

Memorandum

To: NYU Investment Law Law Forum Attendees

From: Tai-Heng Cheng

Date: September 13, 2011

Attached is an early draft of a paper, "Finality and Justice in ICSID Arbitration."

I have found that comments at this stage of the research process are the most useful, and therefore am particularly grateful for the opportunity to workshop this work with you.

Thank you.

T.H.C.

Finality and Justice in ICSID Arbitration

I. RECURRING DEBATES

The decade-long respite from criticism about investor-state arbitrations under the International Centre for the Settlement of Investment Disputes has ended.¹ Recent decisions on annulment of ICSID awards have revived old complaints and provoked new criticisms.² Observers have concluded, somewhat contradictorily, that annulments of ICSID awards by *ad hoc* committees show either that ICSID awards are poorly reasoned,³ or the *ad hoc* committee decisions themselves are badly decided.⁴ They have

¹Compare Emmanuel Gaillard, *Introduction*, in ANNULMENT OF ICSID AWARDS 6 (Emmanuel Gaillard & Yas Banifatemi eds., 2004) [hereinafter ANNULMENT] (noting that the *Wena* and *Vivendi I* annulment decisions, which were both decided in 2002, “deserve the credit for ending the controversy created by the first decisions rendered in the *Klöckner* and *Amco* matters,” which were issued in 1986 and 1994 respectively), with Christoph Schreuer, Transcript of Am. Soc’y Int’l L. 105th Annual Meeting Panel 16, at 6 (2011) [hereinafter *Transcript*] (“I find most problematic, I must say, and I think the *Enron* case is perhaps symptomatic for this one, where the ad hoc committee tends to go over the entire award and check it through, so to speak, and see if it can find any flaws and decide whether these warrant annulment. . . . There are two more worries . . . One is a very expansive interpretation of some of the grounds for annulment. . . and another one is what I would call “hyperactivity” of some *ad hoc* committees, where *ad hoc* committees actively look for grounds of annulment, even beyond what the requesting party has put forward.”).

²Andreas Lowenfeld, *Transcript*, *supra* note 1, at 10 (“I think Professor Schreuer's analysis of these cases confirms my uneasiness. You asked, [chairperson Andrea Meneker], is there something wrong with [these annulment decisions]. I think there is.”); Alcott & Duclos, *Foreign Investment Disputes: A Practitioners Roadmap*, 18 AUT INT’L L. PRACTICUM 147, _ (2004) (“The ICSID Annulment procedure has not been exempt from criticism by both scholars and practitioners”); see also August Reinisch, *The Future of Investment Arbitration- Is there a Backlash?* (slides 4–6, 8) (Feb. 19, 2009) (noting criticisms about poorly reasoned awards, inconsistent decisions, and significant delays caused by annulments). For summaries of recent annulment decisions, see Matthais Scherer, *ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure*, _ CZECH (& CENTRAL EUROPEAN) YEARBOOK OF INT’L ARB. 211 (_); Promod Nair & Claudia Ludwig, *ICSID Annulment Awards: the Fourth Generation?*, GLOBAL ARB. REV. (Feb. 2011). For discussions of earlier annulment decisions, see Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Investment Awards Reasoned?*, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 1, 4-27 (G.A. Alvarez & W.M. Reisman eds., 2008); CHRISTOPH SCHEUERER, THE ICSID CONVENTION: A COMMENTARY 897-901 (2001) [hereinafter ICSID COMMENTARY].

³William W. Burke-White & Andreas von Standen, *Private Litigation In A Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT’L L. 283, 300 (2010) (“This bold pronouncement [of the *CMS ad hoc* committee], which reaches well beyond the committees limited

claimed that *obiter dicta* by *ad hoc* committees about errors in awards that remain legally binding prove that there are inadequate remedies to correct unjust awards,⁵ or they have charged that other decisions that annulled awards establish that the review system is too expansive and delays finality.⁶ Yet other observers have thrown their hands up in frustration at inconsistent decisions of *ad hoc* committees annulling some awards but keeping others intact, arguing that they have damaged the coherence of international investment law and the legitimacy of the ICSID system.⁷

This article studies these criticisms to determine which of them are persuasive and makes recommendations to address those that are. ICSID arbitration is presently the preeminent dispute resolution mechanism for resolving disputes between foreign

jurisdiction, casts a shadow of doubt over both the quality of ICSID jurisprudence and the legitimacy of investor-state arbitration more generally.”).

⁴AARON BROCHES, PROCEEDINGS OF THE 86TH AM. SOC’Y OF INT’L L. ANNUAL MTG 586, 602 (1992) (noting that the first two *ad hoc* committee decisions, in the Klöckner & Amco decisions, respectively, “were criticized, mostly, because of the reasoning of the annulment committees . . .”); see also Schreuer, *supra* note 1 at 6 (criticizing recent *ad hoc* committee decisions).

⁵ William W. Burke-White & Andreas von Staden, *Investment Protections In Extraordinary Times: The Interpretation And Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. INT’L L. 307, 403 (2008) (“Particularly in light of the CMS Annulment Decision, which reaffirms Argentina’s obligations to pay hundreds of millions of dollars in compensation, despite the finding of “errors” that “could have had a decisive impact on the operative part of the award, the legitimacy of subjecting such core state policy decisions to *ad hoc* arbitration,” is questionable”); Tarcisio Gazzini, *Necessity in International Investment Law: Some Critical Remarks on CMS v. Argentina*, 26 NO. 3 J. ENERGY & NAT. RESOURCES L. 450, 467 (2008) (“Notwithstanding the sharp criticism expressed by the *ad hoc* Committee, the award almost entirely survived the annulment proceedings. However disappointing, such an outcome is due to the strictly limited jurisdiction of *ad hoc* Committees and may call for the introduction of an appeal system in investment arbitration.”).

⁶Promod Nair & Claudia Ludwig, *ICSID Annulment: The Fourth Generation*, GLOBAL ARBITRATION REVIEW, February 2011, at 4 (noting danger that annulments “will significantly lengthen ICSID disputes and seriously undermine confidence in the efficacy of the centre dispute resolution regime”).

⁷ Burke-White & von Staden, *supra* note 5, at 409 (“The contradictory decisions in the four recently decided cases against Argentina and the CMS Annulment Decision noted above highlight the urgent need for a harmonized approach that is legally and theoretically justifiable”); Ernst-Ulrich Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice*, 19 EUR. J. INT’L L. 769, 798 (“the frequent contradictions in the legal reasoning of arbitral awards hinders the development of an international “common law” on investment protection”); Bart Legum, *The Introduction on an Appellate Mechanism: the U.S. Trade Act of 2002*, in ANNULMENTS, *supra* note 1, at 289, 296 (noting that some critics favor “modifications to the ICSID model” in order to achieve “coherence to the interpretations of investment provisions in trade agreements”).

investors and host states.⁸ Confidence in dispute resolution is crucial to encourage foreign investment necessary for worldwide economic development.⁹ Therefore, these criticisms about the legitimacy of ICSID must be taken seriously. Because there are several pending ICSID annulment applications, and more will likely be made in future,¹⁰ these criticisms must be addressed promptly. Where criticisms are justified, reform is needed. Where they are unjustified, they must be explained away.

The thrust of this article is that many of these criticisms stem from misunderstandings about content and balance between the competing policies of finality and justice underlying the system of review of investor-state arbitration awards. The article seeks to clarify these policies to resolve many of the apparently contradictory accusations about ICSID arbitration, and to make recommendations in areas where ICSID annulments might indeed fail to achieve the policy goals of the ICSID Convention.

After discussing the structure of ICSID arbitration and annulment under the ICSID Convention in Part II, below, Part III of the Article considers the policies applicable to ICSID arbitral review. Although it is widely-accepted that ICSID

⁸ Susan B. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825, 837 (2011) ("ICSID is the linchpin of the current [investment treaty arbitration] system."); Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 LAW & ETHICS HUM. RTS. 47, 58 (2010) (stating that "the scope of ICSID's authority is unrivalled in its domain of activity.").

⁹ Michael Davison, Letter to the Editor, Downturn Could Boost Arbitration, FIN. TIMES, Apr. 21, 2001, *id* at note 7 (projecting that the global economic downturn could provide a boost to international arbitration).

¹⁰ ICSID arbitration has grown exponentially in the last decade, and annulment applications have correspondingly increased. Since foreign investors are likely to continue to bring ICSID arbitrations in the future, past experience suggests that investors and host states will also continue to make annulment applications. Compare Christoph Schreuer, THE ICSID CONVENTION: A COMMENTARY xvii (2001) [hereinafter COMMENTARY] (noting that until July 2000, there were only 75 ICSID pending and concluded arbitrations) with Franck, *supra* note 8 at 840 (noting that there have been 325 arbitrations since the inception of the ICSID Convention and that in 2009 alone ICSID registered 26 arbitrations).

arbitrations seek to balance finality and justice,¹¹ commentators have paid insufficient attention to what these two policies actually entail.¹² Contrary to a long held belief that finality refers to finality of dispute resolution,¹³ the policy of finality in ICSID arbitration refers more narrowly to finality of awards. Contrary to an understanding that justice refers to reaching a substantively just outcome that applies the law correctly,¹⁴ the policy of justice in ICSID arbitration refers only to procedural justice. As a matter of policy, finality of awards should only be compromised where this narrow conception of justice, which this article will call “procedural justice,” is absent in arbitration and must be rectified by setting aside an award for a new arbitral proceeding. The Article instantiates the meanings of finality and justice by examining scholarly jurisprudence about international arbitration generally and applying them to investor-state disputes specifically. It also verifies whether the proposed meanings of justice and finality find support in the primary materials of the negotiating history of the ICSID Convention,

¹¹ Eric Schwartz, *Finality and What Cost: The Decisions of the Ad Hoc Committee in Wena Hotels v. Egypt*, in ANNULMENT, *supra* note 1 at 43, 85 (“The annulment mechanism of Article 52 of the ICSID Convention balances considerations of arbitral efficiency against considerations of justice. In the interest of efficiency and finality, Article 52 does not allow any appeal of ICSID awards.”).

¹² See Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT’L L. 43, 46 (2008) (“What constitutes finality in international law was and remains ‘still unclear.’”) (citing Yuval Shany); Susan Franck, *supra* note 8 at 914 (asserting that ICSID “should be a model of . . . justice” without addressing what justice means).

¹³ See W. MICHAEL REISMAN, NULLITY AND REVISION 44 (1971) (noting 1912 American Society of International Law debate where Joaquin D. Casaus “equat[ed] the granting of an award with the resolution of the underlying conflict,” and on that basis objecting to revision of awards that would delay finality of dispute resolution); William H. Knull, III & Noah Rubins, *Betting the Farm on International Arbitration: Is It Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 536 (2000) (“According to this position, one of the primary advantages of arbitration lies in the knowledge that once an award has been rendered, the parties’ conflict is essentially at an end. . .”).

¹⁴ See Susan Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1607-08 (2005) (arguing that creating an appellate body “deserves serious consideration” because it could “focus on . . . correcting legal errors in specific cases”); Thomas Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality*, 24 BERKELEY J. INT’L L. 444, 458 (2006) (“Greater accuracy is desirable because it helps ensure that the parties to a dispute receive a fair decision.”).

which surprisingly few scholars have reviewed in the detail that is necessary to fully understand the policy objectives of the ICSID Convention in general and of annulment in particular.¹⁵

Armed with these clarified meanings of finality and justice, it is possible to parry, in Part IV of this Article, many of the scholarly attacks on ICSID annulments and underlying awards.¹⁶ The results of these examinations suggest that many purported flaws in the ICSID system are more apparent than real. Even if ICSID awards are incorrectly decided, that should not raise systemic legitimacy concerns because reaching correct or substantively fair results is not the goal of the ICSID Convention – as decided by the states signatories who negotiated and consented to it and consistent with general policies of international arbitration.¹⁷ *Obiter dicta* in *ad hoc* decisions criticizing awards that are nevertheless left intact do not raise concerns for finality because the award remains final. For example, there is also at most inconclusive evidence that *obiter dicta* in the awards against Argentina had a measurable effect on Argentina’s willingness to pay damages, because it has not paid any award, including those that were not criticized by *ad hoc* committees. There is also no need to broaden the grounds for review by *ad hoc* committees, or establish an appeals process, in order to resolve inconsistencies among awards and *ad hoc* committees, or to correct substantive errors in awards, because the policy-goal of investor-state arbitration is not to resolve each dispute correctly or

¹⁵See Susan Franck, *supra* note 8 at 914 (2011) (not providing support for assertion that ICSID “should be a model of fairness, efficiency, and justice”). Cf., Julian Davis Mortenson, *The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law*, 51 HARV. J. INT’L L. 257 (2010) (reviewing the negotiating history of the ICSID Convention to determine the meaning of “investment” but not examining the negotiating history of the annulment provision).

¹⁶*Infra*, Part IV.

¹⁷*Infra*, Part III.

coherently with other disputes. It is simply to decide each dispute fairly on its own terms reasoning from the law that is applicable to that dispute.

Some scholars have assigned additional policy objectives to ICSID arbitration that are not contained in the Convention or its negotiating documents.¹⁸ In particular, they have focused on the need for consistency and coherence among decisions and awards in order to promote perceptions of legitimacy in the ICSID system. Assuming that it can be appropriate to retroactively ascribe policy objectives to a treaty, and to the extent that coherence is desired by users of the ICSID system, arbitrators should strive for greater consistency among awards so that the system will continue to be used and decisions will be follow. However, aside from the complaints from scholars, counsel, and members of legal teams who have lost arbitrations,¹⁹ there is inconclusive evidence about how much corporate officers and government officials actually worry about coherence among wards

¹⁸Legum, *supra* note 7 at 296 (stating that ICSID should be modified to promote “the objective of ‘providing coherence to the interpretations of investment provisions in trade agreements.’”).

¹⁹David Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VAND. J. TRANSNAT’L L. 39, 51 (2006) (arguing that a shortcoming of the ICSID system is that “the likelihood of consistency among decisions of the Annulment Committee is at best moderate.”); Dohyun Kim, *The Annulment Committee’s Role in Multiplying Inconsistency in ICSID Arbitration: The Need to Move Away from an Annulment-Based System*, 86 N.Y.U.L.REV. 242, 258 (2011) (“promoting coherence in ICSID arbitral decisions is critical to enhancing the legitimacy of ICSID arbitral decisions in the eyes of governments, investors, affected third parties, and, moreover, to strengthening the rule of law in the realm of international investment.”); *see also* Carlos Ignacio Suarez Arizorena, *Vivendi v. Argentina: on the Admissibility of Requests for Partial Annulment and the Ground of a Manifest Excess of Powers*, in ANNULMENT 123, 123 & 174 (admitting that “[i]t is difficult to write about a case in which the author has acted as counsel for one of the parties . . . where the decision is, albeit only in part, contrary to the position defended therein” and continuing to argue that the “decision on annulment . . . is a good example of many of the things that should not happen in an annulment proceeding if the integrity of the system is to be preserved.”); William Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. INT’L L. J. 307, 403 & n. a1 (2008) (noting that one of the authors was an expert witness for Argentina in some of the cases discussed in the article, and arguing that “in light of the CMS Annulment decision, the legitimacy of ad hoc tribunals to regulate within these core sovereign domains of domestic governments has been called into question.”).

and so the impact of incoherence on the effectiveness of the ICSID system is indeterminate.

A further argument could be made on behalf of critics that whether or not incoherence affects effectiveness of dispute resolution, coherence is an important policy objective in international law in an of itself because it increases the moral obligation to obey international law.²⁰ Given the relatively small number annulment decisions and the even smaller number which are actually irreconcilable, it is premature to project that decisions will continue to become more inconsistent rather than less. It is just as reasonable to anticipate that tribunals will continue to reconcile awards, and where they are irreconcilable, decide on the better approach and give their reasons for their decisions. Over time, as with inconsistencies among court decisions, this common law approach is just as likely to increase consistency and coherence.²¹ Therefore, caution, but not alarm, is required by tribunals and scholars in response to the small handful of inconsistent decisions. The practice of arbitrators making *obiter* statements might even help, rather than hurt, the development of an “ICSID jurisprudence” when, in time, other arbitrators consider their reasoning and decide whether or not to adopt it in subsequent disputes.

²⁰See TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS: REALISTIC IDEALISM AFTER 9-11 AND THE GLOBAL RECESSION 103-105 (2011) [hereinafter WHEN INTERNATIONAL LAW WORKS] (suggesting that coherence increases the moral obligation to obey international law); accord TOM FRANCK, POWER AND LEGITIMACY AMONG NATIONS 150-82 (1990) (coherence provides reasons for compliance with international law); TOM FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 38-41 (1989); RONALD DWORKIN, LAW’S EMPIRE 190-92 (1986) (law with integrity, i.e., coherence, “has a better case for legitimacy than one that does not”).

²¹See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III 148, 162-76 (A Bjorklund et al eds. 2009) (revising 30 Ford. J. Int’l L. 1014 (2007)) (reviewing awards and finding informal but highly effective practice akin to precedent in arbitral awards).

The policy-analysis of ICSID arbitration does, however, reveal at least one serious concern about *ad hoc* committees. Some arbitrators who serve on *ad hoc* committees misunderstand the policy balance between finality and justice, or interpret too broadly the narrow procedural grounds for annulment. As a result, they annul awards that should have remained final.²²

Part V makes recommendations to minimize the risks of *ad hoc* committees overreaching their authority. In addition to cautioning *ad hoc* committee members against making such decisions, the article suggests that arbitrators in ICSID disputes can minimize these risks by adopting the practice of some arbitrators in Energy Charter Treaty disputes of circulating the draft awards to the parties for comment before finalizing the award. This practice could allow tribunals to anticipate the arguments that the parties may make on an application on annulment, and to either correct their award before it is final or explain why those arguments fail. Circulating a draft award would also go a long way to immunizing the award from charges that the tribunal failed to give the parties an adequate opportunity to be heard on dispositive findings of fact or conclusions of law, or that they decided the dispute on an issue not raised by the parties, both of which could expose an award to the risk of annulment.

²²See e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25 (Decision on Annulment) Dec. 23, 2010; see also *infra* Part IV(B) (critiquing the Fraport annulment decision).

II. THE STRUCTURE OF ICSID ARBITRATION

The ICSID Convention was concluded in 1965.²³ Its purposes were to promote international cooperation for economic development and the role of private international investment in global economic development.²⁴ As its title suggests, the Convention sought to promote foreign direct investment by providing a facility for the settlement of international investment disputes between foreign investors and host states.²⁵ It established a conciliation procedure and a binding arbitration procedure.²⁶ Although the use of ICSID's dispute settlement facilities was scant in the first few decades after the entry into force of the Convention,²⁷ ICSID arbitration is now widely used when an investor-state dispute cannot be resolved without mandatory third-party settlement.²⁸

Arbitrations under the auspices of ICSID perform a key function in resolving disputes between foreign investors and host states outside of national courts.²⁹

²³Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter ICSID], in INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, HISTORY OF THE ICSID CONVENTION vol. II-2, 1041.(1968) [hereinafter ICSID HISTORY].

²⁴ICSID, pmbl. ("Considering the need for international cooperation for economic development, and the role of private international investment therein...").

²⁵See also Aron Broches, *Settlement of Financial and Economic Disputes between Governments and Private Individuals or Corporations*, in ICSID HISTORY, *supra* note 23, Vol. II-1, at 2 (1968) (proposing that the solution to the problem of a lack of an international forum for dispute resolution in investor-state disputes was to provide for direct access of private individuals or corporations to an international tribunal.)

²⁶See ICSID Convention, Art. 1(2); Art.28-35 (provisions on conciliation); Art. 36-55 (provisions on arbitration).

²⁷SCHREUER, COMMENTARY, *supra* note 10 at xvii ("The use of the dispute settlement procedure created the ICSID Convention remained scant during its early years.").

²⁸Franck, *supra* note 8 at 840 (noting that there have been 325 arbitrations since the inception of the ICSID Convention).

²⁹W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 46 (1992) ("One of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and to protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, with mandatory calls at each successive cubicle to rehear all or part of the case"); Aron Broches, *supra* note 25(stating that a key goal of the designing ICSID convention was to provide "direct access by private individuals and corporations to an international tribunal in the field of financial and economic disputes with Governments.") (emphasis in original).

Mandatory and enforceable dispute resolution takes place under the framework of the ICSID Convention when investment contracts or bilateral investment treaties provide for ICSID arbitration. This mechanism for addressing international disagreements provides the security of a neutral adjudicative forum to investors seeking protection from political and legal risks associated with deploying large sums of capital in foreign countries over long time horizons.³⁰ It also helps host states – whether from the developing or developed world – attract foreign investments that they seek to grow their national economies.³¹

Every ICSID arbitration proceeds within the four corners of the ICSID Convention. Arbitration is triggered by any treaty state or national of such a state (whether a person or corporation) filing a request for arbitration with the ICSID Secretariat.³² In practice, a corporation or individual investor from an ICSID state who has made an investment in another ICSID state files that request. Because the ICSID Convention itself does not provide substantive standards governing the treatment of foreign investors by host states, the causes of action in the arbitration request must be based on another source of law. Most often, the investor alleges that the host state took actions that harmed the investment in violation of its obligations under a bilateral investment treaty between the host state and the state in which the investor is a national,³³ or in violation of its contractual obligations under the project agreement or

³⁰ [Cite statements by corporation counsel].

³¹ [cite statements by government official].

³² ICSID Art. 36.

³³ See, e.g., *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8 (investment claims brought under U.S.-Argentina BIT).

contract for the investment if that contract stipulated ICSID as the arbitral forum for dispute resolution.³⁴

The host state and the foreign investor generally appoint a tribunal of their own choosing,³⁵ which usually comprises three arbitrators, with each side appointing one arbitrator and a chairperson appointed by agreement of the two parties.³⁶ Where, however, the parties are unable to agree on the arbitrators, the ICSID secretariat will appoint the arbitrators to fully constitute the tribunal.³⁷

The tribunal is charged with issuing an award in writing that decides every question submitted to it by a majority of the votes of all of its members,³⁸ and explaining the reasons upon which the award is based.³⁹ Any member of the tribunal may append a separate or dissenting opinion.⁴⁰ The award must be based on the rules of law agreed upon by the parties,⁴¹ which in practice refers to the governing law of the contract or treaty under which the arbitration is brought.⁴² In the absence of such an agreement, however, the law of the host state applies together with applicable international laws.⁴³

Within 45 days of the date of the award, either party may request rectification of the award on the narrowest of grounds that there was a clerical, mathematical or other

³⁴See, e.g., *Malaysian Historical Salvors SDN, BHD v. Gov't of Malaysia*, ICSID Case No. ARB/05/10 (investment claims brought under contract with host state).

³⁵ ICSID, Art. 37(2).

³⁶ ICSID, Art. 37(3).

³⁷ ICSID, Art. 38.

³⁸ ICSID, Art. 48(1)-(3).

³⁹ ICSID, Art. 48(3).

⁴⁰ ICSID, Art. 48(4). See, e.g., *Fraport AG Frankfurt Airport Servs. Worldwide* (Award), Dissenting Op. Cremades; *Vivendi II* (Annulment), Addition Op. of J.H. Dalhuisen.

⁴¹ ICSID, Art. 41.

⁴²See, e.g. [cite award].

⁴³ ICSID, Art. 42(1).

similar error.⁴⁴ Either party may also request clarification on the meaning and scope of the award by submitting an application to the ICSID Secretariat, which will attempt, as far as possible, to refer the question to the original tribunal, but failing which a new tribunal will be constituted.⁴⁵ Since ambiguities may be discovered much later, even as the award is being implemented, there is no time limit on when a party may request clarification.⁴⁶

There are, however, strict time limits on attempts to modify or annul the award. Within three years of the date of the award, if a party discovers some dispositive fact that it could not have reasonably known when the award was rendered, it has 90 days to request the tribunal revise the award on the basis of that new fact.⁴⁷

Either party may also make an application to annul the award within 120 days of receiving the award.⁴⁸ An *ad hoc* committee of three arbitrators is then appointed from the ICSID's panel of arbitrators, to which each member state has designated four arbitrators and the Secretary General has designated ten more.⁴⁹ If an award survived the annulment process, or if there was no request for annulment within 120 days of the date of the award, it is final and not subject to appeal. Each of the signatory states are obliged under the ICSID Convention to recognize the award as if it were a final judgment of a

⁴⁴ICSID Art. 49, *supra* note 32; see *Soufraki* rectification; *Noble Ventures* rectification; *Luchetti* rectification; *Santa Elena* rectification; *Maffezini* rectification (all granting rectification of clerical errors); *Genin* rectification; *Vivendi I ad hoc* committee rectification (both denying request for rectification).

⁴⁵ICSID Art.50,*supra* note 32.

⁴⁶See Memorandum of the Meeting of the Committee of the Whole, Feb. 23, 1965, SID/65-6, in ICSID HISTORY, *supra* note 23 Vol. 2, Pt. 2, 982, 987 (“Mr. Broches explained that . . . [s]ince the compliance with an award may extend over a number of years, no time limit was imposed for requests for interpretation.”).

⁴⁷ ICSID, Art. 51.

⁴⁸See SCHREUER, ICSID COMMENTARY, *supra* note 2 at 881-1075 (discussing annulment under Article 52).

⁴⁹ ICSID, Art. 4.

court in that state,⁵⁰ and the prevailing party in the arbitration may seek recognition or enforcement before domestic courts of signatory states.⁵¹

Unlike an appeal from a domestic court decision, which can be overturned or modified if the decision made errors of law or fact, the grounds for annulment under the review standard of Article 52 of the ICSID Convention are narrowly confined.⁵² Because the firestorm that threatens to engulf the ICSID annulment system and ICSID itself turn on the interpretation of the grounds enumerated in Article 52(1), its text is reproduced here in full. It reads:

- (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.⁵³

In practice most annulment applications have claimed that the tribunal either manifestly exceeded its powers,⁵⁴ that there was a serious departure from a fundamental rule of

⁵⁰ ICSID, Art. 53; *see* [cite case].

⁵¹ ICSID Art 54(2); *see* [cite case].

⁵² ICSID, Art. 53(1) (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention”); *see* SCHREUER, ICSID COMMENTARY *supra* note 2 at 891 (2001) (explaining difference between ICSID annulment and appeal against a judicial decision); *see also* David Caron, *Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, 7 ICSID REV.: FOREIGN INV. L. J. 21 (1992).

⁵³ ICSID, Art. 52(1).

⁵⁴ *See, e.g., Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*, ICSID Case No.ARB/05/10, Decision on the Application for Annulment (2009).

procedure,⁵⁵ or that the award failed to state the reasons on which it was granted.⁵⁶ It is less likely for a party to claim that there was corruption on the part of a member of the Tribunal, or that the Tribunal was not properly constituted.⁵⁷

Even a cursory glance of the three grounds on which awards tend to be challenged shows that the precise standards of review are unclear. To determine that a tribunal manifestly exceeded its powers requires a determination what the powers of a tribunal are, whether it has exceeded them or simply misapplied them, and if this excess was manifest. “Power,” “exceed” and “manifest” are not defined terms in the ICSID Convention, and the ordinary meaning of those words does not provide sufficient specificity that they could be applied in an annulment proceeding without reasonable debate about how they apply to a tribunal’s award or conduct.⁵⁸

Likewise, in considering whether there was a serious departure from a fundamental rule of procedure in the arbitral proceedings, an *ad hoc* committee will find no explicit guidance in the text of the ICSID Convention about the meaning of “serious” or “fundamental,” and it is fairly obvious that the ordinary meanings of these words do not provide a bright line standard for when a departure is serious or not quite serious

⁵⁵*e.g.*, *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment (2009).

⁵⁶*See, e.g., id.*

⁵⁷*But see Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment (2010).

⁵⁸*See Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (2007), dissenting op. Frank Berman, ¶ 4 [hereinafter *Lucetti*] (“There is obviously room for some discussion as to what the standard of ‘manifestness’ under Article 52(1) of the Washington Convention should be understood to mean”); *see also* Carlos Ignacio Suarez Anzorena, *Vivendi v. Argentina: On the Admissibility of Requests for Partial Annulment and the Ground of Manifest Excess of Powers*, in ANNULMENT, *supra* note 1, 123, 175 (“[I]t is impossible to reconcile the meaning that the *ad hoc* Committee assigns to the term ‘manifest’ with the ordinary meaning of that term.”); *see* Statement of Mr. Loukur, World Bank Member from India, in ICSID HISTORY, *supra* note 23, at 851 (noting that he “failed to see” the meaning of the word “manifestly” in the provision of annulment).

enough to trigger annulment, and when a rule of procedure is fundamental or important but not fundamental.⁵⁹

A similar analysis applies to the annulment of awards for the failure to state reasons, which is another undefined standard in the ICSID Convention. As the author has previously shown, it is unclear when the failure to state adequate reasons amounts to a failure to state reasons sufficient to trigger annulment, just as it is unclear when incongruent reasoning based on errors of law or fact amount to a failure to state reasons.⁶⁰

Interpreting the grounds for annulment in the context of the object and purpose of the ICSID Convention also fails to provide sufficient guidance in the interpretation of Article 52.⁶¹ The preamble of the ICSID Convention indicates that the purpose of the Convention is to promote international cooperation for economic development and

⁵⁹ This point is apparent from reading the *Luchetti ad hoc* committee's decision, in which two arbitrators in the majority reached a different conclusion from the third arbitrator, who dissented, on whether there had been a serious departure from a fundamental rule of procedure. Compare *Luchetti*, Decision on Annulment, *supra* note 58, at ¶ 125 (finding no serious departure from a fundamental rule of procedure justifying annulment, even though it refused to allow *Luchetti* to file a full memorial on the merits before its decision on jurisdiction that, accepted on their factual assertions in a decree by respondent Peru) with *Luchetti*, Decision on Annulment *supra* note 58 at Berman Dissenting Op. ¶ 16 (concluding that there was a serious departure from a fundamental rule of procedure within the meaning of Article 52(1)(d) of the ICSID Convention because the tribunal "failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent...").

⁶⁰ Tai-Heng Cheng & Robert Trisotto, *Reasons, Reasoning and Reasonableness*, 32 SUFFOLK TRANSNATIONAL L. REV. 409 (2009); compare *Luchetti*, Decision of the *ad hoc* Committee, *supra* note 50, at ¶ 129 (holding that the failure of an award "to present a full picture of the various elements in treaty interpretation" is insufficient to trigger annulment for failing to state reasons where the tribunal left not doubt as to the legal or factual elements upon which the Tribunal based its conclusion.), with *Luchetti*, Dissent, *supra* note 50, at ¶ 13 (concluding that the same award failed to state reasons because it insufficiently stated "a whole series of steps in the logical chain" of its reasoning); see also Pierre Lalive, *Concluding Remarks*, in ANNULMENT, *supra* note 1, at 308 ("I agree with Christoph Schreuer that the place of this ground for annulment in the ICSID is 'not entirely clear' – which is perhaps an understatement.").

⁶¹ See Vienna Convention on the Law of Treaties, Art. 31(1) (stating that words in treaties should be interpreted in good faith according to their their ordinary meaning in light of the objects and purposes of the treaty).

recognizes the role of private international investment in economic development.⁶² It also recognizes the need to settle disputes through international arbitration rather than in national courts, if that is what the parties desire.⁶³ It is not self-evident from the text of the preamble whether foreign direct investment and economic development would be promoted by interpreting the standards for annulment narrowly or broadly, or what the framers of the Convention thought about this question. Without more guidance from the text, one might speculate that investors and host states prefer narrower grounds of review to reduce that the likelihood of annulment, and therefore narrower review would promote the purposes of the Convention of encouraging private international investments. In the alternative, one might conjecture that investors and host states prefer wider grounds of review to increase the likelihood that awards were decided correctly according to law, and therefore wider review would promote the purposes of the Convention. A reasonable person might instead hypothesize that different investors and host states have different preferences in this regard and therefore turning to the purpose of the Convention to promote investments offers no guidance about how to interpret the ambiguous standards for annulment.

Textual interpretation simply does not provide clear meanings to the grounds for annulment, and accordingly does not provide a basis to appraise whether *ad hoc* committees have properly or improperly applied Article 52 in their decisions. Correspondingly, textual interpretation to try to determine what Article 52 requires fails

⁶²ICSID, pmb1.¶ 1.

⁶³ICSID, pmb1.¶ 3.

to provide a complete basis to appraise the various and occasionally contradictory criticisms of the annulment decisions and the system of ICSID annulment.

III. THE POLICIES OF ARBITRAL REVIEW

Taking into account for policies of arbitral review is particularly important in understanding how ICSID *ad hoc* committees ought to decide applications of annulments, because Article 52 is unclear on its face and nothing in the purposes of the Convention as stated in its text disambiguates the meanings of the standards for annulment.⁶⁴ Justice and finality are two key policies in international arbitration. When taken to extremes, they conflict with each other. Therefore, a system of arbitral review is necessary to harmonize them. The primary documents recording the negotiation of the ICSID Convention, which are discussed later in this part, show how Article 52 attempted to achieve that harmonization. Accordingly, understanding this history of the negotiations of the ICSID Convention, and the policies they reveal, could provide guidance of *ad hoc* committee members on how to discharge their responsibility in deciding whether or not to annul an award before them.

International arbitration is one component of the international legal system, and ultimately must support the goals of the system. An overriding goal of the international legal system is to promote minimum public order. Minimum public order refers to the baseline requirements of stability in international relations without which reasonable

⁶⁴See Vienna Convention on the Law of Treaties, Art. 32 (stating that recourse to *travaux* may assist in interpreting a treaty where its words are ambiguous after interpreting them in good faith in light of their ordinary meaning and in light of their object and purpose).

international activities cannot take place.⁶⁵ In other words, it is necessary for the common good, which moral philosophers have described as the conditions for every actor to reasonably pursue his or her preferred values.⁶⁶ Internationally, minimum public order promotes the common good because it allows corporations, governments and other decisionmakers to cooperate and compete with each other in the pursuit of values for their respective constituents.⁶⁷

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

⁶⁵See CHENG, WHEN INTERNATIONAL LAW WORKS, *supra* note 20 at 74 (explaining minimum order); Steven Ratner, *Between Minimum World and Maximum World Public Order: An Ethical Path for the Future*, in LOOKING TO THE FUTURE: ESSAYS IN HONOR OF W. MICHAEL REISMAN 195, 196 (M. Arsanjani et al eds. 2011) (discussing the same).

⁶⁶See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 156 (1996) (discussing the concept of the common good).

⁶⁷See CHENG, WHEN INTERNATIONAL LAW WORKS, *supra* note 20 at 101 (discussing relationship between minimum world order and common good).

expectation that their arrangements will be carried out or, at a minimum, substituted for adequate compensation.

The mechanisms for rectification are not, however, self-evident. The international legal system assigns primary responsibility on a territorial basis. Ultimate authority for the governance of territories is assigned to governments of nation states. Governments make decisions about what activities may take place within their territories. Aside from certain fundamental moral and legal norms, such as the prohibitions of torture and genocide, the decisions of governments about their territories are not generally subject to review by another government or non-state actor. In Europe, this territorial allocation of authority was formalized in the Peace of Westphalia in the 17th century.⁶⁸ While imperfect, this international design has much to commend to it. Given the difficulties of governing overly expansive lands and the variances in cultural preferences among different communities, it is appropriate for territorial communities that have sufficient resources, land, and people to each govern themselves and pursue their preferred values.

As a result of this territorial allocation of authority, however, the international legal system lacks a comprehensive centralized body to effectively settle disagreements among governments and foreign corporations that invest in and carry out economic activities in the lands under the authority and control those governments. Taken to its logical extreme, the concept of state sovereignty subjects foreign investors to the decisions of host governments. Their investments and associated business activities

⁶⁸See Treaty of Westphalia, Peace Treaty Between the Holy Roman Emperor and the King of France and their Respective Allies, sec. II (1648), available at https://avalon.law.yale.edu/17th_century/westphal.asp

continue only at the pleasure of host governments. This state of affairs would be contrary to minimum public order, because investors could hardly proceed with international transactions with any reasonable assurance that their agreements will be carried out over long periods of time in foreign countries. Ironically, therefore, the division of governing authority around the globe by territories that is so crucial for minimum public order also creates conditions that could undermine the very public order it is meant to promote.

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

A. Balancing Finality and Justice

Because the goal is to protect minimum public order, an arbitral tribunal should authoritatively claim, as swiftly as possible, to resolve a dispute with finality by issuing an award that is not subject to alteration or invalidation. When it issues such a final award in accord with applicable laws, the tribunal communicates to the parties that

it has prescribed an outcome to the dispute under the terms of the arbitration agreement and that the parties should comply with the award in accordance with their arbitration agreement or applicable rules of arbitration. If the parties accept the tribunal's claim of finality and comply with the award, the arbitration would effectively promote minimum order. Effectiveness here refers to making a practical difference to the dispute that is subject to arbitration by causing the parties to act differently than they would have without the award.⁶⁹ The ultimate test of effectiveness is thus whether the award resolves the dispute.

Nothing in the foregoing conflates finality of an award with its effectiveness, albeit every reasonable person would see that the former is a precondition of the latter.⁷⁰ The absence of any comprehensive centralized international body plagues international arbitration as it plagues other international activities. There is nothing to coerce a state into complying with its arbitration agreement and an award issued by a tribunal. It is hoped that governments will abide by their agreement to arbitrate because they voluntarily entered into that agreement, presumably after calculating whether the costs of prolonging the dispute outweigh any potential benefits that they might reap from continuing to press their position bilaterally with the government or non-state actor with

⁶⁹CHENG, WHEN INTERNATIONAL LAW WORKS *supra* note 23at16 (defining effectiveness generally and observing that international legal process scholars use the term “control” interchangeably with “effectiveness”).

⁷⁰Vladimír Balaš, *Review of Awards*, in THE OXFORD HANDBOOK OF INT'L INV. L. 1125, 1148 (P. Muchlinksi et al eds., 2008) (“The arbitration award must be effective; the necessary prerequisite for its effectiveness is that it is final.”); Walsh, *supra* note 14 at 445 (2006) (“The finality of ICSID awards is central to the Centre’s purpose of acting as a neutral venue providing an effective remedy for investors.”).

which they are in disagreement.⁷¹ In order to meet the expectations of parties in arbitration that it will resolve their dispute, the arbitral tribunal must, within a reasonable time period, at least claim to issue a final decision on the dispute and what rectification, if any, is necessary. If a system of arbitration permitted, the parties could require the tribunal, or another third party, to reconsider the award without limitation; the arbitral process could never be effective in resolving the dispute. Such an arbitration system will soon cease to exist because it would utterly fail in its function of rectifying deviations from shared expectations of appropriate conduct and international actors will see no point in using that system to resolve their disputes.

In sum, the distinction between finality of awards and finality of dispute resolution, *i.e.*, the effectiveness of an award, is crucial. Although it is a major policy of the international legal system to resolve disputes effectively, it would be too ambitious to assign complete responsibility for achieving this goal to an international arbitral tribunal. The policy objective for an international arbitral tribunal is instead to contribute to the effectiveness of dispute resolution by issuing a final award that provides a basis for either the losing party to abide by the award, or, more likely, for both sides to reach a settlement with the award as their negotiating baseline. In this manner, a final award can contribute to achieving finality through a broader process of dispute resolution, but the award cannot often resolve a dispute entirely on its own.

Although finality of arbitral decision is a crucial policy in dispute resolution, it should be fairly obvious that finality should not be pursued at any cost. Justice must play

⁷¹See Lee Kuan Yew, *Forward*, in SHUMUGAM JAYAKUMAR & TOMMY KOH, PEDRA BRANCA: THE ROAD TO THE WORLD COURT xiii (2009) (“If a dispute cannot be resolved by negotiations, it is better to refer it to a third party dispute settlement mechanism, than to allow it to fester and sour bilateral relations.”).

a role in the arbitral decisions. If that were not the case, a tribunal might render acutely pragmatic awards without regard for expectations by the parties that tribunals are supposed to decide disputes according to law. If an award claims to be final but lacks in any modicum of justice, giving it any effect could hardly balance the competing interests of the parties and promote a legitimate system. Further, without any assurance that awards will be roughly just and predictable, international actors will have no reason to participate in consensual arbitration and the entire mechanism will be reduced to an obsolete artifact with no practical application.⁷²

There are, of course, many different conceptions of justice. Substantive notions of justice include distributive justice — the fair allocation of values and other resources among individual members and groups in a community — and retributive justice — the appropriate correction of behavior that deviates from community standards of acceptable conduct, whether expressed through criminal laws, voluntarily created through contractual arrangements, or unilaterally assumed through conduct that gives rise to duties of care under law.

In contrast to ideas of justice discussed above about the content of outcomes of problems, other notions of justice concern how outcomes are reached. It is convenient to call the latter concerns “procedural justice.” In the context of third-party adjudication, procedural justice includes the basic norms that all parties must have an adequate opportunity to present their case, that the adjudicator must not be corrupt, that the adjudicator’s decision is confined to subject matter over which is has been assigned

⁷²W. MICHAEL REISMAN, SYSTEMS OF CONTROL 2-3 (1992) (“Much as lawyers cannot practice law without clients, international tribunals cannot decide disputes without litigants. Litigants come on an entirely voluntary basis and have no reason to come to an uncontrolled process.”).

authority to decide, and that that the adjudicator must explain his reasons with sufficient detail that the parties can understand why he reached his decision and are able to check that he did so according to the legal framework and substantive rules that he was supposed to apply.⁷³

Ideally, third party adjudication should optimize both procedural and substantive justice. In domestic court systems, the adjudicative process tries to secure both categories of justice by having a multi-tiered appellate process, in which hierarchically superior judges examine decisions of hierarchically inferior judges for both procedural propriety as well as substantive correctness in terms of fact finding and applying correct legal rules to those facts. Where a lower court decision violates a defendant's due process rights, an appeals court could overturn the decision. Where the decision reaches the wrong conclusion due to errors of fact or law, the appeals court can overturn the decision or direct that the trial court modify its decision to correct its error.

When trying to design a dispute resolution system that promotes both justice and finality, it should be apparent that these two policies quickly collide against each other.⁷⁴ Any process of reconsidering a decision by another set of adjudicators delays finality in dispute resolution. With each layer of appeal, a new court has to study the record, receive briefs, hear the parties, deliberate and decide. Conversely, truncating an appeals

⁷³See Ernst-Ulrich Petersman, *Human Rights, International Economic Law and 'Constitutional Justice,'* 19 EUR. J. INT'L L. 769, 769 (2008) (arguing from Rawls that justice requires through the public use of reason for maintaining a stable and liberal society); Nienke Grossman, *Legitimacy and International Adjudicative Bodies,* 41 GEO. WASH. INT'L L. REV. 107, _ (2009) ("Parties must perceive a tribunal as fair and unbiased before they will agree to submit their disputes to it."); Reisman & Alvarez, *supra* note 2 at 2 ("[T]he reasons requirement, as a control mechanism in other sectors of arbitration, acquires a greater importance in international investment arbitration.").

⁷⁴See SCHREUER, *supra* note 2 at 893 ("There are two potentially conflicting principles at work in the review process. One is the principle of finality; the other is the principle of correctness.").

process reduces the opportunities to detect and rectify unjust decisions by adjudicators, whether this injustice stems from the wrong outcome, or from a process that failed to adequately give each party a fair chance to present their best case and respond of their adversaries contentions.

Finding a balance between justice and finality is therefore necessary. As mentioned, many domestic constitutions provide for a multi-tiered appellate process that by design favors substantive and procedural justice over finality of decision. In the domestic context this makes sense. Courts deal with criminal cases, which, if the defendant is guilty, result in criminal penalties including incarceration or even a death sentence. The harm that may ensue from a defective trial process or a substantive error in decisions could undermine the most basic and fundamental liberties of the defendant. Mitigating the risk of error therefore takes a higher priority than finality. It would seem odd in such a court system (although not inconceivable in theory) if the civil court system would provide for fewer layers of appeal than the criminal system. For consistency, domestic civil disputes also adopt the same balance between justice and finality.

Further, it is also easier for the parties to a dispute before a court to submit themselves to layers of appeal. Although no litigant wishes to prolong the court process, the costs of the judicial system, including the judges' salary and administrative costs, are borne by taxpayers and not by the parties directly. There is a certain moral hazard, therefore, where litigants may choose to incur the costs of appeal for the community and reap the potential benefits for themselves. This is particularly the case with indigent litigants who are represented by public defenders or who pursue appeals *pro se*. In such situations, litigants do not even bear the cost of lawyers to represent them in the appeal.

Finally, delaying finality of judicial decision through appeals does not undermine finality of dispute resolution by domestic courts. Because public authority is centralized with government in domestic systems, courts may deploy the coercive powers of marshals to enforce their decisions when a final decision is made. A criminal can hardly escape a death sentence by claiming at the end of a long appeals process that he has lost faith in the judicial system and therefore rejects the sentence. A corporation found to have violated a contract can hardly reject a judicial decision ordering damages by claiming that it is so disgusted with the court process that he simply refuses to pay. Accordingly, although securing justice in court through appeals can put off finality of decision until appeals are complete, this delay does not preclude finality of dispute resolution when a judicial decision is made and all avenues of appeal are exhausted.

The policy calculus in the international system is different because the system itself is structurally different than domestic constitutional designs. International arbitration does not concern criminal matters. Even though the public policy concerns in investor-state arbitrations are important, the liberty of individuals is not generally directly at stake. Because the need to protect individuals from mandatory criminal sanctions unjustly imposed is absent, the necessity for full blown appeals is diminished. Consistent with this analysis, where criminal sanctions are applicable in international adjudication, such as before the International Criminal Court or the International Criminal Tribunal for the Former Yugoslavia, there are ample appeals available. In contrast, in international arbitration of civil matters, there are no such appeals.

Unlike domestic court processes, which are sponsored by the public through taxes, the costs of international arbitrations, including arbitrators' fees and administrative

expenses, are fully born by the parties to the dispute themselves.⁷⁵ It is natural that parties therefore are slower to demand a full-blown appeal, in order to avoid the substantial financial burden of this process. Since international arbitration is voluntary, it is responsive to the consumer demands of the parties. Accordingly, there is perhaps less economic incentive to design an appeals process.

Crucially, unlike domestic systems where delaying the finality of a decision does not affect finality of the outcome once a decision is reached, delaying finality of award in international arbitrations can diminish the effectiveness of the award. Unlike domestic courts, international arbitrators do not have coercive powers to enforce their judgments. While the prevailing party may move in a domestic court to have the award recognized and enforced,⁷⁶ there is a risk that the court may refuse to recognize or enforce on public policy or other grounds. In extreme circumstances, the court's actions may violate treaty obligations under the ICSID Convention or New York Convention to recognize and enforce international arbitration awards, but there is no immediate remedy for such a violation.⁷⁷ These risks are heightened in investor-state arbitrations under the ICSID Convention, because the losing host state can simply refuse to pay the award in violation of its treaty obligations,⁷⁸ and a court of a third party may refuse to enforce the award by seizing the assets of the host state that lost the arbitration on the basis that those assets are

⁷⁵ Christopher Drahozal, *Enforcing Vacation International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 465 (2000) (noting costs in arbitration and stating: "All else equal, parties obviously would prefer the lower cost means of dispute resolution.").

⁷⁶Convention on the Recognition and Enforcement of Foreign Arbitral Awards art.V, June 10, 1958, 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 40-42 [hereinafter New York Convention]; Federal Arbitration Act (FAA), 9 U.S.C. §1, art.2 (implementing the New York Convention).

⁷⁷ Although the ICSID Convention provides for dispute settlement about the treaty by the International Court of Justice, that provision has never been invoked. ICSID Convention, Art. 64.

⁷⁸*Azurix Calls For Action Against Recalcitrant Argentina*, Global Arbitration Review, Sept. 29, 2010, <http://www.globalarbitrationreview.com/news/article/28765>.

protected by sovereign immunity.⁷⁹ Consequently, if finality of the award is delayed through multiple appeals that ultimately leave the award intact, the losing party may question the efficacy or legitimacy of the ICSID system and ignore the award entirely, or worse, leave the ICSID system.

In international arbitration, therefore, a different balance is appropriate between finality of the award and justice than in domestic judicial decision-making. There is a strong preference for finality over justice.⁸⁰ This preference precludes a full-blown appeal that potentially reexamines every finding of fact and conclusion of law for errors and modifies the decision accordingly. Yet, there must be some external control over the arbitral process to ensure that the arbitrators stay within the mandate for dispute resolution agreed to by the parties, and that their decision process meets minimal requirements of justice. The pragmatic accommodation to achieve these competing goals is a review process that can lead to annulment of the award where the arbitrators have exceeded their powers or failed to observe basic principles of procedural justice. This process does not directly aim at substantive justice, because that would require an appeal or several layers of appeal. Instead, the hope is a review process that ensures that only procedurally just awards are valid will also increase the likelihood of substantive justice although not necessarily secure it.

The preference for finality over substantive justice applies with greater force in ICSID arbitrations because they concern foreign investments in host states. The sums of

⁷⁹ [cite French cases]

⁸⁰SCHEURER, ICSID COMMENTARY *supra* note 2 at 893 (“In international arbitration the principle of finality is often seen to take precedence over the principle of correctness.”).

money in dispute are often large – in the hundreds of millions or even billions⁸¹ – and the investments at issue often concern key infrastructural or developmental projects within a host state. Prolonging that dispute would tie up capital that could be more productively deployed elsewhere in other developmental projects that generate revenue and jobs. It also prevents, in many instances, the host state from restarting the stalled project for no third party investor will wish to run the risk of investing large amounts of capital in a project that is embroiled in a high-stakes international legal dispute.⁸² Accordingly, there are especially strong reasons to favor finality over substantive justice in ICSID arbitrations.

B. Scholarly Opinions

The appropriate balance between finality and justice in international arbitration has vexed scholars for centuries. A review of the literature indicates that although scholars are not unanimously in favor of review rather than appeal in international arbitration, there is a stronger consensus today than before that in ICSID arbitration finality ought to be promoted over justice.

Jurists have long recognized the overriding policy goal of finality.⁸³ Hugo Grotius, who is often thought of as the founding father of the modern law of nations, argued that appeals “cannot have place between Kings and peoples.” He explained: “For,

⁸¹See, e.g., [cite awards].

⁸²See, e.g., *Investment Treaty Arbitration: Some Support ForFraport*, 6 GLOBAL ARB. REV. 2 (2011) (reporting on negative impact of the Fraport dispute on Philippines’ attempt to develop its airport).

⁸³REISMAN, NULLITY AND REVISION 22-33 (discussing classical views on arbitration).

in their case, there is no superior power, which can either bar or break the tie of the promise. And therefore they must stand by the decision whether it be just or unjust.”⁸⁴

In Grotius’s view, international awards cannot countenance appeals in order to promote “the stability and orderliness of international society.”⁸⁵

Likewise, Pufendorf argued that agreements to arbitrate should conclude commitments by the parties to comply with the award whether or not it was just. In the absence of an international appellate body, if awards were to be reviewed they would have to be scrutinized by merely another arbitral tribunal, whose decision in turn could be scrutinized by yet another tribunal, and so on without end. This would undermine finality.⁸⁶

Jurists have also acknowledged that justice played a role in international dispute resolution. Pufendorf also recognized the need for justice, arguing that “when it is said that the parties ought to abide by the award of the Arbitrator, whether he has given it justly or not, that must be accepted with some reservation.”⁸⁷ For him, the policy of finality ought not to extend to situations where the arbitrator was corrupt.⁸⁸ Vattel took an

⁸⁴*Id.* quoting GROTIUS, *in* DE JURE BELLII ET PACIS 350-51 (Whewell trans., 1853).

⁸⁵*Id.*

⁸⁶*Id.* at 22–23, (quoting Pufendorf: “the agreement to arbitrate ought to be framed absolutely that the parties are willing to abide by the award pronounced by the Arbitrator; and not on the condition that he pronounces a just award. Else should either of the contending parties raise a doubt as to the equity of the award, the question would have to be submitted to another Arbitrator, who would investigate that issue; and if again doubt were raised, another Arbitrator would have to be appointed and so on without end. It is also manifest that there cannot be any appeal from Arbitrators, because there is no superior Judge who can revise their award. This principle prevails in States, where parties have voluntarily agreed to refer to an Arbitrator, provided the case be such as it does not interest the government to have settled. If, however, it is anywhere permissible to make such an appeal it is by reason of some positive law.”).

⁸⁷*Id.* at 23 (citing Pufendorf).

⁸⁸*Id.* (“Yet the award of the Arbitrator will surely not be binding if it manifestly appears that he was in collusion with the other party, or was corrupted by a bribe from him or entered into an agreement for our detriment. For he who openly attaches himself to either side cannot any longer sustain the character of an Arbitrator”).

even more expansive view of justice. He argued that any award that was “evidently unjust and unreasonable” ought to be invalid.⁸⁹

Then, as now, the great jurists of international law recognized that international arbitral awards ought to be final, as well as just. Then, as now, the difficulty is prescribing the correct balance when the two policies conflict with each other. Vattel’s solution was to prescribe

If the injustice is of little moment, it must be put up with for the sake of peace; and if it is not absolutely evident, it should be borne with as an evil to which the state voluntarily exposed itself.”⁹⁰ is of little moment, it must be put up with for the sake of peace; and if it is not absolutely evident, it should be borne with as an evil to which the State voluntarily exposed itself.”⁹¹

Several hundred years later, the debate continued with vigor across the Atlantic. At the 1912 Annual Meeting of the American Society of International Law, Mexican diplomat Joaquin D. Casasus asserted:

[T]he principle of arbitration will be discredited if the arbitration awards cannot be definite and the progress obtained by the efforts of the principal nations of the world will become useless and only diplomacy through its numberless resources could perhaps decide the international conflicts after long discussions which might last years.⁹²

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

⁸⁹*Id.* at 25 (citing Vattel).

⁹⁰*Id.*

⁹¹*Id.*

⁹²PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 59 (1912); *see also* REISMAN, NULLITY AND REVISION, at 44-46 (discussing debate at the 1912 meeting).

If arbitration is to exist as a compelling or even a corrective force in the intercourse of nations, it must justify its existence by its works. If arbitral tribunals are but insensate machines to be used without reference to considerations of reason or logic merely to put an end to disputes which nations happen to wage, then it would seem that there would be no real cause for their establishment, for the turn of a wheel, the flip of a coin or the roll of dice, by agreement between the contending nations, could be made to accomplish the desired result and to end the dispute with certainty and much less expense.⁹³

These debates in 1912 predated investor-state arbitration and concerned state to state arbitration. Nonetheless, the policy concerns that were debated would apply directly to ICSID investor-state arbitration decades later.⁹⁴

The first test of Article 52 was in 1985, with the first *ad hoc* decision, *KlöcknerIndustrie-Analgen GmbH v. United Republic of Cameroon*.⁹⁵ In *Klöckner*, the dispute concerned a joint venture for manufacturing fertilizer products between the multinational European corporation of Klöckner and Cameroon.⁹⁶ In 1971, a West German multinational, Klöckner, and Cameroon established a “Basic Agreement” which created a joint venture of Socame that was to construct and manage a fertilizer plant. Klöckner owned 51 percent of Socame while Cameroon owned 49 percent. The agreement established that a factory be built by Klöckner and Socame would pay for the factory and Cameroon government guaranteed Socame’s payments. Once the factory

⁹³*Id.*

⁹⁴ Eric Schwartz, *Finality at What Cost*, *supra* note 11 at 85 (“The annulment mechanism in Article 52 of the ICSID Convention balances considerations of arbitral efficiency against considerations of justice.”).

⁹⁵ *Klöckner GmbH v. United Republic of Cameroon* (Annulment), ICSID Case No. ARB/81/2 (___), published in 1 ICSID Rev. – Foreign Inv. L. J. 89 (1986).

⁹⁶ *Klöckner GmbH v. United Republic of Cameroon* (Award), ICSID Case No. ARB/81/2 (___), translation from French to English annexed to JAN PAULSSON, *THIRD WORLD PARTICIPATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (1984).

started production, output fell below the projections and Cameroon government obtained an outside consultant who suggested the factory's processes be redesigned. Cameroon asked Klöckner to contribute financially but it refused. Instead, Klöckner gave up its majority shareholder status to Cameroon.

Klöckner initiated an ICSID arbitration against the Cameroon government demanding the payment it had guaranteed for the delivery of the factory. Cameroon counterclaimed citing violations of management obligations Klöckner had under their agreement. The majority of the tribunal rejected Klöckner's claim and Cameroon's counterclaim.

After Klöckner filed an application for annulment under Article 52, and the *ad hoc* committee completely annulled the award, holding that the tribunal had failed to state reasons. It criticized the award in the following terms:

[I] [the tribunal's] reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied "the law of the Contracting State." Strictly speaking, it could not be said that it made its decision without providing reasons, within the meaning of Articles 48(3) and 51(I)(e). It did, however, act outside the framework provided by article 42(1) [on the applicable law], applying concepts or principles it probably considered equitable.⁹⁷

The *ad hoc* committee then explained that this defect met the standard for failing to state reasons, because, in the committee's view:

There would be "failure to state reasons" if no reasoning or explanation whatsoever, or no "sufficiently relevant" or

⁹⁷*Klöckner (Annulment)*, ¶ 79.

“reasonably acceptable” reasoning could be found for some conclusion or decision of the Award.⁹⁸

This decision was met with a torrent of criticism from scholars, who appraised that *Klöckner* expanded review too greatly and undermined finality.⁹⁹ Scholars confirmed their preference for finality when they applauded an ad hoc decision that was issued in a dispute in 2002, *Wena Hotels Limited v. Arab Republic of Egypt*, which exercised acute restraint and refused to annul the award for failure to state reasons even though the committee had to infer steps in the chain of reasoning to reconstruct the tribunal’s thinking.¹⁰⁰

However, other scholars have emphasized the need to ensure that awards were just and the quest for finality ought not to undermine justice.¹⁰¹ After United States began creating appellate mechanisms in dispute resolution under its free trade agreements,¹⁰² scholars suggested that one reason for expanding or supplementing review with appeals

⁹⁸*Klöckner (Annulment)*, ¶ 130.

⁹⁹Alan Redfern, *ICSID-Losing Its Appeal?*, 3 ARB. INT’L 98, 99 (1987) (“The decisions of three eminent arbitrators, appointed by or on behalf of the parties, have been wiped out by another three eminent arbitrators, appointed by the President of the World Bank, in what might seem like an elaborate and expensive game of snakes and ladders”); REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 64-65 (“Though the committee was at a pains to distinguish this claim from a claim of an erroneous application (*error in iudicando*), it is difficult to escape the impression that the real thrust of the committee’s concern was that the tribunal’s legal conclusion of an obligation imposed on *Klöckner de tout reveler* constituted a mistake in law.”); Ian Brownlie, 86 PROC. OF THE AM. SOC’Y INT’L L. 586, 593 (1992) (“A fairly pessimistic view does exist. Michael Reisman, in a brilliant lecture at Duke University in 1989, talked about the breakdown of the control mechanism. He pointed to the various problems arising from partial nullification of awards and what may be a questionable approach to the concept of *res judicata*”); Pierre Lalive, *Concluding Remarks*, in ANNULMENTS 297, 298 (acknowledging, as the chair of the *Klockner* ad hoc committee that its’ decision “gave rise to interesting negative reactions”).

¹⁰⁰*Wena Hotels Ltd. v. Arab Rep. of Egypt (Annulment)*, Feb. 2, 2002, 41 I.L.M. 933 (2002); Gaillard, *supra* note 1 at 6 (stating that the *Wena* decision adopted “a balanced understanding of the scope of review”).

¹⁰¹Eric Schwartz, *supra* note 11 at 85 (“In the author’s view, the decision in *Wena* reflects a concern for finality that has been pushed to the extreme, to the detriment of the process and the guarantees that it should be seen to offer.”).

¹⁰²US Trade Act 2002, §2012; *see also* Annex D US Model BIT (providing that treaty parties shall consider whether to establish an appellate process).

was to have “a corrective mechanism in case an arbitration decision is made wrongly.”¹⁰³ In other words, there was an impulse to favor not only the procedural justice that was provided for in the review process, but substantive justice according to the law that applied to the merits of the dispute that could only be secured through appeals when an award made an error of law or fact.

Although unanimity about the correct balance between finality and justice remains elusive, it appears that there is an emerging consensus that finality should be the preeminent policy goal in investor-state arbitration, and ought to be tempered only by procedural but not substantive justice. In 2011, almost a century after the 1912 debates at the American Society of International Law about the proper balance between finality and justice in state-to-state arbitration, another group of scholars was impaneled to discuss the appropriate policy balance in ICSID investor-state arbitration. Unlike the 1912 meeting, scholars now agreed that finality was the preeminent policy concern. Christoph Schreuer, the author of the leading commentary on the ICSID Convention,¹⁰⁴ cautioned against an expansive interpretation of the ground for annulment.¹⁰⁵ Andreas Lowenfeld responded to Professor Schreuer with the following concurring statement:

I think there should be -- and I think there was intended -- a presumption that the tribunal, unless properly constituted -- and put that aside -- got it right. . . . I think ad hoc committees ought to be -- I said maybe given guidelines or

¹⁰³Asif H. Querishi, *An Appellate System in International Investment Arbitration?*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1154, 1157 (2008).

¹⁰⁴See generally SCHREUER, ICSID COMMENTARY, *supra* note 2.

¹⁰⁵Schreuer, *Transcript*, *supra* note 1, at 5 (“There is two more worries that I have about some of the recent decisions. One is a very expansive interpretation of some of the grounds for annulment.”); accord Stanimir Alexandrov, *Transcript*, at 7 (“I agree with Christoph's remarks”); Lowenfeld, *Transcript*, at 10 (“I think Professor Schreuer's analysis of these cases confirms my uneasiness.”); accord David Caron, *Transcript*, at 17 (“So, very basically, I was all on board [with the panelists' comments]. . .”).

have a kind of general notion of the way to behave to say go easy, ask yourself do we really have to do this, do we have to go to every issue.¹⁰⁶

Accordingly, the foregoing review of scholarship indicates that although scholars have long recognized the inherent conflict between finality and justice, there appears to be a general opinion forming that in ICSID arbitration, the policy of finality of awards is particularly crucial, and ought to be given effect except in limited circumstances where a tribunal failed to observe the most fundamental requirements of procedural justice.¹⁰⁷

C. Negotiating History of the ICSID Convention

In light of the textual ambiguity of Article 52 of the ICSID Convention, it is appropriate to consult the *travaux preparatoires* of the Convention.¹⁰⁸ Primary documents from the negotiating history of the ICSID convention confirm that the framers of the Convention intended to favor finality of awards over obtaining the correct outcome in ICSID arbitrations, and chose to temper finality only with a review for procedural justice by *ad hoc* committees.

Aron Broches, the General Counsel of the World Bank, reported in 1961 to his Executive Directors that it was necessary to provide a forum to the settlement of disputes between foreign investors and host states in order to promote private international investment. Broches proposed that the Bank consider establishing a facility to provide

¹⁰⁶*Id.*

¹⁰⁷See also ICJ Statute, June 26, 1945 art. 38(1)(d), 59 Stat. 1055, U.S.T.S. 993 (stating that the teachings of the most highly qualified publicists are a subsidiary source of law).

¹⁰⁸Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331; see Mahnouch H. Arsanjani and W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: “The Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 A.J.I.L. 597, 598 (2010) (recourse to *travaux* is appropriate where text is ambiguous).

investors with direct access to an international tribunal to address such disputes.¹⁰⁹ At a meeting of the Executive Directors on March 13, 1962 to discuss Mr. Broches's proposal, the response of the Directors was mixed. Nevertheless, there was sufficient interest that Sir William Iliff, the acting chairman, directed Broches to provide a more detailed proposal for their review.¹¹⁰

Broches provided a proposal for the ICSID Convention three months later, on June 6, 1962. The stated purpose of the Convention was "to promote the resolution of disputes arising between Contracting States and national of other Contracting States by encouraging and facilitating recourse to international conciliation and arbitration."¹¹¹ Although finality was not explicitly mentioned, the reference to the resolution of disputes without any reference to justice or correct decisions under law suggest that the primary objective of the Convention, even in its earliest draft form, was effective dispute resolution rather than justice. This view is corroborated by Article VI, which provided that an arbitral award rendered under the Convention was final and that each party "shall abide by and comply with the award immediately."¹¹² Although it envisaged revision and clarification by the tribunal on narrow grounds and within a short period of time, it did not provide for any form of review or appeal.¹¹³

¹⁰⁹ See Aron Broches, Note to the Executive Directors, Settlement of Disputes between Governments and Private Parties (Aug. 28, 1961), in ICSID HISTORY *supra* note 23 vol. 2, pt. 1, 1,2.

¹¹⁰ Memorandum of Meeting of Executive Directors on the Subject of "Settlement of Investment Disputes," Mar. 13, 1962, in ICSID HISTORY *supra* note 20, pt. 1, 13, 19, ¶ 34.

¹¹¹ Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors, in ICSID HISTORY, *supra* note 23, vol. 2, pt. 1, 19, art. I.

¹¹² *Id.* art. VI (10).

¹¹³ *Id.* art. VI (11)-(12).

The Executive Directors decided to continue exploring the possibility of a Convention, and after a series of meetings with them, Broche presented the First Preliminary Draft on August 9, 1963.¹¹⁴ The preamble text, while again not directly referring to finality or justice, seemed to temper the need for international facilities to resolve investment disputes, now referred to “settlement thereof in a spirit of mutual confidence, with due respect for the principles of equal rights of States in the exercise of their sovereignty in accordance with international law.”¹¹⁵ While not exactly even handed in recognizing the interests of investors as well as states, the reference to sovereignty and equal rights suggest that ideas about justice began to appear in the Convention. Section 13 of the First Preliminary Draft included, for the first time, a provision for annulling an ICSID award if one of three grounds existed: (1) the tribunal exceeded its powers; (2) there was corruption by a member of the tribunal; or (3) there was a serious departure from a fundamental rule of procedure, including a failure to state reasons for the award.¹¹⁶ The relevant comment to the article explains:

It was recognized in the Preamble as a corollary of the principle that an undertaking must be implemented in good faith, that the award of a tribunal must be complied with. As a general rule the award of the tribunal is final, and there is no provision for appeal. [. . .] 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).¹¹⁷

¹¹⁴ *First Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, in ICSID HISTORY *in supra* note 23, vol. 2, pt. 1, 133.

¹¹⁵ *Id.*, pmb1, ¶ 2.

¹¹⁶ *Id.* art.VI, §13.

¹¹⁷ *Id.*, art VI § 15, cmt.

Broche then carried out a series of meetings with legal experts from World Bank member states in different regions of the world, thereby avoiding the difficulties of achieving consensus among all member states in one large forum. The first meeting was with African states at Addis Ababa in December 1963. At that meeting, most capital importing states welcomed the ICSID Convention. For example, the expert from Guinea said that “economic development could not be achieved without capital and that the developing countries would not obtain capital unless they provided adequate guarantees.”¹¹⁸ They also supported finality of the award. The draft of the Convention before them proposed that applications for revision on the basis of a newly-discovered fact should be made within ten years of the award, and both the representatives from Nigeria and Dahomey stated that that was too long and ought to be reduced to two or three years.¹¹⁹

Likewise, at the meeting of Latin American countries in February 1964, the expert from Costa Rica stated that the time periods to revisit the award, including through an annulment application, “were too long,” on the basis that in “Costa Rica, it was a constitutional principle that justice should be executed promptly.”¹²⁰ There was some interest in expanding the grounds for annulment to include “violation or unwarranted interpretation of principles of substantive law,” but Broche rejected that suggestion to avoid turning review of ICSID awards into an appellate procedure.¹²¹

¹¹⁸*Summary Record of Proceedings, Addis Ababa Consultative Meeting of Legal Experts*, Dec. 16-20, 1963, *in supra* note 23, vol. 2, pt. 1, 236, 244-45.

¹¹⁹*Id.* at 271.

¹²⁰*Summary Record of Proceedings, Santiago Consultative Meeting of Legal Experts*, Feb. 3-7, 1964, *in ICSID HISTORY supra* note 23, vol. 2, pt. 1, 298, 341.

¹²¹*Id.* at 340.

At the meeting with European members in Geneva in June 1964, the issue of annulment was also discussed. Broche revealed that he had received suggestions to expand the ground of annulment to include “a serious departure from principles of natural justice,” or “a serious misapplication of the law.”¹²² The notes of the meeting do not record any responses to these proposals, but records that the West German expert expressed concern that the section on annulment be drafted more restrictively to avoid frustrating awards.¹²³

Annulment was also discussed at the meeting with Asian members in Bangkok in July 1964. In response to a question by the Lebanese expert about the French text, Broche explained that annulment for “*excès de pouvoir*” (excess of power), referred “to the case where a decision of the tribunal went beyond the terms of the compromise.”¹²⁴ The Indian expert favored clarifying the narrow scope of annulment for departures from fundamental rules of procedure was “limited only to those breaches of procedural rules which would constitute a violation of the rules of natural justice” and that “the award should not be challenged solely because conventions procedural rules had not been fully observed.”¹²⁵ Several representatives agreed with Broche that while excess of power included applying the wrong body of law, it did not extend to a mistake of law or fact.¹²⁶

¹²² *Summary Record of Proceedings, Geneva Consultative Meetings of Legal Experts*, Feb. 17-22, 1964, in ICSID HISTORY *supra* note 23, vol. 2, pt. 1, 367, 423.

¹²³ *Id.*

¹²⁴ *Summary Record Proceedings, Bangkok Consultative Meetings of Legal Experts*, Apr. 27-May 1, 1964, in *supra* ICSID HISTORY *supra* note 23, vol. 2, pt. 1, 458, 517.

¹²⁵ *Id.*

¹²⁶ *Id.* at 517-18.

Based on all these consultative meetings, Broche prepared a report on the issues raised and suggestions made. That report of July 9, 1964, noted that there “were no controversial issues of policy” involved in the provision for annulment, and comments were merely of a technical nature.¹²⁷ It appears from this evidence that there was at least a loose consensus in favor of the finality of awards over substantive justice, and that finality ought to be delayed only where a tribunal had offended procedural justice through corruption, departing from fundamental procedures or exceeding their the scope of arbitral authority that the parties conferred upon the tribunal.

In short order, on September 11, 1964, the draft ICSID Convention was produced. The provision on annulment, now numbered Article 55, provided five grounds instead of three for annulment. In addition to the three grounds provided for in the preliminary draft, annulment would now be possible if the Tribunal was not properly constituted. Further, the failure to state reasons was included as a separate ground for annulment, and not as part of the provision permitting annulment if there had been a serious departure from a fundamental rule of procedure.¹²⁸ The draft Convention provided that failure to state reasons would only not apply if the parties had stated that the award did not need to provide reasons.¹²⁹

The responses of World Bank members to the draft Convention shed light on their intentions regarding the policies of the Convention. By a letter dated October 27, 1964, the Ministry of Finance of Turkey objected to the possibility that parties could waive

¹²⁷*Chairman’s Report on the Regional Consultative Meetings of Legal Experts*, ICSID HISTORY *supra* note 23, vol. 2, pt. 1, 557, 573-74.

¹²⁸*Draft Convention: Working Paper for the Legal Committee*, art. 55, in ICSID HISTORY *supra* note 23, vol. 2, pt. 1, 610, 635(1968).

¹²⁹*Id.*

their right to a reasoned award, because “reasons are of such importance to the interested parties that it would be hardly conceivable that parties might willingly waive their right of knowing such reasons.”¹³⁰ At the meeting of Legal Committee to discuss the draft convention, 39 members voted in favor of rejecting the possibility of waiving a reasoned award, with none opposed.¹³¹ This voting record suggests a strong consensus during the negotiation of the Convention that considerations of procedural justice were so important that they could not be overridden by party consent.

However, various other proposals to amend the grounds for annulment were all defeated. A proposal to delete the word “manifestly” from the excess of power provision was defeated by 23 to 11, a proposal to permit an application to annul only part of an award was defeated by 29 votes to 6, a proposal to replace the lower the corruption standard for annulment to simply “misconduct” was defeated by 23 votes to 3, and a proposal to replace the annulment provision of a serious departure from fundamental rule procedure with a requirement that both parties must have a fair hearing was defeated by 18 votes to 4.¹³² These votes indicate a strong policy preference for finality of awards and correspondingly narrow ground for appeal. The representative from the Netherlands, with the support of the United Kingdom representative, emphatically stated that he was “disturbed” by the proposals to relax the terms of annulment because “in the ordinary course of events the award should be treated as final.”¹³³

¹³⁰*Comments and Observations of Member Governments on the Draft*, in *supra* note 20, Doc. 45, 664 (1968).

¹³¹*Summary Proceedings of the Legal Committee Meeting, December 9, Afternoon*, SID/LC/SR/19 (Jan. 4, 1965), in *ICSID HISTORY supra* note 23, vol. 2, pt. 2, 853, 854.

¹³²*Id.* at 852–53.

¹³³*Id.*

The revised draft of the ICSID Convention was produced on December 11, 1964. Article 52 reflected the decision to delete the possibility of waiving the right to a reasoned award, but was otherwise unchanged from its earlier iteration.¹³⁴ On March 30, 1965, the Executive Directors of the World Bank by a resolution approved the text of the ICSID Convention.¹³⁵

The foregoing history of the ICSID Convention confirms that the framers of the Convention intended ICSID arbitration to favor finality of awards. Notably, there is no mention of finality of dispute resolution by sheer fact that an ICSID award is final. Observers today who criticize ad hoc committee decisions for undermining the finality of dispute resolution therefore unwittingly or knowingly depart from the original intention of the members of the World Bank, who recognized that finality of awards was a more achievable goal that could help, but not necessarily ensure, that disputes were resolved swiftly.

The history of the ICSID Convention also confirms that the object and purpose of annulment was to protect the parties and the system of arbitration from defective awards that deviated too greatly from procedural justice. As indicated from the statements of various members, and the strong defeat of proposals to lower the standards for annulment, it is not the direct purpose of the Convention to secure substantive justice through correct findings of fact and conclusions of law.

IV. APPRAISAL OF ICSID ARBITRAL REVIEW

¹³⁴*Revised Draft of the ICSID Convention*, Dec. 11, 1964, Z-13, in *ICSID HISTORY supra* note 23, vol. 2, pt. 2, 911, 926–27.

¹³⁵*Approval of Resolution No. 65-14 approving the text of the Convention and of the Report of the Executive Directors*, SM65-6 (Mar. 30, 1965) in *ICSID HISTORY supra* note 23, vol. 2, pt. 2, 1039.

Many of the criticisms of *ad hoc* committee decisions, and indeed of the constitutive structure of arbitral review in the ICSID Convention, provide less cause for alarm when they are appraised against the balance of policies favoring finality of award, but not necessarily finality of dispute resolution, over procedural, but not necessarily substantive, justice. Each of the criticisms is addressed in turn below.

A. Are ICSID Awards Wrongly Decided?

Critics who favor justice have pointed to the decisions of *ad hoc* committees annulling awards as evidence that ICSID tribunals cannot be relied upon to decide investor-state disputes correctly according to applicable laws.¹³⁶ Even where their observation that some tribunals failed to observe the principles of procedural justice required in Article 52 is correct, but their normative conclusion that this is a flaw in the ICSID system is misplaced. The fact that the award was annulled demonstrates, to the contrary, the ICSID system is functioning as it was designed to operate, that is, in nullifying awards – at the cost of finality – where the awards failed to meet a minimum standard of procedural justice.

For example, consider *Malaysian Historical Salvors, SDN, BHD v. Government of Malaysia*.¹³⁷ In that dispute, Malaysian Salvors brought a claim against the Republic of Malaysia regarding an alleged breach of contract. The parties entered into a contract

¹³⁶See William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE L. J. 283, 284 (2010) (“Even from within the system, an annulment committee constituted under the ICSID Convention to review an award rendered by an ICSID tribunal against Argentina has scathingly critiqued the jurisprudential approach of the first-instance tribunal and raised larger questions about the system’s legitimacy.”); see also *CMS Gas Transmission Co. v. Argentine Republic* (Annulment), ICSID Case No. ARB/01/8, Sept. 25, 2007, ¶ 159 (“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 of this has been identified and underlined by the Committee.”).

¹³⁷See *Malaysian Historical Salvors SDN, BHD v. Gov’t of Malaysia*, ICSID Case No. ARB/05/10.

on August 3rd, 1991 for Malaysian Salvors to locate and salvage the cargo of a sunken British ship, The Diana which sank off the coast of Malacca in 1817. Malaysian Salvors was “required, among other things, to utilize its labour and equipment to carry out the salvage operation, and to invest and expend its own financial and other resources, and assume all risks of the salvage operation, financial or otherwise”¹³⁸. Essentially, Malaysian Salvors agreed to “search and salvage” and to bear all risks and costs of doing so. This agreement also meant that Malaysian Salvors would only recover costs if they found the ship and the subsequent sale of the goods found was successful. Malaysian Salvors brought an ICSID arbitration after it found treasure and a dispute arose over the proceeds of the sale of treasure.¹³⁹

The sole arbitrator, Michael Hwang, issued an award finding that the tribunal lacked jurisdiction because there was no investment within the meaning of Article 25(1) of the ICSID Convention.¹⁴⁰ In reaching this decision, Hwang emphasized that the subject matter of the dispute was of a cultural and historical nature and the small quantum of money spent by Malaysian Historical Salvors.

Malaysian Historical Salvors applied to annul the decision, claiming, *inter alia*, that the tribunal had manifestly exceeded its powers under Article 52(1)(b) of the ICSID Convention in finding that it lacked jurisdiction.¹⁴¹ According to Malaysian Salvors, the

¹³⁸*Id.* ¶ 1.

¹³⁹*Id.* at 3 (according to the terms of the agreement, Malaysian Salvors would collect 70% of the proceeds if the “appraised sum of the unsold artefacts/artifacts/artefacts and auction value of recovered items sold came to less than US\$10 million”).

¹⁴⁰*Id.* at 12; *id.* at 49 (“[T]he Tribunal concludes that the Contract is not an “investment” within the meaning of Article 25(1) of the ICSID Convention. The Claimant’s claim therefore fails *in limine* and must be dismissed for want of jurisdiction.”).

¹⁴¹*Malaysian Historical Salvors SDN, BHD v. The Gov’t of Malaysia*, ICSID Case No. ARB/05/10, Decision on Application for Annulment, 11 (Apr. 16, 2009).

tribunal applied an overly-restrictive definition of the term investment, elevated characteristic-based tests to the level of jurisdictional conditions, and improperly introduced a further jurisdictional requirement of ‘contribution to the economic development of the host State.’”¹⁴²

A majority of the *ad hoc* committee annulled the award, reasoning that the tribunal had manifestly exceeded its power by failing to account for the expansive definition of “investment” in the application Malaysia-U.K. bilateral investment treaty, and failed to consider the *travaux préparatoires* of the ICSID Convention, in which the drafters of the Convention rejected a monetary floor in the amount of an investment.¹⁴³

A member of the committee dissented. Judge Shahabuddeen appended an opinion stating that he agreed with Hwang, and found that the “economic development of the host State is a condition of an ICSID investment”¹⁴⁴. From this premise, he reasoned that “the economic development . . . had to be substantial or significant”, and that Malaysian Salvors contract did “not promote the economic development of Malaysia in a substantial or significant manner”¹⁴⁵ Accordingly, there was no investment and the tribunal lacked jurisdiction over the dispute.

Hwang has since published an article further explaining his reasoning.¹⁴⁶ Whatever one thinks about the award or Hwang’s further explanation in his article or the dissenting *ad hoc* committee member’s opinion, assuming that the *ad hoc* committee was

¹⁴²*Id.* ¶¶ 27-42.

¹⁴³*Id.* ¶¶ 80-81.

¹⁴⁴*Malaysian Historical Salvors SDN, BHD v. Gov’t Government of Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Mohamed Shahabuddeen, 38 (Apr. 16, 2009).

¹⁴⁵*Id.* at 19.

¹⁴⁶ [Cite Hwang article].

correct in its appraisal that the tribunal manifestly exceeded its powers, this dispute supports the claim that some ICSID awards are incorrectly decided. However, it does not provide a basis to question the legitimacy of the ICSID system since the award was annulled, thus rectifying any error by the tribunal. A case such as *Malaysian Salvors* bolsters the credibility of ICSID arbitration and does not undermine it.

The better criticism is that disputes where an *ad hoc* committee excoriates an award but leaves it intact establish that even when ICSID awards are defective there is nothing that can be done about it. Defects in arbitral decision coupled with an inability to correct these defects, so the argument goes, gives cause for concern.

In some instances, however, *obiter dictum* criticizing awards that are not annulled do not establish that procedural justice was undermined and therefore do not support that argument that awards that are fundamentally defective are nevertheless not nullified. Consider *Compañía de Aguas del Aconquija, S.A. v. Argentine Republic* (“*Vivendi IP*”). That dispute arose out of the cancellation by Argentina of a thirty-year concession contract between Compañía de Aguas del Aconquija, S.A. and the Argentinean Province of Tucumán. After the first award in this dispute was annulled,¹⁴⁷ the second tribunal decided that it had jurisdiction over the claims and dismissed the claims.¹⁴⁸

Argentina again applied to annul the second award, arguing that the tribunal was not properly constituted because one of the arbitrators, Gabrielle Kaufmann-Kohler

¹⁴⁷See *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic (Award)*, ICSID Case No.Arb/97/3 (Nov. 21, 2000); *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic (Annulment)*, ICSID Case No.Arb/97/3 (July 3, 2002).

¹⁴⁸*Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic (Award)*, ICSID Case No.Arb/97/3 (Aug. 20, 2007).

“lacked the requirements imposed by ICSID Convention and should have been disqualified during the proceedings.”¹⁴⁹

The *ad hoc* committee, comprising Dr. Ahmed S. El Kosheri, Professor Jan Hendrik Dalhuisen, and Ambassador Andreas J. Jacovides issued a scathing criticism of Kaufmann-Kohler’s conduct, explaining that by accepting a directorship with the bank UBS, she “created, objectively viewed, a conflict of interest which was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.”¹⁵⁰ In the end, however, the committee elected not to annul the award, reasoning that because Ms. Kaufmann-Kohler was unaware of her conflict of interest until after she decided the award and therefore her judgment could not have been impaired.¹⁵¹

Here, if the *ad hoc* committee was correct that Ms. Kauffmann-Kohler’s lapses of judgment did not affect the award, then any defect in the arbitral process was more perceived than real, and the *Vivendi II* award and *ad hoc* committee decision not to nullify the award do not provide evidence that that there were actual harmful defects that could not be rectified.

A stronger argument might be made on behalf of critics based on *Helnan International Hotels A/S v. The Arab Republic of Egypt*.¹⁵² In that dispute, a Danish hotel management company contracted with a government tourism body to manage a five-star hotel in Cairo. The claimant, Helnan International Hotels A/S, filed an arbitration

¹⁴⁹See *Compañía de Aguas del Aconquija, S.A. & Vivendi Universal v. Argentine Republic (Annulment)*, ICSID Case No. Arb/97/3 (___).

¹⁵⁰*Id.* ¶ __.

¹⁵¹*Id.* ¶ __.

¹⁵²*Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID No. 05/19, Award, 13 (July 3, 2008).

claiming that Egypt subjected it to unfair, discriminatory and inequitable treatment by downgrading the status of the hotel from five stars to four as a way to terminate a long-term management contract with the Danish company. Helnan claimed that Egypt orchestrated a series of events that lead to downgrading of the hotel and eventually eviction of Helnan from it.

The tribunal agreed that the government had procedural irregularities in handling the situation, but did not find that these irregularities rose to the level of unfair or inequitable treatment.¹⁵³ The tribunal also held that even though its jurisdiction was not affected by Helnan's failure to pursue local remedies in Egypt, its failure to do exhaust local remedies undermined its claims on the merits.¹⁵⁴

Upon an application for annulment, the *ad hoc* committee chaired by Judge Stephen Schwebel partially annulled the award, nullifying its holding that Helnan failed to establish a claim by not exhaustion local remedies. The *ad hoc* committee determined that as exhaustion of local remedies was requirement for jurisdiction, it was also not a requirement for the merits of an investment claim.¹⁵⁵

However, the *ad hoc* committee left the rest of the award intact. Because the annulled portion of the award was not dispositive, the annulment did not change the outcome that Helnan did not prevail in its arbitration claim. Here, unlike *Vivendi II*, there was an actual defect requiring annulment. Therefore, it comes closer to supporting the

¹⁵³*Id.* ¶ __.

¹⁵⁴*Id.* ¶ __.

¹⁵⁵*Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID No. 05/19, Annulment Proceeding, 26 (June 14, 2010), ¶ __.

contention that the ICSID annulment system is inadequate because it does not allow nullification of awards that fall below acceptable standards of procedural justice.

However, *Helnan* ultimately does not support the argument that ICSID awards that contain defects cannot be corrected because the defective portion was excised from the award. The fact that this did not change the disposition of the award does not indicate any flaw in the ICSID system because the rest of the award was beyond reproach and accordingly withstood scrutiny.

Another variation on the argument by critics can be made by invoking the *CMS Gas Transmission Co. v. The Argentine Republic*. It comes closest to supporting the argument that defective awards cannot be nullified, but ultimately still falls short. In *CMS*, suit was brought against Argentina for a suspension of a tariff adjustment formula for gas transportation in which CMS had an investment.¹⁵⁶ In 1989, Argentina began privatizing “important industries and public utilities” to obtain foreign investments.¹⁵⁷ One of the industries to be privatized was the gas and oil industry. In 1992 Argentina privatized its natural gas industry.¹⁵⁸ The state owned gas company, Transportadora de Gas del Norte (TGN), was opened private investors, and CMS, a U.S. based corporation, invested in the company.¹⁵⁹ At the end of the 1990s, Argentina experienced a severe economic crisis “which eventually had profound political and social ramifications.”¹⁶⁰ After the crisis, Argentina asked the natural gas companies to defer U.S.

¹⁵⁶*CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 5 (May 12, 2005).

¹⁵⁷*Id.* at 16.

¹⁵⁸*Id.* at 17.

¹⁵⁹*Id.*

¹⁶⁰*Id.* at 18.

PPI adjustments on gas tariffs.¹⁶¹ An agreement between the TGN and Argentina provided that the “resulting income losses would be indemnified and it was understood that this arrangement would not set a precedent or amend the legal framework governing the licenses.”¹⁶² Eventually, it became apparent that the agreement would not be implemented and this arbitration arose out of the dispute.¹⁶³

CMS claimed that it made important investments in the gas transportation sector of Argentina and that it suffered a severe loss as a result of Argentina’s changes to its currency regime. Argentina claimed, *inter alia*, that its actions were excused under the necessity defense clause of the Argentina-U.S. bilateral investment treaty.¹⁶⁴

After reviewing the parties’ claims, the tribunal rejected Argentina’s necessity defense and found that Argentina breached its obligations to accord the investor the fair and equitable treatment guaranteed in Article II(2)(a) of the U.S.-Argentina bilateral investment treaty awarded CMS over \$130 mn.¹⁶⁵

Argentina then filed for an annulment claiming that the tribunal manifestly exceeded its powers and failed to state reasons on which the award was based.¹⁶⁶ The *ad hoc* committee partially annulled the portion of award concerning the umbrella clause in the U.S.-Argentina bilateral investment treaty.¹⁶⁷ But it left the other holdings intact, even though it found that the Tribunals analysis of the necessity defense “contained

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at ___.

¹⁶⁵ *Id.* at 139–140.

¹⁶⁶ *Id.* at 12.

¹⁶⁷ *Id.* at 44.

manifest errors of law” and suffered from “lacunae and elisions.”¹⁶⁸ In particular, the committee faulted the tribunal for analyzing necessity only under customary international law and not explicitly consider necessity under Article IX of the Argentina-U.S. treaty. Ultimately, however, the committee concluded that under Article 52’s review standard, it could not “substitute its own view of the law and its own appreciation of the facts,” and accordingly it left the award’s finding on necessity intact.¹⁶⁹

The fact that the *ad hoc* committee identified serious flaws in the tribunal’s reasoning but nevertheless concluded that it lacked the authority under the narrow grounds of Article 52 to annul dispositive portions of the award seems to provide the strongest evidence that some defective awards cannot be rectified. Unlike *Vivendi II*, where if there was an error it was a harmless one, here, if the *CMS* ad hoc committee was correct, the error regarding necessity changed the outcome of the arbitration.

However, even if *CMS* shows that even dispositive substantive errors cannot, without more, be corrected, this observation does not provide a foundation for a normative criticism. As discussed at length earlier, as a matter of policy, in light of the negotiating history of ICSID, and within the four corners of the ICSID Convention, the proper balance between finality and justice is one that favors finality of awards over substantive justice. Accordingly, as in *CMS*, even if the award got the law wrong, it is normatively appropriate to not to nullify the award in order to promote finality of arbitral decision.

¹⁶⁸*Id.* at ____.

¹⁶⁹*Id.* at 42.

A further argument could be made on behalf of critics. In two subsequent disputes against Argentina, *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic* and *Sempra Energy International v. Argentine Republic*,¹⁷⁰ arising from similar facts during Argentina's debt crisis and under the same U.S.-Argentina bilateral investment treaty, the tribunals considered the necessity defense under its customary law elements, and, like the *CMS* tribunal, found that the necessity defense did not apply to excuse Argentina's currency measures that damaged the investments of the U.S. investors.

In those two disputes, however, the *ad hoc* committees reached opposite conclusions from the *CMS* committee and annulled the awards for finding that the necessity defense did not apply. The *Enron* committee reasoned that the *Enron* tribunal manifestly exceeded its powers by failing to consider the elements on necessity under the bilateral investment treaty or customary law, and by failing to give reasons.¹⁷¹ The *Sempra* committee reasoned that the *Sempra* tribunal manifestly exceeded its powers by failing to apply the correct law, which was the treaty and not customary law.¹⁷²

This cluster of three decisions raises concerns. If *Enron* and *Sempra* were correct, there is a basis for critics to charge that in some disputes, like *CMS*, serious defects that damage procedural justice remain uncorrected. If, however, the *Enron* and *Sempra* decisions were wrong in annulling their respective awards, a different criticism can be leveled that *ad hoc* committees have gone too far in nullifying awards and have upset the

¹⁷⁰ *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic (Award)*; *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No.ARB/02/16, Award, 139 (2007).

¹⁷¹ *Enron (Annulment)*, ¶ 1.

¹⁷² *Sempra (Annulment)*, ¶ 1.

proper policy balance between finality of award and procedural justice. This latter criticism is addressed below.

B. Are *Ad Hoc* Committee Decisions Wrongly Decided?

Critics who favor finality have charged that *ad hoc* committees have exceeded their mandate in their decisions. In particular, they have opposed *obiter* statements, such as the ones made in the *CMS* and *Vivendi II ad hoc* committee decisions, as well as annulments of non-dispositive holdings, such as in *Helnan*. They fear that such statements and partial nullifications make it more difficult for the claimant to enforce its award against the host state. Stanimir Alexandrov, a leading arbitration practitioner and formerly the Vice Minister for Foreign Affairs, has put the problem in the following terms:

If you are the prime minister or the minister of finance or the president of a country and you have an award of, say, \$100 million against your country and . . . the annulment decision says, "The tribunal essentially committed gross errors of fact in law and should have decided otherwise. Regrettably, because of the limited nature of annulment, we cannot annul," . . . Wouldn't you be in a difficult position explaining to your constituents that your government has to write a check for \$100 million for an award that an annulment committee considers deeply flawed and essentially wrong¹⁷³

While this intuition appeals to common sense, in fact there is at best inconclusive evidence in support of it. While it is true that Argentina has not paid the *CMS* award, it is dangerous to attribute that to the *obiter* statements in the *CMS ad hoc* committee decision. The fact of the matter is that Argentina has not paid on any of the award

¹⁷³*Transcript, supra* note 1 at 21.

against it, including those that have survived annulment without significant *obiter* criticisms.¹⁷⁴ Accordingly, it is reasonable to conclude that even if the CMS *ad hoc* committee had not criticized the award in *obiter dictum*, Argentina would not have paid. While one could speculate that the *obiter dictum* made things worse, or even caused Argentina to question the entire ICSID system and encouraged it not to pay on any award, these conjectures are unsupported by sufficient evidence.

Even assuming that *obiter* criticisms and nullifying non-dispositive holdings prolong disputes by creating political disincentives for governments to pay awards, that is at most a weak normative criticism of the review process. This is because the basic policy of ICSID arbitration, in accord with its text and negotiating history, is to promote finality of awards, and not finality of dispute resolution.¹⁷⁵ *Obiter* statements and nullifications of non-dispositive holdings do not undermine finality of awards because they are, in terms, determined to be valid and final under the ICSID Convention and the decisions of *ad hoc* committees. Although finality in dispute resolution is an important major policy objective for international law generally, it is not the responsibility of investor-state arbitration tribunals and committees alone. When disputes are not resolved, it is as much the responsibility of host states and investors as it is the result of the decisions and awards of arbitrators.

In any event, considerations of finality of dispute resolution must be balanced against the responsibilities and policy benefits of *ad hoc* committees explaining their reasoning. The ICSID Convention requires them to fully address all the questions put to

¹⁷⁴*Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (Annulment), Sept. 1, 2009.

¹⁷⁵See Part II, III, *supra*.

them, and to provide their reasoning.¹⁷⁶ *Ad hoc* committees would be derelict in their duty if they choose to ignore issues raised by the parties or not give their reasons, and they would be dishonest in their decision if they avoided criticisms or partial annulment where that was actually the opinion of the committee.

Further, while this practice might be irritating to some observers and the prevailing party, there is at least the potential that a well-reasoned *ad hoc* committee decision will help harmonize the jurisprudence of investment treaty law and guide future tribunals.¹⁷⁷ Developing a consistent jurisprudence was not a policy objective of the framers of the ICSID Convention, nor does this responsibility appear anywhere in the text of the Convention itself. However, commentators have assigned this policy to the ICSID arbitration system, and have complained that inconsistent decisions undermine the legitimacy of ICSID arbitration.¹⁷⁸ There is some value to this view. In the past, when ICSID arbitrations were sporadic, the opportunities and necessity for harmonized case law were limited. Now, however, with the exponential growth of ICSID investor-state disputes, there is a stronger justification for consistent reasoning among tribunals interpreting similar, albeit often not identical, bilateral investment treaty provisions. Consistency would be most strongly promoted through a standing appellate body.

¹⁷⁶ICSID Convention, Art 48(3), 52(4).

¹⁷⁷See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, in INVESTMENT TREATY LAW: CURRENT ISSUES III 148, 162-76 (A Bjorklund et al eds. 2009) (revising 30 Ford. J. Int'l L. 1014 (2007)) (reviewing awards and finding informal but highly effective practice akin to precedent in arbitral awards where persuasive reasoning in a decision is adopted by future tribunals).

¹⁷⁸Nienke Grossman, *supra* note 73 at _ (“ICSID has not such appellate mechanism, and the system has been criticized for rendering inconsistent decisions); Franck, *supra* note 14 at 1158 (“In the past five years, there have been a variety of inconsistent decisions in investment treaty arbitration. Inconsistency creates uncertainty and damages the legitimate expectations of investors and sovereverigns.”); Dohyun Kim, *supra* note 19 at 259 (“I argue that annulment committees in their current form are not fit to provide coherence, and I demonstrate that recent annulment committee decisions reveal a jurisprudence still ridden with inconsistency and confusion regarding the annulment committee’s proper role).

However, whether or not an appellate body is a wise innovation, it is not a practical proposal. There is at most a slim chance of persuaded all the signatory states to amend the ICSID convention to provide for mandatory appeals (as opposed to an additional facility that parties could consent to on an ad hoc basis). Consequently, the next best alternative, and one that has been implemented by committees already, some quite intentionally, is to use *obiter dictum* and dissenting opinions to suggest directions in which ICSID jurisprudence might be harmonized.¹⁷⁹

The strongest criticism from proponents of finality is that *ad hoc* committee decisions annul awards that do not meet the standard for annulment under Article 52. Consider *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*. In that dispute, Fraport, manager of Frankfurt airport, invested in a Philippine company, Philippine International Air Terminals Co., Inc. (PIATCO) and contracted to build and operate an airport terminal in Manila.¹⁸⁰ The dispute arose out of the annulment of the concession contract and operation of an international terminal at Nioy Aquino International Airport in Manila, known as Terminal 3.¹⁸¹ In July 1997, a Concession Agreement was made between PIATCO and Philippine Department of Transportation and Communication (DOTC).¹⁸² In July of 1999, Fraport became a

¹⁷⁹See *Luchetti*(annulment), dissenting op. Sir Frank Berman, ¶ 1 (explaining his view “in the interests of the ICSID system as a whole, and as a pointer for future Tribunals”); Klöckner (annulment), ¶ _ (“While it is superfluous here to return to each criticism of the Awerad, it is incumbent upon the Committee, in the interest of the Tribunal itself and in the higher interest of the arbitration system . . . not to leave any of the claimant’s essential complaints unanswered.”).

¹⁸⁰Fraport 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, at ¶14 (Dec. 13, 2010).

¹⁸¹*Id.* at ¶15.

¹⁸²*Id.* at ¶15.

shareholder in PIATCO and directly and indirectly owned 61.44% of PIATCO.¹⁸³ Additionally, Fraport entered into a confidential shareholder agreement to have managerial control over PIATCO. By the time the terminal was almost fully built, the Philippine Supreme Court decided that the concession agreement was null and void ab initio because of serious violations of Philippine law and public policy.¹⁸⁴ Negotiations for compensation failed and Fraport filed a claim alleging that Republic of Philippines violated its obligation towards Fraport as an investor in the country.¹⁸⁵

The tribunal issued a partial award stating that it did not have jurisdiction because it found that Fraport had essentially exercised control over the airport project.¹⁸⁶ The investment treaty defined a qualifying investment as one that was an investment under Philippines law, under Philippines's "Anti-Dummy" law, Fraport's control disqualified the project as an investment. Although Fraport presented the Tribunal with evidence that a Philippines prosecutor concluded that Fraport did not breach the terms of the Anti-Dummy Law,¹⁸⁷ the Tribunal discounted that evidence because it determined that the prosecutor did not have access to the same evidence before the Tribunal. Accordingly, the tribunal concluded it had no jurisdiction.¹⁸⁸

¹⁸³*Id.* at ¶19.

¹⁸⁴*Id.* at ¶24.

¹⁸⁵*Id.* at ¶25.

¹⁸⁶*Id.* at ¶30.

¹⁸⁷ Jarrod Hepburn, "Fraport Files New Claim at ICSID Over Expropriation of Airport Terminal Project; Annulment Committee Ruling Paved Way for New Hearing by Finding Breach of Investor's Right to be Heard," INVESTMENT TREATY ARBITRATION, http://www.iareporter.com/articles/20110331_7 (last visited September 11, 2011) (Prosecutor determined the relevant fact for determining a breach of the ADL was the size of the shareholding held by a foreign investor and not the actual managerial control held by the foreigner).

¹⁸⁸ Fraport Annulment, *supra* note 142, at ¶30.

Fraport filed an application for annulment, claiming, *inter alia*, that the tribunal seriously departed from a fundamental rule of procedure by failing to provide it with an opportunity to rebut Philippines claim that the prosecutor did not have the evidence that was before the tribunal.¹⁸⁹ The ad hoc committee agreed, and annulled the award.¹⁹⁰ It reasoned that Article 52(1)(d) was meant to control the integrity of the arbitral procedure and the right to be heard was a fundamental rule of procedure.¹⁹¹ Because of the tribunal's treatment of new evidence in the original proceedings, it deprived Fraport of its right to heard.¹⁹²

This decision is puzzling. Even assuming that the tribunal departed from a basic rule of procedure by failing to give Fraport an opportunity to rebut Philippines' claim that the prosecutor did not have the material evidence before the tribunal, this departure was harmless error. The tribunal determined that the Fraport's control of the airport project precluded the project from being a foreign investment under Philippines law, and there is nothing in the award indicating that tribunal regarded the prosecutor's decision as dispositive. Although the committee claimed that evidence was significant, it provides no support for its claim. Worse, in exercising its annulment function, the tribunal was precluded from reexamining the tribunal's findings of fact. Accordingly, there was no basis, under the Article 52 standard, for finding that the prosecutor's decision was significant evidence and that the tribunal caused Fraport harm by failing to give it a further post-hearing opportunity to address that evidence.

¹⁸⁹*Id.* at ¶ 32,

¹⁹⁰*Id.* at 111.

¹⁹¹*Id.* at ¶180.

¹⁹²*Id.* at ¶¶197–208.

Under this analysis, the ad hoc committee ought not to have annulled the Fraport award. In doing so, it damaged the policy of finality of awards without any justification of materially protecting Fraport's rights to procedural justice.

Applying the policy balance between finality of awards and procedural justice has indicated that many of the criticisms of ICSID review are overblown. There remains, however, legitimate concerns about *ad hoc* committees that misapply the Article 52 standard to annul awards that should remain intact even if they made errors of law or fact.

V. RECOMMENDATIONS

In order to reduce the risk of distorting the policy balance between finality of awards and procedural justice, as codified in Article 52, *ad hoc* committees should have a clear understanding that they are not charged with ensuring substantive justice, and they should exercise restraint in their reviews.¹⁹³

Another strategy that could help inoculate awards from annulment applications and thereby preserve the policy balance is an innovation from Energy Charter Treaty arbitrations. In some ECT arbitrations, including those under ICSID, tribunals state in an early procedural order that they will circulate the draft award to parties.¹⁹⁴ This practice will give parties a final chance to address any issues they wish to address, and would avoid the Fraport situation where an award is nullified because one party subsequently claims that it was not given a final opportunity to address findings of fact based on evidence on which the tribunal relied. It would also give parties a chance to make legal

¹⁹³*Transcript, supra* note 1, at 16 (counseling ad hoc committees to exercise restraint and humility).

¹⁹⁴*See Limited Liability Co. AMTO v. Ukraine*, SCC Arb. No. 080/2005; *Kardassopoulos & Fuchs v. Georgia* (Award), ICSID Case No. ARB/05/18 & ARB/07/15 (Feb. 26, 2010); *Petrobart Ltd. v. Kyrgyz Republic*, SCC Arb. No. 126/2003.

arguments about flaws in the tribunal's reasoning in an attempt to persuade the tribunal to change its mind. The tribunal, in turn, would have a chance to lay bare in its final award steps in its reasoning that were non-obvious, thereby shielding its award from claims later on that it failed to state reasons. If the parties comment the draft award applies the wrong law, or fails to consider an applicable body of law, the tribunal will also have a chance to address that in the final award. This will reduce the risk that an ad hoc committee will find that the tribunal manifestly exceeded its powers by applying the wrong law. The net effect of this process of circulating draft awards could be to protect awards from annulment by ensuring that tribunals respect procedural justice, thereby harmonizing and promoting the twin goals of finality and justice in ICSID arbitration.

For a system of annulment with relatively few decisions compared to developed domestic legal systems, the ICSID annulment mechanism has generated a disproportionately large number of books, articles, and practitioner essays.¹⁹⁵ Many of these commentaries have been valuable in enhancing our collective understanding of ICSID arbitration. In spite of this extensive scholarly attention, disagreements about whether ICSID annulments adequately serve justice, on the one hand, or finality, on the other hand, remain pervasive. This is because scholars remain divided, or even unclear, about the content of these policies and the correct balance between them. This article makes a contribution to the ongoing debate on ICSID annulments by clarifying the meaning of finality and justice in light of general policies of international arbitration, the negotiating history of the ICSID Convention, and the practice of tribunals and *ad hoc*

¹⁹⁵ See ICSID COMMENTARIES, supra note 2 at 885-86 (bibliography of scholarship on annulment). Recently, there has been another wave of scholarship of on the same topic in light of recent annulment decisions.

committees. The analysis has shown that although the ICSID arbitral system is far from perfect, criticisms about ICSID awards or decisions getting the law wrong, and *ad hoc* committees critiquing awards in *obiter dictum* are often overblown. These criticisms should fade with a proper understanding that finality of awards is a key policy goal that is limited only by the need to control tribunals within the constraints of procedural justice through narrow grounds for review. In contrast, the criticism that some committees have exceeded their mandate in trying to secure substantive justice carries some weight. It is hoped that the risk of nullification from such overly intrusive committee reviews will diminish if tribunals adopt the practice of circulating draft awards to the parties.