* where the *ad hoc* Committee issued an order taking note of the discontinuance of the proceeding.[143]

76. In the 2022 ICSID Arbitration Rules a resubmission proceeding is governed by Rule 74. There is no time limit for resubmission of a dispute, and upon receipt of the request and the lodging fee the Secretary-General shall promptly register the request (Rule 74(3)(b)). The Rule eliminates the possibility of staying or continuing to stay enforcement of the award during the resubmission proceeding. Issues that may arise in the context of a resubmission (such as the scope of the new Tribunal's mandate or the admissibility of new claims and counterclaims) are, as in current practice, left to be decided on a case-by-case basis by Tribunals. The Rule further establishes that any procedural agreements and orders on matters that were addressed at the first session of the original Tribunal will not apply to the resubmission unless the parties agree otherwise (Rule 74(6)).

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[137] ICSID Convention Article 52(6); Arbitration Rule 55(1); 2022 Arbitration Rule 74(1). The new Tribunal could reach the same conclusion as the original Tribunal whose award was annulled.

[138] Arbitration Rule 55(1). The Secretary-General has no authority to refuse registration of a resubmitted dispute. Arbitration Rule 55(2); 2022 Arbitration Rule 74(1) & (3).

[139] Arbitration Rule 55(2)(d); 2022 Arbitration Rule 74(3)(d).

[140] Arbitration Rule 55(3). A partial annulment means that only those portions of the award that have been annulled may be resubmitted, whereas the remainder will be *res judicata*; *see also* 2022 Arbitration Rule 74(4)

[141] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award (December 17, 1992) ("*Amco II*"); *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Second *ad hoc* Committee Decision on Annulment (May 17, 1990) ("*Klöckner II*"); *MINE*; *Vivendi II*; *Enron*; *Sempra*; *Pey Casado II; Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (March 9, 2017); *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23 (resubmission discontinued) ("*TECO II*"*); Eiser* (resubmission pending); *Alhambra* (resubmission pending).

[142] *See Amco II*; *Klöckner II*; *Vivendi II; Pey Casado II; TECO II.*

[143] *Amco II*. The annulment is regarded as a partial annulment of an award for purposes of the tables contained in this paper. *TECO II* where the *ad hoc* Committee issued a procedural order taking note of the discontinuance of the proceeding pursuant to ICSID Arbitration Rules 53 and 43(1).

V. Interpretation of the Annulment Mechanism, the Role of the *ad hoc* Committee, and the Individual Grounds for Annulment

A. *The General Standards Identified in the Drafting History and ICSID Cases*

77. As illustrated in Section III, the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, annulment was designed purposefully to confer a limited scope of review which would safeguard against "violation of the fundamental principles of law governing the Tribunal's proceedings."[144] The remedy has thus been characterized as one concerning "procedural errors in the decisional process" rather than an inquiry into the substance of the award.[145]

78. The drafting history of the ICSID Convention also demonstrates that annulment "is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment]."[146] It does not provide a mechanism to appeal alleged misapplications of law or mistakes in findings on fact. The Legal Committee confirmed by a vote that even a "manifestly incorrect application of the law" is not a ground for annulment.[147]

79. The limited and exceptional nature of the annulment remedy expressed in the drafting history of the Convention has been repeatedly confirmed by ICSID Secretary-Generals in Reports to the Administrative Council of ICSID, papers and lectures.[148]

80. ICSID *ad hoc* Committees have also affirmed these principles in their decisions.[149] These decisions have clearly established that: (1) the grounds listed in Article 52(1) are the only

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[144] *See* comment to Section 13 of the Preliminary Draft, History, *supra* note 5, at Vol. II, 218 & 219. This approach is common in the review of arbitrations, *see* for example the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, Introduction.

[145] Broches, *supra* note 6, at 298.

[146] *See* comment to Section 13 of the Preliminary Draft, History, *supra* note 5, at Vol. II, 218 & 219.

[147] *See supra* para. 22.

[148] *See e.g.*, Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twentieth Annual Meeting 3 (October 2, 1986): "The history of the Convention makes it clear that the draftsmen intended to: (i) assure the finality of ICSID awards; (ii) distinguish carefully an annulment proceeding from an appeal; and (iii) construe narrowly the ground for annulment, so that this procedure remained exceptional;" Report of Secretary-General Ibrahim F.I. Shihata to the Administrative Council at its Twenty-Second Annual Meeting (September 27-29, 1988): "It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the shortcomings against which it is meant to be a safeguard. It is also wrong to confuse the annulment proceeding with an appeals process which is not possible in respect of awards issued by ICSID's tribunals;" Broches, *supra* note 6, at 354 & 355.

[149] All decisions on annulment have been published, either by ICSID with the consent of the parties, by the parties themselves, or in summaries of the legal reasoning of the *ad hoc* Committee excerpted by ICSID. *See* Annex 1, which includes references to each decision on annulment and its publication source. Pursuant to ICSID Arbitration Rule 48(4), the Centre has published the legal reasoning of the decisions on annulment in the following cases: *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the ad hoc committee on the request for

grounds on which an award may be annulled; (2) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* Committee is limited; (3) *ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own; (4) *ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly; and (6) an *ad hoc* Committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full. The following section enumerates each of these commonly cited principles related to ICSID annulment, accompanied by excerpts of annulment decisions confirming the relevant principle.

(1) The grounds listed in Article 52(1) are the only grounds on which an award may be annulled

- "The remedy of annulment requested by either or by both Parties under Article 52 of the CONVENTION is essentially limited by the grounds expressly enumerated in paragraph 1, on which an application for annulment may be made. This limitation is further confirmed by Article 53 (1) by the exclusion of review of the merits of the Awards." *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "It seems quite clear that, in accordance with Article 52(1), the grounds on which an application is founded can only be the five grounds provided for in the Convention." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment, para. 4.24 (May 17, 1990) [unofficial translation from French].

- "Claimants and Respondent agree that an *ad hoc* Committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 62 (July 3, 2002).

annulment of Consortium RFCC (January 18, 2006); *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on Annulment (January 8, 2007); *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Annulment (May 11, 2010); *Lemire*; *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Excerpts of the Decision on Annulment (February 20, 2013)*, Raymond Charles Eyre and Montrose Developments (Private) Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/16/25, Excerpts of the Decision on Annulment (December 2, 2020) and *Cementos La Union S.A. and Aridos Jativa S.L.U v. Arab Republic of Egypt*, ICSID Case No. ARB/13/29, Excerpts of the Decision on Annulment (July 31, 2023). *See also* 2022 Arbitration Rule 62(4).

- "The power for review is limited to the grounds of annulment as defined in [Article 52 of the ICSID Convention]." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002).

- "Annulment may be based only on a very limited number of fundamental grounds exhaustively listed in Article 52(1)." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 222 (January 18, 2006) [unofficial translation from French].

- "Both parties recognize that an *ad hoc* committee is not a court of appeal and that its competence extends only to annulment based on one or other of the grounds expressly set out in Article 52 of the ICSID Convention." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 43 (September 25, 2007).

- "The limitation of recourse to the annulment mechanism to the few grounds listed in Article 52(1) serves to reinforce the finality and stability of ICSID awards..." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 127 (June 5, 2007).

- "Annulment review is limited to a specific set of carefully defined grounds (listed exhaustively in Article 52(1) of the ICSID Convention)." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, para. 74 (June 29, 2010) (footnote omitted).

- "The role of the Committee is confined to the grounds of annulment in Article 52 of the ICSID Convention, and as noted above, even if the Tribunal erred in law, this would not be a ground for annulment." *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 237 (July 30, 2010).

- "The review conducted by an *ad hoc* Committee is limited to the grounds that were carefully contemplated and are exhaustively listed in Article 52(1) of the Convention." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 236 (December 10, 2010) (footnote omitted) [unofficial translation from Spanish].

- "The grounds for annulment are exhaustively listed in Article 52(1). Neither the ordinary meaning of the terms used by such article nor its context allows any possibility for additional grounds." *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, para. 51 (September 6, 2011) (footnote omitted) [unofficial translation from French].

- "Article 52(1) of the ICSID Convention sets out the five grounds on the basis of which a party may request annulment of an award. This is an exhaustive list." *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, para. 89 (December 18, 2012).

- "As regards the general approach of Article 52, the annulment grounds referred therein are clearly exhaustive." *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment of RSM Production Corporation, para. 76 (February 20, 2013) [unofficial translation from French].

- "The only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention... Thus the grounds for annulment should be interpreted as being exhaustive and restrictive." *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, para. 118 (January 24, 2014).

- "Indeed, Article 52(1) of the ICSID Convention limits annulment to five grounds, all of which concern the very integrity of the arbitral process." *Alapli Elektrik B.V. v. Republic of Turkey,* ICSID Case No. ARB/08/13, Decision on Annulment, para. 32 (July 10, 2014).

- "[T]he Committee will review the allegations raised by Argentina corresponding to those which are exhaustively listed in Article 52 of the ICSID Convention; the remaining allegations, which do not refer to the grounds for annulment, will be rejected without any analysis." *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 137 (September 22, 2014) (emphasis omitted).

- "The award may only be subject to annulment if an *ad hoc* committee finds that one or more of the five grounds for annulment established in Article 52(1) apply." *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 47 (November 2, 2015).

- "Under the ICSID Convention, annulment provides relief for egregious violations of certain basic principles. Article 52(1) of the Convention circumscribes the reasons for annulment." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 39 (December 30, 2015).

- "Annulment is a remedy of limited scope. Article 53 provides for the finality of awards by stating that they shall not be subject to 'any appeal or any other remedy except those provided for in this Convention'. Article 52 sets out the limits of that exception by listing the grounds on which a party may seek annulment. The list is exhaustive. The decision to annul cannot be based on a ground other than the five listed in Article 52(1). It is now well settled that this exhaustive list of grounds safeguards the integrity and not the outcome of the arbitration proceedings." *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 28 (January 15, 2016).

- "It is not disputed that the grounds for annulment provided by Article 52(1) of the ICSID Convention are exhaustive and are the only grounds under which an award may be annulled." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 163 (February 1, 2016).

- "[I]t is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds. Its function is not to consider whether or not it agrees with the reasoning or the conclusions of the tribunal but only to determine whether or not one or more of the five grounds has been made out." *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 67 (February 5, 2016).

- "An annulment committee's mandate is strictly circumscribed by the five grounds for annulment listed under the ICSID Convention and it may not, under the guise of applying them, reverse an award on the merits." *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, para. 73 (April 5, 2016).

- "The Parties do not dispute or contest that ICSID awards are binding on the disputing parties, that they are not subject to appeal, and that they are not subject to any remedies except those provided for in the ICSID Convention. Therefore, this Committee is aware that it exercises its jurisdiction under a limited and constrained mandate under Article 52 of the ICSID Convention", *Venoklim Holding v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/22, Decision on Annulment, paras. 183-184 (February 22, 2018) [unofficial translation from Spanish].

- "…[I]t is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* Committee is not entitled to range beyond those five grounds. Its function is not to consider whether it agrees with the reasoning or the conclusions of the tribunal but only to determine whether one or more of the five grounds has been made out." *CEAC Holdings Limited v. Montenegro,* ICSID Case No. ARB/14/8, Decision on Annulment, para. 83 (May 1, 2018).

- "Thus, the practice of ICSID annulment committees has confirmed that the grounds of annulment listed in Article 52 are exclusive, and that it is the applicant that carries the burden of proof in establishing that any of the annulment grounds it invokes exist [footnote omitted]." *Bernhard von Pezold et al v. Republic of Zimbawe,* ICSID Case No. ARB/10/15, Decision on Annulment, para. 238 (November 21, 2018).

- "…[A]n award may only be annulled on the limited grounds listed in Article 52(1)." *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic,* ICSID Case No. ARB/09/1, Decision on Annulment, para. 48 (May 29, 2019)

- "[T]he Committee is fully aware of its mandate. It must confine itself to an analysis conducted in the light of the grounds for annulment provided for in Article 52(1) of the ICSID Convention. An award can be annulled only on these grounds, and only if these

grounds are well-founded, and not if the Committee disagrees, in whole or in part, with the conclusions reached by the Tribunal on the merits of the dispute. [...] The list of grounds provided for in article 52(1), which is exhaustive in nature, is intended to protect the integrity of the annulment system, and it is respect for this integrity to which the Committee is bound within the strict limits of its mandate as defined by the Convention", *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on the Application of Annulment, paras. 252, 253 (October 25, 2019) [unofficial translation from French].

- "Thus, annulment is an exceptional remedy limited to the five instances set forth in Article 52 of the ICSID Convention. The exceptional character of the remedy has been consistently recognized by annulment committees and it is not disputed by the Parties." *Fábrica de Vidrios Los Andes C.A v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/21, Decision on Annulment, para. 92 (November 22, 2019)

- "In light of "the ordinary meaning of the terms of [Article 52 of the ICSID Convention] in their context and in the light of its object and purpose," the Committee finds that the grounds set out in Article 52(1) are exhaustive, and therefore *ad hoc* committees have no power to annul an award under any other grounds", *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, para. 58 (May 28, 2021).

- "In light of 'the ordinary meaning of the terms of [Article 52 of the ICSID Convention] in their context and in the light of its object and purpose,' the Committee finds that the grounds set out in Article 52(1) are exhaustive, and therefore *ad hoc* committees have no power to annul an award under any other grounds." *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, para. 58 (May 28, 2021).

- "… [I]t is clear from the text of Article 52 that an award may be annulled only on one or more of the five grounds set out in Article 52. An *ad hoc* committee is not entitled to range beyond those five grounds." *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia,* ICSID Case No. ARB/16/6, Decision on Annulment, para. 216 (September 22, 2021).

- "This means that the scope of annulment is by nature quite limited, since the Committee is precluded from revisiting the facts and the evidence and even the conclusions of the Tribunal", *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, para. 52 (September 30, 2022).

- *"*The provisions under the Convention and the Arbitration Rules are exhaustive in the enunciation of the grounds that warrant an annulment. Only those explicitly mentioned in Article 52(1) of the ICSID Convention can serve as basis for annulment*." Global Telecom Holding S.A.E. v. Canada,* ICSID Case No. ARB/16/16, Decision on Annulment, para. 50 (September 30, 2022).

- "The provisions under the Convention and the Arbitration Rules are exhaustive in the enunciation of the grounds that warrant an annulment. Only those explicitly mentioned in

Article 52(1) of the ICSID Convention can serve as basis for annulment […] The interpretation of Article 52(1) should be made in the light of Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties ("VCLT"). Therefore, an interpretation of Article 52(1) in good faith, in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose, requires the Committee to strictly adhere to the annulment standards", *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, para. 50 (September 30, 2022).

- "Article 52(3) of the ICSID Convention provides in equally unambiguous terms that *ad hoc* committees 'shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)'. Article 52(1) enumerates these grounds. They are exclusive. Annulment requires that 'one or more of the five grounds under Article 52(1) of the ICSID Convention is established'. [footnote omitted] The requirements for each ground are specific." *Cyprus Popular Bank Public v. the Hellenic Republic,* ICSIS Case No. ARB/14/16, Decision on Annulment, para. 181 (November 30, 2022).

- "The Committee is in agreement with Spain that 'annulment under the ICSID Convention is an exceptional remedy that is delimited by the specific grounds provided for in the Convention, and that annulment is not and appeal.'" *OperaFund Eco -I Nvest Sicav Plc and Schwab Holding AG v. Kingdom of Spain,* ICSID Case No. ARB/15/36, Decision on Annulment, para. 71 (March 2, 2023).

(2) Annulment is an exceptional and narrowly circumscribed remedy, and the role of an *ad* hoc Committee is limited

- "Article 52(1) makes it clear that annulment is a limited remedy." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.04 (December 22, 1989).

- "Because of its focus on procedural legitimacy, annulment is 'an extraordinary remedy for unusual and important cases.'" *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 34 (June 29, 2005) (footnote omitted).

- "The sole purpose of Article 52 is to provide for an exceptional remedy in cases where there has been a manifest and substantial breach of a number of essential principles set out in this Article." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 223 (January 18, 2006) [unofficial translation from French].

- "The purpose of the grounds for annulment under Article 52 of the Convention is to allow a limited exception to the finality of ICSID awards, which is highlighted by Article 53." *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, para. 81 (January 8, 2007) (footnote omitted) [unofficial translation from Spanish].

- "[T]he role of an *ad hoc* committee in the ICSID system is a limited one." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 54 (March 21, 2007) (footnote omitted).

- "It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 20 (June 5, 2007).

- "It is not contested by the parties that the annulment review, although obviously important, is a limited exercise, and does not provide for an appeal of the initial award. In other words, it is not contested that '. . . an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any way. The annulment system is designed to safeguard the integrity, not the outcome, of ICSID arbitration proceedings.'" *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 20 (June 5, 2007) (footnote omitted).

- "One general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 101 (September 5, 2007).

- "At the outset, the Committee must recall that, in the ICSID system, annulment has a limited function." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 44 (September 25, 2007).

- "[T]he Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention. The scope of this mandate allows annulment as an option only when certain specific conditions exist." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 158 (September 25, 2007).

- "[T]he role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness." *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, para. 24 (October 19, 2009).

- "It is true that the annulment procedure is exceptional in its nature…the grounds for the annulment remedy and the mandate of the *ad hoc* committee are limited." *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision of the *ad hoc* Committee on the Application for Annulment of the Gabonese Republic, para. 228 (May 11, 2010) [unofficial translation from French].

- "[T]he Committee considers that annulment proceedings are confined to determining whether the integrity of the arbitration proceedings has been respected." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 236 (December 10, 2010) [unofficial translation from Spanish].

- "[T]he object and purpose of the ICSID annulment procedure is to control the integrity of the arbitral proceeding in all its aspects... [L]imiting the number of grounds for annulment also aims to reinforce the finality and the 'stability' of ICSID awards." *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment of RSM Production Corporation, paras. 73, 75 (February 20, 2013) (footnote omitted) [unofficial translation from French].

- "[I]t follows from the very nature of annulment as an exceptional measure that it should not be resorted to unless the tribunal's act or its failure to act has had, or at least may have had, serious consequences for a party." *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, para. 102 (May 22, 2013).

- "In the Committee's view, and in light of the text of the Convention, annulment is a limited remedy with a strictly circumscribed role: to safeguard the fundamental fairness and integrity of the underlying proceeding." *Alapli Elektrik B.V. v. Republic of Turkey,* ICSID Case No. ARB/08/13, Decision on Annulment, para. 32 (July 10, 2014).

- "The annulment procedure is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed, but a limited remedy meant to ensure the fundamental fairness of the arbitration proceeding." *Alapli Elektrik B.V. v. Republic of Turkey,* ICSID Case No. ARB/08/13, Decision on Annulment, para. 232 (July 10, 2014).

- "Therefore, when an allegation is made that there was a manifest excess of powers for failure to apply the applicable law, it is not the role of an *ad hoc* committee to verify whether the interpretation of the law by the tribunal was correct, or whether it correctly ascertained the facts or whether it correctly appreciated the evidence. These are issues relevant to an appeal, but not for annulment proceedings in view of the limited grounds provided for under the ICSID Convention." *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment, para. 189 (January 7, 2015).

- "In the context of the ICSID Convention, the object of the review is, however, restricted by Article 52(1)(e) which provides only a limited scope for review, as confirmed by a series of *ad hoc* committees' decisions." *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, para. 112 (February 12, 2015) [unofficial translation from Spanish].

- "Article 52 of the ICSID Convention follows the model of a limited review. It represents a control mechanism that ensures that a decision has remained within the framework of the parties' agreement to arbitrate and is the result of a process that was in accord with basic requirements of fair procedure. The main function of annulment is to provide a limited

form of review of awards in order to safeguard the integrity of ICSID proceedings." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 41 (December 30, 2015).

- "Annulment is possible on a very limited number of grounds. In the case of the ICSID Convention, these are listed exhaustively in Article 52(1)." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 43 (December 30, 2015).

- "As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed. Annulment under the ICSID Convention is a limited remedy." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 179 (February 1, 2016) (footnotes omitted).

- "[A]nnulment is an exceptional, narrowly circumscribed remedy, and the role of an *ad hoc* committee is limited." *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, para. 108 (March 29, 2016) [unofficial translation from French].

- "The grounds for annulment included in Article 52(1) are exhaustive and limited. In view of the grounds for annulment provided for by the Convention, the remedy of annulment is therefore an exceptional remedy used to protect the integrity of the arbitration proceedings and the legitimacy of the award", *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Annulment, para. 160 (December 19, 2016) [unofficial translation from Spanish].

- "…[A]nd finds that annulment grounds were designed purposefully to confer a limited scope of review, which would safeguard against "violation of the fundamental principles of law governing the [t]ribunal's proceedings". The remedy has been characterized as one concerning "procedural errors in the decisional process" rather than an inquiry into the substance of the award.", *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, para. 59 (August 22, 2018).

- "It is also clear from the language of Article 52, and it is well established in ICSID annulment practice, that annulment is an extraordinary remedy and not an appeal from the legal or factual findings of the arbitral tribunal.139 The object and purpose of annulment proceedings is not to test the substantive correctness of the award; indeed, Article 53(1) of the ICSID Convention specifically provides that "[t]he 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." Annulment can be successful only if there is a fundamental flaw in the award, or in the proceeding that led to it, that falls under one or more of the annulment grounds in Article 52. The function of an ICSID *ad hoc* committee is not to review the factual findings of an ICSID tribunal or its decision on the merits, but to determine whether any of the annulment grounds in Article 52 has been established." *Bernhard von Pezold et*

al v. Republic of Zimbawe, ICSID Case No. ARB/10/15, Decision on Annulment, para. 239 (November 21, 2018).

- "Therefore, the "limited and exceptional nature" of annulment has to be taken into account as well as its "narrowly circumscribed" criteria. Its objective is "to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.", *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, para. 43 (December 28, 2018).

- "Therefore, the 'limited and exceptional nature' of annulment has to be taken into account as well as its 'narrowly circumscribed'[fn omitted] criteria. Its objective is 'to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.'" *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/23, Decision on Annulment, para. 43 (December 28, 2018).

- "Questions relating to the evaluation of evidence are subject to the primacy of the arbitrators' judgement and are not reviewable by *ad hoc* committees under Article 52 of the ICSID Convention. [...] The discretion accorded to tribunals under Article 42(1) of the ICSID Convention when determining the applicable rules of law does not square with an extensive power of *ad hoc* committees to check the determination, application and content of the law applied by the tribunals. This has been recognized, with a few exceptions, [fn omitted] by *ad hoc* committees." *Churchill Mining & Planet Mining v. Indonesia,* ICSID Cases Nos. ARB/12/14 and ARB/12/40, Decision on Annulment, paras. 188 and 231 (March 18, 2019) (footnote omitted).

- "… The Committee proceeds on the basis that annulment is an exceptional remedy that is distinct from an appeal, which is intended to ensure the integrity of ICSID arbitration proceedings, not their substantive correctness." *Vestey Group Ltd v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/06/4, Decision on Annulment, para. 56 (April 26, 2019).

- "…[A]an annulment committee under Art. 52 of the Convention does not sit in appeal of the arbitral tribunal's decision. As rightly pointed out by the ICSID Updated Background Paper on Annulment, the scope of review that an annulment committee is entitled to perform under Article 52 is limited." *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, para. 47 (May 29, 2019)

- "…[A]nd finds that annulment grounds were designed purposefully to confer a limited scope of review, which would safeguard against 'violation of the fundamental principles of law governing the [t]ribunal's proceedings'.[fn omitted] The remedy has been characterized as one concerning 'procedural errors in the decisional process' rather than an inquiry into the substance of the award." *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited,* ICSID Case No. ARB/10/20, Decision on Annulment, para. 59 (August 22, 2019).

- "The Applicants have also argued that a jurisdictional excess of powers may require a finding that the Tribunal wrongly established the relevant facts. There is no support in the case law for such approach. On the contrary, annulment committees have been consistent in holding that the nature of the annulment remedy "forbids an inquiry … on mistakes in analyzing the facts."[fn omitted] Similarly, annulment committees cannot review the correctness of an award's findings on facts.[fn omitted] The role of an annulment committee is limited and should not second guess the evaluation of evidence by the Tribunal." *Fábrica de Vidrios Los Andes C.A v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/21, Decision on Annulment, para. 97 (November 22, 2019).

- "Questions relating to the evaluation of evidence are subject to the primacy of the arbitrators' judgement and are not reviewable by *ad hoc* committees under Article 52 of the ICSID Convention. […] The discretion accorded to tribunals under Article 42(1) of the ICSID Convention when determining the applicable rules of law does not square with an extensive power of *ad hoc* committees to check the determination, application and content of the law applied by the tribunals. This has been recognized, with a few exceptions, by *ad hoc* committees.", *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Annulment, paras. 188, 231 (March 18, 2019).

- "The extraordinary and exceptional nature of the annulment remedy has its roots in the history of the Convention and has also been repeatedly confirmed by ICSID's Secretaries General in the Centre's publications and by numerous *ad hoc* committees in their decisions", *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on the Application of Annulment, para. 116 (October 25, 2019) (footnote omitted) [unofficial translation from French].

- "The Applicants have also argued that a jurisdictional excess of powers may require a finding that the Tribunal wrongly established the relevant facts. There is no support in the case law for such approach. On the contrary, annulment committees have been consistent in holding that the nature of the annulment remedy 'forbids an inquiry … on mistakes in analyzing the facts'. Similarly, annulment committees cannot review the correctness of an award's findings on facts. The role of an annulment committee is limited and should not second guess the evaluation of evidence by the Tribunal.", *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, para. 97 (November 22, 2019) (footnote omitted).

- "An *Ad Hoc* Committee, in annulment proceedings, is not entitled to decide which one of several possible interpretations of an annulment decision, among which the Tribunal could choose, was preferable. It has simply to ascertain whether the Tribunal whose award is challenged acted in manifest breach of its competence." *Blusun, S.A. et al v. Italian Republic,* ICSID Case No. ARB/14/3, Decision on Annulment, para. 148 (April 13, 2020).

- "[T]his Committee adopts and endorses the criteria expressed by several *ad hoc* committees after recognizing the limited and exceptional nature of the aforementioned remedy. […] Although the Kompetenz-Kompetenz principle does not exempt from review

the Tribunal's decision on its own jurisdiction, nor can the alleged duty of deference be understood as a limitation in that sense, the Committee is of the opinion that, to the extent that the decision on jurisdiction is reasonable, and, moreover, considering the limited nature of the remedy of annulment, the Committee cannot review de novo the Tribunal's decision on jurisdiction", *Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on Annulment, paras. 76, 182 (June 22, 2020) [unofficial translation from Spanish].

- "With respect to object and purpose of the text, features such as the finality of awards, exclusion of appeals, and the exceptional nature of the annulment remedy may be among those that inform the role of annulment committees.[footnote omitted] As other committees have observed, the role of an annulment committee relates to "procedural legitimacy", [footnote omitted] "the legitimacy of the award," [footnote omitted and "safeguard[ing] the integrity" of the proceedings and the award. [footnote omitted] Thus, while agreeing with the Eiser Parties about the "limited scope" of the annulment procedure, [footnote omitted] this Committee holds that there can be no greater threat to the legitimacy and integrity of the proceedings or of the award than the lack of impartiality or independence of one or more of the arbitrators", *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Decision on Annulment, para. 175 (June 11, 2020).

- "We pause, however, to note a submission made by the Applicants in their PHM, to the effect that the Tribunal's jurisdictional ruling on SML 351, if followed by other tribunals, would have negative consequences "for the ICSID system" and prejudice mining sector claimants. [footnote omitted] That argument is colorable; but this Committee is not a policy-making body. As repeatedly underscored above, our role in this proceeding is far more circumscribed: we are charged only with deciding whether the Tribunal committed a manifest excess of powers, or provided reasoning so inadequate that it cannot be understood by the Parties. For the reasons given above, we conclude that the Applicants have not satisfied the heavy burden of establishing either circumstance. It follows that the Application for Annulment must be dismissed in its entirety", *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Annulment, para. 290 (March 19, 2021).

- "Given the undisputed fact that annulment in the ICSID system is an exceptional remedy, running contrary to the principle of finality, it seems clear to the Committee that all of the grounds for annulment, including Article 52(1)(e), need to be strictly construed in light of their fundamental purpose, on which the parties agree, of safeguarding the fundamental procedural integrity of the proceedings. If the principle of finality is to be set aside, the basis for doing so should be clearly identifiable in one or more of the relevant grounds for annulment, with doubts resolved in favor of the arbitral tribunal." *Hydro SRL et al v. Republic of Albania,* ICSID Case No. ARB/15/28, Decision on Annulment, para. 107 (April 2, 2021).

- "The Claimants have argued for a narrow application of the 52(1)(e) exception. But the Committee questions whether characterizing the standard as "narrow" versus "broad", or the threshold for annulment as "high" versus "low" provide much assistance in this context.

Given the undisputed fact that annulment in the ICSID system is an exceptional remedy, running contrary to the principle of finality, it seems clear to the Committee that all of the grounds for annulment, including Article 52(1)(e), need to be strictly construed in light of their fundamental purpose, on which the parties agree, of safeguarding the fundamental procedural integrity of the proceedings. If the principle of finality is to be set aside, the basis for doing so should be clearly identifiable in one or more of the relevant grounds for annulment, with doubts resolved in favor of the arbitral tribunal", *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, paras. 107 (April 2, 2021).

- "… [t]he Committee also agrees with the position presented by both Parties that annulment is an exceptional and narrowly circumscribed remedy and that annulment proceedings cannot be equated with appeal proceedings." *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Annulment, para. 92 (March 28, 2022).

- "The Committee is of the opinion that its powers are limited by the ICSID Convention (and the ECT) as 'the annulment is a limited remedy.'" *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain,* ICISD Case No. ARB/14/12, Decision on Annulment, para. 404 (June 10, 2022).

- "This means that the scope of annulment is by nature quite limited, since the Committee is precluded from revisiting the facts and the evidence and even the conclusions of the Tribunal." *Global Telecom Holding S.A.E. v. Canada,* ICSID Case No. ARB/16/16, Decision on Annulment, para. 52 (September 30, 2022).

- "The Committee recalls that the ICSID Convention is 'for the most part self-explanatory'. [fn omitted] It provides in unambiguous terms that awards are not 'subject to any appeal', and that the remedies enumerated in Articles 50-52 of the ICSID Convention are 'exceptional' in the sense that no other remedies are available (Article 53(1) ICSID Convention)." *Cyprus Popular Bank Public v. the Hellenic Republic,* ICSID Case No. ARB/14/16, Decision on Annulment, para. 180 (November 30, 2022).

- "Under the ICSID Convention system, no curial review exists." *Watkins Holdings S.à r.l. and others v. Kingdom of Spain*, ICSID Case No. ARB/15/44, Annulment Decision, para. 71 (February 21, 2023).

(3) *Ad hoc* Committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the Tribunal's determination on the merits for its own

- "[I]t should be recalled that as a rule an application for annulment cannot serve as a substitute for an appeal against an award and permit criticism of the merits of the judgments rightly or wrongly formulated by the award. Nor can it be used by one party to complete or develop an argument which it could and should have made during the arbitral proceeding or help that party retrospectively to fill gaps in its arguments." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*

(*Klöckner I*), ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, para. 83 (May 3, 1985) [unofficial translation from French].

- "The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco I*), ICSID Case No. ARB/81/1, Decision on Annulment, para. 23 (May 16, 1986).

- "Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.04 (December 22, 1989).

- "Another basic consideration which must be mentioned concerns the limited scope of the annulment procedure, which cannot in any way serve as an appellate procedure." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner II*), ICSID Case No. ARB/81/2, Decision on Annulment, para. 5.07 (May 17, 1990) [unofficial translation from French].

- "Annulment is not a remedy against an incorrect decision. An *ad hoc* Committee may not in fact review or reverse an ICSID award on the merits under the guise of annulment under Article 52." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "It is incumbent upon *Ad hoc* Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.18 (December 17, 1992).

- "As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002) (footnote omitted).

- "Article 52(1) looks not to the merits of the underlying dispute as such, but rather is concerned with the fundamental integrity of the tribunal, whether basic procedural guarantees were largely observed, whether the Tribunal exceeded the bounds of the parties' consent, and whether the Tribunal's reasoning is both coherent and displayed. To borrow Caron's terminology, annulment is concerned with the 'legitimacy' of the process of decision" rather than with the 'substantive correctness of decision.' Because of its focus on

procedural legitimacy, annulment is 'an extraordinary remedy for unusual and important cases.' That annulment is not the same thing as appeal is a principle acknowledged, although applied unevenly, in the various decisions of *ad hoc* Committees." *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 34 (June 29, 2005) (footnotes omitted).

- "Even the most evident error of fact in an award is not in itself a ground for annulment." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 222 (January 18, 2006) [unofficial translation from French].

- "No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the carrying out of a substantive review of an award." *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006).

- "The Parties are aware that the annulment proceedings are designed to grant reparation for damages only in cases of serious violations of certain fundamental principles. Such procedures should not be confused with the proceedings of an Appeals Tribunal and, therefore, should be adopted only in special situations." *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment, para. 86 (January 8, 2007) (footnote omitted) [unofficial translation from Spanish].

- "Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 31 (March 21, 2007).

- "[T]he role of an *ad hoc* committee in the ICSID system is a limited one. It cannot substitute its determination on the merits for that of the tribunal. Nor can it direct a tribunal on a resubmission how it should resolve substantive issues in dispute. All it can do is annul the decision of the tribunal: it can extinguish a *res judicata* but on a question of merits it cannot create a new one." *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, para. 54 (March 21, 2007) (footnote omitted).

- "An *ad hoc* committee is responsible for controlling the overall integrity of the arbitral process and may not, therefore, simply determine which party has the better argument. This means that an annulment, as already stated, is to be distinguished from an ordinary appeal, and that, even when a ground for annulment is justifiably found, an annulment need not be the necessary outcome in all circumstances." *Hussein Nuaman Soufraki v. United Arab*

Emirates, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, para. 24 (June 5, 2007).

- "[A] request for annulment is not an appeal, which means that there should not be a full review of the tribunal's award." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (*formerly *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 101 (September 5, 2007).

- "[I]t is no part of the Committee's functions to review the decision itself which the Tribunal arrived at, still less to substitute its own views for those of the Tribunal, but merely to pass judgment on whether the manner in which the Tribunal carried out its functions met the requirements of the ICSID Convention." *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (*formerly *Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, para. 97 (September 5, 2007).

- "The Committee recalls, once more, that it has only a limited jurisdiction under Article 52 of the ICSID Convention. In the circumstances, the Committee cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal." *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, para. 136 (September 25, 2007).

- "In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, para. 41 (September 1, 2009) (footnotes omitted).

- "It is an overarching principle that *ad hoc* committees are not entitled to examine the substance of the award but are only allowed to look at the award insofar as the list of grounds contained in Article 52 of the Washington Convention requires... Consequently, the role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness. The committee cannot for example substitute its determination on the merits for that of the tribunal..." *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, para. 24 (October 19, 2009) (footnote omitted).

- "An *ad hoc* committee is not a court of appeal and cannot therefore enter, within the bounds of its limited mission, into an analysis of the probative value of the evidence produced by the parties." *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, para. 96 (March 25, 2010).

- "In respect to the legal framework of the ICSID annulment proceedings, both Parties agree that an annulment proceeding is not an appeal process and that Article 52 of the ICSID Convention should be construed in accordance with the Vienna Convention on the Law of

Treaties." *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision of the *ad hoc* Committee, para. 70 (March 25, 2010).

- "It is very common for an *ad hoc* Committee considering an application for annulment to deem it necessary to delineate between appeal (which relates to the merits of the arbitral award) and annulment (a form of specific control over the arbitral process subject to the requirements of Article 52 of the ICSID Convention)… The Committee insists, however, on strongly emphasizing that annulment is certainly not a means by which a party to an arbitral proceeding may seek to invalidate the merits of the arbitral award that it does not like." *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision of the *ad hoc* Committee on the Application for Annulment of the Gabonese Republic, para. 19 (May 11, 2010) [unofficial translation from French].

- "It is no part of the function of an annulment committee to reconsider findings of fact made by an ICSID arbitral tribunal. Rather the issues for this Committee are circumscribed by the terms of Article 52(1) of the ICSID Convention and relate to the Tribunal itself: its powers; its process; and the reasoning of its Award." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, para. 20 (June 14, 2010).

- "Annulment is distinct from an appeal. An *ad hoc* committee cannot substitute its own judgment on the merits for the decision of the Tribunal." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award, para. 73 (June 29, 2010).

- "In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* Committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, para. 63 (July 30, 2010).

- "It is agreed by all that Article 52 does not introduce an appeal facility but only a facility meant to uphold and strengthen the integrity of the ICSID process. In the Treaty, the possibility of annulment is in this connection based on specific and limited grounds." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, para. 247(i) (August 10, 2010).

- "An *ad hoc* committee may not replace the Tribunal's decision on the merits of the dispute by its own decision." *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision of the *ad hoc* Committee on the Application for Annulment of Sociedad Anónima Eduardo Vieira, para. 235 (December 10, 2010) [unofficial translation from Spanish].

- "Although this Committee expressed earlier some reservations about the way the Tribunal proceeded in its interpretation exercise, it is not itself empowered to act as an appeal body and substitute its own interpretation of the BIT for the one adopted by the Arbitral Tribunal." *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide, para. 112 (December 23, 2010).

- "An *ad hoc* committee, which is not an appellate body, is not called upon to substitute its own analysis of law and fact to that of the arbitral tribunal." *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision of the *ad hoc* Committee, para. 144 (March 1, 2011).

- "Article 52 excludes a review of the Award on the merits to the extent that article 53(1) excludes any appeal. As a result, an *ad hoc* Committee cannot consider new matters regarding the merits of a case in an annulment proceeding." *Togo Electricité and GDF-Suez Energie Services v. Republic of Togo*, ICSID Case No. ARB/06/7, Decision on Annulment, para. 50 (September 6, 2011) (footnote omitted) [unofficial translation from French].

- "An ICSID award is not subject to any appeal or to any other remedy except those provided for in the ICSID Convention. In annulment proceedings under Article 52 of the ICSID Convention, an *ad hoc* committee is thus not a court of appeal, and cannot consider the substance of the dispute, but can only determine whether the award should be annulled on one of the grounds in Article 52(1)." *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and the Application for Partial Annulment of the Argentine Republic, para. 81 (September 16, 2011) (footnotes omitted).

- "As unambiguously expressed in Article 53 of the Convention, an award is not subject to an appeal. Annulment must therefore be different from appeal. It is well settled in international investment arbitration that an *ad hoc* committee may not substitute its own judgment on the merits for that of a tribunal." *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary*, ICSID Case No. ARB/07/22, Decision of the *Ad Hoc* Committee on the Application for Annulment, para. 15 (June 29, 2012).

- "It is clear that Chile is here seeking in effect to appeal the Tribunal's decision and is asking the Committee to substitute its decision for that of the Tribunal. As is well established, this is not the remit of an Annulment Committee. An *ad hoc* committee is not an appeal body." *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, para. 129 (December 18, 2012).

- "Article 52.1.e of the Convention is not a means by which a Committee may decide or influence the substance of the dispute. Indeed, this provision is no means of appeal, which is not disputed by the parties for that matter." *RSM Production Corporation v. Central African Republic*, ICSID Case No. ARB/07/2, Decision on Annulment of RSM Production Corporation, para. 92 (February 20, 2013) [unofficial translation from French].

- "Allowing annulment committees to overturn incorrect applications of the law was specifically rejected by the drafters of the ICSID Convention because some delegates feared that this would call into question the finality of awards. Incorrect application of the law is thus not a basis for annulment except in the most egregious cases[.]" *Libananco Holdings Co. Ltd. v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment, para. 97 (May 22, 2013) (footnote omitted).

- "If the tribunal's legal interpretation is reasonable or tenable, even if the committee might have taken a different view on a debatable point of law, the award must stand – otherwise the annulment procedure would expand into an appeal mechanism, in contravention of the clear wording of the Convention." *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, para. 144 (February 21, 2014) (footnote omitted).

- "In essence, there is a unanimous agreement that annulment is distinct from appeal. The *ad hoc* committees are not courts of appeal and their task is not to harmonize ICSID's jurisprudence[.]" *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Annulment, para. 105 (May 19, 2014) (footnote omitted).

- "Article 52(1)(e) does not empower an *ad hoc* Committee to review the merits of a case. Indeed, such a review would amount to an appeal, which is an impermissible remedy pursuant to Article 53 of the ICSID Convention." *Alapli Elektrik B.V. v. Republic of Turkey,* ICSID Case No. ARB/08/13, Decision on Annulment, para. 197 (July 10, 2014).

- "If this Committee were to undertake a careful and detailed analysis of the respective submissions of the parties before the Tribunal… and annul the Award on the ground that its understanding of facts or interpretation of law or appreciation of evidence is different from that of the Tribunal, it will cross the line that separates annulment from appeal." *Daimler Financial Services A.G. v. Republic of Argentina* ICSID Case No. ARB/05/1, Decision on Annulment, para. 186 (January 7, 2015).

- "The annulment proceeding is not an appeal and therefore, is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed." *Daimler Financial Services A.G. v. Republic of Argentina* ICSID Case No. ARB/05/1, Decision on Annulment, para. 188 (January 7, 2015) (footnote omitted).

- "Most committees have understood that this recourse of annulment must be clearly distinguished from an appeal. The difference between appeal and annulment is relevant in two ways. First, as to the result of the review procedure: an appeal can modify the award under review, whereas annulment can only invalidate it (fully or partially) or assert its validity, without being able to modify its content. Second, as has been recognized (among others) by the Committees in *Soufraki* and *Pey Casado* in the annulment decision it is not pertinent to rule on the substantive correctness of the award, because the annulment regime was designed to protect the integrity and not the result of ICSID arbitration proceedings; therefore, annulment refers only to the legitimacy of the decision process and not to its

merit." *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Request for Annulment of the Award Submitted by Iberdrola Energía, S.A., para. 74 (January 13, 2015) (footnotes omitted) [unofficial translation from Spanish].

- "It is the Arbitral Tribunal which must interpret the law. The Committee reiterates that it is not its function to act as an appeals tribunal." *Mr. Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment, para. 156 (February 12, 2015) [unofficial translation from Spanish].

- "[A]n examination of the reasons presented by a tribunal cannot be transformed into a re-examination of the correctness of the factual and legal premises on which the award is based. Committees do not have the power to review the adequacy of the reasons set forth by the tribunal in its award. Rather, the role of the committee is limited to analyzing whether a reader can understand how the tribunal arrived at its conclusion. Broadening the scope of Article 52(1)(e) to comprise decisions with inadequate reasons would transform the annulment proceeding into an appeal." *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 66 (November 2, 2015).

- "Annulment is fundamentally different from appeal. The result of a successful application for annulment is the invalidation of the original decision. The result of a successful appeal is its modification. A decision-maker exercising the power to annul only has the choice between leaving the original decision intact or annulling it in whole or in part. An appeals body may substitute its own decision for the decision that it has found to be deficient. Under the ICSID Convention, an *ad hoc* committee only has the power to annul the award. The *ad hoc* committee may not amend or replace the award by its own decision on the merits. Article 53(1) of the Convention explicitly rules out any appeal." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 42 (December 30, 2015).

- "ICSID *ad hoc* committees have adamantly stressed the distinction between annulment and appeal. They have stated consistently that their functions are limited and that they do not have the powers of a court of appeal. A decision to annul has to be based on one of the five reasons listed in Article 52(1). *Ad hoc* committees cannot review an award's findings for errors of fact or law." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 44 (December 30, 2015) (footnotes omitted).

- "[I]t is not within the Committee's remit to review the substantive correctness of the Award, either in fact or in law. However, the Committee must examine the legitimacy of the arbitration proceedings resulting in the Award. This means that it is not the Committee's function to sit in appeal on the Award of the Tribunal. It must not substitute its views for those of the Tribunal." *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 29 (January 15, 2016).

- "It is not within an *ad hoc* committee's remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A

tribunal's discretion in such matters of appreciation and evaluation of evidence is recognized by the ICSID system. An *ad hoc* committee cannot sit in appeal on a tribunal's assessment of the evidence. If the Committee were to proceed to a re-examination of the facts of the present case and an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body. That is not a function envisaged for it by the ICSID Convention." *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment, para. 129 (January 15, 2016) (footnotes omitted).

- "Article 53 of the ICSID Convention provides for the fundamental features of an arbitration award and confirms the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties. The said article confirms also that the only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention and that no appeal is allowed." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 164 (February 1, 2016) (footnote omitted).

- "As indicated before, the annulment proceeding is not an appeal and therefore is not a mechanism to correct alleged errors of fact or law that the tribunal may have committed. Annulment under the ICSID Convention is a limited remedy." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 179 (February 1, 2016) (footnotes omitted).

- "[I]t is a well established principle that, as the *ad hoc* committee in *MTD Equity and MTD Chile* v. *Republic of Chile* put it – Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the Tribunal." *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 64 (February 5, 2016) (footnote omitted).

- "The Committee notes that ICSID *ad hoc* committees have repeatedly held that the annulment mechanism is an exceptional and narrowly circumscribed remedy, and that it is not a remedy against an incorrect decision. As a result, committees have stressed the distinction between annulment and appeal, and stated that they cannot review the correctness of an award's findings on facts or law. The Committee agrees with *CMS v. Argentina* that a committee 'has only limited jurisdiction under Article 52 of the Convention' and 'cannot simply substitute its own view of the law and its own appreciation of the facts for those of the Tribunal.' The Committee will apply these general standards when considering each of the grounds for annulment pleaded in this case." *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, para. 122 (February 26, 2016) (footnotes omitted).

- "Unreasoned awards can be annulled, because parties should be able to ascertain to what extent a tribunal's findings are based on a correct interpretation of the law and on a proper evaluation of the facts. However, as long as reasons have been stated, even if incorrect, unconvincing or non-exhaustive, the award cannot be annulled on this ground. Article 52(1)(e) does not permit any enquiry into the quality or persuasiveness of reasons." *Ioan*

Micula, Viorel Micula and others v. Romania, ICSID Case No. ARB/05/20, Decision on Annulment, para. 135 (February 26, 2016) (footnotes omitted).

- "[*A*]*d hoc* committees are not courts of appeal, and annulment is not a remedy against a decision deemed as incorrect. This principle has been repeatedly stated by *ad hoc* committees." *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, para. 111 (March 29, 2016) (footnote omitted) [unofficial translation from French].

- "It is nevertheless necessary to distinguish between the non-application by the arbitral Tribunal of the normally applicable law that constitutes a ground for annulment, and the misapplication of the applicable law, which does not constitute an excess of power and is therefore not a ground for annulment." *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on the Application for Annulment of the Democratic Republic of the Congo, para. 119 (March 29, 2016) (footnotes omitted) [unofficial translation from French].

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

- "It is evident from the drafting history of that provision [Article 52 of the ICSID Convention], and its subsequent and consistent application, that the function and purpose of an annulment proceeding is distinct from an appeal", *Poštová Banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment, para. 128 (September 29, 2016).

- "There is no doubt that the scope of an annulment proceeding under the ICSID Convention is distinct from that of an appeal in its purpose, and therefore in its operation [...] The role of the Committee is therefore not to correct any error of law of the Tribunal, or its analysis of the facts, or its evaluation of the evidence. The Committee cannot substitute its appreciation of the facts and the manner in which it would have applied the law for that of the Tribunal. […] The Committee emphasizes that the annulment mechanism was designed to protect the legitimacy and integrity of the decision process, and not for the *ad hoc* committee to correct errors of fact or law of the tribunal, or to replace the tribunal's view on the merits with its own. In this sense, Article 52 of the ICSID Convention does not empower the Committee to annul an award solely because, had it been in its position, it would have presented a different reasoning. An *ad hoc* committee's review can never replace the tribunal's decision in terms of what it considers to be materially correct. To do otherwise would amount to an appeal", *SAUR International SA v. Republic of Argentina*,

ICSID Case No. ARB/04/4, Decision on Annulment, paras. 160, 190 (December 19, 2016) [unofficial translation from Spanish].

- "The Committee insists with some gravity on the finality of ICSID awards. They "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", as unequivocally stated in Article 53 of the ICSID-Convention. […] Appeals are explicitly excluded in the ICSID system and *ad hoc* committees are not instance courts. That is a matter of the text of the ICSID Convention.", *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, paras. 123, 128 (December 27, 2016).

- "… As it is expressly provided in Article 53(1) of the ICSID Convention, ICSID awards are not subject to any appeal, and in line with this provision… It is therefore not for this Committee to make its own assessment of the factual and/or legal questions of this case or to substitute its own views for the conclusions that the Tribunal has reached in the course of almost twelve years of proceedings.[…] In interpreting the scope of its review under these five grounds, the Committee will take into account the intention of the drafters of the ICSID Convention in not providing for an appeal, but rather a very limited annulment proceeding, which is designed to ensure the fundamental integrity of the arbitral proceedings but must not be misused to re-litigate the case on the merits." *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Annulment, paras. 51-53 (May 5, 2017).

- "It is not the duty of this *Ad Hoc* Committee to reconsider the merits of the case, or to comment on what it would have decided on the merits had it been acting as an arbitral tribunal. Annulment is the exception to the general rule; the general rule is the binding and enforceable character of an ICSID award", *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/22, Decision on Annulment, para. 188 (February 2, 2018) [unofficial translation from Spanish].

- "[T]he Committee bears in mind the drafting history of the Convention, which also demonstrates that annulment "is not a procedure by way of appeal requiring consideration of the merits of the case, but one that merely calls for an affirmative or negative ruling based upon one [of the grounds for annulment]". It, therefore, does not provide a mechanism to appeal any alleged misapplication of law or mistake in fact by a tribunal.", *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, para. 60 (August 22, 2018).

- "Nor is an ICSID annulment proceeding a retrial and accordingly it is based on the record before the tribunal. Pursuant to ICSID Arbitration Rule 34(1), it is the tribunal, and not an ICSID annulment committee, that is the judge of the admissibility of evidence and its probative value. It follows from these principles that a party seeking annulment cannot make new arguments on the merits that were not made in the original proceedings, or more generally, try to reargue the case on the merits. […] It is well-established that an ICSID annulment proceeding is indeed an annulment proceeding and not an appeal, and it is therefore not a place for a party to raise an argument that it did not make in the underlying

arbitration proceeding [footnote omitted]—and even less a place to raise an argument that contradicts the argument raised by a party in the arbitration proceeding", *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Decision on Annulment, paras. 239, 240, 251 (November 21, 2018).

- "Thus, even if an *ad hoc* annulment committee reaches a decision to annul, partially or totally, an ICSID award, that committee does not have the mandate to revisit the merits of the case in which the annulled award was rendered. […] Although the principle of Kompetenz-Kompetenz does hot shield the Tribunal's decision on its own competence from scrutiny, the principle favors a presumption of deference to the Tribunal as regards its decision. Taken together with the fact that this process must not be treated as an appeal, it is clear that the Committee cannot conduct a de novo analysis of the reasoning underlying the Tribunal's jurisdictional decision", *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment, paras. 61, 183 (December 6, 2018).

- "It is widely recognized that the power of annulment under Article 52 of the Convention does not extend to an appeal on facts or law. The question is where the distinction between appeal and annulment should be drawn." *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Annulment, para. 159 (December 14, 2018).

- "Therefore, the "limited and exceptional nature" of annulment has to be taken into account as well as its "narrowly circumscribed" criteria. Its objective is "to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.", *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, para. 43 (December 28, 2018).

- "ICSID Convention Article 53 provides that an award is not 'subject to any appeal.'…Therefore, the Committee has no competence to substitute its own judgments on the jurisdiction of the Tribunal or on the merits for the judgments of the Tribunal. […] The Committee emphasizes that it is not a court of appeal and that it does not have the authority to substitute its judgment on jurisdictional requirements, the interpretation of law, and/or the assessment of facts, for that of the Tribunal.", *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, paras. 44, 64 (December 28, 2018).

- "The Committee also wishes to emphasize that an annulment is not equivalent to an appeal, as is apparent from the ordinary meaning of the terms of Article 52 of the ICSID Convention in the context of the Convention, particularly Sections 5 and 6 of Chapter IV. […] It follows from the foregoing that what was sought from the outset under the ICSID system was a very limited mechanism for annulment of awards, whereby an *ad hoc* committee or commission is not permitted to and should not review the merits of the underlying case, and thus essentially precludes annulment on the merits of the award or modification of the award. Through the annulment remedy provided finally in Article 52(1) of the ICSID Convention, an award is either partially or completely annulled on the listed

grounds, or it is not annulled. However, in no way does it allow an *ad hoc* Committee to amend an award by substituting or correcting the reasoning of an Arbitral Tribunal. [...] While a Committee cannot engage in a *de novo* analysis of the scope of the Tribunal's jurisdiction, it can undertake the minimal analysis necessary to determine whether the conclusions reached by the Tribunal regarding jurisdiction were within its powers. [...] Firstly, the Committee notes that it is not an appellate court that can assess a purported error in the evaluation of evidence. The evaluation of evidence constitutes a substantive issue and not a matter of (fundamental or otherwise) procedural rule", *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, paras. 46, 47, 70, 342 (April 15, 2019) [unofficial translation from Spanish].

- "In substance, annulment is not an appeal allowing reconsideration of the merits of the case." *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, para. 48 (May 29, 2019)

- "Firstly, it has been established that the ICSID Convention's annulment mechanism does not constitute an appeal procedure requiring examination of the merits. This is because the finality of ICSID awards is one of the fundamental aspects of the system set up by the Convention", *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on the Application of Annulment, para. 116 (October 25, 2019) [unofficial translation from French].

- "Similarly, annulment committees coincide in differentiating the annulment remedy from an appeal. Annulment is a remedy "to uphold and strengthen the integrity of the ICSID process." It does not entail a substantive review of the award.", *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment, para. 92 (November 22, 2019).

- "The Parties not only agree with the analysis of the First Committee, they also agree that annulment proceedings are not to be equated to an appeal, which is obvious given the clear wording of Article 53(1) of the ICSID Convention. […] The Committee is mindful of its limited role to protect the propriety and integrity of the proceeding and not to sit as a court of appeal. It is not authorised to qualify the Tribunal's reasoning as deficient, superficial or wrong, and inconsistencies between different parts of the Resubmission Award do not amount to a lack of reasons, unless the contradiction is of a kind that two arguments neutralise each other or "cancel each other out. […] In maintaining this balance, the Committee does not venture into the field of an appeal proceeding, which would violate the principle of Article 53 of the ICSID Convention. It understands the apprehension of the *ad hoc* committee in Azurix v. Argentina that refused to decide whether "a decision under Article 58 was correct, as this would be tantamount to an appeal."[footnote omitted] When examining whether the Chairman of the Administrative Council rendered decisions that no reasonable decision-maker would have rendered, the issue is not the correctness of the decisions but rather the protection of the basic integrity of the challenge procedure. The legitimate apprehension to avoid a test equivalent to an appeal must not engender the curtailing of committees' functions to a degree that would prevent the supervision of the

integrity of the ICSID system. […] In that context, the Committee recalls that it is not a court of appeal. It is convinced that "a misapplication of the applicable law is not an annullable error […] provided it is not of a magnitude as to amount to a veritable non-application of the proper law as a whole. It is also conscious of the legitimacy of the annulment mechanism. Its objective is to "reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice", *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment, paras. 187, 205, 584, 683 (January 8, 2020).

- **"**Furthermore, annulment is not an inquiry into the substance of the award nor is it a remedy against a flawed or incorrect decision", *UAB Energija (Lithuania) v. Republic of Latvia,* ICSID Case No. ARB/12/33, Decision on Annulment, para. 94 (April 8, 2020).

- "It is important to note, at this juncture, that within the ICSID system of Arbitration there is no appeal or any other remedy against an award except those provided for in the Convention. […] The role of an *ad hoc* committee is to ensure the stability of the ICSID arbitration system, not to overthrow awards because of its disagreement with the arbitral tribunal. Otherwise, the annulment mechanism of Article 52 would slide into an appeal", *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, para. 148 (April 13, 2020).

- "Both Parties agree that an Annulment Proceeding is not an appeal, in other words, it is not a 'review' or 'second instance' proceeding in which, as a possible outcome, an award is modified. [...] Both Parties concur that this means the Committee cannot correct alleged errors of fact or law, nor review the evaluation of evidence presented in the proceedings, and therefore, a committee like the present one cannot undertake a *de novo* review and modify the award. It either confirms it or annuls it, partially or entirely. [...] This Committee is not tasked with annulling an award for any alleged erroneous application of provisions on treaty interpretation under the VCLT, as both Parties have acknowledged in their submissions", *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on Annulment, paras. 72, 73, 180 (June 22, 2020) [unofficial translation from Spanish].

- "The annulment under Article 52 of the Convention represents an exception to the principle of finality of the awards. That principle is embodied in Article 53(1) of the Convention according to which "[t]he 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". The only remedies, envisaged in Section 5 of Chapter IV of the Convention, are interpretation, revision and annulment of the awards. The annulment process is not an appeal, it differs from it. It is not concerned with the substantive correctness of the award but with the integrity of the decision-making and the process which has led to the decision. […] The distinction between annulment and appeal has been emphasized by many *ad hoc* committees. They have stated consistently that their functions are limited and that they do not have the powers of a court of appeal. A decision to annul can be based on one or several of the five grounds listed in Article 52(1) of the ICSID Convention. [footnote omitted] It is not the role of *ad hoc* committees to review tribunals' findings on facts or to control their interpretation of the applicable law. […] It is not the role of the annulment Committee to

review the Tribunal's specific findings on the relevant facts of the case to which the Tribunal applied the concept of abuse of rights. Neither is it the role of the annulment Committee to assess whether the evidence gathered by the Tribunal justify a finding of abuse of rights. This would transform the Committee into an appellate body", *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, paras. 120, 124, 317 (September 17, 2020).

- "There is no appeal in the ICSID system, and it is not within the province of an annulment committee to review the adequacy of a tribunal's reasoning.293 Nor is it "the role of an annulment committee to conduct a re-evaluation of the record before the tribunal. Pursuant to Arbitration Rule 34(1), a tribunal is the judge of the admissibility and probative value of any evidence adduced before it", *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Decision on Annulment, para. 228(a) (March 19, 2021).

- "The Committee is also in full agreement with the position, not disputed by the parties at least in principle, that annulment is not an appeal. Indeed, Article 53 of the ICSID Convention makes clear that there are no rights of appeal against awards rendered pursuant to the Convention and that the only remedies are the ones set forth in the Convention itself. This point has particular force when the ground for annulment is a failure to state reasons under Article 52(1)(e). In the Committee's view, *ad hoc* committees must be especially cautious when considering this ground for annulment not to venture into territory that would implicate an appeal, for example, by requiring the examination of the adequacy or correctness of the reasoning of the Tribunal in rendering the Award. The Committee considers well-founded the admonition of Professor Schreuer that the risks of crossing the line into impermissible territory are greatest with applications for annulment that rely on Article 52(1)(e)", *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, paras. 105-106 (April 2, 2021).

- "… [A]n *ad hoc* committee shall not act as an appellate court to review the substance of the Award and it is not entitled to substitute its views for those of the tribunal because it disagrees with the substantive outcome of the award." *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, para. 59 (May 28, 2021)

- "The Committee stresses that finality of awards is one of the cornerstones of the ICSID system. As an exception to such rule, annulment is a limited remedy designed to safeguard the fundamental fairness and integrity of the underlying arbitration.[fn omitted] Consequently, an *ad hoc* committee shall not act as an appellate court to review the substance of the Award and it is not entitled to substitute its views for those of the tribunal because it disagrees with the substantive outcome of the award. This analysis is confirmed by Article 53 of the ICSID Convention, which stresses that the 'award […] shall not be subject to any appeal", *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, para. 59 (May 28, 2021).

- "… [T]he Committee is mindful that the annulment procedure under the ICSID Convention is not an appeal against the Tribunal's legal and factual findings." *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on Annulment, para. 168 (July 30, 2021).

- "The Committee is not an appellate body and much less a first trier of fact", *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment, para. 257 (August 11, 2021).

- "…[T]he Committee cannot express a view on the alleged incorrectness or unfairness of the Award, nor can it substitute its own view of the facts and law for that of the Tribunal. On the contrary, the Committee's role is limited to assessing the legitimacy and integrity of the underlying arbitration based on the grounds for annulment provided for in Article 52(1) of the ICSID Convention…", *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on Annulment, para 119 (December 21, 2021) [unofficial translation from Spanish].

- "… The Committee notes that it is undisputed that an annulment process is distinct from an appeal. [fn omitted] Unlike an appellate court, the Committee is limited in its competence to assess the legitimacy of the process leading up to the Tribunal's decision, not its substantive correctness in terms of law or facts." "…[t]he Committee is not in a position to review the matter de novo and substitute the Tribunal's findings with its own, nor should it allow the Parties to relitigate matters with the benefit of hindsight in order to secure a better outcome." *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Decision on Annulment, paras. 56, 253 (March 16, 2022).

- "… Art. 53(1) of the ICSID Convention confirms that an annulment should not amount to an appeal by providing that an "award shall be binding on the parties and shall not be subject to any appeal". A fundamental goal of the ICSID system is to assure the finality of an ICSID arbitration award.", *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment para. 61 (March 18, 2022).

- "What has been set up in the ICSID Convention is not an appeal committee, but rather an annulment committee, and this is also to be understood in a way that takes into account that the threshold for annulling an award is stricter than the threshold for amending an award by means of rendering a more adequate one." "It is expected that a committee will refrain from reassessing evidence, giving it more (or less) weight than the tribunal did, and that it will not reinstate evidence as being essential when the evolution of the arbitral proceedings did not convince the adjudicators of it." *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICISD Case No. ARB/14/12, Decision on Annulment, paras. 675-676 (June 10, 2022).

- …[A]nnulment proceedings cannot be construed as an appeal against an award, but rather as a solution to avoid illegal awards to survive in the international community." "…[A Committee] cannot extend its powers to look at the Award as a decision to be amended,

which would be possible under a different system having with an appeal tribunal. […] This means that members of *ad hoc* committees must refuse the "temptation" of looking to ICSID awards as if they could enter into the shoes of the arbitrators to reassess facts and law and to "recreate" a solution that eventually might be considered by them as a better outcome for the case. The committees cannot 'review the awards' findings for errors of fact or law.'" *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICISD Case No. ARB/14/12, Decision on Annulment, paras. 400, 404-405 (June 10, 2022).

- "Further, neither the ICSID Convention nor the Rules include appeal as a remedy against an award." *Global Telecom Holding S.A.E. v. Canada,* ICSID Case No. ARB/16/16, Decision on Annulment, para. 50 (September 30, 2022).

- "Regarding the "proper VCLT analysis" referred to by Canada,[footnote omitted] it is not for the Committee to examine whether the Tribunal's interpretation of the Treaty is correct or incorrect. Such assessment would be equivalent to an appeal and to a de novo review of the Tribunal's jurisdiction, which is beyond the Committee's powers under the ICSID Convention. […] [A]n annulment proceeding is not an appeal. The Committee finds that the role of *ad hoc* committees in safeguarding the ICSID system does not include reviewing the substance of tribunals' interpretation of the jurisdictional exceptions raised by the parties. In this case, the Tribunal exercised the powers to determine its own jurisdiction, which is how the Parties characterized the matter, per the principle of compétence-compétence enshrined in Article 41 of the ICSID Convention. The Committee agrees with other annulment committees that nothing in the ICSID Convention dictates a differentiation between grounds for annulment on the basis of jurisdiction or on the merits", *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, paras. 125, 221 (September 30, 2022).

- "At a more general level, annulment is an extraordinary remedy. [fn omitted] It is not rehearing or an appeal in which the *ad hoc* Committee is tasked with the correction of what it perceives to be errors…" *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on Annulment, para. 103 (October 14, 2022).

- "[I]t is evident that *ad hoc* committees do not have the authority to substitute their interpretation of the law and/or their appreciation of the facts to the interpretation or appreciation of the tribunals. Competing interpretations and judgment of *ad hoc* committees over the quality of work of tribunals do not contribute to the integrity of the system and necessarily blur the line between an appeal and an annulment. That is all the more so since the Committee presumes that it is rare that arbitrators, who are appointed on the basis of their "high moral character and recognized competence in the fields of law", as requested in Article 14 of the ICSID Convention. would produce a misinterpretation or misapplication of the proper law which no reasonable person could accept in a tribunal of three. It does not exclude the possibility of such conduct completely but believes that the probability is extremely low that a tribunal with recognized competence in the fields of law misinterprets it in a way unacceptable to any reasonable person. Committees must resist the temptation to assume that their own interpretation of the law and appreciation of the

facts are superior to the ones of the tribunal and to replace them. […] The Committee agrees with the Green Power tribunal that "the scope of review of an *Ad hoc* Committee under the ICSID Convention" [footnote omitted] does not encompass an interpretation of legal provisions in contradiction to the interpretation of the same legal provisions by the tribunal, to the extent that the issues remain open to different interpretations. Such an approach would invariably qualify as an appeal decision for which *ad hoc* committees have no authority", *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, (ICSID Case No. ARB/14/16), Decision on Annulment, paras. 199, 246 (November 30, 2022).

- "[…] The Committee agrees that annulment should not be an opportunity for a de novo assessment of facts or law that leads to the decision on jurisdiction." Watkins Holdings S.à r.l. and others v. Kingdom of Spain, ICSID Case No. ARB/15/44, Annulment Decision, para. 72 (February 21, 2023).

- "…[T]he Committee agrees with OperaFund and Schwab when they cite Professor Schreuer's commentaries to the ICSID Convention submitting that an implication of this principle is that an annulment proceeding is only 'concerned with the legitimacy of the process of the decision, it is not concerned with its substantive correctness. […] the Committee also agrees with the further implication that an annulment proceeding concerns 'the record before the Tribunal;'[fn omitted] it is not an opportunity to raise new evidence or new arguments on the merits. [fn omitted] It is incumbent upon the Committee to ensure the integrity of the process in this regard, and therefore it will not rely on evidence or arguments that were not part of the record before the Tribunal." *OperaFund Eco -I Nvest Sicav Plc and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment, paras. 73-74 (March 2, 2023).

- "With respect to the principle that *ad hoc* committees are not courts of appeal, the Committee agrees with OperaFund and Schwab when they cite Professor Schreuer's commentaries to the ICSID Convention submitting that an implication of this principle is that an annulment proceeding is only "concerned with the legitimacy of the process of the decision, it is not concerned with its substantive correctness", *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment, para. 73 (March 2, 2023).

- "Annulment proceedings must therefore be distinguished from appeals, since they do not involve a review of the merits of the award, or the possibility of its modification." *BayWa r.e. AG (formerly BayWa r.e. renewable energy GmbH and BayWa r.e. Asset Holding GmbH) v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Annulment, para. 132 (May 8, 2023).

- "… [T]his Committee's jurisdiction is limited to considering whether or not the Tribunal manifestly exceeded its powers on the basis of those arguments, law and evidence that were before it at the time of its Award." *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment, para. 217 (May 20, 2023).

(4) *Ad hoc* Committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards

- "An *ad hoc* Committee retains a measure of discretion in ruling on applications for annulment. To be sure, its discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. It may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.10 (December 22, 1989).

- "The *ad hoc* Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.20 (December 17, 1992).

- "[It] appears to be established that an *ad hoc* committee has a certain measure of discretion as to whether to annul an award, even if an annullable error is found... Among other things, it is necessary for an *ad hoc* committee to consider the significance of the error relative to the legal rights of the parties." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I*), ICSID Case No. ARB/97/3, Decision on Annulment, para. 66 (July 3, 2002).

- "Keeping the object and purpose of the Convention as well as these underlying policy considerations in mind, we note that the *ad hoc* Committees operating during the last two decades have considered that a Committee has discretion to determine not to annul an Award even where a ground for annulment under Article 52(1) is found to exist... We thus should consider the significance of the [alleged annullable] error relative to the legal rights of the parties." *CDC Group plc v. Republic of the Seychelles*, ICSID Case No. ARB/02/14, Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of Seychelles, para. 37 (June 29, 2005) (footnotes omitted).

- "[The Committee] should therefore refrain from making an annulment decision too hastily. It must do so only in case of manifest error, substantial breach or, more specifically, whenever the breach is such that, if it had not been committed, the Tribunal would have reached a different outcome than the one reached. To this extent, the *ad hoc* Committee retains a measure of discretion." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 226 (January 18, 2006) (citations omitted) [unofficial translation from French].

- "An *ad hoc* Committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule protected by Article 52." *Patrick Mitchell v.*

Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006).

- "An *ad hoc* committee will not annul an award if the Tribunal's disposition is tenable, even if the committee considers that it is incorrect as a matter of law." *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* Committee, para. 55 (June 14, 2010) (footnote omitted).

- "[E]ven in the case of annullable error, the *ad hoc* Committee still has a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi II*), ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award Rendered on 20 August 2007, para. 252 (August 10, 2010).

- "The fundamental goal of the ICSID system is to assure the finality of the ICSID arbitration award. In this respect, the Committee agrees with Claimant that the annulment proceeding concerns serious procedural irregularities in the decisional process rather than an appeal on the merits. The limited and exceptional nature of the annulment remedy provided by Article 52 of the ICSID Convention forbids an inquiry on the substance of the case, on the misapplication of the law or on mistakes in analyzing the facts." *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award, para. 233 (July 8, 2013) (footnotes omitted).

- "Article 53 sets out the fundamental features of an arbitration award, reiterating the well-established doctrine of finality in arbitration and the binding effect of the awards on the parties... Given this framework this Committee concludes that in balancing these principles and interests, annulment is an exceptional recourse that should respect the finality of the award." *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* Committee on the Application for Annulment, para. 118 (January 24, 2014).

- "Article 52(3) of the ICSID Convention provides in part that '[t]he Committee shall have the authority to annul the award […].' Under the ordinary meaning of this provision, an *ad hoc* committee has some discretion and is not under an obligation to annul even if it finds that there is a ground for annulment listed in Article 52(1). Decisions on applications for annulment confirm that, even if a ground listed in Article 52(1) exists, annulment will ensue only if the flaw has had a serious adverse impact on one of the parties." *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment, para. 45 (December 30, 2015) (footnote omitted).

- "[I]t is also undisputed that an annulment committee should not review the merits. It is not the duty of an *ad hoc* committee under the ICSID Convention to revisit the merits of the case, or to comment on what it would have decided on the merits had it acted as an arbitral tribunal. Annulment is an exceptional recourse that should consider the finality of the award." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 165 (February 1, 2016).

- "Thus, the grounds for annulment should be interpreted as being exhaustive, considering their object and purpose, as an exceptional remedy, against an award that is otherwise considered final and binding." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 166 (February 1, 2016).

- "The Committee considers that the [final sentence of Article 52(3) of the ICSID Convention] clearly indicate[s] that committees were intended to have a degree of discretion. To say that a committee 'shall have the authority to annul the award' is very different from saying that a committee 'shall annul the award'. Moreover, the Committee notes that other *ad hoc* committees have proceeded on the basis that annulment was not mandatory and that they enjoyed a discretion whether or not to annul the award under consideration. The Committee concludes that, even if an Article 52(1) ground is made out, it nevertheless retains a discretion as to whether or not to annul the award. That discretion is by no means unlimited and must take account of all relevant circumstances, including the gravity of the circumstances which constitute the ground for annulment and whether or not they had – or could have had – a material effect upon the outcome of the case, as well as the importance of the finality of the award and the overall question of fairness to both Parties." *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision, para. 73 (February 5, 2016) (footnote omitted).

- "Furthermore, *ad hoc* Committees should use their discretion so as not to frustrate the object and purpose of the annulment remedy, nor to erode the finality of the awards or their binding force, and to decide on a full or partial annulment", *SAUR International SA v. Republic of Argentina*, ICSID Case No. ARB/04/4, Decision on Annulment, para. 162 (December 19, 2016) [unofficial translation from Spanish].

- "The Committee insists with some gravity on the finality of ICSID awards. They "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", as unequivocally stated in Article 53 of the ICSID-Convention.", *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, paras. 123 (December 27, 2016).

- "Regarding the annulment remedy under Article 52, the drafting history of the ICSID Convention reflects that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system.", *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Annulment, para. 59 (August 22, 2018).

- "Therefore, the "limited and exceptional nature" of annulment has to be taken into account as well as its "narrowly circumscribed"9 criteria. Its objective is "to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.", *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, para. 43 (December 28, 2018).

- "This Committee fully subscribes to the six (6) principles expressed in paragraph 49 above, and taking into account the Applicant's arguments referred to in the preceding paragraph, this Committee particularly reminds the Parties that it must use its judgment or discretion so as not to frustrate the object and purpose of the remedy, nor to erode the binding force and finality of the awards. In the opinion of this Committee, this is in accordance with the interpretation related to the object and purpose of the treaty to be given to Article 52 of the ICSID Convention and, therefore, it is not a matter of making narrow or broad interpretations, but interpretations that are consistent with that object and purpose", *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment, para. 51 (April 15, 2019) [unofficial translation from Spanish].

- **"**In addition, the Committee notes that Article 52 of the ICSID Convention aims at protecting the fundamental integrity of arbitral tribunals' decisions and the fulfilling of basic procedural guarantees", *UAB Energija (Lithuania) v. Republic of Latvia,* ICSID Case No. ARB/12/33, Decision on Annulment, para. 94 (April 8, 2020).

- "An *Ad hoc* Committee retains a measure of discretion in its ruling on applications for annulment. This is clearly implied in the CONVENTION through the use of terms, such as "manifest," "serious" and "fundamental". This discretion is not unlimited and should not be exercised to the point of defeating the object and purpose of the remedy of annulment. The *Ad hoc* Committee may refuse to exercise its authority to annul an Award if and when annulment is clearly not needed to remedy procedural injustice and annulment would unwarrantably erode the binding force and finality of ICSID Awards", *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, para. 148 (April 13, 2020).

- "The Background Paper [*i.e.*, ICSID's Background Paper on Annulment], cited by both Parties in these Proceedings, is clear: 'As illustrated by Section III, the drafting history of the ICSID Convention demonstrates that assuring the finality of ICSID arbitration awards was a fundamental goal for the ICSID system. As a result, annulment was designed purposefully to confer a limited scope of review which would safeguard against 'violation of the fundamental principles of law governing the Tribunal's proceedings.' The remedy has thus been characterized as one concerning 'procedural errors in the decisional process' rather than an inquiry into the substance of the award'", *Blue Bank International & Trust (Barbados) Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on Annulment, para. 75 (June 22, 2020) (footnotes ommitted) [unofficial translation from Spanish].

- "The main goal of the ICSID Convention is to assure the finality of the ICSID awards. [footnote omitted] Therefore, the drafters of the ICSID Convention opted for the model of a limited review", *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, para. 122 (September 17, 2020).

- "At the outset, the Committee notes its agreement with the parties that the ICSID Convention favors the finality of awards and provides only limited exceptions to that

principle in the interest of fundamental procedural integrity", *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case No. ARB/15/28, Decision on Annulment, para. 105 (April 2, 2021).

- "The Committee stresses that finality of awards is one of the cornerstones of the ICSID system. As an exception to such rule, annulment is a limited remedy designed to safeguard the fundamental fairness and integrity of the underlying arbitration." *Perenco Ecuador Limited v. Republic of Ecuador,* ICSID Case No. ARB/08/6, Decision on Annulment, para. 59 (May 28, 2021).

- "The Committee stresses that finality of awards is one of the cornerstones of the ICSID system. […] The Committee is of the view that while it is true that Article 52(3) of the ICSID Convention states that an *ad hoc* committee 'shall have the authority' to annul the award or any part thereof […],' the discretion resulting from such provision should not be interpreted to defeat the object and purpose of the annulment remedy—'[the] safeguard against 'violations of the fundamental principles of law governing the Tribunal's proceedings''—or to erode the binding force and finality of awards.", *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, paras. 59, 63 (May 28, 2021).

- "The Committee agrees with the Parties that a fundamental goal of the ICSID Convention is to assure the finality of awards and to provide limited exceptions to the concept of finality in the interest of fundamental procedural integrity." "… there is no presumption either in favor of or against annulment and there is no basis for either an extensive or restrictive interpretation of Article 52 of the ICSID Convention. [fn omitted] Here again, the starting point of the annulment process is the finality of awards." *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain,* ICSID Case No. ARB/15/20, Decision on Annulment, paras. 92-93 (March 28, 2022)

- "The intention of the drafters of the ICSID Convention has been "to reconcile finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice." [fn omitted] This intention has been implemented under the Convention by conferring to annulment committees "a limited scope of review which would safeguard against 'violation of the fundamental principles of law governing the tribunal's proceedings.'" *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICISD Case No. ARB/14/12, Decision on Annulment, paras. 407 (June 10, 2022).

- "At the same time, the discretion awarded to the Committee by Article 52(3) of the ICSID Convention – 'the Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)' – should be interpreted so as not to defeat the object and purpose of the remedy or erode the finality or binding force of awards", *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, para. 51 (September 30, 2022).

- "The textual clarity of the provision [Article 52(10(b) of the ICSID Convention] is supported by the purpose of the ICSID Convention: the remedy of annulment is focused on the integrity of the arbitral proceedings the finality of awards. It does not extend to

corrections of awards in circumstances where one "instance", an *ad hoc* committee, has an opinion different from another "instance", a tribunal", *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment, para. 201 (November 30, 2022).

(5) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly

- "[A]pplication of the paragraph demands neither a narrow interpretation, nor a broad interpretation, but an appropriate interpretation, taking into account the legitimate concern to surround the exercise of the remedy to the maximum extent possible with guarantees in order to achieve a harmonious balance between the various objectives of the Convention." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais (Klöckner I*), ICSID Case No. ARB/81/2, Decision of the *ad hoc* Committee, para. 3 (May 3, 1985) [unofficial translation from French].

- "The fact that annulment is a limited, and in that sense extraordinary, remedy might suggest either that the terms of Article 52(1), *i.e.*, the grounds for annulment, should be strictly construed or, on the contrary, that they should be given a liberal interpretation since they represent the only remedy against unjust awards. The Committee has no difficulty in rejecting either suggestion. In its view, Article 52(1) should be interpreted in accordance with its object and purpose, which excludes on the one hand, as already stated, extending its application to the review of an award on the merits and, on the other, an unwarranted refusal to give full effect to it within the limited but important area for which it was intended." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.05 (December 22, 1989).

- "Article 52(1) should be interpreted in accordance with its object and purpose: this precludes its application to the review of an Award on the merits and in a converse case excludes an unwarranted refusal to give full effect to it within the limited but significant area for which it was intended." *Amco Asia Corporation and others v. Republic of Indonesia* (*Amco II*), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment, para. 1.17 (December 17, 1992).

- "As has been stated in earlier published decisions made on requests for annulment of ICSID awards, the remedy of Article 52 is in no sense an appeal. The power for review is limited to the grounds of annulment as defined in this provision. These grounds are to be interpreted neither narrowly nor extensively." *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on the Application by the Arab Republic of Egypt for Annulment of the Arbitral Award dated December 8, 2000, para. 18 (February 5, 2002) (footnotes omitted).

- "Furthermore, there is no presumption either in favor of or against annulment." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc*

Committee on the Application for Annulment of Consortium R.F.C.C., para. 220 (January 18, 2006) (citation omitted) [unofficial translation from French].

- "[T]he grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively." *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 19 (November 1, 2006) (footnote omitted).

- "Article 52 of the ICSID Convention must be read in accordance with the principles of treaty interpretation forming part of general international law, which principles insist on neither restrictive nor extensive interpretation, but rather on interpretation in accordance with the object and purpose of the treaty. Some commentators have suggested that in case of doubt, an annulment committee should decide in favor of the validity of the award. Such presumption, however, finds no basis in the text of Article 52 and has not been used by annulment committees." *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* Committee on the Application for Annulment of Mr. Soufraki, paras. 21-22 (June 5, 2007) (footnote omitted).

- "As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied. Nor is there any preponderant inclination '*in favorem validitatis*', *i.e.*, a presumption in favour of the Award's validity." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, paras. 75-76 (June 29, 2010) (footnotes omitted).

- "[T]he Award shall be reviewed in light of the annulment grounds invoked by Iberdrola according to their genuine meaning, *i.e.*, pursuant to an interpretation that is neither restrictive nor extensive, but limited to the scope and object of annulment." *Iberdrola Energía, S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on the Request for Annulment of the Award Submitted by Iberdrola Energía, S.A., para. 77 (January 13, 2015) (footnote omitted) [unofficial translation from Spanish].

- "ICSID *ad hoc* committees have affirmed in their decisions, and this Committee agrees, that (a) the grounds listed in Article 52(1) are the only grounds on which an award may be annulled; (b) annulment is an exceptional and narrowly circumscribed remedy and the role of an *ad hoc* committee is limited; (c) *ad hoc* committees are not courts of appeal, annulment is not a remedy against an incorrect decision, and an *ad hoc* Committee cannot substitute the tribunal's determination on the merits for its own; (d) *ad hoc* committees should exercise their discretion not to defeat the object and purpose of the remedy or erode the binding force and finality of awards; (e) Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly: and (f) an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 167 (February 1, 2016) (footnotes omitted).

- "According to the Committee, this article must be interpreted as required by Article 31 of the Vienna Convention on the Law of Treaties, *i.e.*, it must be interpreted in good faith, in the ordinary meaning of its terms and taking into account its context and object. The fact that the procedure is exceptional does not imply that the tenor of the interpretation of Article 52 of the ICSID Convention should be different from the interpretation of other articles of the Convention, nor that its interpretation should be broad or narrow as other annulment committees have stated,…" *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Annulment, para. 110 (May 18, 2018) [unofficial translation from Spanish].

- "[T]his Committee agrees that Article 52 of the ICSID Convention should be interpreted neither restrictively nor extensively, but rather in accordance with the object and purpose of the ICSID Convention", *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Application for Annulment, para. 59 (December 6, 2018).

- "…It agrees with the Klockner committee that Article 52 is to be interpreted neither narrowly nor expansively. Article 52 is a treaty provision and must be interpreted in accordance with the ordinary meaning of the words used, in their context and in light of the object and purpose of the Convention." *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, para. 128 (December 14, 2018).

- "The Committee has to interpret these terms "in good faith in accordance with the ordinary meaning to be given to the terms … in their context and in the light of its objective and purpose," as provided for in Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") of 1969. […] This Committee agrees with the annulment committee in Mitchell v. Congo, which stated that the grounds for annulment 'must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively.", *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Annulment, paras. 42-43 (December 28, 2018).

- "… The Committee will interpret the ICSID Convention in light of the law of treaty interpretation, [fn omitted] in what has been called an "objective" manner. [fn omitted] There is no doubt that annulment is a circumscribed ground of review, limited by the confined terms of Article 52 of the ICSID Convention.", *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Decision on Annulment, para. 57 (April 26, 2019).

- "In view of the Committee, no question of interpretation of Article 52 is at stake here, and defining the scope of the Committee's review does not require any analysis of whether Article 52 should be construed narrowly or broadly. Article 52 must be applied in accordance with its clear terms, which are exclusive of any review of the substance of the award." *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment, para. 48 (May 29, 2019).

- "In addition, it is also accepted that there is no presumption in favor of or against annulment, and that the approach an *ad hoc* committee must take to the grounds for annulment must be neither restrictive nor extensive.", *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on the Application of Annulment, para. 117 (October 25, 2019) [unofficial translation from French].

- "[T] he Committee observes that nothing in the ICSID Convention provides for a restrictive or a broad interpretation of Article 52 or any other provision applicable to annulment proceedings. Accordingly, Article 52 and the other relevant rules on annulment, shall be interpreted in the light of Articles 31 and 32 of the of the Vienna Convention on the Law of Treaties (the "VCLT"), which are customary international law", *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Decision on Annulment, para. 57 (May 28, 2021).

- "…[T]he Committee concludes that 'there is no presumption either in favour of or against annulment.'[fn omitted] In the same vein, when interpretating the grounds for annulment, 'there is compelling support for the view that neither a narrow nor a broad approach is to be applied.'" *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICISD Case No. ARB/14/12, Decision on Annulment, paras. 408 (June 10, 2022).

- "… [T]he Committee agrees with the Total v. Argentina committee in that "annulment is an exceptional and narrowly circumscribed remedy" and that "Article 52 should be interpreted in accordance with its object and purpose, neither narrowly nor broadly.", *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Decision on Annulment, para. 51 (September 30, 2022).

(6) An *ad hoc* Committee's authority to annul an award is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* Committee has discretion with respect to the extent of an annulment, *i.e.*, either full or partial

- "The Committee notes that an *ad hoc* Committee may annul an award (or any part thereof) only pursuant to a request by a party and only within the scope of that request, unless by necessary implication annulment entails the annulment of other portions." *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated January 6, 1988, para. 4.08 (December 22, 1989).

- "[M]erely because the Parties agree on the total or partial annulment of the Award on the same ground does not mean that the Committee must follow their requests in whole or in part. The annulment procedure is above all a procedure for the protection of the law. It is not instituted merely in the interest of the Parties." *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (*Klöckner II*), ICSID Case No. ARB/81/2, Decision on Annulment, para. 9.15 (May 17, 1990) [unofficial translation from French].

- "[W]here a ground for annulment is established, it is for the *ad hoc* committee, and not the requesting party, to determine the extent of the annulment. In making this determination, the committee is not bound by the applicant's characterisation of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award." *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (*Vivendi I)*, ICSID Case No. ARB/97/3, Decision on Annulment, para. 69 (July 3, 2002).

- "The *ad hoc* Committee derives its authority from the same source, the parties' will, as the Arbitral Tribunal itself. Its authority is no more legitimate than that of the Arbitral Tribunal. It should therefore refrain from deciding to annul too hastily." *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision of the *ad hoc* Committee on the Application for Annulment of Consortium R.F.C.C., para. 226 (January 18, 2006) [unofficial translation from French].

- "Once an *ad hoc* committee has concluded that there is one instance of manifest excess of powers (or any other ground for annulment), which warrants annulment of the Award in its entirety, this will be the end of the *ad hoc* committee's examination. Since annulment of an award in its entirety necessarily leads to the loss of the *res judicata* effect of all matters adjudicated by the Tribunal, it is unnecessary to consider whether there are other grounds - whether in respect of the same matter or other matters - that may also lead to annulment. On the other hand, an *ad hoc* committee will need to proceed differently where it decides not to annul the Award or decides to annul the Award only in part. In those instances it will be necessary for the *ad hoc* committee to examine all of the grounds invoked by the applicant in support of its application." *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, paras. 78-79 (June 29, 2010).

- "Awards can be annulled in their entirety 'or any part thereof' [Article 52 (3)]. Committees, however, are not empowered to amend or replace such awards, nor to review the merits of the dispute. Factual findings and weighing of evidence made by tribunals are, as a general rule, outside the remit of *ad hoc* committees." *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, para. 47 (November 2, 2015) (footnote omitted).

- "ICSID *ad hoc* committees have affirmed in their decisions, and this Committee agrees, that… an *ad hoc* committee's authority to annul is circumscribed by the Article 52 grounds specified in the application for annulment, but an *ad hoc* committee has discretion with respect to the extent of an annulment, *i.e.*, either partial or full." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment, para. 167 (February 1, 2016) (footnotes omitted).

- "Article 52(3) of the ICSID Convention bestows the authority upon the Committee to annul "the award or any part thereof." Arbitration Rule 55(3) provides that '[i]f the original award had only been annulled in part, the new tribunal shall not reconsider any portion of the award not so annulled.' [… T]he Committee's authority includes the possibility to annul

portions of the part of the Award for which annulment has been requested." *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, paras. 198, 203 (December 27, 2016).

- "The Committee associates itself with the views of other *ad hoc* committees that a request for the partial annulment of an award can relate, in appropriate cases, to limited portions of an Award only." *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, para. 137 (March 9, 2017).

- "An *ad hoc* committee may annul an award partially or entirely. If a decision contained in an award is supported by two alternative lines of reasoning, there is a basis to annul the award only if the *ad hoc* committee finds an annullable error in both lines of reasoning." *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Decision on Annulment, para. 58 (April 26, 2019).

- "[A]n *ad hoc* Committee has discretion in relation to the extent of annulment, *i.e.*, whether it is total or partial." *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Decision on Annulment, para. 76 (June 22, 2020) [unofficial translation from Spanish].

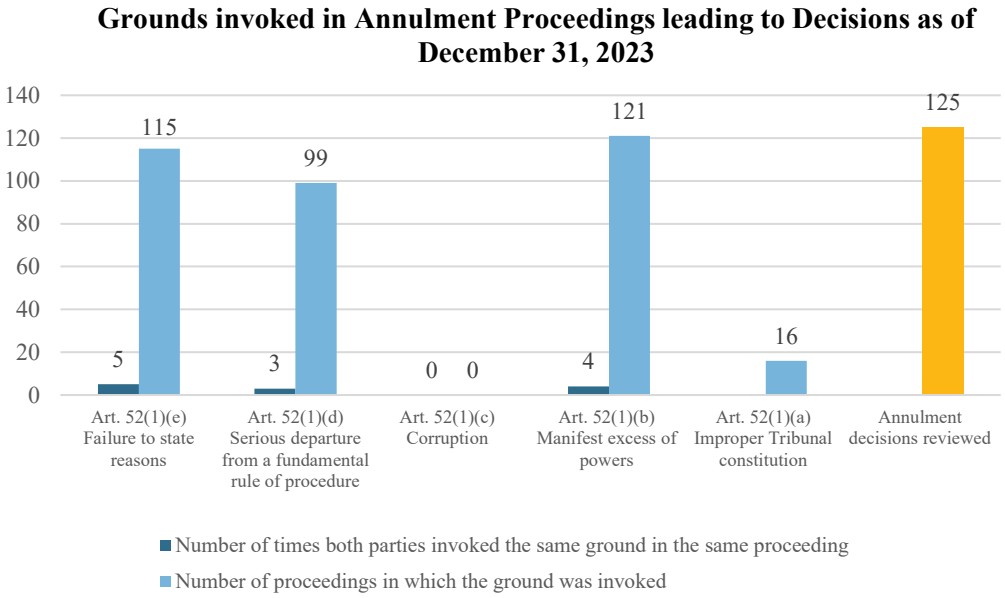
- "Annulment differs from appeal also in its possible outcome. The successful request for annulment may lead to the setting aside of the award, to its invalidation. The annulment committee has the power either to confirm the award or to annul it in whole or in part. It cannot substitute its decision for the decision under review that it has found to be deficient." *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/12/35, Decision on Annulment, para. 123 (September 17, 2020).

- "The fact that the Convention speaks of a committee having the authority to annul indicates that, even where an *ad hoc* committee determines that one of the grounds for annulment is made out, the Committee has a discretion whether or not to annul the award." *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Decision on Annulment, para. 217 (September 22, 2021).

B. *The Interpretation of Specific Grounds*

81. The grounds for annulment in Article 52(1) of the ICSID Convention are: (a) the improper constitution of the Tribunal; (b) manifest excess of powers by the Tribunal; (c) corruption on the part of a Tribunal member; (d) a serious departure from a fundamental rule of procedure; and (e) failure to state reasons. Grounds (b), (d) and (e) are the most frequently relied upon grounds for annulment and they are usually invoked cumulatively in support of the annulment application.[150]

[150] ICSID Convention Article 52(1) provides that a party may request annulment "on one or more" grounds.



82. The specific grounds for annulment were discussed in the drafting history of the ICSID Convention and have been extensively analyzed and interpreted in ICSID cases, in particular grounds (b), (d) and (e). The following is a brief summary of the meaning of these grounds as indicated in the drafting history and as interpreted by *ad hoc* Committees. The table at Annex 2 details the grounds invoked in annulment decisions, showing which were upheld and rejected.[151]

(i) Improper Constitution of the Tribunal

83. The drafting history of the ICSID Convention indicates that the ground of improper constitution of the Tribunal was intended to cover situations such as a departure from the parties' agreement on the method of constituting the Tribunal or an arbitrator's failure to meet the nationality or other requirements for becoming a member of the Tribunal.[152]

84. No provision of the ICSID Convention or rules explicitly addresses when a Tribunal might be considered to be improperly constituted. However, Chapter I of the ICSID Arbitration Rules, entitled "Establishment of the Tribunal" provides detailed rules concerning constitution of a Tribunal, including nationality and other requirements for Tribunal members, the appointment process, and the arbitrator's declaration of impartiality and independence.[153] The parties may raise an objection concerning compliance with any of these provisions, which should be addressed by the Tribunal as soon as it has been constituted. In practice, Tribunals consistently ask the parties whether they have any

[151] *See* "Annulment Grounds in Concluded Proceedings," Annex 2.

[152] *See supra* para. 19.

[153] *See* Arbitration Rules 1-12 (which implement the provisions of ICSID Convention Articles 14(1), 37-40 & 56-58). *See* also 2022 Arbitration Rules 13-21.

objection to the constitution of the Tribunal or to any individual member during the Tribunal's first session dealing with procedural matters.[154] If a Tribunal decides that it has been properly constituted following an objection by a party, that party must await the Tribunal's award before filing an application for annulment on this ground.[155]

85. The ground of improper constitution of a Tribunal has been raised in 16 annulment cases leading to decisions. Fourteen *ad hoc* Committees rejected this ground.[156] In particular, in one case this ground for annulment was based on the appointment of an arbitrator by ICSID after the Gambia had failed to appoint its own arbitrator. This was the sole ground for annulment.[157] In that case, the Gambia argued that it had been deprived of its "fundamental right" to appoint its own arbitrator. It further argued that it was not challenging the arbitrator's competence or impartiality but the appointment by ICSID which it said denied the Gambia the opportunity to make its own appointment. After analyzing the appointment process, the *ad hoc* Committee found that there was no deprivation of any fundamental right and rejected the application. In another case, the *ad hoc* Committee did not address the ground, as it had already decided to annul the award in full based on another ground.[158] To date, there has been only one case where an *ad hoc* Committee annulled an Award on the basis that the Tribunal was improperly constituted due to undisclosed connections between an arbitrator and a case expert. The Committee, aiming to maintain the integrity of the proceedings and the legitimacy of the award, affirmed that evaluating the impartiality and independence of arbitrators is crucial in upholding the validity and credibility of an award.[159]

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[154] *See* Arbitration Rule 13(1). The first session is to be held within 60 days after the Tribunal's constitution or such other period as the parties may agree; 2022 Arbitration Rule 29(3).

[155] History, *supra* note 5, at Vol. II, 851 & 852.

[156] *See* Annex 2; *Vivendi II*; *Azurix*; *Transgabonais; EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment (February 5, 2016)*; Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19*,* Decision on Annulment (May 5, 2017) ("*Suez II*")*; Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17 ("*Suez I*"), Decision on Annulment (December 14, 2018)*; Von Pezold; OI European Group B.V. v. Bolivarian Republic of* Venezuela, ICSID Case No. ARB/11/25, Decision on Application for Annulment (December 6, 2018)*; RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Annulment (April 29, 2019)*; Pey Casado II; Mobil Exploration and Development Argentina Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Annulment (May 8, 2019)*; Border Timbers Limited, Border Timbers International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Decision on Annulment (November 21, 2018)*; Carnegie Minerals (Gambia) Limited v. Republic of The Gambia* (ICSID Case No. ARB/09/19), Decision on Annulment (July 7, 2020).

[157] *Carnegie*.

[158] *Sempra.*

[159] *Eiser,* para. 178. The *ad hoc* Committee found that "[…] in light of the text, context and object and purpose of Article 52(1)(a) of the ICSID Convention, this Committee concludes that, for purposes of determining whether the Tribunal was properly constituted, it has the authority to examine whether the members of the Tribunal were and remained (and were seen to be/remain) impartial and independent throughout the proceedings. The role of an ad hoc committee is to ensure that the integrity of the proceedings and the legitimacy of the award was not undermined. The

86. The fourteen decisions indicate that annulment applications based on this ground succeed only in rare circumstances. Some annulment decisions have held that the *ad hoc* Committee's role is limited to considering whether the provisions concerning the constitution of the Tribunal were respected in the original proceeding, and does not extend to matters such as the review of a Tribunal's decision on a request for disqualification of a Tribunal member under Article 58 of the Convention.[160] Other *ad hoc* Committees have found that they did not have the power to conduct a *de novo* review of a disqualification decision rendered in the original proceeding but they could make an assessment on whether such a decision was "plainly unreasonable."[161] *Ad hoc* Committees have also indicated that a party with knowledge of an alleged improper constitution of the Tribunal that fails to raise such issue during the original proceeding may be taken to have waived its right to bring an annulment application on this basis.[162] Notably, one *ad hoc* Committee has found that looking at the plain meaning of the text of Article 52(1)(a) in all three official languages of the ICSID Convention, and read in its proper context, requires the Tribunal to not only be correctly formed upon constitution of the Tribunal, but to remain correctly formed throughout the proceeding.[163]

(ii) Manifest Excess of Powers

87. The drafters of the ICSID Convention considered that a Tribunal incurred in an excess of powers when it went beyond the scope of the parties' arbitration agreement, decided points which had not been submitted to it, or failed to apply the law agreed by the parties.[164] The main powers of the Tribunal that appear to have been contemplated by this provision thus relate to the Tribunal's jurisdiction and to the applicable law. These two categories will be described separately below.

88. Article 52(1)(b) of the ICSID Convention provides that only instances of "manifest" excess of the Tribunal's powers may lead to an annulment, indicating a dual requirement of an "excess" that is "manifest."[165] As a result, *ad hoc* Committees have identified two methodological approaches to determine whether there is an annullable error on this ground. The first is a two-step analysis pursuant to which there is first a determination

impartiality and independence of the arbitrators, being an essential requirement for a valid and legitimate award, can, therefore, be assessed in the context of annulment proceeding".

[160] *Azurix*, paras. 272-284; *RSM Production,* para. 159.

[161] *EDF*, para. 145; *Suez II*, para. 93: "In the Committee's view, the reasons given by the EDF committee for its approach are convincing because they achieve a reasonable balance between an ad hoc committee's important task to safeguard the fundamental integrity of the proceedings on the one hand and the appropriate respect for its limited role, given the existence of proceedings under Articles 57 and 58 as well as the generally limited nature of annulment proceedings, on the other. The Committee considers that the threshold of plain unreasonableness leaves sufficient room for taking up the role that is intended for an ad hoc committee."; *Mobil Exploration*, para. 44.

[162] *Von Pezold*, para. 266; *Azurix*, para. 291; *Transgabonais*, paras. 129-130.

[163] *Eiser*, para. 158.

[164] *See supra* paras. 15, 20-21.

[165] *See supra* paras. 15, 20–22.

whether there was an excess of powers and, if so, whether the excess was "manifest."[166] The second approach is a *prima facie* test, consisting of a summary examination to determine whether any of the alleged excesses of power could be viewed as "manifest."[167]

89. The "manifest" nature of the excess of powers has been interpreted by most *ad hoc* Committees to mean an excess that is obvious, clear or self-evident,[168] and which is

[166] *Sempra,* para. 212; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment (December 23, 2010), para. 40; *AES*, para. 32; *Lemire*, para. 240; *Occidental*, para. 57; *EDF*, para. 191; *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Annulment (February 1, 2016), para. 171; *Micula*, para. 123; *TECO I*, para. 76; *Blue Bank*, para. 91; *SolEs*, Decision on Annulment (March 16, 2022), para. 63; *Gambrinus, Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/31, Decision on Annulment (October 3, 2017), para. 167; *Standard Chartered*, Decision on Annulment (August 22, 2018), para. 181; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on Annulment (December 21, 2021), para. 108; *Antin*, Decision on Annulment (July 30, 2021), para. 148; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Annulment (March 17, 2022), para. 72; *SolEs,* Decision on Annulment (March 16, 2022), para. 63.

[167] *Id*. One *ad hoc* Committee has stated that "'manifest' does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of power has in fact occurred." *Occidental*, para. 267.

[168] *Vivendi II*, para. 245 ("must be 'evident'"); *Repsol*, para. 36 ("obvious by itself"); *Azurix*, para. 68 ("obvious"); *Soufraki,* para. 39 ("obviousness") (citing *Webster's Revised Unabridged Dictionary* (1913) ("'clear,' 'plain,' 'obvious,' 'evident'….")); *CDC*, para. 41 (citing *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (February 5, 2002), para. 25 ("clear or 'self-evident'")); *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (October 19, 2009), para. 49 (citing *Wena*, para. 25) ("self-evident"); *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment (March 25, 2010), para. 96 ("evident on the face of the Award"); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment (June 14, 2010), para. 55 ("obvious or clear"); *Malicorp Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on Annulment (July 3, 2013), para. 56 ("both obvious and serious"); *Tza Yap Shum*, para. 82 ("must be evident"); *SGS*, Decision on Annulment (May 19, 2014), para. 122 ("textually obvious and substantively serious"); *Libananco*, Excerpts of Decision on Annulment (May 22, 2013), para. 82 ("'self-evident,' 'clear,' 'plain on its face' or 'certain'"); *Occidental*, para. 57 ("perceived without difficulty"); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Türkiye*, ICSID Case No. ARB/11/28, Decision on Annulment (December 30, 2015), para. 56 ("obvious, clear or easily recognizable"); *Micula*, para. 123 ("evident, obvious, clear or easily recognizable"); *Total*, para. 173; *Dogan*, para. 103; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on Annulment (March 29, 2016), para. 128; *TECO I*, paras. 77, 181; *UP and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Annulment (August 11, 2021), para. 164; *Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon*, ICSID Case No. ARB/15/18, Decision on Annulment (October 25, 2019), para. 120; *Watkins Holdings*, Decision on Annulment (February 21, 2023), para. 73; *Gambrinus*, para. 167; *Standard Chartered*, para. 181; *Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Decision on Annulment (November 22, 2019), para. 93; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Annulment (May 29, 2019), para. 59; *Antin,* para. 149; *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment (May 1, 2018), para. 87; *NextEra,* para. 76; *InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain*, ICSID Case No. ARB/14/12, Decision on Annulment (June 10, 2022), para. 422; *Cube*, Decision on Annulment (March 28, 2022), para. 174; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya,* ICSID Case No. ARB/15/29, Decision on Annulment (March 19, 2021), paras. 124 & 126; *Venoklim*, Decision on Annulment (February 2, 2018), para. 195.

discernable without the need for an elaborate analysis of the award.[169] One *ad hoc* Committee has stated that the degree of argument or analysis required cannot be answered in the abstract but only by taking into account the circumstances of the case.[170] Another *ad hoc* Committee interpreted "manifest" both in its ordinary sense of being clear or apparent and within the context of safeguarding the integrity of ICSID proceedings. It concluded that "manifest" includes a substantive element, implying that minor errors not undermining ICSID's integrity shouldn't be annulled, while a superficial analysis of the award isn't enough to determine whether an excess is manifest.[171] Some *ad hoc* Committees have interpreted "manifest" to require that the excess be serious or material to the outcome of the case.[172]

90. Parties have most frequently invoked manifest excess of powers (121 proceedings) There have been 12 instances of partial or full annulment on this basis.[173]

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[169] *See Wena*, para. 25 ("The excess of power must be self-evident rather than the product of elaborate interpretations one way or the other."); *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Annulment (November 1, 2006), para. 20 (manifest if found "with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award"); *Enron*, para. 69 (quoting *MTD*, para. 47 ("not arguable")); *Repsol*, para. 36 (quoting Christoph H. Schreuer, *The ICSID Convention: A Commentary* 933 (Cambridge University Press 2001) ("discerned with little effort and without deeper analysis")); *Azurix*, paras. 48 & 68; *CDC*, para. 41 ("Any excess apparent in a Tribunal's conduct, if susceptible 'one way or the other', is not manifest"); *Sempra*, para. 213 ("quite evident without the need to engage in an elaborate analysis"); *MCI*, para. 49 ("the manifest excess requirement in Article 52(1)(b) suggests a somewhat higher degree of proof than a searching analysis of the findings of the Tribunal"); *El Paso*, para. 142 ("obvious, evident, clear, self-evident and extremely serious"); *Pey Casado II*, para. 198 ("whereas conversely, the alleged excess which is difficult to perceive even with some degree of analysis, or which has no substantively serious effect, does not qualify as 'manifest.'"); *Tenaris II,* Decision on Annulment (December 28, 2018), para. 80 ("a committee should not need to resort to complex argumentation and analysis to find the existence of an excess of power by a tribunal, if such excess of power was sufficiently clear and obvious to fulfill the "manifest" requirement."); *Standard Chartered Bank,* para. 211; *Churchill Mining*, Decision on Annulment (March 19, 2019), para. 239; *Valores Mundiales*, para. 112; *RREEF,* Decision on Annulment (June 10, 2022), para. 22, ("the term 'manifest' can only refer to a defect that is obvious, or so evident on a first reading of the document without need for further investigation or inquiry".); *Antin,* para. 152; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Decision on Annulment (November 17, 2022), para. 209 ("a committee can only annul the tribunal's award on damages if the tribunal has made an obvious or manifest error that is discernible from the face of the award"); *BayWa*, Decision on Annulment (May 8, 2023), para. 139; *Cortec*, para. 170 citing *Daimler* at para. 186

[170] *Suez I,* para. 113.

[171] *Perenco*, para. 98 ("on the one hand, minor or inconsequential errors that do not undermine the integrity of the ICSID system should not be annullable; on the other hand, and as stated above, a superficial analysis or reading of the award is not sufficient to determine whether the excess is manifest").

[172] *Klöckner I*, para. 52I ("the [Tribunal's] answers seem tenable and not arbitrary"); *Vivendi I*, para. 86 ("clearly capable of making a difference to the result"); *Soufraki*, para. 40 ("at once be textually obvious and substantially serious"); *Fraport*, para. 44 ("demonstrable and substantial and not doubtful"); *MHS*, para. 80; *AES*, para. 31; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision on Annulment (January 24, 2014), para. 128 ("obvious, self-evident, clear, flagrant and substantially serious"); *Libananco* para. 102; *Total*, para. 308; *Capital Financial,* para. 121; *Suez I,* para. 118; *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Annulment (November 30, 2022), para. 203, (citing *Soufraki*); *Valores Mundiales*, paras. 113-115; *RREEF*, para. 23.

[173] *Amco I* (partial); *Klöckner I* (full); *Vivendi I* (partial); *Mitchell* (full); *Enron* (partial); *Sempra* (full); *MHS* (full); *Helnan* (partial); *Occidental* (partial); *RSM Production* (partial); *Venezuela Holdings* (partial).

(a) Manifest Excess of Powers Relating to Jurisdiction

91. A Tribunal is expected to observe the parties' arbitration agreement. If a Tribunal goes beyond the scope of the parties' arbitration agreement, it in effect surpasses the mandate granted to it by the parties. In addition, the ICSID Convention prescribes certain mandatory requirements that must be fulfilled for a Tribunal to have jurisdiction.[174] These jurisdictional requirements are: (i) the existence of 'a legal dispute;' (ii) 'arising directly out of an investment;' (iii) 'between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State);' (iv) 'and a national of another Contracting State;' (v) 'which the parties to the dispute consent in writing to submit to the Centre.'[175] The parties cannot derogate from these requirements. In fact, the Tribunal must decline jurisdiction where a mandatory requirement is not met, even if neither party has raised any objection to jurisdiction.[176]

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

93. *Ad hoc* Committees have held that there may be an excess of powers if a Tribunal incorrectly concludes that it has jurisdiction when in fact jurisdiction is lacking,[177] or when the Tribunal exceeds the scope of its jurisdiction.[178] A Tribunal's rejection of jurisdiction when jurisdiction exists also amounts to an excess of powers.[179]

[174] ICSID Convention Article 25(1).

[175] *Id.*

[176] *Id.* at Article 41(1).

[177] *Vivendi I*, para. 86; *Mitchell*, paras. 47, 48 & 67; *CMS*, para. 47 (quoting *Klöckner I*, para. 4); *Azurix*, para. 45 (quoting *Klöckner I*, para. 4); *Lucchetti*, para. 99; *MCI*, para. 56 (quoting *Lucchetti*, para. 99); *Occidental*, paras. 49-51; *Tulip*, para. 55; *EDF*, para. 191; *Total*, para. 242; *Dogan*, para. 105; *Micula*, para. 125; *Lahoud*, para. 118; *TECO I*, para. 77; *(DS)2, S.A., Peter de Sutter and Kristof De Sutter v. Republic of Madagascar*, ICSID Case No. ARB/17/18, Decision on Annulment of October 14, 2022, para. 99; *Global Telecom Holding S.A.E. v. Canada,* ICSID Case No. ARB/16/16, Decision on Annulment of September 30, 2022, para. 59; *Tenaris II,* para. 65; *Cyprus Popular Bank*, para. 192; *Mobil,* para. 51; *UP,* para. 250; *Cube,* para. 176.

[178] *Klöckner I,* para. 4; *Soufraki*, para. 42; *Occidental*, paras. 49-51; *Tulip*, para. 55; *Total*, para. 242; *Dogan*, para. 105; *Micula*, para. 125; *Lahoud*, para. 118; *TECO I*, para. 77; *Global Telecom,* para. 59; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Decision on Annulment (September 22, 2021), para. 228; *Teinver,* para. 59; *Capital Financial*, para. 119; *Flughafen Zürich A.G. y Gestión E Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Decision on Annulment of April 15, 2019, para. 66.

[179] *Vivendi I*, para. 86; *Soufraki*, para. 43 (quoting *Vivendi I*, para. 86); *Lucchetti*, para. 99; *Fraport*, para. 36 (citing *Vivendi I*, para. 86); *MHS*, para. 80; *Helnan*, para. 41 (citing *Soufraki*, para. 44 and *Vivendi I*, para. 86); *Caratube,* para. 75(quoting *Vivendi I,* para. 115 *MHS*, para. 80); *Tulip*, para. 55; *Dogan*, para. 105; *Micula*, para. 126; *Global Telecom,* para. 59; *Standard Charter Bank*, para. 210 citing the Background Paper on Annulment; *Orascom TMT Investments S.à r.l. v. People's Democratic Republic of Algeria,* ICSID Case No. ARB/12/38, Decision on Annulment of September 17, 2020, para. 155; *Valores*, para. 118; *Capital Financial Holdings,* para. 147.

94. At the same time, *ad hoc* Committees have acknowledged the principle specifically provided by the ICSID Convention that the Tribunal is the judge of its own competence.[180] This means that the Tribunal has the power to decide whether it has jurisdiction to hear the parties' dispute based on the parties' arbitration agreement and the jurisdictional requirements in the ICSID Convention. In light of this principle, the drafting history suggests—and most *ad hoc* Committees have reasoned—that in order to annul an award based on a Tribunal's determination of the scope of its own jurisdiction, the excess of powers must be "manifest."[181] However, one *ad hoc* Committee found that an excess of jurisdiction or failure to exercise jurisdiction is a manifest excess of powers when it is capable of affecting the outcome of the case.[182]

95. The issue of lack or excess of jurisdiction has been ruled on in 69 annulment decisions and has led to one full and one partial annulment.[183] In addition, failure to exercise jurisdiction when jurisdiction exists has been ruled on in 16 annulment decisions and has resulted in one full and 2 partial annulments.[184]

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

96. According to the drafting history of the ICSID Convention, a Tribunal's failure to apply the proper law could constitute a manifest excess of powers, but the erroneous application of the law would not amount to an annullable error, even if it is manifest.[185] As stated

[180] *Enron*, para. 69 (citing *Azurix*, para. 67); *Azurix*, para. 67; *Soufraki*, para. 50; *SGS v. Paraguay*, para. 114; *see also* History, *supra* note 5, at Vol. I, 186-190, Vol. II, 206, 291-92, 406 & 511; *OI European Group BV v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Annulment of December 6, 2018, para. 183; *Cyprus Popular Bank*, para. 193; *BayWa,* para. 138; *Watkins,* para. 69; *Standard Charter Bank*, para. 209; *Standard Chartered Bank,* para. 209; *RREEF,* para. 18; *Capital Financial Holdings,* para. 184; *Flughafen*, para. 69; International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, para. 38 (March 18, 1965).

[181] *See supra* para. 20; *MTD*, para. 54; *Azurix*, paras. 64–66 (quoting *Lucchetti*, paras. 101 & 102); *Soufraki*, paras. 118 & 119 ("the requirement that an excess of power must be 'manifest' applies equally if the question is one of jurisdiction"); *Lucchetti*, para. 101; *Rumeli*, para. 96; *SGS v. Paraguay*, para. 114; *Kilic*, para. 56; *Total*, para. 176; *TECO I*, para. 219; *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya* (ICSID Case No. ARB/15/29), Decision on Annulment of March 16, 2021, para. 128 (regarding whether there is a more lenient standard for assessing alleged jurisdiction errors, stating that "Article 52(1)(b) requires that to warrant annulment an excess of powers must be "manifest," and it provides no carve-out for particular kinds of errors"); *Watkins*, para. 73; *(DS)2,* para. 101.

[182] *Vivendi I*, paras. 72,86; *Capital Financial,* citing *Vivendi I* "it is only where the failure to exercise a jurisdiction is clearly capable of making a difference to the result that it can be considered a manifest excess of power' [fn omitted]. The Committee notes in this regard that when it comes to a decision on jurisdiction, excess of power, if it exists, would inevitably have an impact on the outcome of the proceeding." [unofficial translation from French]

[183] *See Mitchell*, para. 67. The award in *Mitchell* was annulled in full on 2 grounds: manifest excess of powers and failure to state the reasons. *See Occidental*, para. 590. The award in Occidental was partially annulled on this ground.

[184] *Vivendi I* (partial); *Helnan* (partial); *MHS* (full).

[185] *See supra* paras. 16 & 22.

above, there is no basis for an annulment due to an incorrect decision by a Tribunal, a principle that has been expressly recognized by many *ad hoc* Committees.[186]

97. The ICSID Convention provides as follows concerning the law to be applied by a Tribunal:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.[187]

98. Where the parties agree on the applicable law, a disregard of this law would likely be equivalent to a derogation from the mandate conferred on the Tribunal by the parties.

99. *Ad hoc* Committees agree that a Tribunal's complete failure to apply the proper law or acting *ex aequo et bono* without agreement of the parties to do so as required by the ICSID Convention could constitute a manifest excess of powers.[188] However, *ad hoc* Committees have taken different approaches to whether an error in the application of the proper law may effectively amount to a non-application of the proper law. Some *ad hoc* Committees have concluded that gross or egregious misapplication or misinterpretation of the law may lead to annulment,[189] while others have found that such an approach comes too close to an appeal.[190] Similarly, *ad hoc* Committees have discussed whether application of a law different from that purportedly applied by the Tribunal could be considered a manifest excess of powers.[191] These discussions have led *ad hoc* Committees to observe that there is sometimes a fine line between failure to apply the proper law and erroneous application of the law.[192] In this connection, one issue discussed by some *ad hoc* Committees concerns

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[186] *See supra* para. 80.

[187] ICSID Convention Article 42(1).

[188] *Amco I*, paras. 23 & 28; *Amco II*, para. 7.28; *Klöckner I*, para. 79; *MINE*, para. 5.03; *Enron*, para. 218 (quoting *Azurix*, para. 136 (footnotes omitted)); *MTD*, para. 44; *CMS*, para. 49, *Soufraki*, para. 85 (quoting *Amco I*, para. 23); |*Daimler*, para. 153; *Tulip*, para. 58; *EDF*, para. 191; *Total*, para. 195; *Dogan*, para. 98; *Micula*, para. 127; *Lahoud*, para. 118; *TECO I*, paras. 283, 311; *Tenaris II,* paras. 65, 68; *Mobil*, paras. 62, 67; *Teinver,* para. 60; *Standard Chartered Bank,* para. 284; *NextEra,* para.82; *BayWa*, para.144; *Cube,* para. 175; *Glencore,* para. 326.

[189] *Soufraki*, para. 86; *Sempra*, para. 164; *MCI*, paras. 43 & 51 (quoting *Soufraki*, para. 86); *MHS*, para. 74; *AES*, paras. 33 & 34 (quoting *Soufraki*, para. 86); *Caratube*, para. 81 (quoting *Soufraki,* para. 86); *Dogan*, para. 105; *Micula*, para. 130; *Lahoud*, para. 121, *Teinver,* para. 80; *NextEra,* para. 84; *BayWa*, para. 144; *SolEs*, paras. 67 & 115; *Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Annulment (March 20, 2023), paras. 134 & 135.

[190] *MINE*, paras. 5.03 & 5.04; *MTD*, para. 47; *CMS*, paras. 50–51 (quoting *MINE*, paras. 5.03 & 5.04; *MTD*, para. 47); *Sempra*, para. 206; *Impregilo*, para. 131; *El Paso*, para.144; *Occidental*, para. 56; *Valores Mundiales,* para. 125; *Venoklim,* 204; *Flughafen*, para. 73.

[191] *MTD*, para. 47; *CMS*, para. 51 (quoting *MTD*, para. 47); *Azurix*, para. 136, fn 118 (citing *MTD*, para. 47); *Sempra*, para. 163, fn 44 (citing *MTD*, para. 47); *Occidental*, para. 55.

[192] *Klöckner I*, para. 60; *Enron*, paras. 68 & 220; *Azurix*, para. 47; *Iberdrola*, para. 98; *Dogan*, paras. 106-108; *Teinver*, para. 110; *RREEF*, para. 25; *NextEra,* para.83; *Tidewater*, para. 129.

which rules of law apply when consent to arbitration is based on an arbitration clause in a bilateral investment treaty.[193]

100. The failure to apply the proper law has been invoked in 90 annulment proceedings. It has led to three partial and two full annulments.[194] In addition, manifest excess of power for dismissal of the case with prejudice was successfully invoked in one case, leading to partial annulment of the award.[195]

(iii) Corruption on the Part of a Tribunal Member

101. The drafters of the ICSID Convention decided not to replace the word "corruption" with "misconduct," "lack of integrity" or "a defect in moral character."[196] They also decided not to limit this ground to cases of corruption evidenced by a court judgment or a showing of "reasonable proof that corruption might exist."[197]

102. When an arbitrator agrees to serve as a member of a Tribunal, the arbitrator is required to sign a declaration that he or she "shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the ICSID Convention."[198] Should an arbitrator accept such instructions or compensation, in breach of its duties of independence and impartiality under the Convention, this could amount to a ground for annulment of an award.

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

(iv) Serious Departure from a Fundamental Rule of Procedure

104. It appears from the drafting history of the ICSID Convention that the ground of a "serious departure from a fundamental rule of procedure" has a wide scope and includes principles of natural justice, but that it excludes the Tribunal's failure to observe ordinary arbitration rules. The phrase "fundamental rules of procedure" was explained by the drafters as a reference to principles.[199] One such fundamental principle mentioned during the negotiations was the parties' right to be heard.[200] The drafting history thus indicates that this ground is concerned with the integrity and fairness of the arbitral process.

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[193] *Enron*; *CMS*; *Sempra*.

[194] *Amco I* (partial); *Klöckner I* (full); *Enron* (partial); *Sempra* (full); *Venezuela Holdings* (partial).

[195] *RSM Production.*

[196] *See supra* para. 22.

[197] *Id*.

[198] *See* Arbitration Rule 6(2), which provides the standard form of the declaration; 2022 Arbitration Rule 19(3)(b).

[199] *See supra* para. 23-24.

[200] *See supra* para. 17.

105. Based on the words "serious" and "fundamental" in this ground, *ad hoc* Committees have adopted a dual analysis: the rule of procedure must be fundamental and the departure from the rule in question must be serious.[201] *Ad hoc* Committees have thus consistently held that not every departure from a rule of procedure justifies annulment.[202] Examples of fundamental rules of procedure identified by *ad hoc* Committees are: (i) the equal treatment of the parties; [203] (ii) the right to be heard; [204] (iii) an independent and impartial Tribunal;[205] (iv) the treatment of evidence and burden of proof;[206] and (v) deliberations among members of the Tribunal.[207]

106. The task of determining whether an alleged fundamental rule of procedure has been seriously breached is usually very fact specific, involving an examination of the conduct of the proceeding before the Tribunal.[208] Some *ad hoc* Committees have required that the departure have a material impact on the outcome of the award for the annulment to succeed.[209] One *ad hoc* Committee has found that if a party is aware of a departure from a

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[201] *Amco II*, para. 9.07; *MINE*, para. 4.06; *Wena*, para. 56; *CDC*, para. 48; *Fraport*, para. 180; *Malicorp*, para. 28; *Libananco*, para. 84. See also *Iberdrola*, para. 103 (recognizing these two cumulative requirements and noting that "although the qualifier of fundamental is not found in the Spanish version [of the ICSID Convention], it should equally be understood as incorporated") [unofficial translation from Spanish]; *Occidental*, para. 62; *Tulip*, para. 70; *EDF*, paras. 199-200; *Micula*, paras. 131-134, 283; *TECO I*, para. 81; *Orascom,* para. 137; *Cyprus Popular Bank*, para. 296; *Valores Mundiales*, para. 140; *NextEra,* para. 98; *InfraRed*, para. 722; *BayWa*, para. 150; *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Decision on Annulment (March 17, 2023), para. 562; *SolEs,* 93; *Watkins,* para. 270; *Global Telecom*, para. 67; *Tidewater,* para. 160; *Venoklim,* para. 211; *Flughafen,* para. 112; *Blue Bank*, para. 345.

[202] *MINE*, para. 4.06; *CDC*, para. 48; *Fraport*, para. 186; *Tulip*, para. 71; *Total*, para. 312; *Orascom*, para. 138; *CEAC,* para. 90; *Cube*, paras. 441-445; *Watkins,* para. 265; *Glencore*, para. 220; *Flughafen,* para. 117; *Quiborax,* para. 114.

[203] *Amco I*, paras. 87-88; *Malicorp* para. 36; *Iberdrola*, para. 105; *Tulip*, paras. 72, 84, 145; *Total*, paras. 309, 314; *Teinver,* para. 164; *UP and CD,* para. 294; *Glencore,* para. 320.

[204] *Amco II*, paras. 9.05-9.10; *Klöckner I*, paras. 89-92; *Wena*, para. 57; *CDC*, para. 49; *Lucchetti*, para. 71; *Fraport*, para. 197; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (December 18, 2012) ("*Pey Casado I*"), paras. 261-271; *Malicorp*, paras. 29, 36; *Iberdrola*, para. 105; *Occidental*, para. 60; *Tulip*, paras. 80, 145; *Total*, paras. 309, 314; *TECO I*, para. 184; *Churchill Mining*, para. 178; *Antin,* para. 197; *SolEs,* para. 95; *Gobal Telecom,* para. 68; *Glencore,* para. 221; *Tidewater,* para. 149; *Venezuela Holdings,* para. 130; *Von Pezold,* para. 243; *Gambrinus,* para. 228.

[205] *Klöckner I*, para. 95; *Wena*, para. 57; *CDC*, paras. 51-55; *EDF*, paras. 123-125; *Total*, paras. 309, 314; *Valores Mundiales,* para. 142; *Venoklim,* 216.

[206] *Amco I*, paras. 90-91; *Klöckner II*, para. 6.80; *Wena*, paras. 59-61; *Iberdrola*, para. 105; *Total*, paras. 309, 314; *Tenaris II*, para. 88; *(DS)2*, para. 143.

[207] *Klöckner I*, para. 84; *CDC*, para. 58; *Daimler*, paras.297-303; *Iberdrola*, para. 105; *Total*, paras. 309, 314; *Cyprus Popular Bank,* para. 297; *Venoklim,* para. 219.

[208] *Cyprus Popular Bank*, para. 298; *Standard Chartered Bank,* para. 388; *InfraRed,* para. 774; *Cube*, para. 443, *Tenaris I*, Decision on the Application for Annulment (August 8, 2018), para. 201; *Flughafen,* para. 116.

[209] *Wena*, para. 58; *Repsol*, para. 81; *CDC*, para. 49; *Fraport*, para. 246; *Impregilo*, para. 164; *El Paso*, para. 269; *Iberdrola*, para. 104; *Dogan*, para. 208; *Micula*, para. 134; *TECO I*, paras. 82-85; *Tenaris II*, paras. 98-100; *InfraRed,* para. 757; *OperaFund*, para. 564; *Watkins,* para. 268; *Perenco,* paras. 133 & 137; *Tenaris I,* para., 200; *Gambrinus*, para. 228. *See* also the analysis of the Annulment Committee in *Kiliç*.

fundamental rule and does not positively oppose such violation during the Tribunal proceeding, it has waived its right to request annulment on that basis.[210]

107. The ground of serious departure from a fundamental rule of procedure has been pursued in 99 proceedings which led to annulment decisions. It resulted in the annulment in full of two awards, the annulment in part of two further awards, and in the annulment of one decision on supplemental decisions and rectification.[211]

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

108. During the drafting of the ICSID Convention, the ground of "failure to state the reasons on which the award is based" was originally included in the ground of a "serious departure from a fundamental rule of procedure."[212] It subsequently became a stand-alone ground. In addition, a proposed qualifier enabling parties to waive the requirement that reasons be stated was eliminated during the negotiation of the Convention.[213] This elimination of the proposed waiver related to the removal of the same discretion in another provision in the Convention, which now reads: "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[214] There is thus a clear link between the provision in the Convention requiring the Tribunal to state the reasons for the award, and the ground providing for annulment when there has been a failure to provide the reasons on which the award is based. The drafting history of the Convention concerning annulment based on a failure to state reasons does not provide further guidance as to when such a failure has occurred, nor does the Convention specify the manner in which a Tribunal's reasons should be stated.

109. While a Tribunal must deal with every question submitted to it, the drafting history indicates that a failure to do so should not result in annulment.[215] Instead, the ICSID Convention provides another remedy where a Tribunal fails to address a question: the dissatisfied party may request that the same Tribunal issue a supplementary decision concerning the question not addressed.[216] In addition, if there is a dispute between the parties as to the meaning or scope of the award, either party may request interpretation of

[210] *Perenco,* para. 139.

[211] *Fraport* (full); *Pey Casado I* (partial); *Amco II* (supplemental decision and rectification)*; TECO I* (partial); *Eiser* (full).

[212] *See supra* para.25.

[213] *Id*.

[214] *Id.*; ICSID Convention Article 48(3).

[215] History, *supra* note 5, at Vol. II, 849.

[216] ICSID Convention Article 49(2). The request must be made within 45 days of the dispatch of the award. The supplementary decision becomes part of the award and is thus subject to the remedy of annulment.

the award by the original Tribunal.[217] Therefore, certain issues relating to the reasoning or lack of reasoning in an award can be heard by the Tribunal that rendered the award.[218]

110. At the same time, if a Tribunal's failure to address a particular question submitted to it might have affected the Tribunal's ultimate decision, this could, in the view of some *ad hoc* Committees, amount to a failure to state reasons and could warrant annulment.[219] *Ad hoc* Committees have also noted that such failure could amount to a serious departure from a fundamental rule of procedure.[220] A recent decision on annulment found that the failure to address certain evidence relevant to the determination of damages amounted to a failure to state the reasons.[221]

111. *Ad hoc* Committees have explained that the requirement to state reasons is intended to ensure that parties can understand the reasoning of the Tribunal, meaning the reader can understand the facts and law applied by the Tribunal in coming to its conclusion.[222] The correctness of the reasoning or whether it is convincing is not relevant.[223] There have been

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[217] *Id.* at Article 50(1). There is no time bar for a request to interpret an award under the ICSID Convention.

[218] *Wena*, para. 100; *Tulip*, para. 113; *Cube*, para. 325.

[219] *Amco I*, para. 32; *Klöckner I*; para. 115; *MINE*, para. 5.13; *Soufraki*, para. 126; *Duke Energy*, para. 228; *Lemire*, para. 279; *EDF*, paras. 197-198; *Teinver,* para. 210; *Standard Chartered Bank,* 605; *Cube*, para. 324. In *Alapli*, the Committee held that "it is for the Tribunal to determine the questions which are material to resolve the dispute between the parties and put these to vote." *Alapli Elektrik B.V. v. Republic of Türkiye*, ICSID Case No. ARB/08/13, Decision on Annulment (July 10, 2014), para. 129.

[220] *Amco I*, para. 32; *Klöckner I*; para. 115.

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

[222] *MINE*, para. 5.09 ("the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law"); *Vivendi I*, para. 64; *Wena*, para. 81; *Transgabonais*, para. 88; *El Paso*, para. 220; *Kilic*, para. 64; *Iberdrola*, para. 124; *Lemire*, para. 277; *Libananco*, para. 192; *Occidental*, para. 66; *Tulip*, paras. 98, 104; *Total*, para. 267; *Dogan*, paras. 261-263; *Micula*, paras. 136, 198; *Lahoud*, para. 131; *TECO I*, paras. 87, 124; *Orascom*, para. 164; *Cyprus Popular Bank,* para. 408; *Mobil*, para. 166; *Teinver,* para. 209; *Churchill Mining,* paras. 242 and 254 citing *Wena* at paras. 81-82; *Valores,* para. 175; *UP,* para. 205; *Antin,* para. 230; *Capital Financial Holdings,* para. 129 (citing *MINE*, para. 5.09) and paras. 233-234; *InfraRed*, para. 578; *Cortec,* para. 227 (citing *MINE*, para. 5.09); *SolEs*, para. 80; *Glencore,* para. 237; *Tidewater,* para. 163; *Perenco,* para. 161; *Poštová Banka, A.S. and Istrokapital SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Decision on Annulment of September 29, 2016, para. 134 (citing *Tulip,* para. 98); *Venoklim,* para. 222; *Flughafen,* paras-95. 93; *Blue Bank,* para. 225.

[223] *Klöckner I*, para. 129; *MINE*, paras. 5.08 & 5.09; *Vivendi I*, para. 64; *Wena*, para. 79; *CDC*, paras. 70 & 75; *MCI*, para. 82; *Fraport*, para. 277; *Sociedad Anónima Eduardo Vieira v. Republic of Chile*, ICSID Case No. ARB/04/7, Decision on Annulment (December 10, 2010), para. 355; *Caratube,* para. 185; *Impregilo*, para. 180; *SGS*, para. 121; *Iberdrola*, paras. 76-77; *Lemire*, para. 278; *Occidental*, para. 66; *Tulip*, paras. 99, 104; *EDF*, para. 328; *Total*, para. 271; *Micula*, para. 135; *TECO I*, para. 124; *Orascom*, para. 165; *Suez I*, para. 154; *Teinver,* para. 209; *Valores,* para. 177; *UP,* para. 205 citing *MINE* paras. 5.08-5.09; *Antin,* para. 230; *CEAC,* paras. 96-97; *Capital Financial Holdings,* para. 243; *NextEra,* paras. 128,348; *9REN,* para. 211; *BayWa*, para. 145; *OperaFund*, para. 398; *Hydro,* paras. 400-

ad hoc Committees that have concluded that there is no requirement to discuss arguments which have no impact on the outcome of the award.[224]

112. Some *ad hoc* Committees have suggested that "insufficient" and "inadequate" reasons could result in annulment.[225] However, the extent of insufficiency and inadequacy required to justify annulment on this basis has been debated.[226] Other *ad hoc* Committees have suggested that they have discretion to further explain, clarify, or infer the reasoning of the Tribunal rather than annul the award.[227]

113. Finally, a majority of *ad hoc* Committees have concluded that "frivolous" and "contradictory" reasons are equivalent to no reasons and could justify an annulment.[228]

401; *Glencore,* para. 236 (citing *EDF* para. 195); *Perenco,* para. 164; *Poštová Banka,* paras. 135-136 (citing *MINE,* paras. 5.08 & 5.09); *Gambrinus,* para. 207 (citing *Wena* at para. 79); *Quiborax,* para. 117; *Suez I,* para. 154.

[224] *Orascom*, para. 164; *Standard Charter Bank*, para. 273-275; *Churchill Mining,* para. 243.

[225] *Mitchell*, para. 21 ("a failure to state reasons exists whenever reasons are... so inadequate that the coherence of the reasoning is seriously affected"); *Soufraki*, paras. 122-26 ("insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal"); *TECO I*, paras. 248-250.

[226] *Compare Amco I*, para. 43 ("sufficiently pertinent reasons"), *and Klöckner I*, para. 120 ("sufficiently relevant"), *with Amco II*, para. 7.55 ("no justification for adding a further requirement that the reasons stated be 'sufficiently pertinent'"), and *MINE*, para. 5.08 ("[t]he adequacy of the reasoning is not an appropriate standard of review"); *Iberdrola*, para. 94 ("this Committee considers that the annulment mechanism does not allow it to review the adequacy of the reasoning of the Award") [unofficial translation from Spanish]; *Occidental*, para. 64; *TECO I*, paras. 249-250; *Tenaris II*, para. 112 ("[a]t the same time, a total absence of reasons is so improbable that an appropriate interpretation, taking into consideration the mandate of VCLT Article 31, must extend the meaning of 'failure' to practically relevant insufficiencies such as total incoherence or genuine contradiction"); *Valores,* paras. 192-195.

[227] *Vivendi II*, para. 248; *Wena*, para. 83; *Soufraki*, para. 24; *CMS*, para. 127; *Rumeli*, para. 83 (with the caveat that if non-stated reasons "do not necessarily follow or flow from the award's reasoning, an *ad hoc* committee should not construct reasons in order to justify the decision of the tribunal"); *Standard Chartered Bank,* para. 609; *Cube*, para. 324; *Poštová Banka*, paras. 141 & 142; *Flughafen,* para. 97.

[228] *Amco I*, para. 97; *Klöckner I*, para. 116; *MINE*, paras. 5.09, 6.107; *CDC*, para. 70; *MCI*, para. 84; *Vieira*, para. 357; *Caratube*, paras. 185-86, 245; *Tza Yap Shum*, para. 101; *El Paso*, para. 221 ("contradictory to a point to neutralize each other"); *Malicorp*, para. 45 ("an award must be upheld unless the logic is so contradictory as to be 'as useful as no reasons at all'"); *RSM Production*, para. 86 (noting that the contradiction must be substantial); *Occidental*, para. 65; *Tulip*, paras. 109-112; *Total*, para. 268; *Lahoud*, paras. 133-135; *TECO I*, paras. 90, 275, 278; *Tenaris II*, paras. 110, 114 (with respect to "frivolous" it stated that "[e]fforts to move the exercise further by labelling reasons as 'frivolous' or 'inadequate' will inevitably cross the border to the scrutiny of the quality of the award and thereby to an appeal award"); *Mobil,* para. 171, *Teinver,* para. 209 ("contradictory reasons may only entail annulment if the contradiction is such that it becomes impossible to understand the motives that led such tribunal to adopt its solution"); *Standard Chartered Bank*, para. 610; *Valores Mundiales,* para. 189; *Antin,* para. 231; *Capital Financial Holdings,* para. 131; *NextEra,* para. 131; *OperaFund,* paras. 396-397; *SolEs,* para. 84 ("the contradictions cause the aforementioned reasons in the award to be incapable of standing together on any reasonable reading of the decision"); *Glencore,* para. 238 ("a reason is not "frivolous" because many – including an ad hoc committee – consider it wrong; to justify annulment, it must be such that no reasonable tribunal could possibly take it seriously"); *Tidewater,* para. 170 ("only genuine contradictions which 'cancel each other out'[fn omitted] may amount to a failure to state reasons"); *Flughafen,* para. 98; *Blue Bank,* para. 228.

114. Failure to state the reasons is the second most frequently invoked ground (115 proceedings which led to annulment decisions). The ground was upheld in 11 cases which resulted in 2 full and 8 partial annulments.[229]

VI. Conclusion

115. Annulment is a limited and exceptional recourse, available only on the basis of the grounds enumerated in Article 52 of the ICSID Convention. It safeguards against "violation of the fundamental principles of law governing the Tribunal's proceedings."[230]

116. While there is agreement on the general standards for annulment, commentators sometimes disagree on whether a specific case has been decided correctly or incorrectly.[231] The complexity of the task assigned to *ad hoc* Committees was summarized by Broches as follows:

> Annulment is an essential but exceptional remedy. It is well understood that the grounds listed in Article 52(1) are the only grounds on which an award may be annulled. [footnote omitted] However, the application of that paragraph places a heavy responsibility on the *ad hoc* committees which must rule on requests for annulment. For example, in relation to a Tribunal's alleged "excess of powers" they may have to make fine distinctions between failure to apply the applicable law, which is a ground for annulment, and incorrect interpretation of that law, which is not. With respect to allegations that a tribunal's failure to deal with questions submitted to it constitutes a serious departure from a fundamental rule of procedure, or failure to state the reasons on which the award is based, they will have to assess the relevance of those questions, that is to say, their nature and potential effect, had they been dealt with, on the tribunal's award. They are also likely to be called on to give specific meaning to such terms as "manifest," "serious departure" and "fundamental rule of procedure" in judging the admissibility of claims for annulment.
>
> After these determinations have been made on the basis of objective legal analysis, the *ad hoc* committees may be faced with the delicate final task of weighing the conflicting claims of finality of the award, on the one hand and, on the other, of protection of parties against procedural injustice, as defined in the five sub-paragraphs of Article 52(1). This requires that an *ad*

[229] *Amco I* (partial), *Klöckner I* (full), *MINE* (partial), *Mitchell* (full); *CMS* (partial), *Enron* (partial), *Pey Casado I* (partial); *TECO I* (partial); *Perenco* (partial); *Tidewater* (partial).

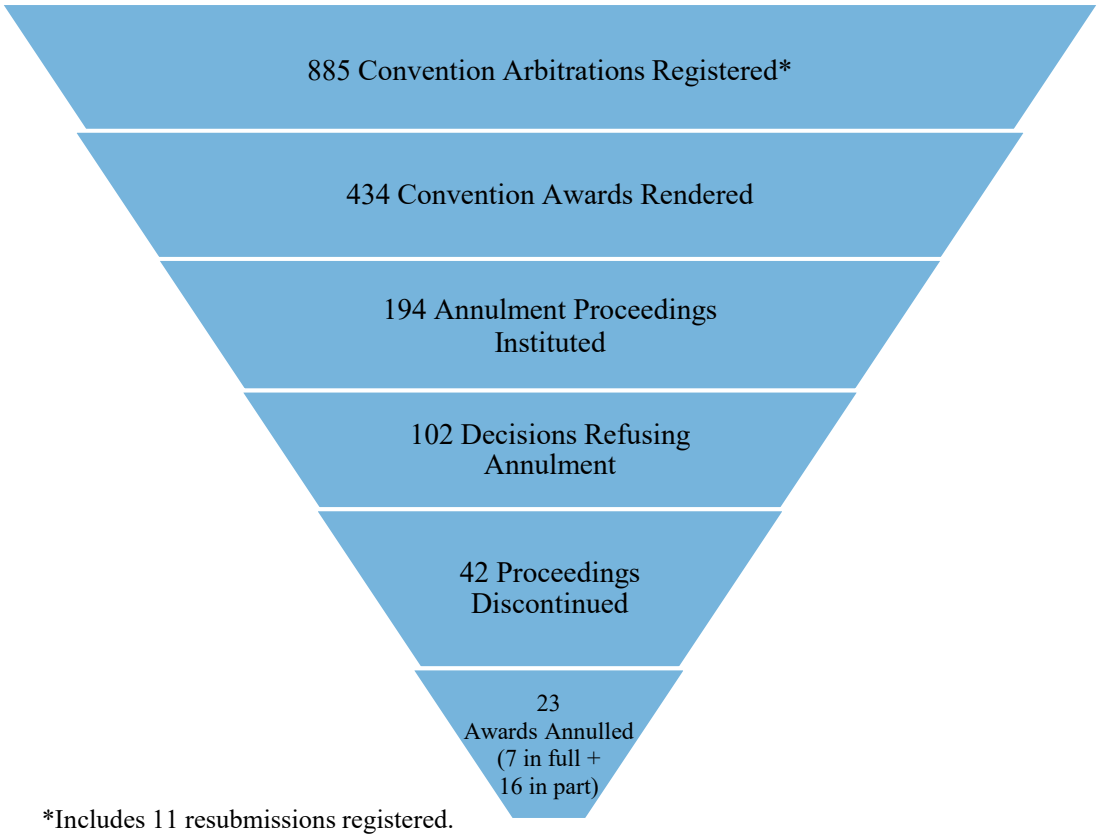
[230] *See supra* note, paras. 12 & 77.

[231] A number of authors have analyzed and commented on annulment decisions and the annulment mechanism generally. Such discussions are included in the bibliography at Annex 3 of this paper.

hoc committee be able to exercise a measure of discretion in ruling on applications for annulment.[232]

117. The task of an *ad hoc* Committee should also be assessed in the overall context of the ICSID case load. In its history (until December 31, 2023), ICSID has registered 885 Convention arbitrations[233] and rendered 434 awards. Of these, 7 awards have been annulled in full and another 16 awards have been partially annulled. In other words, only 1.6 percent of all ICSID awards have led to full annulment and 3.7 percent have led to partial annulment.

Annulment Proceedings under the ICSID Convention – Overview



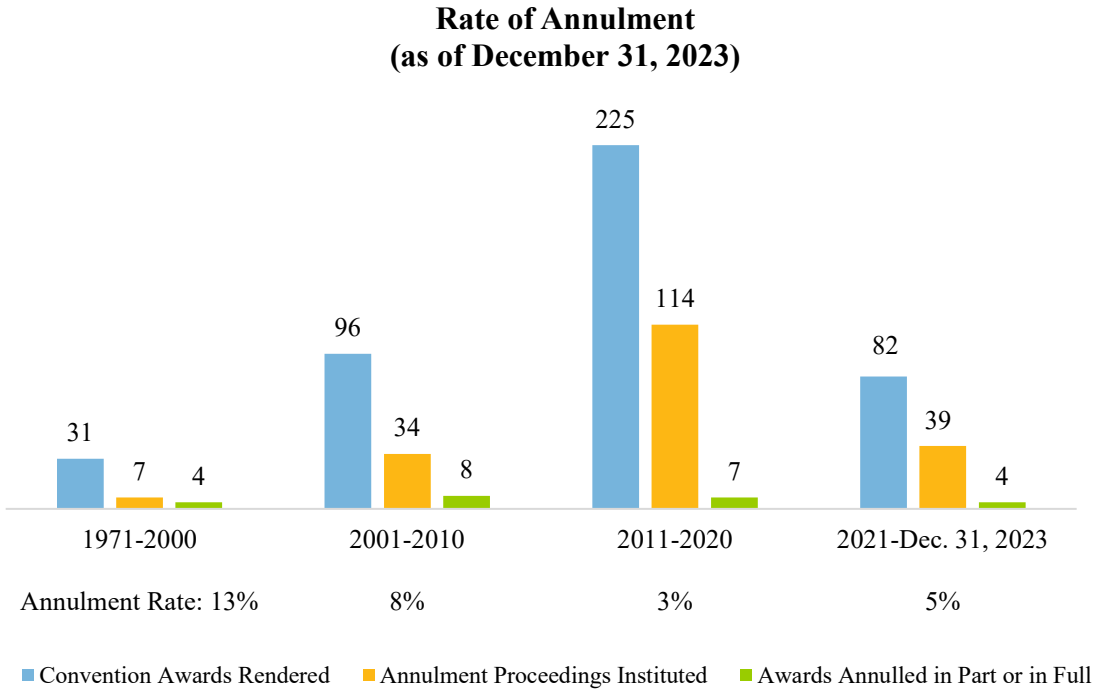
*Includes 11 resubmissions registered.

118. While the number of applications for annulment registered annually fluctuates, the increase in annulment applications in the last 7 years reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period. Between April 16, 2016, and December 31, 2023, 206 Convention awards were rendered, 104 annulment proceedings

[232] Broches, *supra* note 6, at 354 & 355.

[233] This number considers 874 Convention Arbitrations and 11 resubmissions registered as of December 31, 2023.

were instituted, 6 awards were partially annulled and 2 awards were annulled in full. At the same time, the number of annulment proceedings that have been discontinued has increased, with a total of 42 discontinuances as of December 31, 2023 (22 discontinuances between April 16, 2026, and December 31, 2023). By comparison, in the period of January 2011 to December 2020, 225 Convention awards were rendered, 114 annulment proceedings were instituted, and 7 awards were annulled in part or in full. In the period 2001 – 2010, 96 Convention awards were rendered, 34 annulments were instituted, 8 awards were annulled in full or in part and 5 annulment applications were discontinued. Between 1971 – 2000, 31 Convention awards were rendered, 7 annulment proceedings were instituted, 4 awards were annulled in full or in part (13 percent of awards were annulled in part or in full) and one was discontinued. As a result, the rate of annulment as of December 31, 2023, is 2.6 percent of all registered arbitrations under the ICSID Convention and 5 percent of all Convention awards rendered. For the 2011-2020 period the rate is 3 percent of awards rendered in that period, while the annulment rate for the decade 2001 – 2010 is 8 percent, and the rate for the years 1971 – 2000 is 13 percent.



119. Finally, it is vital that ICSID Contracting States continue to supply the ICSID Panel of Arbitrators with capable, experienced and impartial individuals who may be called upon to apply the standards of Article 52 of the ICSID Convention.

* * *

ICSID is the world's leading institution devoted to international investment dispute settlement. It has extensive experience in this field, having administered the majority of all international investment cases. States have agreed on ICSID as a forum for investor-State dispute settlement in most international investment treaties and in numerous investment laws and contracts.

ICSID was established in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the World Bank to further the Bank's objective of promoting international investment. ICSID is an independent, depoliticized and effective dispute-settlement institution. Its availability to investors and States helps to promote international investment by providing confidence in the dispute resolution process. It is also available for State-State disputes under investment treaties and free trade agreements, and as an administrative registry.