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Framing the Work of ICSID Annulment Committees

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I. INTRODUCTION

The mechanism within ICSID for annulment potentially erases an ICSID arbitral award – an award that, except for the processes of annulment and revision, was intended to be final and binding. These decisions of the *ad hoc* annulment committees are therefore critically significant. But arguably the quality of the decisions of the committees is not commensurate with their significance. A number of recent annulment decisions have been sharply criticized by scholars (and others not associated with a particular case) as overly intrusive and undisciplined. Others point to these same decisions as being emblematic of deeper problems in the ICSID arbitration system and foreign investment protection generally.

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* This essay is dedicated to José María Abascal as he completes his 50th year of legal practice. A man of great learning with whom I had the honor of working with at the United Nations Compensation Commission and the Institute for Transnational Arbitration. A man of great compassion and wisdom that it is my good fortune to have as a friend.

I thank Richard Buxbaum, Jan Dalhuisen, Leah Harhay, Saira Mohamed, Lucy Reed and Susan Spencer for their comments on drafts of this essay. I also thank Preeti Khanna, LL.M. ’12 Berkeley Law, and Timothy Hughes J.D. ’10 Berkeley Law, for their excellent assistance with the collection and analysis of data. The views expressed in this essay are mine and are not necessarily shared by those who have commented upon it.

1 The possibility of a request for interpretation of an award is arguably a third process to be mentioned. Interpretation, however, is not inconsistent with the intention that an award be finding and binding.

2 The ICSID Convention refers to the committees as *ad hoc* committees. This article hereinafter will refer to them as “annulment committees” or simply “committees.”


4 *See, e.g.*, Leah D. Harhay *The Argentine Annulments: The Uneasy Application of ICSID Article 52 in Parallel Claims* (forthcoming in COLUMBIA YB OF INV’T. L.)
This essay briefly summarizes what we know of the performance of the annulment mechanism and then describes the current critiques of that mechanism. Specifically, it identifies three criticisms of recent annulment decisions and reflects on why committee members might leave their work open to such criticisms. This essay then proceeds to offer five principles intended to frame how annulment committees might approach their work. The task placed before members of annulment committees is set forth in Article 52 of the ICSID Convention. The effort to frame the work of the committees offered in this essay is intended to be complimentary to the formal mandate set forth in the ICSID Convention and the Arbitration Rules.

In form, this essay should be viewed as an open letter. It is brief and direct so as to communicate to committee members who seek to reflect upon their task. It is also open in the sense that it recognizes that there likely are different views of this task, encourages the articulation of such opposing views and believes that public debate of these divergent views will benefit the annulment process.

Before proceeding, a very brief introductory word as to the annulment mechanism and its place in the ICSID system is appropriate. In particular, an ICSID award may be revisited under three mechanisms set forth in Chapter VII of the ICSID Convention. These mechanisms are the possibilities of (1) interpretation, (2) revision and (3) annulment. Interpretation potentially clarifies an award; it does not per se represent a challenge to the finality of the award. Revision potentially alters (concluding from a review of the annulment proceedings for the Argentine cases that “[t]o have such similar definitions of the mandate, and yet inconsistent application in the annulments has, when combined with the inconsistency exhibited in the underlying awards, led to significant implications for the . . . the broader investment arbitration system, generally.”

5 See ICSID Convention, Regulations and Rules (2006), art. 53 (1) that provides in relevant part that “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.” In addition to the three mechanisms mentioned in the text, it is possible under art. 49 for a party to request the Tribunal to “decide any question which it had omitted to decide in the award: or to “rectify any clerical arithmetical or similar error.”

6 Id. art. 50.
an award on the basis of the “discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.”

Annulment potentially erases the award.

The core question addressed by the annulment mechanism is set forth in Article 52 of the ICSID Convention. Specifically, Article 52(1) lists the five grounds upon which a committee may decide to annul an award:

(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.

If an award is annulled, then it is erased as though it never happened. Given that the award never existed, arbitration proceedings may be resubmitted and the process may start over. This return to the start is reflected in the fact that when a proceeding begins again following annulment of a final award, the proceeding retains the initial the case number it was issued by the ICSID Secretariat. It retains the same case number because it is the same case.

Lastly, a word on terminology is appropriate and revealing. Within ICSID, the reviewing body is referred to an “annulment committee,” not an annulment tribunal. These annulment committees render “decisions,” not awards. Both of these linguistic choices themselves point to the significant differences between the processes of annulment and arbitration. The arbitration is a process aimed at a final and binding award concerning a dispute. The annulment mechanism is a process aimed at deciding whether the award that resulted from the

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7 Id. Article 51(1).
arbitration process should be regarded as an award at all. An annulment decision is not about the dispute, it is about the award – in particular, the integrity of the process that yielded it.

With this introduction, I turn first to what we know and do not know regarding the performance of the ICSID annulment mechanism and then to describe three current concerns regarding how the annulment mechanism is operating in practice.

II. WHAT WE KNOW REGARDING THE PERFORMANCE OF THE ICSID ANNULMENT MECHANISM

Substantial concern is voiced that the ICSID annulment mechanism is not operating as intended and that this tendency potentially undermines both ICSID awards and the institution of ICSID.\(^8\) Before discussing the forms this concern takes, it is important at the outset to observe that it is difficult to gauge how accurate and serious these perceptions of the annulment mechanism are in fact.

A. What We Know

ICSID maintains publically available data regarding its work and publishes some statistical analysis utilizing that data on a semiannual basis. From 2001 through 2010, ICSID advises that awards were rendered in 96 arbitration cases. Simultaneously over that time period, we are advised that 8 committee decisions annulled awards in part or in full, 13 decisions rejected an application for annulment, and 5 annulment proceedings were discontinued. Assuming there is not any change in the rate of proceedings or how long they take,\(^9\) we can say from these numbers on a rolling basis that, in the 2001 through 2010 period,

\(^8\) See, e.g. Christoph Scheuer, supra note 4 at 213 (arguing that “[s]ome recent annulment cases show an unprecedented level of activism in reviewing awards”).

\(^9\) It is important to note that these numbers are not necessarily tied to one another, that is, the annulment decisions are not necessarily tied to awards issued in that decade. Rather, the numbers indicate what occurred in that decade. Just as some percentage of the 96 arbitration cases with awards were likely registered with ICSID before 2001, so too might some number of the annulment proceedings have been initiated before 2001 or remained pending after 2010.
approximately 38% of decided annulment proceedings resulted in full or partial annulment or, more broadly, that 8% of all awards rendered were annulled.10

Figures 1 through 4 present a similar but slightly different picture of ICSID proceedings regarding annulment proceedings from the coming into force of the ICSID Convention through June 1, 2012.11 The aim of this analysis is to identify the number of awards for which annulment proceedings could have been brought, the number of annulment proceedings that were in fact brought, and the number of decided annulment applications that were granted. Figures 1 through 4 tell us the following story:

First, since 1972 a total of 362 cases have been filed with ICSID, of these 120 (33%) remain pending and 242 (67%) have in some fashion been disposed of (see Figure 1). That one third of the cases are pending reflects the dramatic increase in filings over the last decade.

Second, of the 242 cases disposed of since 1972, 94 (39%) were either discontinued or settled (see Figure 2). This is significant for our purposes because these 94 cases were not susceptible to possible annulment. It is instead the 148 cases

![Figure 1: Disposed v. Pending ICSID Cases (Total Filed 362).](image)

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10 These numbers are drawn from statistics prepared by the ICSID Secretariat, “The ICSID Caseload – Statistics (Issue 2012-1)” at 15.

11 The data underlying these Figures and Table 1 was compiled by the author in collaboration with Timothy Hughes, J.D. 2010 and his research assistant at the time, and Preeti Khanna, LL.M. 2012, the author’s research assistant.
decided by final award that establish the pool for possible annulment proceedings.\textsuperscript{12}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Contested Awards v. Settled/Discontinued Cases. (Total Disposed 242)}
\end{figure}

Third, of the 148 cases disposed of since 1972 by contested award, applications for annulment were filed in 49 (33\%)(see Figure 3).

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{Annulment Applications from Contested Awards (148).}
\end{figure}

Fourth, of the 49 applications for annulment, 12 applications are pending. Of the 37 decided applications for annulment:

- 15 applications were denied (40\%),
- 11 applications were granted (30\%), and
- 11 applications were either settled or discontinued.

\textsuperscript{12} It may be possible to reduce this number further. This analysis in taking the full number of cases decided by contested award thus is conservative.
(see Figure 4). The discontinuation or settlement of an annulment application may imply that it was not meritorious or that it to some negotiated degree was successful in its attack on the award, more cannot be said without an investigation of each.\textsuperscript{13} But if we remove the 11 applications that either were settled or discontinued, then Figure 4 instead would indicate that of a total of 26 applications for annulment decided:

15 applications were denied (58%) and
11 applications were granted (42%).\textsuperscript{14}

Finally, this analysis indicates a rate for annulment in whole or in part for contested awards of 7% (11 of 148).

![Figure 4: Total Annulment Applications Decided (37).](image)

Fifth and last, it is important to note that of the eleven annulment applications granted in whole or in part, six of the underlying proceedings were subsequently resubmitted. Three of these resubmitted proceedings resulted in an award that was again the subject of annulment proceedings where in each instance the application was rejected.\textsuperscript{15} One of the resubmitted

\textsuperscript{13} Of these eleven applications, six were settled and five were discontinued.

\textsuperscript{14} Four of these eleven applications were only partially granted. It may be roughly said that three of these four decisions represent substantially a grant of annulment, while the one remaining decision is in effect a rejection of the application.

\textsuperscript{15} In one of these second round annulments, the application was granted only as to a subsidiary aspect. Amco Asia v. Republic of Indonesia (ICSID Case No. ARB/81/1) decision on Annulment of Award of 5 June 1990 and of
arbitrations proceedings also resulted in an award for which annulment proceedings were initiated, but the matter was settled before a decision was made. The last two resubmitted proceedings remain pending.

If one moves from the entire span of ICSID’s history and instead examines the outcomes of cases initiated in a particular year, then this approach gives yet another impression. For example, if one goes back to analyze the proceedings first registered in 2001 (going back that far in time so as to minimize the number of cases still pending today), we find the following:

The total number of arbitration proceedings registered in 2001 is 14, but of those 1 remains pending and 4 were discontinued. Therefore the total number of 2001 proceedings with a final award in which an annulment application could be made is nine. For those nine final awards, applications for annulment were made in 5. And of the five applications for annulment, the award was annulled in whole or in part in two. Thus for arbitration proceedings initiated in 2001, 40% of relevant decided annulment proceedings resulted in full or partial annulment or, more broadly, 22% of all awards rendered were annulled.

These three statistical analyses can be arrayed as follows:

<table>
<thead>
<tr>
<th>Data Source</th>
<th>Period Covered</th>
<th>Percentage of Contested Annulment Decisions Granted in Whole or in Part</th>
<th>Percentage of Contested Awards Annulled in Whole or in Part</th>
</tr>
</thead>
<tbody>
<tr>
<td>Author’s compilation</td>
<td>1972 to June 1, 2012</td>
<td>42%</td>
<td>7%</td>
</tr>
<tr>
<td>ICSID</td>
<td>2001 through 2010</td>
<td>38%</td>
<td>8%</td>
</tr>
<tr>
<td>Author’s compilation</td>
<td>2001</td>
<td>40%</td>
<td>22%</td>
</tr>
</tbody>
</table>

Supplemental Award of 17 October 1990 (3 December 1992) reprinted at 9 ICSID REPORTS (annulling the Supplemental Award of 17 October 1990 which at the request of the claimant had attempted to correct an arithmetical error). The annulment application as to the primary award however was rejected.
B. *What We Do Not Know*

1. Statistical Limitations: Trends, Small Numbers and Special Circumstances

The statistics above regarding ICSID practice necessarily offer a limited picture. The analysis offered tells of past averages rather than of trends. The ICSID context is changing with there presently being both more arbitral awards and more applications for annulment. Statistical averages for the last three decades, or even the last decade, do not necessarily tell us much regarding current trends. It is often assumed that trends may be worsening, but it may also be that, even if a problem existed at one time, potential committee members already are learning from the critiques expressed in the arbitration community. Simultaneously, although there are more proceedings, it need be borne in mind that the numbers of arbitration and annulment proceedings under ICSID are small both in an absolute sense and relatively when compared to the numbers present in international commercial arbitration. Small numbers are important because small differences in outcome may yield substantial changes in percentages. A comparison of the ICSID statistics for 2001 through 2010, and the example of 2001 show both the influence of small numbers and the care that must be taken in drawing conclusions. Finally, some commentators – rather than drawing general conclusions regarding the annulment mechanism from recent practice – would tie current arguably problematic annulments to some extent to the particular context of the many arbitrations that arose from the Argentine crisis and to the much debated treatment of issues such as necessity in the awards ending those arbitrations.

2. Is the Granting of an Annulment Application the Only Indicator of Concern?

The statistics cited focus on the number of applications for annulment granted. However, as we will see, one of the current critiques is that committees are undermining the legitimacy of even those awards that are not annulled. In this sense, care should be taken in assuming the number of annulments granted is the only measure of whether an issue exists.
3. What Does It Mean to Say Annulment is “Exceptional”?

Overall, it is to my mind striking that 40% of all contested annulment applications have been granted in whole or in part. It could be argued that this high percentage simply reflects the fact that applications are not brought unless there is a high likelihood of success. Yet, many observers will state that national jurisdictions with rule of law and established annulment procedures very rarely grant annulments. But these anecdotal statements, even if widespread, are simply that and require investigation.

An annulment rate for all contested awards of 7% or 8%, in contrast, does not seem particularly “striking.” Yet an annulment rate of 7% or 8%, even if not striking to the same degree, does not seem particularly “exceptional” either. It must be granted that the meaning of the term “exceptional” is elusive, its meaning coming in part from comparisons which are difficult to draw. Further investigation of annulment outcomes in national jurisdictions may provide a basis for comparisons. An effort to appreciate “exceptional” by reference to the design and consequences of annulment is offered in Part V.

III. WHAT CONCERNS ARE EXPRESSED REGARDING THE PERFORMANCE OF THE ICSID ANNULMENT MECHANISM

With these caveats as to the seriousness in fact of stated concerns in mind, I turn to three concerns raised by the practice of annulment committees over the last five years: (1) that the finality of ICSID awards is too easily challenged; (2) that the legitimacy of an award that survives annulment proceedings may be weakened; and (3) that although annulment committees recite holdings regarding the limits of their work, they simultaneously in practice appear to not truly appreciate those limits.

A. The View that Annulment Committees Exhibit an Undisciplined Tendency to Delve into Reviewing the Substance of the Award

The tendency of annulment committees to delve too deeply into the substance of the award is the concern most often and most strenuously raised. An example of this tendency arguably can be found in the numerous invocations of the annulment
ground that the Tribunal manifestly exceeded its powers. It is widely accepted that an example of manifest excess of powers is failure to apply the chosen law. Simultaneously, it is also widely accepted that the erroneous application of the applicable law is not a manifest excess of powers that calls into question the legitimacy of the entire process, but rather a substantive decision that calls into question the correctness of the award. The former is concerned with the framework of the arbitral process; the latter, the correctness of the decision reached within that framework. Yet, Professor Scheuer – in a prominent example of the depth of current concern – in examining the annulment decisions of 2010, concluded that “the distinction between non-application of the proper law and it erroneous application in practice is melting away.”

B. The View that Annulment Committees Exhibit a Tendency to Make Unnecessary Critical Statements Regarding the Original Award thereby undermining the Legitimacy of such Award

Related to the first concern is a tendency of annulment committees to explain in their decisions that substantial problems exist with the award being examined, although such problems do not rise to the level at which annulment is warranted. On the one hand, this practice shows restraint as to the decision to annul. On other hand, it shows a lack of awareness of the impact that such statements may have on the legitimacy of the award and the possible impacts such statements may have on the enforceability of the award as a practical, if not legal, matter.

16 The grounds cited for almost all annulments granted have been (1) that the Tribunal has manifestly exceeded its powers (Article 51(b)) and (2) that the award has failed to state the reasons on which it is based (Article 51(e)).

17 Scheuer, supra note 4 at 216-221 (discussing inter alia the Sempra v. Argentina Decision on Annulment of 29 June 2010 which he concludes “abandoned the distinction,” and the Enron v. Argentina Decision on Annulment of 30 July 2010 where he regards the Committee’s reasoning as “truly baffling”).

18 See, e.g. José Alvarez, The Return of the State, pp. 15-16, available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_news_media/documents/documents/ecm_pro_067586.pdf (stating that “The CMS annulment formally upheld the investor’s award. But by going out of its way to severely criticize the legal merits of that award, the CMS annulment committee,
A commonly cited example of this practice is to be found in the Annulment Committee 2007 Decision in CMS v. Argentina. In that Decision, the Committee writes:

Throughout its consideration of the Award, the Committee has identified a series of errors and defects. The Award contained manifest errors of law. It suffered from lacunae and elisions. All this has been identified and underlined by the Committee. However the Committee is conscious that it exercises its jurisdiction under a narrow and limited mandate conferred by Article 52 of the ICSID Convention...19

Consciously or not, made enforcement of that decision considerably harder. Whether or not the CMS annulment committee intended the result, the underlying award has not yet been paid. ... it is always hard to secure payment from an entity that enjoys sovereign immunity. Although ICSID awards are more enforceable than most international obligations, they are not immune from the fundamental weakness of all such obligations: namely that enforcement rests in the end on the legitimacy of the obligation and the state's desire to comply. By removing the legal legitimacy of the underlying award, the CMS annulment committee made it easier for Argentine authorities to continue to refuse to pay. The annulment decision in effect licensed Argentina's continued civil disobedience. Indeed, even assuming that the Argentine authorities had been inclined to comply with the underlying award if it had survived the annulment process, the CMS annulment’s criticisms of the basis for the award would render the public payment of such award by a democratically accountable body much more difficult to explain to tax payers. The CMS annulment in short empowers the state by enabling the defiance of the law.”

19 CMS v. Argentina, ICSID Case No. ARB/01/8; Decision of the ad hoc Committee, ¶ 158 (Sept 25, 2007). See also ¶ 136 where the Committee writes: “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. Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers...”

Other Decisions exhibit this tendency as well. See, e.g., MCI v. Ecuador, ICSID Case No. ARB/03/6; Decision of the ad hoc Committee, ¶ 52 (Oct. 19, 2009) (explaining that “The refusal of the Tribunal to exercise jurisdiction over the accounts receivable appears to the ad hoc Committee to be a debatable solution, and notwithstanding that another solution would have been possible, the Committee cannot find in this respect any egregious violation of the law on the part of the Tribunal ... ”).
Although the committee is not charged with deciding whether the award is correct, the committee writes its decision as though that were a part of its function. The committee could write simply for example: “it has carefully reviewed the arguments of the applicant. It does not find that the Tribunal manifestly exceeded it powers and therefore rejects this ground for annulment.” Yet, it writes much more instead. The crucial question of why committees do more than necessarily required is explored below.

C. The View that Annulment Committees Exhibit a Tendency to Focus Not Only on their Immediate Task (whether a Particular Award should be annulled) but also to Focus on the ICSID System and the Consistency of Jurisprudence Generally

The last concern is subtle and one not discussed in the literature to my knowledge. An example can be found in the otherwise restrained approach to annulment taken in the 2010 Annulment Decision in Helnan International Hotels v. Egypt. Amidst the other decisions in the summer of 2010 that raised substantial concerns, the Helnan Decision was pointed to as a bright spot in ICSID annulment practice. But the Helnan Decision in my view is of potential concern for a third reason.

The Helnan Award of 2008 had dismissed Helnan’s claims on the merits. Helnan applied for annulment of the award on the bases that “the tribunal has manifestly exceeded its powers,” that “there has been a serious departure from a fundamental rule of procedure,” and that “the award has failed to state the reasons on which it is based.” The Committee, in a relatively succinct decision of 27 pages, denied Helnan’s pleas to annul the award.

The curious part of the Helnan Decision is that although the Committee – a particularly distinguished one – rejects the application to annul the award, it does annul a legal proposition of the arbitral tribunal that bears on the doctrine of exhaustion of local remedies. In particular, the Committee decides:

To annul the holding of the Arbitral Tribunal in paragraphs 148 and 162 of its Award which, while disclaiming a requirement of exhaustion of local remedies before ICSID arbitral recourse may be implemented, nevertheless accepts that challenge by Helnan of the decision to terminate its Management
Contract in competent Egyptian administrative courts was required in order to demonstrate the substantive validity of its claims.20

Helnan argued to the Committee that the Tribunal’s holding was stated without reasons, a violation of a fundamental rule of procedure and a manifest excess of power. Ultimately, the Committee agreed with Helnan that a particular holding of the Tribunal constituted a manifest excess of power. It annulled the holding, but not an operative part of the award because the holding “was merely confirmatory, not decisive” to the award.21

A threshold question is whether it is within the authority of an annulment committee to annul a part of an award that is not an operative part of the award. The Helnan Committee touches on this question of authority noting that Article 52(3) grants committees the power to annul an award “in whole or in part.”22 Arguably, the authority to annul an award “in part” requires that that part be a portion of the dispositif. But the text of the Convention does not say this explicitly. My concern is not so much the question of whether it is possible to annul a legal proposition, but rather the question of why an annulment committee would be interested in doing so.

At least in part, the Helnan Annulment Committee appeared to believe that the legal holding left un-annulled could work mischief in other proceedings. The Committee begins its analysis noting that the holding raises “a question of importance to the arbitration of investment treaty claims under the ICSID Convention, namely the extent to which an investor may be required, as a matter of substance rather than jurisdiction, to pursue local remedies in order to sustain a valid claim for breach of treaty.”23 The Committee goes on to find the holding in question to be a manifest excess of powers. Putting aside the question of whether the Committee’s decision is another example

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20 Helnan International Hotels v. Egypt, ICSID Case No ARB/05/19, Decision of the ad hoc Committee, ¶ 73 (June 14, 2010).

21 Id. ¶ 57.

22 Id. ¶ 56.

23 Id. ¶ 34 (emphasis in original)
of the first concern of delving too deeply into the merits, the following statement of the Committee is telling as to why it might have concluded that it is important to annul a legal holding even though that action would not annul an operative part of the award:

The consequences of the adoption of the approach of the Tribunal in question in investment treaty law could be serious. It would inject an unacceptable level of uncertainty into the way in which an investor ought to proceed when faced with a decision on behalf of the Executive of the State, replacing the clear rule of the Convention which permits resort to arbitration.\(^{24}\)

In this statement, the Committee focuses not on whether it should annul the award, but rather it indicates a sense that it has a duty to ensure the doctrinal integrity of the system. Why?

IV. WHY?

Given that commentators and the decisions themselves indicate generally a widespread agreement as to doctrinal requirements of Article 52, the criticisms of present annulment practice in ICSID present two puzzling questions as to why. First, assuming for a moment the accuracy of the three mentioned concerns, why do annulment committees exhibit such tendencies? And this question is particularly puzzling given that some of the most respected members of the international arbitration community are called upon to serve as committee members. Second, why are these tendencies arising now? These two questions in my view are intertwined.

As to why annulment committees exhibit such tendencies, there are at least three explanations.

A first (in my view relatively unlikely) explanation is that it simply is exceedingly difficult for an annulment committee to not be pulled into the merits of the case. After all, the committee is faced with talented counsel arguing at great length over a substantial amount of time that a mistake in the award is not merely an error, but rather much more. As Hamlet asks whether

\(^{24}\) Id. ¶ 52.
his indecision is some "scruple of looking too precisely at the matter," so too it can be argued that distinctions such as error and fundamental flaw blur the more a specific award is studied. If that is the case, then it is important that such psychological effects be identified beforehand in as much as forewarned is forearmed.

A second (in my view also relatively unlikely) explanation is that the members of annulment committees are quite consciously deciding that their role is or should be larger than that provided for in Article 52. In this explanation, the committees consciously conclude that they should act, as Lucy F. Reed has said, as educators and preachers delving into the merits of the award sometimes annulling, sometimes not annulling but pointing out the many errors now clear after the conclusion of the annulment proceeding. In this explanation, the committees consciously conclude that they have a responsibility to the ICSID system as a whole and that, in the absence of a true appellate mechanism, they should ensure doctrinal coherence and integrity. Although I find this explanation unlikely, I observe that, in discussions with a number of persons involved in ICSID matters, they have a tendency to believe that at least some committee members are quite conscious of what they are doing.

The third (and in my view the most likely) explanation is that committees tend in these three directions of concerns because the arbitration community does not sufficiently reflect on the task of annulment committees. I do not suggest the choices of committees are unconscious, but I also do not believe the actions are taken particularly consciously either. This third view rests in part on the possibility that committee members inappropriately extend styles of drafting and reasoning from the arbitration frame to the annulment frame. For example, in arbitration it is a virtue to dispose of each and every contention of the parties by considering whether it is correct or not. In annulment, however, the question is not whether a particular assertion regarding the correctness of the award is accurate, but rather whether the ground of illegitimacy asserted is met or not. This third view also rests in part on the possibility that the approach of committee members can be subtly influenced by civil society’s critique of foreign investment protection that calls for greater coherence and accuracy in investment awards. It is
in this last sense that the question of “why” may be intertwined with the question of “why now.”

As far as “why now,” it is interesting to note that we are presently in the midst of a second wave of annulments. The first wave of annulments occurred in respect of two cases filed in the first half of the 1980s. After the 1980s, there followed a quiet decade with next annulment proceedings occurring in respect of cases filed in the last half of the 1990s. The second and present wave of annulments takes place in the third decade of ICSID, a decade in which there has also been a dramatic increase in both ICSID arbitrations and annulments.

The initial wave of ICSID annulments related to four proceedings, two of them first filed in 1981 and two first filed in 1984. Decisions in three of the annulments proceedings resulted in awards being erased, the fourth annulment proceeding did not reach a decision as the parties settled. In the three proceedings where awards were annulled, new requests for arbitration were filed. Two of the new arbitrations proceeded to a second award, the third new arbitration was terminated following settlement by the parties.

The two proceedings in 1981 were Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, and Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2. The two proceedings in 1984 were Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3 and Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4.
Table 1 – ICSID Arbitral and Annulment Activity 1972 - First quarter of 2012

26 Table 1 shows ICSID arbitral and annulment activity from 1972 through the first quarter of 2012 where the bar graph in the last row indicates the number of arbitration proceedings filed that year; the bar graph in the middle row indicates the number of annulment applications eventually made in relation to the proceedings of that year; and the bar graph in the front row indicates the number of those annulment applications granted in whole or in substantial part.

It is important to emphasize that this table ties all activity on a particular matter to the year the proceeding was originally filed with the Center. For example, 1981 indicates in the back row that two arbitration proceedings were filed (the *Klockner v. Cameroon* and *Amco Asia v. Indonesia* arbitrations), the middle row indicates that petitions for annulment in both were later filed, the front row indicates that both petitions were later granted in whole or in substantial part. The middle row indicates four petitions because both of these arbitrations were filed again after annulment, petitions for annulment were sought in both again, but neither were granted the second time. Note that the Table does not chose to place the second round of proceedings in the year when the second request for arbitration was filed, it does this so as to tie the whole series of proceedings to the year when the dispute was first placed before ICSID.
In consideration of “why now,” it is critical to recognize that the criticisms and concerns of the second wave are broader than that in the first wave. In general, it can be said that, during the first wave, criticism was concerned primarily with the ICSID process remaining efficient, by which I mean that virtually all commentators sought to reestablish the assumption that ICSID awards were final and binding except with respect to very rare cases. This second wave – both in terms of the practice and in terms of the opinions of some commentators – shows an additional concern with whether the award is correct. This new focus matches aspects of the critique by civil society of foreign investment protection generally and in this sense also complements calls for the establishment of an appellate, rather than annulment, mechanism.\(^{27}\) Thus, interestingly, although the first concern of delving too deeply into the merits was the concern of the first wave of annulments, the other two concerns – the tendencies to make unnecessary critical statements and to focus on the ICSID system as well as the award subject to review – appear to be more a characteristic of this second wave.

During the first wave, the assumption was that, at that early point in ICSID’s development, there simply was confusion as to what the grounds of Article 52(1) required. A clarification and elaboration of doctrine thus would lead to a stabilization of practice. Twenty years later, however, the world of foreign investment has been harshly scrutinized, particularly by civil society. I would suggest that the annulment committees are not unaffected by this evolution and general atmosphere.

Thus, an explanation for the resurgence of a tendency to delve into the merits is not so much confusion as to the requirements of the various grounds, but rather that the committees feel some sense of responsibility for the correctness of the award. A number of persons closely involved in the ICSID arbitration world

\(^{27}\) See David D. Caron, Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal, 7 ICSID FOREIGN INVT. LJ. 21-56 (1992) (asserting that “Mark Feldman expressed the concern that the annulments rendered in Klöckner and Amco Asia would impair the “efficacy” of ICSID arbitration generally. What must be seen, however, is that implicit in this concern over “efficacy” is the assumption that it is more important to ICSID’s being efficacious that its awards be final rather than correct.”)
have suggested to me that perhaps members of committees may feel that a decision to not annul will be equated with the inadequacies of the awards. Thus they are more prone to delve into, be pulled into, the substantive merits of the award. Similarly, committees may feel an impulse to point out the errors of awards even though those errors are not an adequate basis for annulment, possibly in hopes of instructing and improving subsequent awards. Likewise, a concern for the integrity of the system may lead a committee to examine not only the fundamental legitimacy of the particular award, but also the implications of the holdings in the award for the system as a whole.

V. PRINCIPLES TO FRAME THE WORK OF COMMITTEES

The first wave of annulments in the late 1980s appeared to subside because the mechanism self-corrected, and it self-corrected in large part because the likely pool of annulment committee members appeared to learn from the criticisms that were raised.28 Much has been written about Article 52 of the Washington Convention and what it requires. And although all agree that the task of annulment committees begins and ends with the text of the Convention, there nonetheless arguably is substantial variation in practice. This section therefore focuses not on the generally agreed requirements of Article 52 but rather on providing five principle-like statements that frame and may assist committee members in approaching their work.

A. First, the Meaning of the “Exceptional” is best understood by Appreciating the Severity of the Remedy of Annulment

Virtually every annulment decision – even those criticized for undertaking an excessive level of review – at some point state that annulment is “an exceptional remedy.” Given the number of annulments granted in full or in part, it is as though the word “exceptional” has lost meaning. Rather than very rarely, the word exceptional has come to mean one in 10 or one in five depending at how one looks at the numbers. I seek to recapture the sense of

28 There also was the likely positive effect of the then ICSID Secretary General apparently reappointing as Committee Members those who appeared best suited for the task.
exceptional as very rare by reconnecting it to the concept of finality and the severity of the remedy of annulment.

In international commercial arbitration, the arbitration agreement ideally provides for the place of arbitration, the rules of arbitral procedure to be applied and the applicable substantive law. And it often also provides that the award is “final and binding.” ‘Final’ means final – that is it. Once the award is issued, it may perhaps be corrected for technical errors or interpreted, but its conclusion is not revisited. If one views arbitration as an elaborate form of settlement, the parties have agreed that the award is the final settlement. Simultaneously, the place of arbitration usually offers a mechanism for annulment of the arbitral award.

These two circumstances lead us to the complex relationship between “final” and “annulment.” Given that the award is final, at what could the process of annulment possibly look? It does not make sense for it to examine the merits of the award, or the substance of the conclusion, because to do so is to say that award is not final at all. Rather, annulment in essence involves the conclusion that the arbitration process is so fundamentally flawed that the resulting document is not entitled to bear the label of an “award.” In other words, the award is not final because it is not an award at all. It is in this sense that the award is legally erased. The end result of annulment is not reversal; it is non-existence.

The annulment mechanism in this sense looks to the minimum adequacy of the arbitration process – the arbitrators were not properly put in place, the tribunal clearly took on a task not given it, the tribunal was corrupt, there was a serious departure from a fundamental rule of procedure, the award lacked reasons.

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30 The UNCITRAL Model Law, for example, adopted by many states provides a mechanism for annulment of the award.
B. *Second, an Annulment Committee’s Focus is on the Illegitimacy of the Process, Not the Legitimacy of the Award*  

A corollary of the conceptual foundations of the remedy of annulment is that the reviewing body examines the arbitral process that yielded an award only for the specified bases of illegitimacy that require annulment. The reviewing body is not concerned with whether the award could be better, more correct, or more legitimate. The annulment committee is not responsible for the correctness of the award. The parties to the arbitration accepted a range of error when they accepted a process that provides only for revision or annulment of what is otherwise a final and binding award. The state parties to the ICSID Convention likewise accepted a process that provides only for revision or annulment of what is otherwise a final and binding award. Indeed, the state parties who engaged in the negotiation of the ICSID Convention specifically rejected a mechanism to correct for manifest misapplication of the law.31

C. *Third, it is Not the Task of the Annulment Committee to Amend the ICSID System*  

Notwithstanding the limited scope of Article 52, the annulment committee may feel that its mandate should be more exacting. The simple answer to this tendency is that it is not the task of the annulment committee to amend the ICSID system. *Ad hoc* unauthorized *de facto* amendment only serves to undermine much more fundamentally the very system that a committee comes to believe it must act to somehow strengthen. To say that the extent that such adoption of unauthorized scrutiny of awards is justified on the ground that the ICSID Convention cannot be amended (as is occasionally said), is an exaggeration in my opinion. It is not easy to amend almost any multilateral treaty. But it can happen, and the ICSID Convention as a primarily procedural framework is certainly a possible candidate. The ICSID Convention is an agreement between contracting State Parties and it is they who have the power – and responsibility – to assess and adjust the process as necessary.

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Moreover, annulment committees should recognize that their impressions of the needs of the system generally might not be accurate. Care should be taken, for example, in assuming, as is sometimes done, that a mechanism that more easily annulled awards would benefit states over investors,\textsuperscript{32} or that capital exporting states, capital importing states or investors in an amendment conference would favor a more intrusive annulment, or even appellate, mechanism.

D. \textit{Fourth, an Annulment Committee’s Focus is on the Record as it was Before the Tribunal}

Annulment committees are charged with examining whether an arbitral award should be declared void in whole or in part for one or more of five reasons specified in Article 52. I do not question that this assessment must occur despite the difficulties of undertaking such a review. However, it simultaneously is essential that the Committee understand fully the dimensions of the difficulties facing it so that it may avoid its own error.

First, it is important to recognize that the annulment committee’s examination is necessarily bound to the time period before the conclusion of the award under consideration. The circumstances that render an award potentially subject to annulment necessarily exist before that award is rendered. Knowledge about such circumstances of course may arise after the award is issued, but the circumstances themselves arise prior to issuance.

The difficulty that this insight makes clear is that the Committee analysis is bound in time. In arbitration, the tribunal at some point closes the record. At that point, further submission of argument or evidence is not allowed and the tribunal renders its award on the basis of the closed record.\textsuperscript{33} Similarly, an

\textsuperscript{32} For example, of the 47 annulment applications registered before ICSID, 28 applications were made by the respondent-state, and 19 applications were made by the claimant-investor.

\textsuperscript{33} Rule 38 Closure of the Proceeding

\begin{enumerate}
\item When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
\item Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence
annulment committee at some point closes the record as to the
annulment proceeding. But, the committee’s closed record is
concerned with a tribunal’s record already long closed. This
situation means that new evidence presented in the annulment
proceedings indicating that the arbitration tribunal made the
incorrect conclusion is not relevant. Indeed, although the line is
clearly more difficult to draw, this situation also means that a new
legal argument presented in the annulment proceedings likewise
is not relevant. This insight is difficult because it touches on the
very nature of arbitration. Arbitration is a process that seeks the
best decision possible within the limits of the arguments made
and evidence offered in the time that was made available. It may
be the case after the award was rendered that, if the arbitration
were to proceed for a second time, counsel would argue the
matter differently and offer more or different evidence resulting
in a different award. But the fact that the second proceeding
could come out differently does not mean that the award in the
first proceeding necessarily was so fundamentally illegitimate as
to be annulled.

Second, once one appreciates the time bounded nature of
analysis, the magnitude of the task of recreating the record as it
existed before the arbitral tribunal likewise becomes apparent.
The arbitration proceeding likely lasted on the order of three
years. The written pleadings are extensive. The transcript of the
hearing is likewise long. In addition, the pleadings and the
transcript do not always capture the discussions that took place.
To complicate matters even further, counsel in the annulment
proceeding necessarily stress only portions of this extensive
record. To recognize the difficulty in reconstructing a record,
however, is not a justification for not undertaking the
assessments required of an annulment committee. Rather, this
difficulty suggests that the committee be diligent in its attempt to
recreate the record.

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is forthcoming of such a nature as to constitute a decisive factor,
or that there is a vital need for clarification on certain specific
points.

34 Indeed, that it is this situation that is precisely that which is to be addressed
by the revision mechanism.
E. Fifth, Annulment Committees Should Not Decide More than is Asked for or Say More than is Needed

The last guiding principle is a simple but admittedly elusive one: A committee should not do more than is required. As arbitrators, there is a tendency to provide detailed reasons in response to every argument made; indeed it is one of the ways in which to demonstrate to the parties (and a potential annulment committee) that all arguments were heard and considered and all evidence weighed. To do so in annulment decision, however, potentially leads to the situation where the committee in essence states that the award is not perfect, even possibly acknowledging errors in the award, but stating that this imperfection does not rise to the level so as to warrant annulment.

In my opinion, not all, but much, of the criticism of awards in annulment decisions is not necessary to the decision. Of course, some level of discussion of the reasoning will be deemed necessary by a committee, but in general it often will suffice for the committee to state that it has reviewed the award in light of the objections raised by applicant and decides that the grounds asserted for annulment have or have not been established.

VI. Conclusion

Annulment is not simply a less intensive standard of review. It is a remedy that potentially decides that an award that was meant to be final and binding was the result of an illegitimate process that requires the document not be labeled as an “award” at all. The framework offered in this essay as to how committees should approach this very important task can be encapsulated in five guiding principles.

First, the Annulment Committee need keep forefront in their considerations that annulment is exceptional in the sense that it involves the denial of the very existence of an award.

Second, an Annulment Committee’s focus is on the illegitimacy of the arbitral process, not the legitimacy of the award.
Third, it is not the task of the Annulment Committee to amend the ICSID system.

Fourth, an Annulment Committee’s focus is on the record as it was before the Tribunal.

Fifth, Annulment Committees should not decide more than is asked for or say more than is needed.

The image presented in this essay is one where the committee members are asked to follow their designated role carefully. This approach will not always be simple or easy. Annulment considerations require that committees examine claims of illegitimacy while accepting the possibility that the award is incorrect, or not as correct as the committee believes it could be.

The limits of that inquiry go fundamentally to the very nature of arbitration and the relationship of arbitration to truth.

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