

## **From ICSID Annulment to Appeal Half Way Down the Slippery Slope\***

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### **Abstract**

Annulment under the ICSID Convention offers a limited remedy on the basis of a few carefully circumscribed grounds. Recently, losing parties have attacked awards for a wide array of reasons. Some ad hoc committees deciding these requests for annulment have taken a broad view of their powers. They have given some grounds for annulment an extremely wide interpretation thereby blurring the line between annulment and appeal. For instance, a perceived mistake in the interpretation of a rule of law has been regarded as an excess of powers for failure to apply the proper law. One ad hoc committee went beyond the reasons for annulment put forward by the applicant. It actively searched for additional grounds and eventually annulled the award for a reason not relied upon by the applicant. Some ad hoc committees have gone beyond the task given to them by the ICSID Convention, offering general criticism and advice to tribunals. The risk that an ICSID award will be annulled is now higher than that a non-ICSID award will be set aside by a competent domestic court.

### **Keywords**

ICSID arbitration; annulment; appeal; excess of powers

## **I. Introduction**

Among the main virtues of arbitration are efficiency and economy. The finality of awards is an important element of these features. This means sacrificing the usual mechanisms of review which are typical of litigation before domestic courts. Put differently, the goal of correctness yields to the goal of finality.

Under the ICSID Convention, annulment constitutes a limited exception to the principle of finality. It is designed to provide relief for egregious

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violations of a few basic principles under exceptional circumstances. Annulment was designed to be an exceptional remedy to deal with extraordinary emergency situations. Annulment of an award implies a severe censure of the tribunal.

Annulment is fundamentally different from appeal. Annulment is only concerned with the legitimacy of the process of decision. It is not concerned with its substantive correctness. Annulment is based on a limited number of fundamental standards. In the case of the ICSID Convention these are listed exhaustively in Article 52(1).<sup>1</sup>

The result of a successful application for annulment is the invalidation of the original decision. Under the ICSID Convention, an *ad hoc* committee only has the power to annul the award. It may not amend or replace the award by its own decision.

*Ad hoc* committees have routinely stressed the distinction between annulment and appeal. They have stated that their functions were limited and that they did not have the powers of a court of appeal.<sup>2</sup> Rather, a decision to annul had to be based on one of the five grounds listed in Article 52(1) and they could not review the awards' findings for errors of

<sup>1</sup> Article 52(1) of the ICSID Convention provides:

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

<sup>2</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, para. 61; *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, paras. 23, 38–44; *MINE v. Guinea*, Decision on Annulment, 22 December 1989, paras. 5.04, 5.08; *Amco v. Indonesia*, Resubmitted Case: Decision on Annulment, 3 December 1992, paras. 1.14, 7.19, 8.08; *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para. 18; *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, paras. 62, 64; *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, paras. 34–37; *Mitchell v. DR Congo*, Decision on Annulment, 1 November 2006, paras. 19/20; *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, paras. 20, 24; *Repsol v. Petroecuador*, Decision on Annulment, 8 January 2007, para. 38; *MTD v. Chile*, Decision on Annulment, 21 March 2007, para. 31; *CMS v. Argentina*, Decision on Annulment, 25 September 2007, paras. 43, 44, 135, 136, 158; *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010, para. 70; *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, paras. 73, 74; *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 63–65; *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, para. 247; *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, para. 76.

fact or law. The *ad hoc* Committee in *Amco II* said that “[i]t is incumbent upon Ad Hoc Committees to resist the temptation to rectify incorrect decisions or to annul unjust awards”.<sup>3</sup>

The practice of *ad hoc* committees has shown some variations and has been described extensively.<sup>4</sup> Some committees have shown more restraint than others in going about their task.<sup>5</sup> Some recent annulment cases show an unprecedented level of activism in reviewing ICSID awards.<sup>6</sup> In part this is due to the inflationary nature of requests for annulment. In large measure this is due to an extensive interpretation of the grounds for annulment and a tendency of some *ad hoc* committees to take an expansive view of their functions.

In 2010 ICSID *ad hoc* Committees have rendered eight decisions on annulment.<sup>7</sup> Four of these decisions led to the annulment of the respective awards.<sup>8</sup> In four cases the awards survived.<sup>9</sup>

## II. Inflationary Nature of Requests for Annulment

It has become a routine step for losing parties in ICSID arbitrations to try to overturn awards in annulment proceedings. A typical request for annulment lists a number of aspects each of which allegedly should lead to the award’s annulment. Especially Argentina has developed the technique of attacking unfavourable awards on as many aspects as possible.

<sup>3</sup> *Amco v. Indonesia*, Resubmitted Case: Decision on Annulment, 3 December 1992, para. 1.18.

<sup>4</sup> C. Schreuer/L. Malintoppi/A. Reinisch/A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, pp. 890–1045 and the references cited there.

<sup>5</sup> See C. Schreuer, Three Generations of ICSID Annulment Proceedings, in: *Annulment of ICSID Awards* 17–42 (E. Gaillard, Y. Banifatemi eds., 2004).

<sup>6</sup> For a critical review see A. Crivellaro, Annulment of ICSID Awards: Back to the “First Generation”?, in: *Liber Amicorum – Mélanges en l’Honneur de Serge Lazareff 145 et seq.* (L. Levy/Y. Derains eds., 2011).

<sup>7</sup> One of these decisions has remained unpublished: *Chemin de Fer Transgabonais c. Gabon*, 11 May 2010.

<sup>8</sup> *Semptra v. Argentina*, Decision on Annulment, 29 June 2010; *Enron v. Argentina*, Decision on Annulment, 30 July 2010; *Fraport v. Philippines*, Decision on Annulment, 23 December 2010. In *Helnan v. Egypt*, Decision on Annulment, 14 June 2010, the annulment did not affect the Award’s dispositif but only an aspect of the reasoning.

<sup>9</sup> *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010; *Chemin de Fer Transgabonais c. Gabon*, 11 May 2010; *Sociedad Anónima Eduardo Vieira v. Chile*, 10 December 2010. In *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010 the *ad hoc* Committee came close to annulling the Award but eventually upheld it.

In *Rumeli*<sup>10</sup> and *Helnan*<sup>11</sup> the Requests for annulment are each based on four aspects of the Awards. In *Sempra* the *ad hoc* Committee noted that Argentina had raised “a number of issues” each of which, on Argentina’s case, constituted one or more grounds for the Award’s annulment in its entirety.<sup>12</sup> The Request in *Enron* listed more aspects of the Award than in Argentina’s view deserved annulment than one can reasonably count – a veritable area bombardment.<sup>13</sup>

At the same time, the requesting parties typically use several of the grounds for annulment listed in Article 52(1) simultaneously to attack an award. In fact, three of the five grounds for annulment listed in Article 52(1) are invoked in virtually every request for annulment.<sup>14</sup> They are manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons.<sup>15</sup> In *Sempra* the Request listed four grounds, adding improper constitution of the Tribunal.<sup>16</sup> The Request in *Vivendi II* initially invoked all five grounds, but subsequently dropped the charge of corruption on the part of a member of the Tribunal.<sup>17</sup>

Not infrequently, the same aspect of an award is attacked with the help of several grounds for annulment simultaneously in a kind of shrapnel tactics.<sup>18</sup> Therefore, the Committees are often confronted with numerous complaints concerning various features of the award based on several of the grounds for annulment listed in Article 52(1).

*Ad hoc* committees have tried to cope with the inflationary nature of requests for annulment in different ways. The *Fraport* Committee adopted the traditional method of systematically going through the different grounds for annulment provided by the Convention, examining whether

<sup>10</sup> *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010, para. 3.

<sup>11</sup> *Helnan v. Egypt*, Decision on Annulment, 14 June 2010, para. 8.

<sup>12</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, paras. 41–42.

<sup>13</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 85, 130, 167, 185, 204, 214, 296, 319, 352, 353.

<sup>14</sup> See, e.g., *Helnan v. Egypt*, Decision on Annulment, 14 June 2010, para. 8; *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010, para. 3.

<sup>15</sup> For an analysis of ICSID practice on failure to state reasons see *The Government of Sudan v. The Sudan People’s Liberation Movement/Army (Abyei Arbitration)*, Final Award, 22 July 2009, paras. 528–531.

<sup>16</sup> *Sempra v. Argentina*, Decision on Annulment, para. 43.

<sup>17</sup> *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, paras. 2, 17.

<sup>18</sup> See e.g. *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, para. 119; *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, paras. 59, 84.

any of the complaints put forward fell under any of these. Eventually it found that one of the complaints amounted to an annulable error.<sup>19</sup>

The *Sempra* Committee adopted a different technique: It said that “[o]nce an *ad hoc* committee has concluded that there is . . . one instance . . . which warrants annulment of the Award in its entirety, this will be the end of the *ad hoc* committee’s examination. . . . 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.”<sup>20</sup> This approach has the benefit of economy but will increase the pressure towards annulment. A finding that there is a ground for annulment will dramatically ease the burden of the *ad hoc* Committee. It need not look any further to examine the multitude of other arguments that have been put forward for annulment.

In a third group of decisions, notably in *Enron* and *Vivendi II*, one cannot help the impression that the *ad hoc* Committees got so overwhelmed by the multitude of arguments that they lost track of the individual grounds for annulment listed in Article 52(1) of the ICSID Convention. In these cases the Committees seemed to indulge in a general critique of the awards or of the arbitrators. As a consequence, the Convention’s grounds for annulment became entirely secondary. Some parts of the annulment decisions discuss the merits and demerits of the respective awards without clear reference to a particular ground for annulment. The categorization of the awards’ perceived flaws in terms of the grounds for annulment is unclear,<sup>21</sup> or several grounds for annulment are disposed of jointly without proper differentiation.<sup>22</sup> Therefore, the categories of Article 52(1), as applied by these committees, are no longer distinguishable but have become blurred.

### III. Extensive Interpretation of the Grounds for Annulment

In the ICSID Convention the grounds for annulment are carefully circumscribed. This is underlined by adjectives like “manifest” “serious” and “fundamental”. It has become a ritual for *ad hoc* Committees to stress their

<sup>19</sup>) *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, paras. 218–247.

<sup>20</sup>) *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, para. 78.

<sup>21</sup>) *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, paras. 31, 200–242.

<sup>22</sup>) *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 216–291, *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, paras. 243–267.

limited role. In particular, the distinction between annulment and appeal is repeated like a mantra at the beginning of almost every decision.<sup>23</sup> Successive *ad hoc* committees have rejected suggestions that the grounds for annulment should be interpreted either extensively or restrictively.<sup>24</sup>

This professed self-restraint is not always evident in the actual decisions. Two examples suffice to illustrate the point. One concerns a failure to apply the proper law as a form of excess of powers. The other concerns an alleged serious departure from a fundamental rule of procedure.

#### A. *Failure to Apply the Proper Law*

There is general agreement that an excess of powers in the sense of Article 52(1)(b) of the ICSID Convention may consist in a tribunal's failure to apply the proper law.<sup>25</sup> This is so because the parties' agreement on applicable law forms an essential part of the tribunal's parameters. A number of *ad hoc* Committees have held so.<sup>26</sup> Also uncontested, at least in theory, is the distinction between non-application of the proper law and a mere error in its application. Non-application is a valid reason for annulment. A mere error is not.<sup>27</sup> The *ad hoc* Committee in *Soufraki v. UAE* noted in this respect:

85. ICSID *ad hoc* committees have commonly been quite clear in their statements – if not always in the effective implementation of these

<sup>23</sup> See note 2 *supra*.

<sup>24</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, paras. 3, 62, 119; *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para. 4.05; *Amco v. Indonesia*, Resubmitted Case: Decision on Annulment, 3 December 1992, paras. 1.17, 7.55; *Wena Hotels v. Egypt*, Decision on Annulment, 5 February 2002, para. 18; *Vivendi v. Argentina*, Decision on Annulment, 3 July 2002, para. 62; *CDC v. Seychelles*, Decision on Annulment, 29 June 2005, para. 33; *Mitchell v. DR Congo*, Decision on Annulment, 1 November 2006, para. 19; *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 21.

<sup>25</sup> For extensive discussion see C. Schreuer/L. Malintoppi/A. Reinisch/A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 52, paras. 191–270.

<sup>26</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, paras. 58, 59, 60; *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, para. 23; *MINE v. Guinea*, Decision on Annulment, 22 December 1989, para. 5.03; *Amco v. Indonesia*, Resubmitted Case: Decision on Annulment, 3 December 1992, paras. 7.19, 7.21, 7.26; *Lucchetti v. Peru (sub nomine: Industria Nacional de Alimentos)*, Decision on Annulment, 5 September 2007, para. 98; *Mitchell v. DR Congo*, Decision on Annulment, 1 November 2006, para. 57.

<sup>27</sup> *CMS v. Argentina*, Decision on Annulment, 25 September 2007, paras. 48/49, 135/6.

statements – that a distinction must be made between the failure to apply the proper law, which can result in annulment, and an error in the application of the law, which is not a ground for annulment.<sup>28</sup>

In fact, during the ICSID Convention's drafting a proposal was specifically rejected that would have inserted a "manifestly incorrect application of the law" as a ground for annulment.<sup>29</sup>

In looking at some of the recent decisions one cannot help the impression that the distinction between non-application of the proper law and its erroneous application is melting away. To be sure, the *ad hoc* committees still invoke the distinction.<sup>30</sup> But there seems to be a tendency to ignore it in practice.

The concept of a failure to apply the proper law is not without ambiguity. It can be interpreted as a failure to identify correctly and apply the proper system of law, such as international law, French law or Argentinean law. But it has also been interpreted in a stricter sense as the failure to apply a particular rule of law.

The *ad hoc* Committee in *Duke Energy* had no doubt that what mattered was the application of the right system of law and not the application of a particular rule of law. In the context of an alleged excess of powers it said:

... the obligation upon a tribunal under Article 42(1) of the ICSID Convention to apply, *inter alia*, 'the law of the Contracting State' is a reference to the whole of that law, such as the Tribunal may determine to be relevant and applicable to the issue before it, and not to any particular portion of it.<sup>31</sup>

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<sup>28</sup>) *Soufraki v. UAE*, Decision on Annulment, 5 June 2007, para. 85.

<sup>29</sup>) History of the Convention, Vol. II, pp. 847/8, 851, 853/4.

<sup>30</sup>) *Rumeli v. Kazakhstan*, Decision on Annulment, 25 March 2010, para. 78, *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, paras. 173, 174, 205, *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 67, 68, 219, 220, 237, *Duke Energy v. Peru*, Decision on Annulment, 1 March 2011, para. 96.

<sup>31</sup>) *Duke Energy Intl. v. Peru*, Decision on Annulment, 1 March 2011, para. 212. Italics original.

The problem is not new. Already in *Amco v. Indonesia* the first *ad hoc* Committee annulled the Award because the tribunal had overlooked a provision of Indonesia's Foreign Investment Law.<sup>32</sup>

In *Sempra* a key question was the relationship between Article XI of the US-Argentina Bilateral Investment Treaty (BIT) addressing measures necessary to deal with emergencies and Article 25 of the ILC Articles on State Responsibility reflecting customary international law on the state of necessity.<sup>33</sup> The Tribunal had found that the treaty provision was inseparable from and had to be applied in the light of the rule under customary international law. For the Tribunal it followed that since the requirements for a state of necessity under customary international law were not met there was no need to enter into a separate review of Article XI of the BIT.<sup>34</sup>

Three days before the Award in *Sempra* another *ad hoc* Committee in *CMS v. Argentina* had criticized a similar position and had pointed to the different functions of the treaty provision and of customary international law. The *CMS ad hoc* Committee found that the Tribunal had made a manifest error of law in that respect. But the *CMS* Committee said that although the Tribunal had applied Article XI of the BIT defectively it had applied it and hence there was no manifest excess of powers.<sup>35</sup>

The *Sempra ad hoc* Committee adopted the *CMS* Committee's analysis but drew different conclusions. It found that Article XI of the BIT differs materially from the customary international law provision as reflected in the ILC Articles. The Committee found that "[a]s a general rule, a treaty will take precedence over customary international law."<sup>36</sup> It held that since the Tribunal had regarded Article 25 of the ILC Articles and not Article XI of the BIT as the "primary law" it had made a fundamental error in identifying and applying the applicable law. It concluded that the Tribunal's failure to base its review on the applicable legal norm constituted an excess of powers deserving annulment.<sup>37</sup>

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<sup>32</sup> *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, paras. 95, 97. For critical comments see C. Schreuer/L. Malintoppi/A. Reinisch/A. Sinclair, *The ICSID Convention: A Commentary*, 2d ed. 2009, Article 52, paras. 230–232.

<sup>33</sup> See J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002) pp. 178–186.

<sup>34</sup> *Sempra v. Argentina*, Award, 28 September 2007, paras. 376, 388.

<sup>35</sup> *CMS v. Argentina*, Decision on Annulment, 25 September 2007, paras. 128–136.

<sup>36</sup> *Sempra v. Argentina*, Decision on Annulment, 29 June 2010, para. 176.

<sup>37</sup> *Ibid.*, at paras. 208, 209.

The *Sempra* Tribunal had identified the applicable system of law correctly – international law. It had also identified the applicable rules correctly, namely Article XI of the BIT and Article 25 of the ILC Articles. Where it had erred, in the opinion of the *ad hoc* Committee, was the relationship between the two. The Tribunal's conclusion that the treaty provision was to be interpreted in light of the requirements of customary international law for a state of necessity had, in the *ad hoc* Committee's view, resulted in a failure to apply the proper law.

The *Sempra ad hoc* Committee apparently operated on the basis of two doubtful assumptions:

1. The failure to apply one “norm” of the applicable law constitutes a failure to apply the proper law and hence an excess of powers.
2. An error consisting in the interpretation of an applicable rule with the help of another rule amounts to its non-application.

This suggests that, despite protestations to the contrary, the *ad hoc* Committee in *Sempra* has abandoned the distinction between a failure to apply the proper law and an error in the application of the law. This impression is confirmed by the *ad hoc* Committee's own words. In response to Argentina's insistence that an error of law constitutes a ground for annulment if only it is sufficiently serious, the *ad hoc* Committee said:

As a general proposition, this Committee would not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers.<sup>38</sup>

Although the statement is harnessed by several caveats, the principle is clear: given the right circumstances an error of law may amount to a manifest excess of powers in the sense of Article 52(1)(b) of the ICSID Convention and may hence form the basis for annulment.

The Decision on Annulment in *Enron* confirms the impression that the distinction between non-application and erroneous application of the proper law is being eroded. For instance, the *ad hoc* Committee examines

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<sup>38)</sup> *Ibid.*, at para. 164.

the Tribunal's decisions on fair and equitable treatment and on the umbrella clause concluding that the Tribunal had employed the correct method of interpretation and had hence applied the applicable law.<sup>39</sup> The clear implication of these findings by the *ad hoc* Committee is that an incorrect interpretation of these concepts could have amounted to a failure to apply the proper law.

The emphasis on the correct interpretation of the applicable law is most obvious in the *Enron ad hoc* Committee's treatment of the plea of necessity. The Committee had no problem with the Tribunal's reliance on Article 25 of the ILC Articles but it took issue with the way the Tribunal had interpreted that provision.<sup>40</sup> Specifically, on the questions whether the measures adopted by Argentina were "the only way" to cope with the situation and whether the State had "contributed to the situation of necessity," the Tribunal had adopted the findings of an economics expert. This, in the view of the *ad hoc* Committee, meant that the Tribunal had not applied Article 25 of the ILC Articles and had hence failed to apply the applicable law.<sup>41</sup>

This reasoning of the *ad hoc* Committee is truly baffling. The Tribunal had correctly identified the governing law. It had also correctly identified the relevant rule and had applied it. But the *ad hoc* Committee found an excess of powers because it disagreed with the way the Tribunal had interpreted that rule. More specifically, the *ad hoc* Committee found that "the process of reasoning" applied by the Tribunal was defective and that this constituted an excess of powers.<sup>42</sup> Perhaps most surprisingly, this argument had not even been put forward by Argentina but was the *ad hoc* Committee's own creation.

<sup>39</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 314, 344.

<sup>40</sup> Article 25 of the ILC Articles on State Responsibility dealing with necessity provides:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
  - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
  - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
  - (a) the international obligation in question excludes the possibility of invoking necessity; or
  - (b) the State has contributed to the situation of necessity.

<sup>41</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, paras. 377, 392, 393.

<sup>42</sup> *Ibid.*, at para. 393.

If one is to take the annulments in *Sempra* and *Enron* as an indication of current practice, an *ad hoc* committee can annul an award whenever it disagrees with the way a tribunal interprets an applicable rule. In other words, failure to apply the proper law as a form of excess of powers has undergone two permutations: first the proper law became the proper rule. Second, the rule's application became its correct application.

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

The second example for an extensive interpretation of the Convention's grounds for annulment concerns "serious departure from a fundamental rule of procedure" as listed in Article 52(1)(d) of the ICSID Convention. *Ad hoc* committees are not always careful about identifying the rule in question and establishing its fundamental character.<sup>43</sup> But if one is to follow the *Enron* Committee this is hardly necessary.

Among the numerous complaints put forward in its request for annulment, Argentina had protested against the acceptance of an expert's report filed out of time. This, in Argentina's view was in violation of the parties' agreement on the submission of evidence as recorded in the minutes of the Tribunal's First Session. The *ad hoc* Committee found that the principle of party autonomy was a fundamental rule of procedure that would be violated by a departure from an agreement of the parties on procedure.<sup>44</sup>

In the end the Committee found that the Tribunal in allowing the late submission of the report had not violated the agreement and even if it had done so the departure would not have been serious.<sup>45</sup> But the example still shows how easily the concept of a "fundamental rule of procedure" can be expanded. Any detail from a party agreement on procedure, no matter how trivial, could be seen as an expression of the fundamental rule of party autonomy. In a wider sense the ICSID Arbitration Rules operate by agreement of the parties and could hence be imported into this ground for annulment under the label of party autonomy. In fact, almost any procedural rule can somehow be traced back to one or another broader principle that may be described as fundamental. The inevitable consequence would be that any rule of procedure becomes fundamental.

<sup>43</sup> See e.g. *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, paras. 200–242.

<sup>44</sup> *Enron v. Argentina*, Decision on Annulment, 30 July 2010, para. 195.

<sup>45</sup> *Ibid.*, at paras. 196, 197.

#### IV. Hyperactive *Ad Hoc* Committees

Some of the recent decisions indicate that *ad hoc* committees have an extremely wide perception of their functions. This includes a search for additional reasons for annulment not put forward by the party requesting the annulment. It also includes a broad supervisory function over the behaviour of tribunals and arbitrators.

##### A. *Ex Officio* Search for Additional Reasons for Annulment

As mentioned before, in *Enron* Argentina had put forward a myriad of reasons to support its request for annulment of the Award. As if these reasons were not enough, the *ad hoc* Committee went out of its way to search for additional reasons to annul the Award.

For instance the argument based on party autonomy as a fundamental rule of procedure, discussed above under III.B., had not been put forward by Argentina but was created by the Committee on its own initiative. The Committee recalled that Argentina had complained of the acceptance of an expert report that was submitted out of time. Argentina had included this argument under the heading of breach of the principle of equality of the parties and denial of the right of defence. The Committee recalled that the deadlines for the submission of documents had been agreed to by the parties. Therefore it had additionally considered the argument as an alleged breach of the principle of party autonomy as a fundamental rule of procedure.<sup>46</sup>

In another part of its decision the *Enron* Committee stated that lack of impartiality would be a ground for annulment under Article 25(1)(d) (serious violation of a fundamental rule of procedure) and examined whether there was evidence of partiality. At the same time the Committee admitted that Argentina had not expressly sought to rely on this ground for annulment in this context.<sup>47</sup>

Most importantly, the ground on which the *Enron* Award was actually annulled had also not been put forward by Argentina but was developed by the *ad hoc* Committee on its own initiative. Argentina had argued that the Tribunal's reasons on the requirements of the state of necessity under cus-

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<sup>46</sup> *Ibid.*, at para. 195.

<sup>47</sup> *Ibid.*, at para. 278.

tomary international law were contradictory and insufficient warranting annulment under Article 52(1)(e) for failure to state reasons.<sup>48</sup> But the *ad hoc* Committee found that the Tribunal's treatment of customary international law on necessity amounted to a failure to apply the applicable law and hence an excess of powers under Article 52(1)(b) and annulled the award on that ground.<sup>49</sup> Therefore, the *ad hoc* Committee annulled the Award on a ground that had not been put forward by Argentina.

Oddly enough, the Committee did reach the conclusion that there had also been a failure to state reasons and that this constituted a ground for annulment as argued by Argentina.<sup>50</sup> But if one looks at the decision's *dispositif* there is no reference to failure to state reasons. The Award was annulled on excess of powers only. Therefore the Committee:

- a) annulled the Award on a ground that had not been put forward by Argentina;
- b) found that another ground for annulment existed that had been put forward by Argentina but did not annul the Award on that ground.

#### B. *Ad hoc Committees as Educators*

Some *ad hoc* committees seem to believe that they have a pedagogical function. That they have superior insights which it is their duty to impart upon the investment arbitration community.<sup>51</sup> In some of the recent cases *ad hoc* committees assumed the role of supreme court judges whose task is to give policy guidelines or of educators who dispense gratuitous advice.

For instance, in *Vivendi II* the central question was the alleged failure of an arbitrator to fully disclose her role as a director of a bank that owned shares in one of the claimants. The *ad hoc* Committee did not restrict itself to determining whether this constituted a ground for annulment. After pointing to its grave responsibility for the integrity of the ICSID process as a whole,<sup>52</sup> the Committee entered into a lengthy discussion of arbitrators' ethics. The Committee developed rules for arbitrator conduct at the same

<sup>48</sup> *Ibid.*, at para. 353(j).

<sup>49</sup> *Ibid.*, at paras. 377, 392, 393.

<sup>50</sup> *Ibid.*, at paras. 378, 384.

<sup>51</sup> See already *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, para. 82.

<sup>52</sup> *Vivendi II v. Argentina*, Decision on Annulment, 10 August 2010, para. 206.

time castigating the arbitrator for not having complied with these rules.<sup>53</sup> But in the end the Committee decided not to annul the Award seeing that the arbitrator was unaware of the conflict and that “despite most serious shortcomings” her independent judgment was not impaired.<sup>54</sup> Therefore, the major part of the Decision deals with what the Committee thought would have been the proper way to handle disclosures in cases of possible conflicts of interest and not with the decision on whether to annul.

The tendency to try and educate arbitrators is also apparent in the *Fraport* annulment decision. In that case the Tribunal’s majority had interpreted the BIT with the help of the Philippine’s Instrument of Ratification.<sup>55</sup> The *ad hoc* Committee was critical of this step and indicated that the Tribunal’s method of treaty interpretation was not in accordance with the Vienna Convention on the Law of Treaties (VCLT).<sup>56</sup> The Committee nevertheless declined to annul on that ground.<sup>57</sup> Apparently the Committee merely tried to instruct the Tribunal (or rather its majority) on how to properly interpret a treaty.

Apart from the question whether this is part of an *ad hoc* Committee’s functions, it appears that the Committee was incorrect in its criticism. Article 31 of the VCLT contains the “general rule of interpretation” and refers to good faith, ordinary meaning, context and object and purpose. Under Article 31(2)(b) the context for the purpose of the interpretation of a treaty includes:

any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The Philippines’ Instrument of Ratification squarely fits into this category. Therefore the Tribunal’s majority was quite correct in relying on it for purposes of interpreting the treaty. The *ad hoc* Committee does not explain why the Instrument of Ratification should not be covered by Article 31(2)(b) of the VCLT nor does it discuss that provision.

<sup>53</sup> *Ibid.*, at paras. 218–232.

<sup>54</sup> *Ibid.*, at paras. 233–242.

<sup>55</sup> *Fraport v. Philippines*, Award, 16 August 2007, paras. 337–343.

<sup>56</sup> *Fraport v. Philippines*, Decision on Annulment, 23 December 2010, paras. 98, 99, 107.

<sup>57</sup> *Ibid.*, at para. 112.

## V. Conclusions

If the recent annulment decisions discussed here are indicative of current practice one can draw the following conclusions:

1. Requests for annulment have become routine steps for parties trying to overturn unfavourable awards. Not infrequently, requesting parties put forward an array of reasons based on several of the grounds listed in Article 52(1) of the ICSID Convention.
2. Lately, some *ad hoc* committees, dealing with requests for annulment, have shown a tendency to give unusually wide meanings to the grounds listed in Article 52(1). Thus, failure to apply the proper law is becoming increasingly indistinguishable from an error in the application of the law. As a consequence, any award, no matter how well drafted, is threatened by annulment. All it takes is a different view held by the *ad hoc* committee on what it sees as an important question of law. The consequence is a full appeal. This runs counter to Article 53 of the ICSID Convention which explicitly excludes appeal.
3. In one case the *ad hoc* Committee did not restrict itself to examining the arguments for annulment put forward by the requesting party. It trawls the award for potential flaws that may qualify as grounds for annulment and eventually annuls on the basis of an argument that had not been raised by the requesting party.
4. It has become considerably easier to overturn an ICSID award in annulment proceedings than to have a non-ICSID award set aside by a domestic court. This, in turn, is likely to increase the incentive for a losing party to seek annulment.
5. It has become common for *ad hoc* committees to offer gratuitous advice and criticism. Even if the award survives, the criticism may act as a consolation prize to the losing party. At the same time this makes compliance with the award more difficult.

