EMPIRICAL STUDY:
ANNULMENT IN ICSID ARBITRATION

The British Institute of International and Comparative Law (BIICL) and Baker Botts LLP

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Introduction

BIICL and Baker Botts are pleased to present this comprehensive empirical study on annulment in investor-State arbitration under the auspices of ICSID.[1] The study examines over 150 annulment decisions rendered by ICSID *ad hoc* committees and offers a unique insight into how the ICSID system deals with annulment. It provides a detailed examination of the entire universe of publicly available annulment awards.[2] In particular, it builds on the *Updated Background Paper on Annulment for the Administrative Council of ICSID* published by ICSID in May 2016.[3]

This report examines the trends and practices of annulment committees on key issues such as the success rate of annulment applications, the most frequently invoked annulment grounds, the length and costs of annulments proceedings. It also provides an in-depth analysis on how tribunals approach the specific annulment grounds under Article 52(1) of the ICSID Convention.

The drafters of the ICSID Convention regarded the annulment process as an exceptional remedy.[4] As a result, ICSID awards can be challenged exclusively within the ICSID Convention framework, on the five defined grounds. These are contained in Article 52(1) of the Convention are the following:

a. The Tribunal was not properly constituted;

b. The Tribunal manifestly exceeded its powers;

c. There was corruption on the part of a member of the Tribunal;

d. There was a serious departure from a fundamental rule of procedure; and

e. The award failed to state the reasons on which it was based.[5]

This study shows that although applications for annulment are increasingly common, the number of successful annulment applications remains low. Of the estimated 355 ICSID awards rendered under the ICSID Convention as of 31 January 2021, nearly a half were subject to annulment proceedings but only 19 (around 5%) have been annulled in full or in part. Notwithstanding this low success rate, the importance of the ICSID annulment mechanism to the whole investment arbitration system is difficult to overestimate.

States within the *UNCITRAL Working Group III: Investor-State Dispute Settlement Reform* are currently considering whether the ICSID annulment process should co-exist with non-ICSID annulment grounds or be merged in the future.[6] However, any major changes in the annulment process would require an amendment of the ICSID Convention, which is likely to take a long time. The current ICSID annulment procedure is therefore likely to stay with us for many years.

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In the absence of the system of precedent and guidance on applicable procedural and substantive law, this study identifies the key patterns of decision-making and will facilitate a greater level certainty for States and investors considering or engaged in ICSID annulment proceedings.

As Judge Donoghue, current President of the International Court of Justice, points out: *"Empirical studies help us to disentangle advocacy from facts. This study about annulment in ICSID arbitration and the evidence it contains will serve as a launching pad for future discussions in the investment arbitration community."*

We hope that the study, to be updated regularly, will become an anticipated development in the field of investor-state arbitration.

Finally, the authors would like to thank the following lawyers from Baker Botts for their invaluable assistance in preparing this report: Maria Eugenia Bagnulo Cedrez; Alejandro Escobar; Maros Hodor; Thaysa Panza de Paula; Aida Rodriguez Olea; Robert Schultz; Benjamin Silva Aldana (now at Bofill Mir & Alvarez Jana) and David Turner.

The authors would also like to thank everyone who kindly reviewed drafts of the report and provided feedback: Professor Andrea Bjorklund; Judge Joan Donoghue; Antonio Parra and Martina Polasek.[7]

Executive summary

NEARLY A HALF OF ALL ICSID AWARDS FACE ANNULMENT APPLICATIONS, AND THE PROPORTION IS GROWING

Of the estimated 355 awards rendered under the ICSID Convention to date, 156 have been or are currently the subject of annulment proceedings – over 40% of all ICSID awards. This number has increased dramatically over the last decade. Three quarters of annulment proceedings have been initiated since 2009. This growth has significantly outpaced the growth in the number of substantive ICSID arbitration proceedings.

THE SUCCESS RATE OF ANNULMENT APPLICATIONS REMAINS LOW

Applicants have only succeeded in approximately 12% of annulment requests. To date, only six ICSID awards have been annulled in full. This represents less than 2% of the total awards under the ICSID Convention. With many annulment proceedings still pending, the number of successful applications will likely increase. Annulment (or set-aside) applications in non-ICSID investment arbitration proceedings (i.e., before national courts) have a significantly higher success rate than in ICSID proceedings.

NEARLY HALF OF ANNULMENT APPLICATIONS ARE DISCONTINUED BEFORE REACHING AN *AD HOC* COMMITTEE

Almost 30% of all annulment cases are discontinued and never decided by *ad hoc* committees. The apparent reason for this is that many annulment applications are made on a tentative basis, in order to comply with the 120-day application deadline and/or to create leverage for settlement negotiations. The discontinuance rate has increased over the past decade.

STATES ARE MORE LIKELY TO SEEK ANNULMENT AND TO PREVAIL THAN INVESTORS

States seek to annul ICSID awards more often than investors and are more likely to prevail. A small number of States account for a significant portion of ICSID annulment applications. Argentina, Venezuela and Spain are the most frequent State applicants and account for nearly 45% of all annulment applications submitted by States.

MOST POPULAR AND SUCCESSFUL ANNULMENT GROUNDS

The three most commonly invoked grounds of annulment are those in Article 52(1)(b), (d) and (e) of the Convention, namely: (i) that the tribunal manifestly exceeded its powers; (ii) that there was a serious departure from a fundamental rule of procedure and (iii) that the award failed to state the reasons on which it is based. They are also the most frequently successfully invoked grounds. In practice, where a partial annulment is ordered (which is more common than full annulment), the tribunal's damages analyses and jurisdictional findings are more likely to be annulled than findings on liability.

The most frequently and successfully invoked annulment ground is manifest excess of powers. It has been raised in almost 90% of all completed annulment proceedings. Seventeen percent of applications were successful. Of the 11 successful applications, three related to jurisdiction, six related to the applicable law and two related to other powers.

Parties have claimed that there was an absence of reasons in most annulment proceedings (80%), with a 15% success rate.

Ad hoc committees have linked the ground of a serious departure from a fundamental rule of procedure with the need to ensure fundamental principles of due process and natural justice are complied with. Parties relied on this ground in over 70% of annulment proceedings but have only been successful in slightly less than 8% of cases.

Requests for annulment on the basis that the tribunal was not properly constituted have been relatively rare. Parties have invoked this annulment ground in 6% of completed proceedings (often in conjunction with an allegation of a serious departure from a fundamental rule of procedure) but only once successfully. The final ground for annulment based on corruption on the part of a member of the tribunal has not yet been successfully invoked.

Key trends and statistics regarding ICSID annulment proceedings

This report is based on a review of 156 annulment proceedings under the ICSID Convention. Of those proceedings, 121 are completed proceedings and the remainder are still pending. Of the 121 completed proceedings, there have been 89 decisions rendered by *ad hoc* committees. The remaining 32 proceedings were discontinued before the committee issued a decision. Of the 89 rendered decisions, *ad hoc* committees upheld the underlying award on 70 occasions. Nineteen awards were annulled (in part or in full).

ANNULMENT PROCEEDINGS HAVE INCREASED DRAMATICALLY IN THE LAST 10 YEARS

Over 40% of the estimated 355 awards rendered under the ICSID Convention to date have been subject to annulment proceedings. The number of ICSID annulment proceedings has increased dramatically over the last decade: 122 of the 156 annulment proceedings (over 75%) have been initiated since 2009. The dramatic growth in annulment proceedings is consistent with the growth in ICSID arbitration generally, but even outpaces it: the number of ICSID annulment cases has risen even more steeply in the last decade than ICSID arbitration cases.

While the first ICSID arbitration was registered in 1972[8] and the first ICSID award was rendered in 1977,[9] the first annulment application was not registered until 1984 in *Klöckner Industrie-Anlagen GmbH & Ors v United Republic of Cameroon and Anor* ("***Klöckner I***"[10]). By this time, at least four ICSID awards had been issued. There was a degree of alarm regarding the breadth of the decision in *Klöckner I* (and subsequently in the annulment decision in *Amco I*).[11]

Following *Klöckner I*, however, the number of annulment proceedings registered at ICSID remained low. Just four further proceedings were initiated in the 1980s. One sole annulment was sought in the 1990s, during which time 35 cases were registered and 18 awards were rendered. The number of annulment requests increased significantly to 31 proceedings in the decade from 2000 to 2009 as ICSID arbitration grew in popularity (212 claims were registered, and 80 merits awards were rendered in the decade, giving a figure of annulment sought in nearly 40% of all rendered awards).

Chart 1: Annulment Proceedings By the Decade

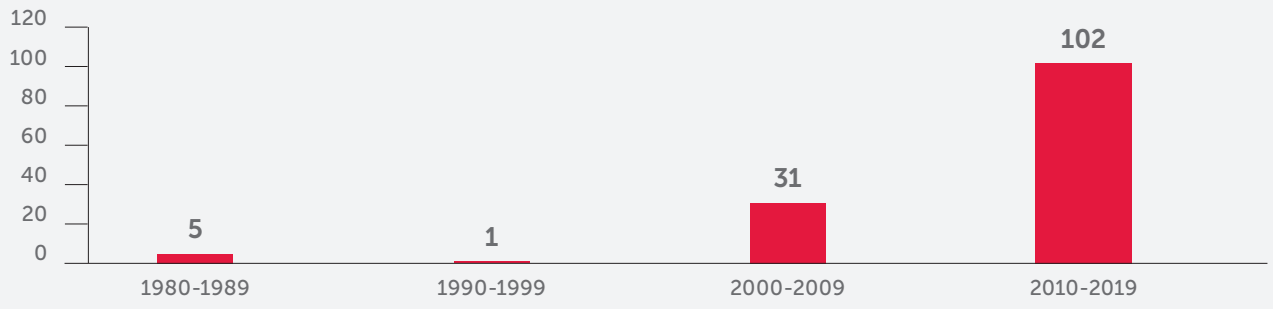
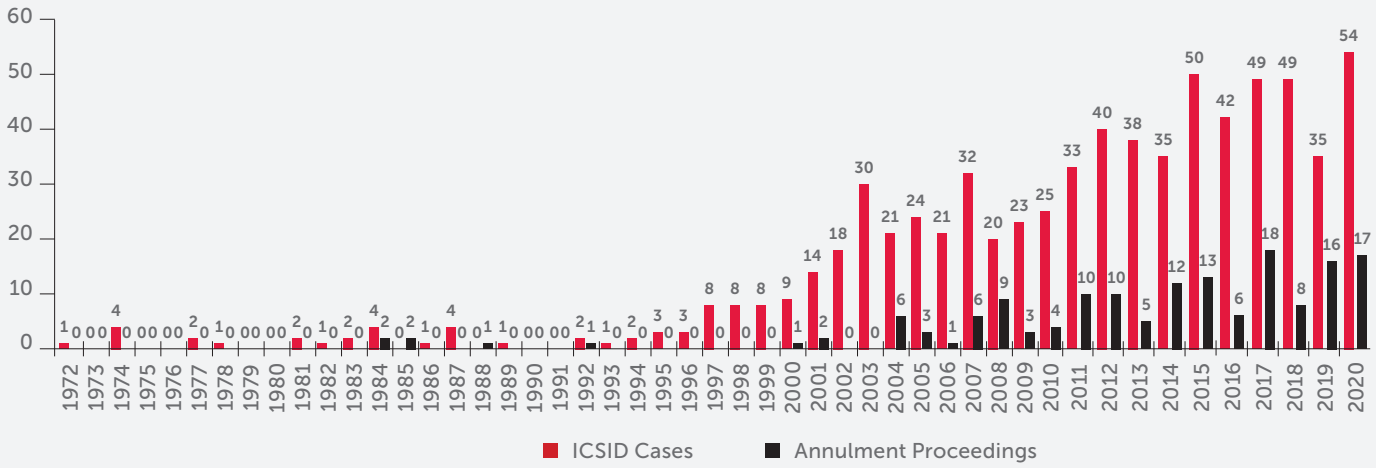


Chart 2: Number of ICSID Cases and Annulment Proceedings Registered, by Year



The decade from 2010–2019 saw no less than 102 annulment applications registered. This trend shows no sign of abating, with 17 new annulment applications in 2020 and six further annulments sought in the first quarter of 2021. This increase is correlated with, but again outpaces, the growth in ICSID arbitration generally. From 2010-2019, 397 ICSID claims were registered and 199 merits awards were rendered, a growth in ICSID claims of around 187% and in awards of 249% from the preceding decade. The growth in annulment proceedings was even more steep: 326% on the preceding decade.

What is the explanation for the significant increase in annulment proceedings over the last decade, with parties now resorting to annulment in over 50% of cases? It seems unlikely to be the product of increased levels of dissatisfaction with the quality of awards rendered. The predictability of outcomes in ICSID arbitration and the quality of ICSID awards has arguably increased over time, as the greater number of awards produced has assisted in the development of clearer rules of international investment law.

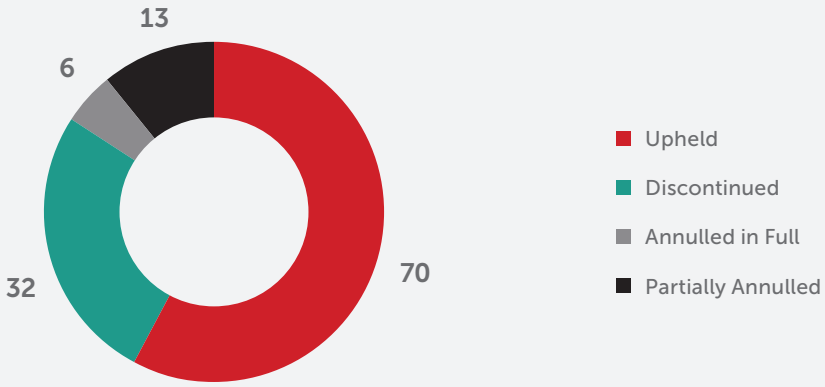
The low success rate in ICSID annulment proceedings also offers little encouragement to prospective applicants.

In part, the growth may be driven by a greater degree of familiarity and comfort with the annulment procedure and the grounds for seeking annulment. Some States, in particular, appear to have adopted a policy of filing for annulment of unfavourable awards as a matter of course, whether for political, economic or legal reasons. Further, many annulment applications appear to be made on a tentative basis, in order to comply with the 120-day application deadline or create settlement leverage.

ANNULMENT APPLICATIONS ARE RARELY SUCCESSFUL

While the use of the ICSID annulment procedure has increased significantly over the last two decades, the vast majority of annulment applications have been unsuccessful. To date, only six ICSID awards have been annulled in full.[12] Those six annulled awards comprise less than 2% of the total awards to have been issued to date under the ICSID Convention. The odds of successfully overturning an award in its entirety therefore remain exceptionally low. Those figures are consistent with the intended extraordinary and limited nature of the remedy. A further thirteen awards have been annulled in part.[13]

Chart 3: Annulment Outcomes in Completed ICSID Proceedings



Based on 124 Annulment Decisions.

Chart 4: Successful Annulment Proceedings by Year

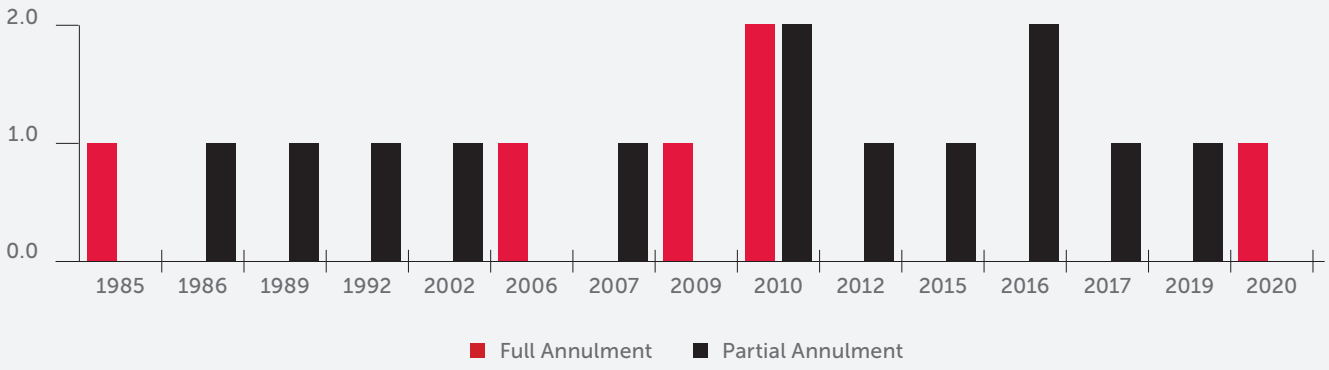
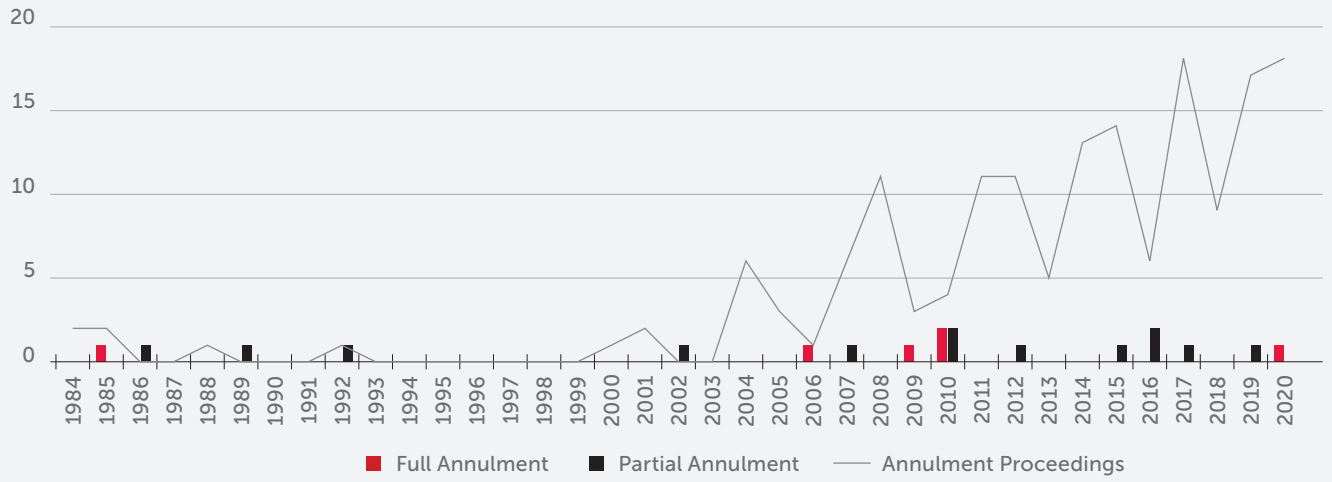


Chart 5: Number of Annulment Proceedings Registered and their Success, by Year



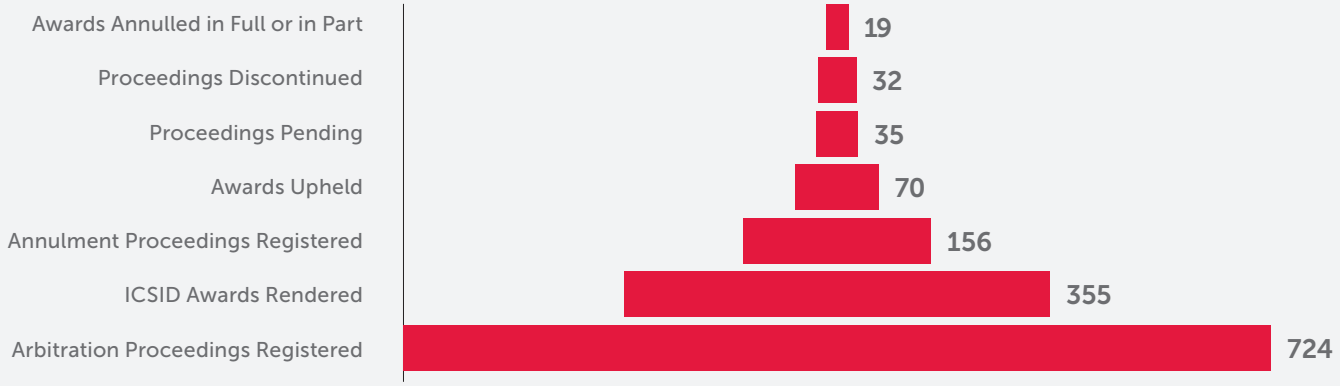
The most commonly annulled portion of these partially annulled awards was the tribunal's damages analysis (five cases), followed by the tribunal's jurisdictional findings (three cases). In *Enron*, the *ad hoc* committee found that the tribunal had failed to apply the applicable law with respect to a particular issue in dispute (the defence of necessity/the BIT's "*security interests*" exception).[14]

In *CMS*, the committee partially annulled the award on the basis that the tribunalfailed to provide reasons regarding Argentina's breach of an umbrella clause.[15]

RSM v Saint Lucia is unique as the *ad hoc* committee found that the tribunal had manifestly exceeded its powers in discontinuing the proceedings, holding that the tribunal had no power to dismiss the investors' claims "*with prejudice*" in circumstances where the investor had failed to provide security for costs.[16]

In *Amco II*,[17] the *ad hoc* committee upheld the award, but annulled a supplemental award on the basis that the tribunal had failed to give the State an opportunity to be heard on the investor's request for a supplemental decision.

Chart 6: Overview Arbitration Proceedings under the ICSID Convention, as of 1 February 2021

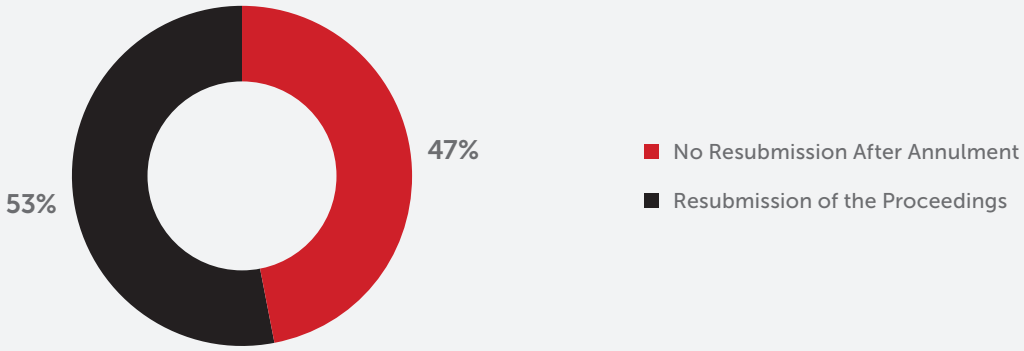


RESUBMISSION PROCEEDINGS

Under the ICSID system, an annulment decision does not replace the award or substitute any reasoning in the award. Rather, Article 52(6) of the ICSID Convention allows for the resubmission of the parties' dispute following annulment: "*if the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal.*" Our research shows that the parties opt for a resubmission in about half of the successful annulment cases.

In relation to the six awards that have been annulled in full, there have been three resubmission proceedings registered to date. The resubmission led to a more successful outcome for the applicant in only one case.[18] Resubmission proceedings have been initiated in relation to partially annulled awards on seven occasions. They have not led to a more successful outcome for the applicants.[19]

Chart 7: Resubmission of the Dispute



Based on 19 Annulment Decisions.

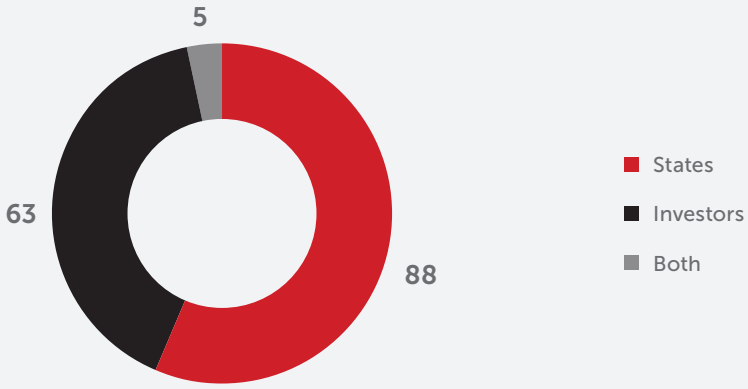
A FEW STATES ACCOUNT FOR THE BULK OF ANNULMENT APPLICATIONS

States are more likely to seek to annul an ICSID award than investors.[20] States have initiated 88 annulment proceedings, while investors have initiated 63. In the remaining five cases, both parties submitted annulment applications.

A small number of States are responsible for a significant portion of the 93 applications submitted by States. Argentina has submitted 16 annulment applications. Venezuela and Spain have submitted 12 and 13 applications, respectively. Collectively, these three States account for 44% of all annulment applications submitted by States, and a quarter of the 161 annulment applications registered by ICSID.[21] Other States to have initiated a significant number of annulment proceedings include Hungary (five applications), Egypt (four applications), Ecuador (four applications), Kazakhstan (three applications) and Georgia (three applications).[22]

The number of annulment proceedings initiated by these States reflects their disproportionate involvement in ICSID arbitration generally. Argentina has been the respondent in 56 ICSID arbitrations to date, with 18 unfavourable awards rendered against it. Venezuela has been the respondent in 49 ICSID arbitrations, with 14 unfavourable awards rendered against it.[23] Spain has been the respondent State in 39 ICSID arbitrations (all but one commenced in the last decade, primarily as a result of the recent flood of renewable energy claims brought against Spain), with 14 unfavourable awards rendered against it.

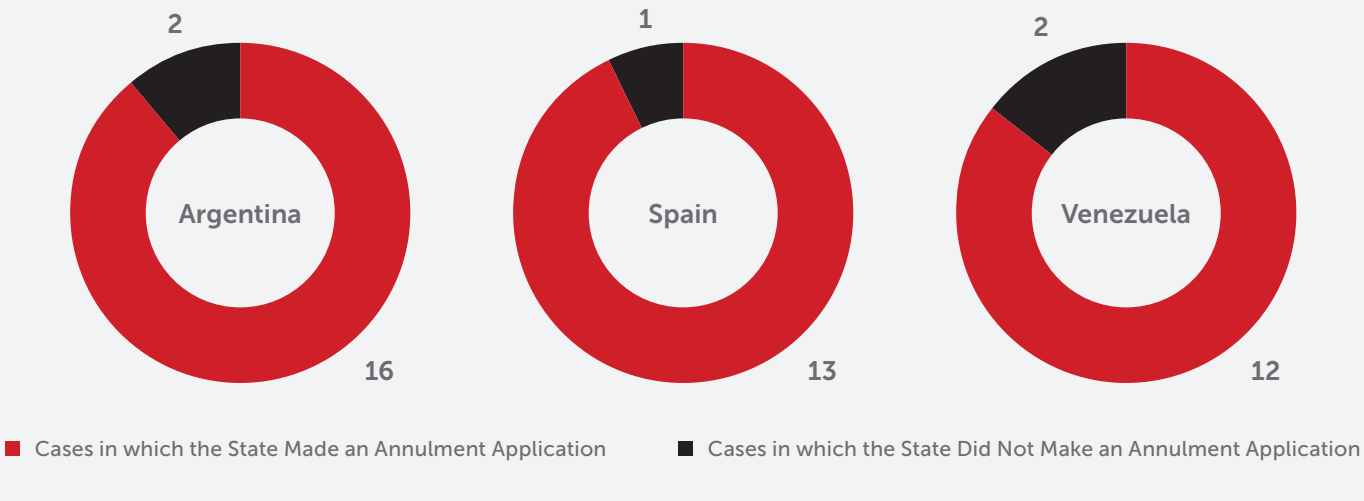
Chart 8: Breakdown of Parties Making Annulment Applications



While it is therefore unsurprising that Argentina, Venezuela and Spain feature pro*mine*ntly among those seeking to annul unfavourable ICSID awards, their willingness to resort to annulment is nonetheless worth noting: Argentina has sought to annul 16 of the 18 unfavourable ICSID awards (the other two awards – *Hochtief*[24] and *LG&E Energy*[25] – were both subject to annulment applications from the claimants). Similarly, Venezuela has sought to annul 12 of the 14 unfavourable awards (the two awards it did not seek to annul were the earliest awards rendered against it, *Fedax*[26] in 1998 and *Autopista Concesionada*[27] in 2003). Finally, Spain has sought to annul 13 of the 14 unfavourable awards (the one exception was the earliest award rendered against it, *Maffezini*[28]).

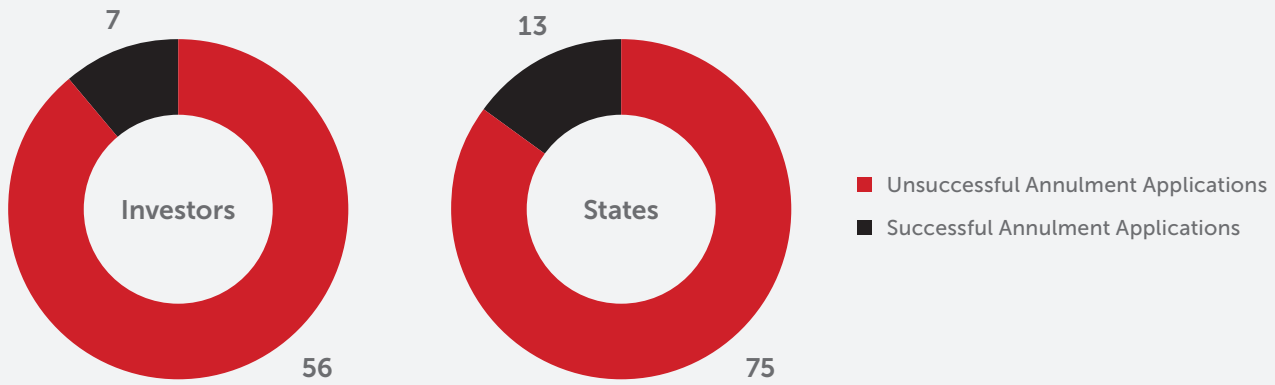
In recent years a very large number of annulment applications have been filed by European Union Member States, presumably as a consequence of the Court of Justice of the European Union's *Achmea* judgment.[29] Out of the 41 annulment applications filed between 2018 and 2020, 17 (or 41%) were filed by EU Member States that may have felt legally compelled to do so as a matter of EU law.

Chart 9: Most Frequent Applicants



Overall, States have enjoyed somewhat more success in their annulment applications than investors. Of the six awards annulled in full, three were challenged by the investor (Klöckner I, *Fraport I* and *Malaysian Historical Salvors*) and three were challenged by the State (*Patrick Mitchell*, *Sempra and Eiser*). Of the 13 awards to be partially annulled, three were challenged by the investor (*Vivendi I*, *Helnan* and RSM), eight were challenged by the State (*Amco I*, *Maritime International* Nominees, *CMS*, *Enron*, *Pey Casado I*, *Occidental II*, *Tidewater* and *Mobil Corporation*) and two (*Amco II* and *TECO*)[30] were challenged by both the State and the investor. States have thus, to date, succeeded in 13 of their 66 concluded annulment applications, while investors have succeeded in seven of their 58 concluded annulment applications.[31] Given the limited number of successful applications, it is hard to draw firm conclusions from these figures.

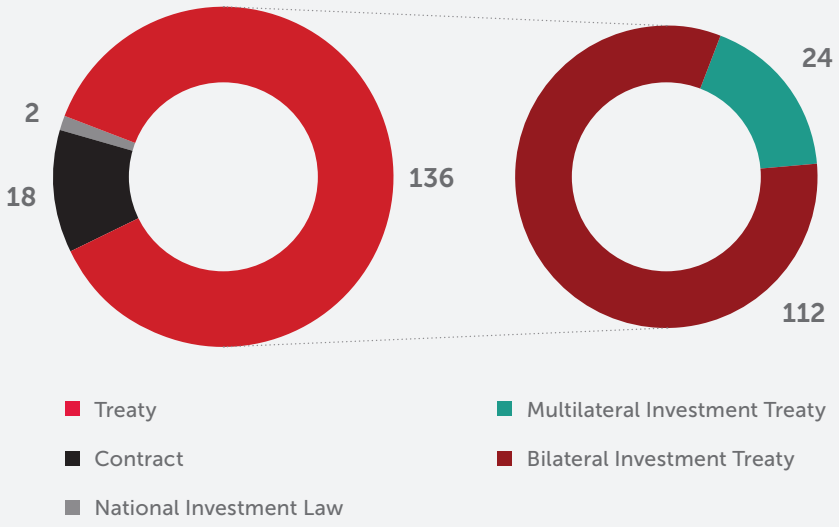
Chart 10: Success of Investors vs States



INVESTMENT INSTRUMENT

Of the 156 annulment proceedings registered to date, 111 related to awards made under a BIT and 24 to awards made under a multilateral investment treaty (22 under the Energy Charter Treaty ("**ECT**") and two under the North American Free Trade Agreement ("**NAFTA**")). Eighteen related to awards made pursuant to an arbitration agreement in a contract and two related to awards made under a national investment law. In three arbitrations under the ECT, a BIT was also invoked and in one arbitration under a BIT, a contract was also invoked.

Chart 11: Investment Instrument Basis for the Arbitration Proceedings



ICSID awards made pursuant to a contractual agreement appear to be more likely to be annulled than ICSID awards made pursuant to a bilateral or multilateral treaty. They account only for 11.6% of the total number of ICSID annulment proceeding but 26% of all annulled ICSID awards, although it is again hard to draw firm conclusions because of the limited number of successful annulments.

Chart 12: Annulment Proceedings by Geographic Region

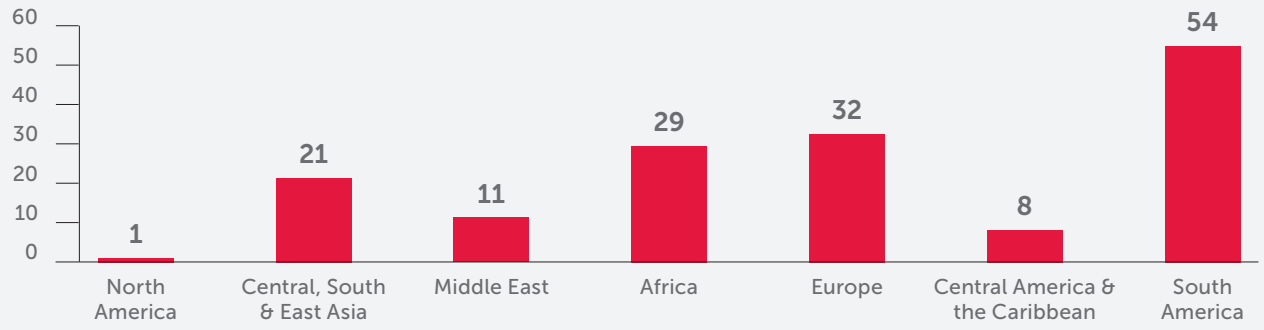
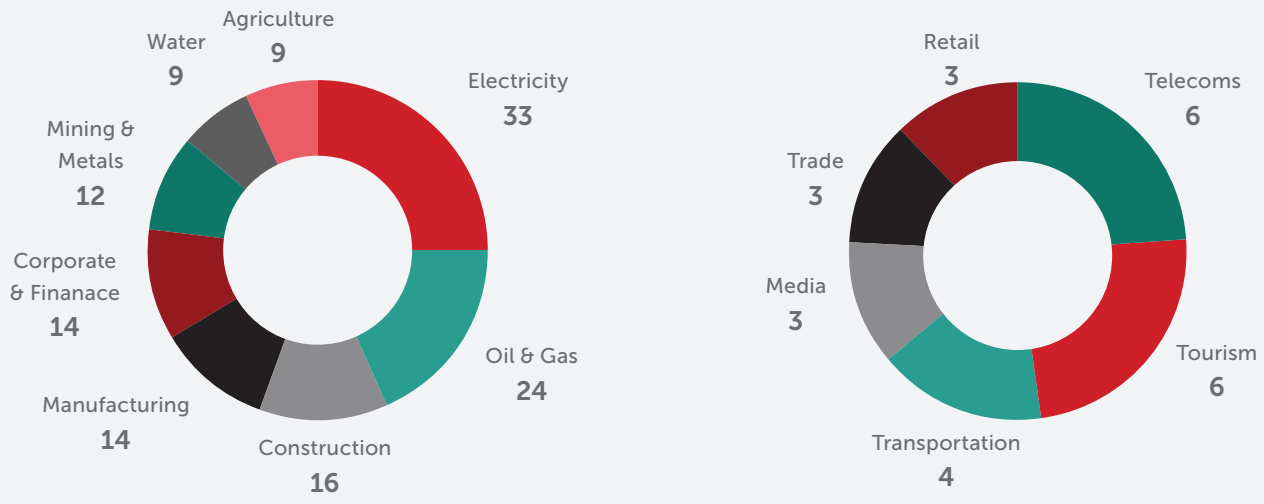


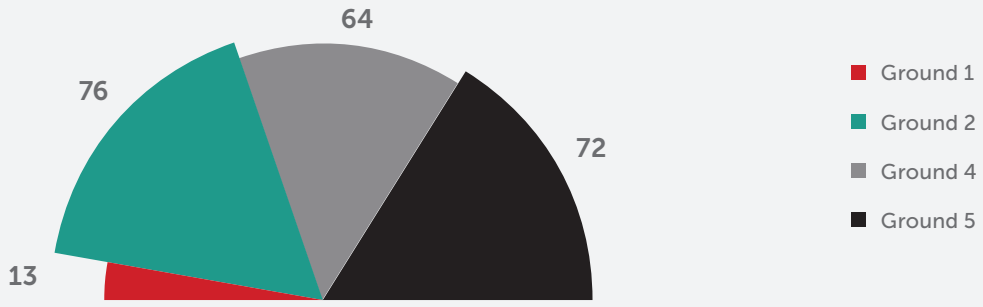
Chart 13: Annulment Proceedings by Investment Subject-Matter



SOME GROUNDS OF ANNULMENT ARE INVOKED FAR MORE THAN OTHERS

The three most commonly invoked grounds of annulment are: (i) that the tribunal manifestly exceeded its powers (invoked in almost all of the 79 cases where the grounds for annulment are known[32]) (Ground 2), (ii) that the award failed to state the reasons on which it is based (in about four-fifths of cases) (Ground 5) and (iii) that there has been a serious departure from a fundamental rule of procedure (in almost three quarters of cases) (Ground 4).

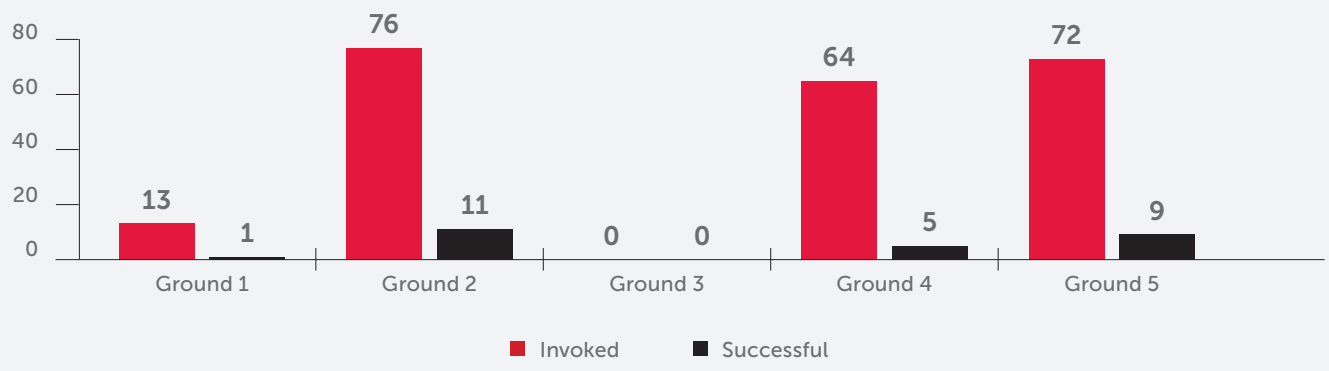
Chart 14: Grounds of Annulment: How Often Invoked



The most commonly invoked grounds of annulment are also the most successful. Ground 2 has a 14.5% success rate.[33] Ground 5 is the second most successfully (and frequently) invoked ground of annulment, with a 12.5% success rate.[34] Ground 4 is the third most successfully invoked ground of annulment with a 7.8% success rate.[35] Ground 1 has a 7.7% success rate.[36]

Seven of the 19 annulment decisions have annulled an award on two grounds.[37]

Chart 15: Grounds of Annulment: Chances of Success



THE LENGTH OF ANNULMENT PROCEEDINGS VARIES

The length of ICSID annulment proceedings varies greatly. The applications in *Astaldi v Honduras, Burlington Resources v Ecuador, Joy Mining v Egypt, KT Asia Investment Group v Kazakhstan* and *Levy v Peru*[38] were all resolved in less than a year. By contrast, the longest proceedings were in *LG&E v Argentina*[39] which lasted approximately six and a half years.

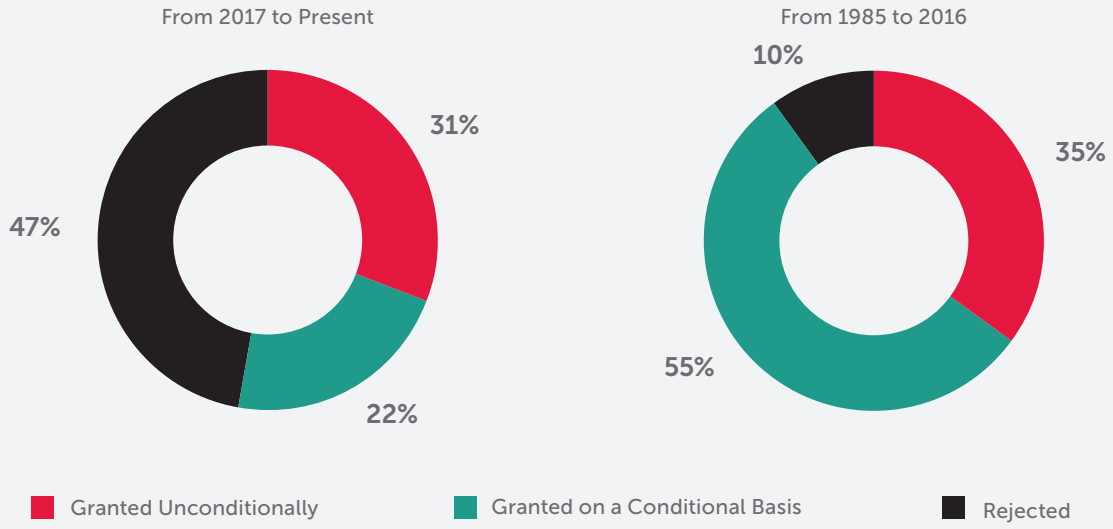
STAY OF ENFORCEMENT

Under Article 52(5) of the ICSID Convention, a party to an annulment proceeding may apply for a full or partial stay enforcement of an award pending the decision of the *ad hoc* committee. Applications are granted where the committee considers that the circumstances require it. Past decisions on stay applications show that relevant circumstances include: (i) the prospect of prompt compliance with the award; (ii) hardship to one of the parties; (iii) the risk of non-recovery; (iv) irreparable harm to the award debtor; (v) late requests for annulment; (vi) the enforcement regime; and (vii) the balancing of interests.[40] Circumstances that have been considered insufficient to grant or continue a stay include: (i) strained public resources and a need to reallocate the State's public budget to meet an award[41] and (ii) limitations arising out of the State's obligations under EU law.[42]

Applications for a stay of enforcement used to be granted almost as a matter of course. Between 1985 and 2016, ICSID *ad hoc* committees rendered 43 stay decisions, granting the stay application on 36 occasions (83.7% of decisions). Those stays were granted either conditionally (22 cases, on the provision of financial security or a written undertaking) or unconditionally (14 cases). In 11 of those 22 conditional cases, the stay was later terminated because the conditions of the stay were not satisfied.

Since 2017, *ad hoc* committees have become

Chart 16: Stay of Enforcement



Based on 81 Decisions on Stay of Enforcement.

much slower to grant stays. They have decided 38 applications, of which six remain unpublished. Out of the 32 publicly available decisions, 15 applications were rejected. Conditional stays were granted in seven cases and unconditional stays were granted in the remaining ten cases.[43]

The new, more restrictive trend may be explained by the fact that certain States now seek annulment and stay of enforcement as a matter of course and are finding it increasingly difficult to meet the unchanged high legal threshold for a stay. For example, nine of the recent applications have concerned Spain, and its argument that a stay should be granted because of the legal quagmire it finds itself in as a result of arguably conflicting EU law and international law obligations, has been rejected in all cases.

DECISION ON COSTS

ICSID *ad hoc* committees deter*mine* the allocation of costs incurred by the parties in connection with the annulment proceeding including committee fees and expenses.[44]

Historically, ICSID *ad hoc* committees tended to follow the traditional public international law approach, dividing costs equally between the parties and ordering that each party bear that party's own costs. In the last five years, however, there has been a steep increase in *ad hoc* committees applying a "costs follow the event" (or "loser pays") approach. Between 1985 and 2009, there was full or partial cost-shifting in 28% of proceedings. Since 2010, that number has increased to 81%.

Chart 17: Allocation of Costs of Proceedings

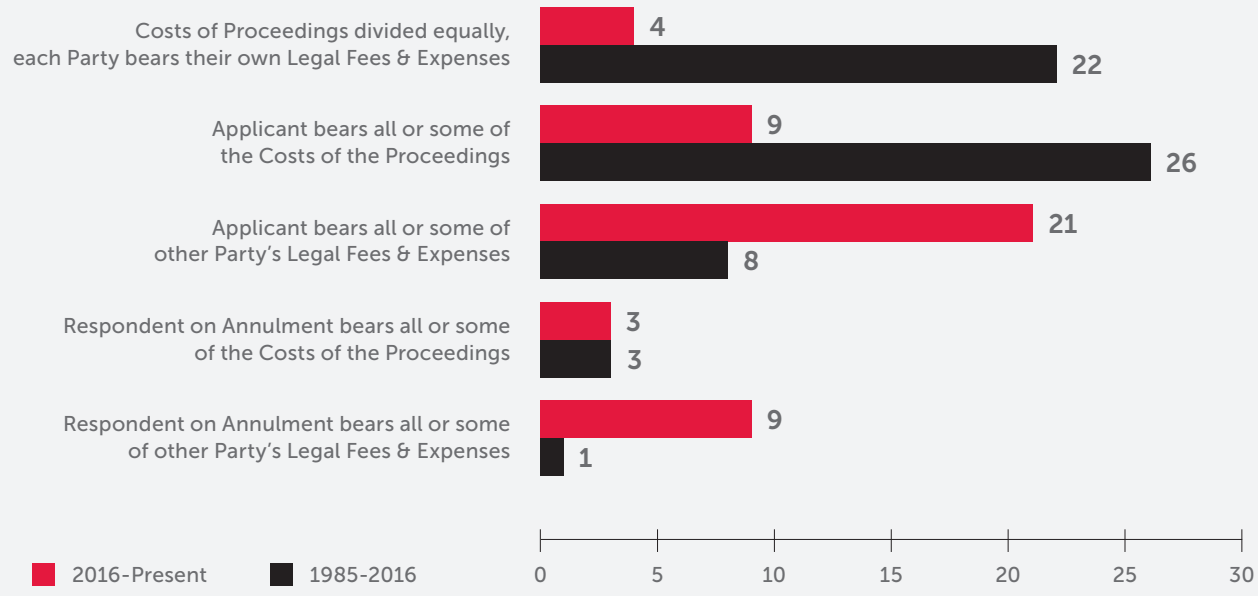
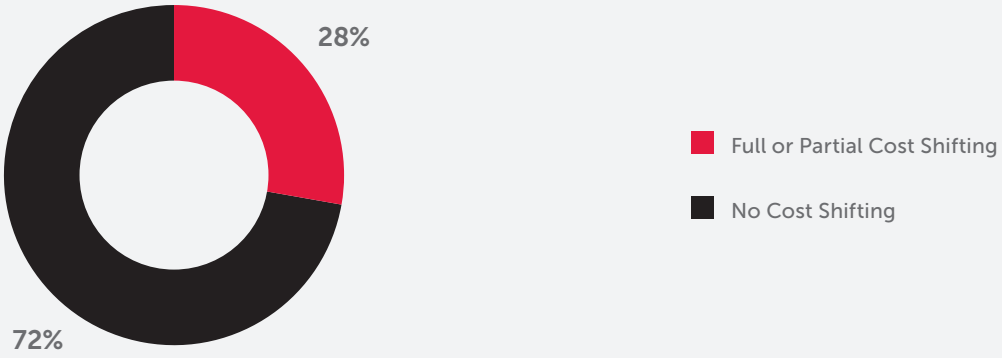
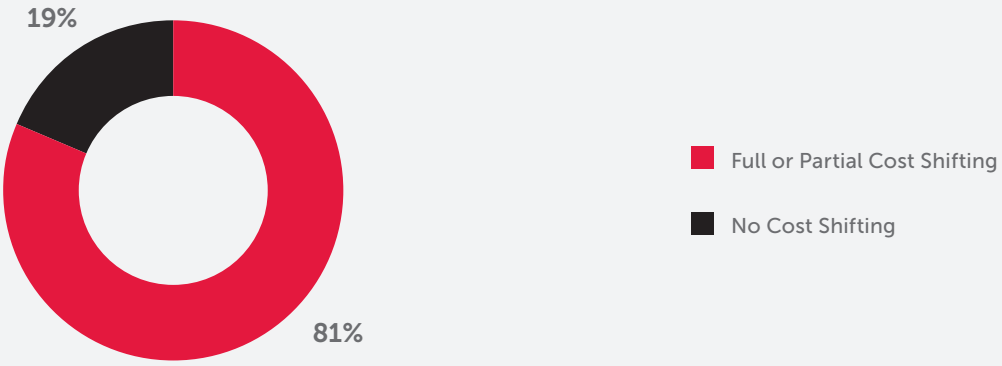


Chart 18: Cost-Shifting in Annulment Proceedings, from 1985 to 2009



Based on 18 Decisions on Costs.

Chart 19: Cost-Shifting in Annulment Proceedings, from 2010 to Present



Based on 70 Decisions on Costs.

COMPARISON TO NON-ICSID ANNULMENT/ SET-ASIDE PROCEEDINGS (AS OF 1 FEBRUARY 2021)

We have identified 96 publicly known annulment proceedings before domestic courts around the globe concerning an investor-State award not governed by ICSID (primarily awards rendered under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules and the ICC Rules of Arbitration).[45]

Mirroring the growth in ICSID annulment proceedings over the last decade, the number of non-ICSID annulment proceedings has also increased significantly in recent years. About two-thirds of the identified proceedings were initiated in the period between 2010 and 2020, half of them from 2015. This is, however, still a less dramatic increase than the recent growth in ICISD annulment proceedings.[46]

Chart 20: Number of Non-ICSID Annulment Proceedings Initiated Each Year

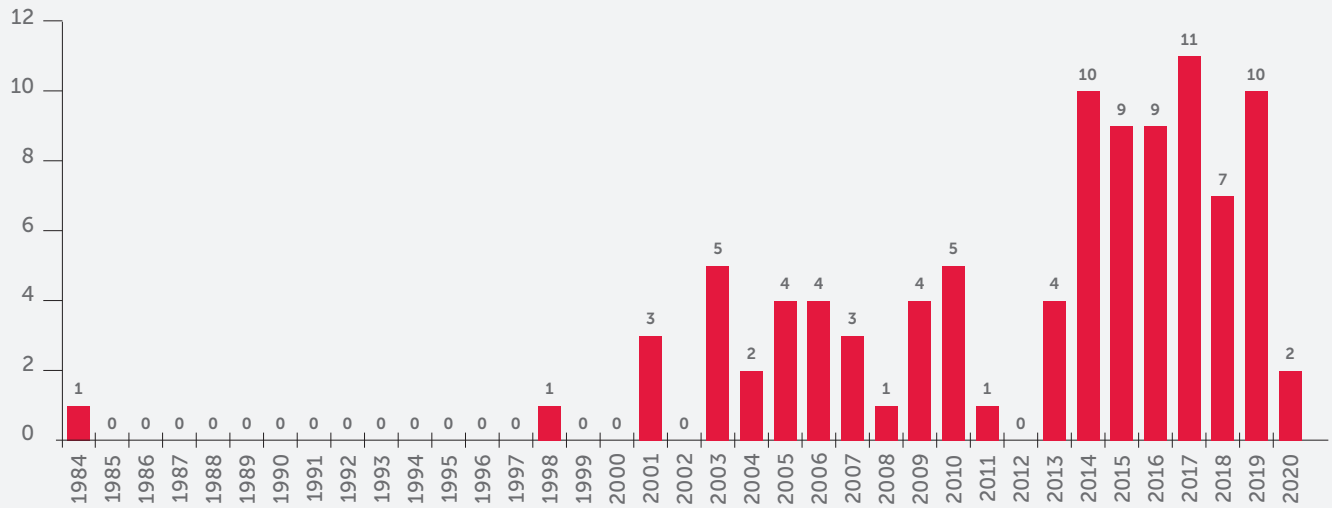
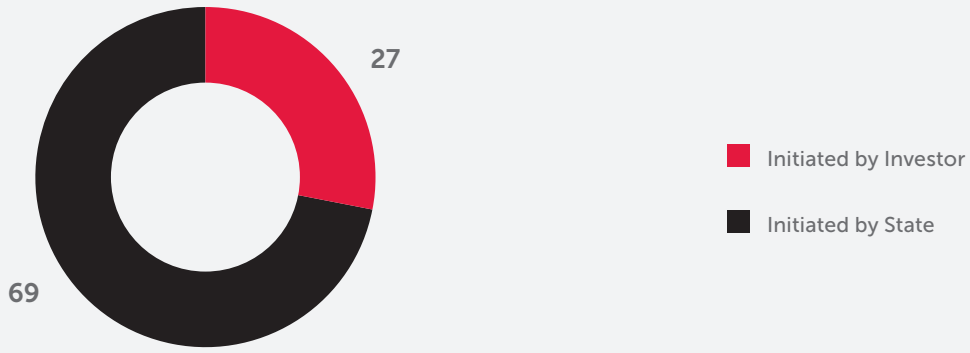


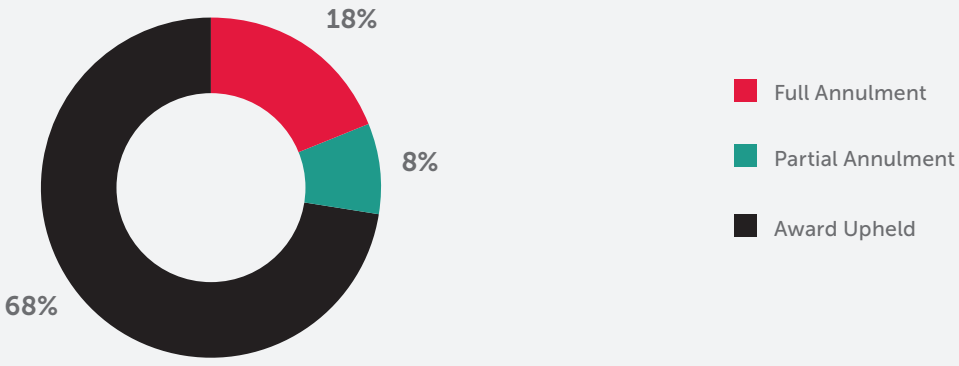
Chart 21: Number of Non-ICSID Annulment Applications Initiated by States and Investors



Of the 96 non-ICSID annulment proceedings, just under three-quarters were initiated by States. This figure is even higher than the 56.5% of ICSID annulment proceedings initiated by States.

Non-ICSID annulment applications appear to have a significantly higher rate of success than ICSID annulment applications: 26 of the proceedings resulted in full or partial annulment of the award (27.65% of the 94 concluded proceedings)[47], compared with just 21.59% of ICSID annulment proceedings.[48]

Chart 22: Results In Completed Non-ICSID Proceedings



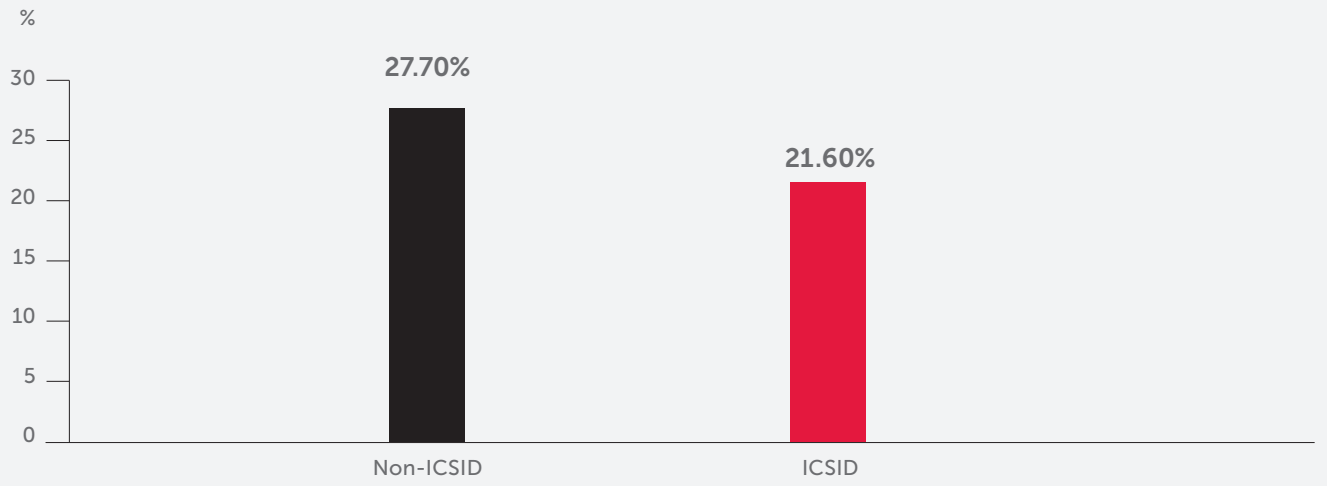
Based on 94 Non-ICSID Annulment Decisions.

Whether and to what extent these divergences are due to differences in the available grounds for annulment, diverging approaches taken by national courts and ICSID *ad hoc* committees, or other factors is a matter for further study.[49]

The most frequently invoked ground for non-ICSID annulment (broadly categorised) is an excess of authority by the tribunal (invoked in 62.5% of the proceedings). This resembles the most commonly-invoked ground for annulment under the ICSID Convention, that the tribunal manifestly exceeded its powers (invoked in 96% of the ICSID cases where the grounds for annulment are known – see Section on Ground 2 – Manifest Excess of Powers). The ground of excess of authority by the tribunal has been upheld in 12 of the non-ICSID proceedings in which it was invoked, representing a success rate of 20%. This figure is similar to the success rate of the ICSID Convention ground, which as discussed in Section on Key trends and statistics regarding ICSID annulment proceedings above has a 14.5% success rate.

The second most commonly invoked ground for annulment in non-ICSID annulment proceedings is the violation of the public policy of the arbitral seat (invoked in 37.5% of the cases). This ground has no equivalent under the ICSID Convention. It has been upheld in five cases (14% of the proceedings in which it was invoked). Other commonly invoked grounds for annulment in non-ICSID proceedings include irregularity in the proceedings or the composition of the tribunal (34.3% of the cases studied), incapacity of the parties or invalidity of the annulment agreement (24% of the cases studied) and improper notice or inability to present a party's case (24% of the cases studied).

Chart 23: Success Rates of ICSID vs Non-ICSID Annulment Proceedings



Based on 89 ICSID Annulment Decisions and 94 Non-ICSID Annulment Decisions.

The grounds for annulment under the ICSID Convention

This section will outline the main jurisprudential trends and *ad hoc* committee decisions under the five annulment grounds contained in Article 52(1) of the ICSID Convention.

GROUND 1 – IMPROPER CONSTITUTION OF THE TRIBUNAL

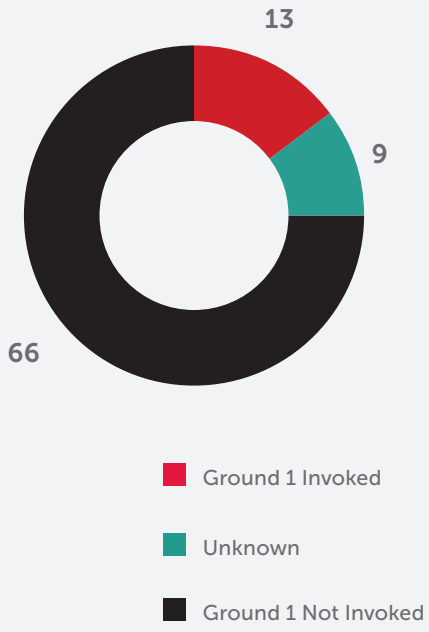
Article 52(1)(a) states that a party may request the annulment of an award on the basis that "*the Tribunal was not properly constituted*". *The term "properly constituted"* covers technical departures from the parties' agreement on the method of constituting the arbitral tribunal or arbitrator qualifications (e.g., arbitrator nationality). Committees are divided over whether there is also scope for annulment where an arbitrator fails to meet the standard of independence and impartiality required for all arbitrators by Article 14(1) of the Convention (whether party or chair-appointed), and if so, if this is the case even if there has been a dismissal of a challenge before the tribunal.[50]

Articles 57-58 of the Convention provide for Article 14(1) challenges to the tribunal in an arbitral proceeding. The challenge right is qualified in that there must be a "*manifest*" lack of the required qualities, and a challenge is waived if not promptly pursued.[51] A challenge is to be decided by the non-challenged arbitrators, or the Chairman of the ICSID Administrative Council in the case of the challenge of a majority of arbitrators or a sole arbitrator (Article 58).

Overall Findings

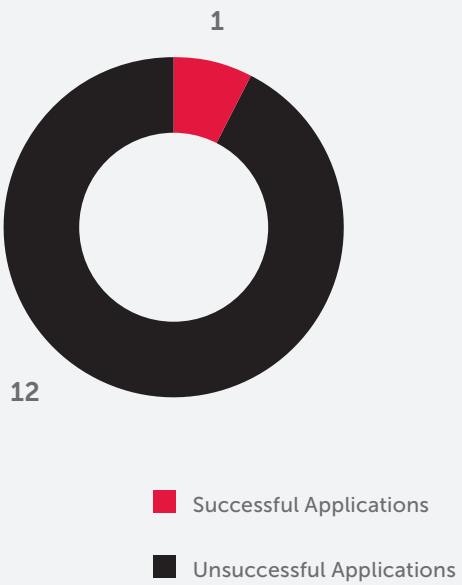
Ground 1 was invoked in 13 completed proceedings and is thus the second least invoked ground.

Chart 24: Frequency of Ground 1 Claims



Of these 13 occasions, Ground 1 has succeeded only once (in *Eiser*).[52]

Chart 25: Ground 1 Results



Challenges have focused on alleged breaches of the impartiality and independence standard. Ground 1 is often invoked in conjunction with Ground 4 (a serious departure from a fundamental rule of procedure).

Ten of the 13 invocations of Ground 1 were based on an asserted breach of Article 14(1). Three challenges were soley based on, or included, more technical procedural grounds. These were that: (i) the body that took an arbitrator disqualification decision in the underlying arbitration was not the proper body under Article 58 of the Convention;[53] (ii) ICSID followed an incorrect appointment process (in the absence of the appointment of an arbitrator by a party);[54] and (iii) during the underlying arbitration one of the parties forfeited its right to appoint an arbitrator when the arbitrator it had appointed resigned.[55]

Of the ten unsuccessful occasions on which an impartiality and independence claim was rejected, four *ad hoc* committees held that the applicant knew or should have known about an issue but did not raise its concerns at the appropriate time. The most frequently cited decisions by *ad hoc* committees are the contrasting decisions in *Azurix* (issued in 2009) and *EDF* (issued in 2016).[56]

Elements of Ground 1 and Relevant Case Law

Proceedings involving Ground 1 claims are in two categories: (i) claims regarding a lack of independence or impartiality and (ii) claims regarding a failure to follow appointment procedures.

Independence and Impartiality

Ten of the 13 Ground 1 challenges related to an alleged failure by the arbitrator to meet the standards of independence and impartiality in Article 14(1).[57] These allegations invariably involved assertions that arbitrators had failed to make disclosure of material indicating a potential conflict of interests, as provided for in Rule 6 of the ICSID Arbitration Rules.

In *Azurix*, the first decision that dealt with Ground 1, the committee took the view, relying on the absence of the reference to Article 14 in Article 52(1)(a) and the limited role of annulment under the Convention, that annulment would only be justified where, in respect of a challenge before a tribunal under Article 57 to 58, the technical process for the determination of that application had not been complied with (e.g., the wrong decision-makers decided the challenge). The committee saw no scope for review of the merits of the decision, which would amount an impermissible merits appeal.[58] Similarly, if no challenge was made at all (including because the facts supporting an asserted conflict had not been disclosed before the end of proceedings), there was no failure to follow procedure and there could be no annulment.[59]

Other committees have disagreed with *Azurix*. The committee in *EDF* found that, failure to meet Article 14(1) at any point in an arbitrator's tenure (i.e., including a tribunal ceasing to be properly constituted due to subsequently arising partiality concerns) is also a ground for annulment under Article 52(1)(a).[60] In reaching this conclusion, the *EDF* committee relied on the text of Article 40 of the Convention, which requires arbitrators appointed from outside the ICSID Panel of Arbitrators to meet the Article 14(1) standard. The *EDF* committee found this was the case, whether or not an Article 57 challenge had been made. Where an Article 57 process had been followed, and a challenge rejected, a committee's role on annulment was necessarily more limited (in *EDF* the impartiality of two arbitrators was challenged and an Article 57 challenge had only been sought in relation to one of them).

Where there had been no Article 57 challenge, the *EDF* committee considered that, in the absence of an existing evidential record, it necessarily had to decide *de novo* the question of whether Article 14(1)'s standard of independence and impartiality was violated. This meant determining, first, if the right to challenge an arbitrator had been waived under ICSID Rule 27. If it had not been waived, the committee would rule on the facts and law, with the burden of proof on the applicant. In terms construing the applicable legal framework, the committee concluded that the "*manifest*" standard required by Article 57 means an "evident" or "obvious" lack of independence and impartiality, and that, drawing on previous Article 57 decisions, proof of actual bias is not required, but rather objective evidence of an appearance of dependence or bias on a reasonable evaluation of that evidence.[61] The committee also held the applicant did not need to prove impartiality had a material effect on the award by only that it could have.[62]

In contrast, where an Article 57 challenge had been made, it was necessary, given ICSID's preference for contemporaneous bias challenges, that committees should not rule *de novo*.[63] The disqualification decision of the tribunal should be accepted unless that decision was plainly unreasonable.[64]

The *Eiser v Spain*[65] decision is the only known instance of an *ad hoc* committee annulling an award on the basis of Ground 1. The underlying award related to Spain's decision to withdraw financial incentives in the renewable energy sector. Spain claimed that there was "*manifest appearance of bias*"[66] of the investor's appointed arbitrator due to an undisclosed longstanding relationship with the investor's the damages consultant. The *ad hoc* committee applied a substantially similar approach to that in *EDF v Argentina* (there had been no Article 57 application as the relationship was undisclosed). The committee considered that the facts did create a manifest appearance of bias to the reasonable observer and there was a clear possibility of a material impact on the award.

Procedural Grounds

Three of the 13 Ground 1 claims were based on or included procedural or "technical" grounds for annulment.[67] In *Azurix v Argentina*, as well as asserting impartiality grounds, the applicant claimed that the body which took the disqualification decision (the other two members of the Tribunal), was not the proper body prescribed by Article 58.[68] The *ad hoc* committee concluded (without further analysis) that there was no suggestion that the body which took the disqualification decision, was not the proper body prescribed by Article 58, as it was taken by the unchallenged members of the Tribunal.

Carnegie Minerals v Gambia involved a challenge regarding the process followed by ICSID in appointing an arbitrator in the absence of a party-appointed arbitrator. In the circumstances, the applicant had failed to appoint its arbitrator within the contractually stipulated timeframe. Therefore, the *ad hoc* committee concluded that the tribunal was constituted "*in accordance*" with the contractual agreement of the parties under a licence contract and rejected the challenge.[69]

In *Pey Casado II*, the applicant claimed that one of the parties had forfeited its right to appoint one of the arbitrators after its first appointee resigned.[70] The *ad hoc* committee decided that "*it would exceed its powers*" to deter*mine* that the resubmission tribunal was not

properly constituted in a case where the applicant refused to submit a formal request for disqualification of the arbitrator.[71] Therefore, it rejected the Applicants' request to annul the Resubmission Award based on Article 52(1)(a) of the ICSID Convention.

Waiver / Timing of Objections

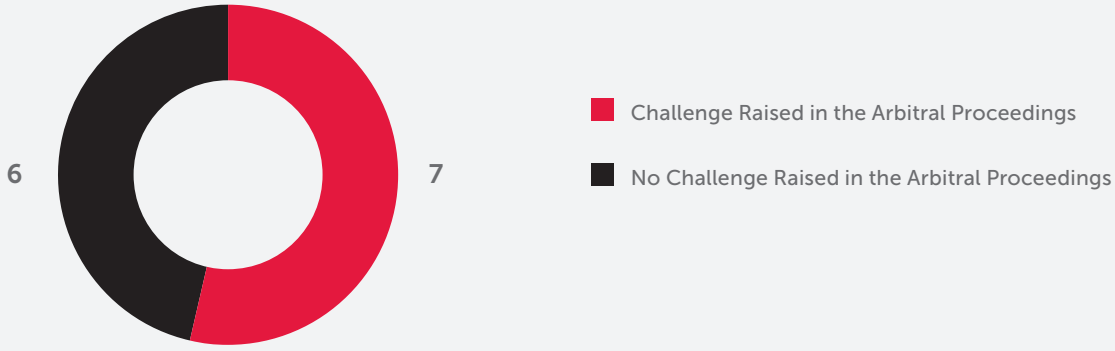
As noted, committees rejected four claims on the basis that the applicant knew (or should have known) about an issue giving rise to a Ground 1 challenge but did not raise its concerns at the appropriate time.

A previous challenge was made during the arbitral proceedings on seven occasions (54%) and no challenge was made in the remaining six instances (46%). In *Eiser*, the challenge was raised for the first time during the annulment proceedings. The *Eiser* annulment committee held that *"a clear and unequivocal waiver"*[72] is needed to surrender a right so fundamental that it goes to the very foundation of the proper constitution of the tribunal.[73]

Conclusion

Compared to some of the other annulment grounds under the ICSID Convention, Ground 1 has received relatively limited attention from parties seeking the annulment of awards. Committees frequently refer to the decisions by the committees in *Azurix* (which applied a very narrow "process only" approach) and *EDF v Spain* (which applied a broader approach). *Ad hoc* committees deciding Ground 1 challenges will either apply a *de novo* standard where no Article 57 challenge was made during the arbitration or conduct a limited reasonableness review of a challenge made before the tribunal. Following the successful application in *Eiser*, it remains to be seen whether there will be an increase in annulment applications under Ground 1.

Chart 26: Timing of Objections



GROUND 2 – MANIFEST EXCESS OF POWERS

Article 52(1)(b) provides for the annulment of an award on the basis *"that the Tribunal has manifestly exceeded its powers."* Applications based on this ground have usually related to either (i) a tribunal allegedly incorrectly finding that it has or does not have jurisdiction or (ii) a tribunal allegedly failing to apply the applicable law (whether that be domestic law, the BIT or customary international law).

Overall Findings

Ground 2 has been invoked in almost 90% of all completed annulment proceedings.[74]

Ground 2 has been successfully invoked on 11 occasions and is thus the most successful annulment ground under the ICSID Convention.

Of those 11 occasions, three annulments related to an incorrect finding of jurisdiction,[75] six decisions related to the applicable law[76] and two decisions related to other tribunal powers.[77]

Elements of Ground 2 and Relevant Case Law

Ground 2 applications must demonstrate (i) that the tribunal exceeded its powers and (ii) that that excess of powers was manifest.

Chart 27: Frequency of Ground 2 Claims

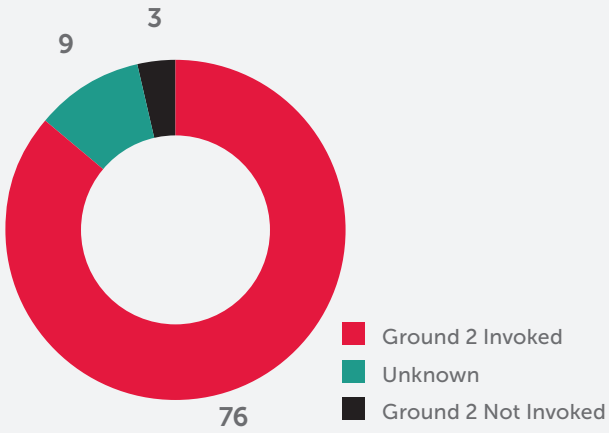


Chart 28: Ground 2 Results

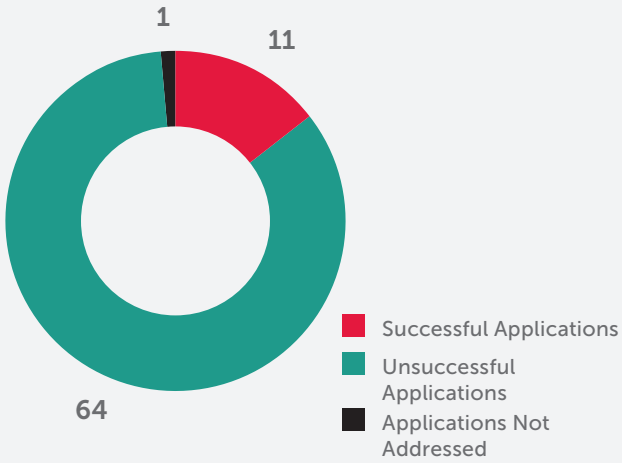
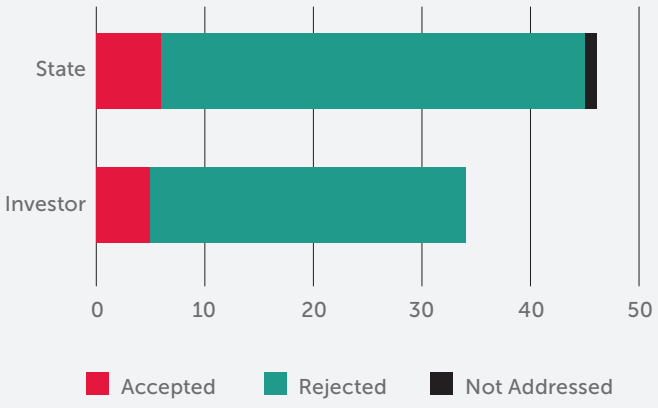


Chart 29: Comparative State vs Investor Success Rates



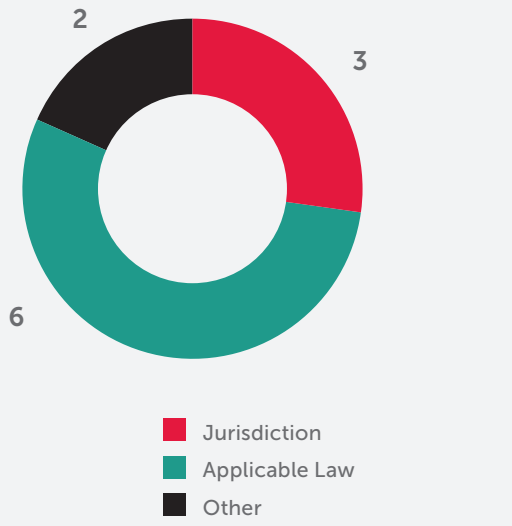
Excess of Powers

The reference to powers in Ground 2 usually relates to either (i) a tribunal's decision to accept or decline jurisdiction or (i) a tribunal's failure to apply the applicable law. The committee in *Helnan v Egypt* explained the concept of "powers" as follows:

> ***The concept of the 'powers' of a tribunal goes further than its jurisdiction, and refers to the scope of the task which the parties have charged the tribunal to perform in discharge of its mandate, and the manner in which the parties have agreed that task is to be performed. That is why, for example, a failure to apply the law chosen by the parties (but not a misapplication of it) was accepted by the Contracting States of the ICSID Convention to be an excess of powers, a point also accepted by ad hoc committees. Further, a failure to decide a question entrusted to the tribunal also constitutes an excess of powers, since the tribunal has also in that event failed to fulfil the mandate entrusted to it by virtue of the parties' agreement.***[78]

Ground 2 does not distinguish between (or impose different standards on) jurisdictional errors and "merits" errors (failure to apply the applicable law to merits issues).[79]

Chart 30: Breakdown of Successful Ground 2 Applications



Jurisdictional Errors

Under Ground 2, any excess of powers (including in relation to jurisdiction) must be manifest. As a result, *ad hoc* committees do not typically carry out a full *de novo* review regarding jurisdiction and should not simply annul awards because they disagree with the tribunal's original finding.[80] The *ad hoc* committee's decision in *Alimentos v Peru* is illustrative of a deferential approach to the findings of ICSID arbitral tribunals:

> ***In the Committee's view, treaty interpretation is not an exact science, and it is frequently the case that there is more than one possible interpretation of a disputed provision, sometimes even several. It is no part of the Committee's function, as already indicated above, to purport to substitute its own view for that arrived at by the Tribunal.***[81]

Notwithstanding this deferential approach, some awards have been annulled on Ground 2. The award in *Occidental v Ecuador II* was partially annulled on the basis that the tribunal wrongfully defined the scope of the investor's investment. The *ad hoc* committee held that "[b]*y compensating a protected investor for an investment which is beneficially owned by a non-protected investor, the Tribunal has illicitly expanded the scope of its jurisdiction and has acted with an excess of powers.*"[82] As a result, the *ad hoc* committee reduced the damages payable to the investor.

Conversely, the award in *Malaysian Historical Salvors v Malaysia* was annulled on the basis that the tribunal wrongfully held that there was no investment under the BIT (and thus no jurisdiction). The tribunal held that there was no investment under the ICSID Convention and did not consider whether there was an investment under the relevant BIT. The *ad hoc* committee held that:

> ***[B]y the terms of the [BIT], and for its purposes, the Contract is an investment. There is no room for another conclusion. The Sole Arbitrator did not reach another considered conclusion in respect of the Agreement. He rather chose to examine, virtually exclusively, the question of whether there was an investment within the meaning of Article 25(1) of the ICSID Convention. Finding that there was not, he found that 'it is unnecessary to discuss whether the Contract is an 'investment' under the BIT'.***[83]

As a result, the *ad hoc* committee found "*the failure of the Sole Arbitrator even to consider, let alone apply, the definition of investment as it is contained in the [BIT] to be a gross error that gave rise to a manifest failure to exercise jurisdiction.*"[84]

Failure to Apply the Applicable Law

The failure to apply the applicable law has regularly arisen in annulment proceedings related to Ground 2.[85] This basis for annulment must be distinguished from the misapplication of the applicable law. The *ad hoc* committee in *Amco I* described the dividing line as follows:

> ***The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc Committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law would constitute a manifest excess of power on the part of the Tribunal and a ground for nullity under Article 52(1)(b) of the Convention.***[86]

Six of the 11 successful annulment applications under Ground 2 have been based on a tribunal's failure to apply the applicable law. For example, the award in *Vivendi v Argentina* was partially annulled on the basis that the tribunal failed to apply the relevant BIT. Instead, the tribunal had only addressed the investors' claims under a concession contract.[87]

The award in *Enron v Argentina* was annulled after the *ad hoc* committee held that the tribunal had failed to apply customary international law to the State's claimed defence of necessity. Argentina had relied on International Law Commission Article 25(1)(a) to argue that the relevant measures that it took were the only way to safeguard an essential interest. The tribunal rejected that argument and held that there were indeed other options that the State could have taken. The *ad hoc* committee focused on whether tribunal had addressed the specific elements of the issue:

> ***The Tribunal was required to determine whether, on the proper construction of Article 25(1)(a) of the ILC Articles, the 'only way' requirement in that provision was satisfied, and not merely whether, from an economic perspective, there were other options available for dealing with the economic crisis. The Committee concludes that in determining that the measures adopted were not the 'only way', the Tribunal did not in fact apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances the Committee finds that this amounts to a failure to apply the applicable law, as ground of annulment under Article 52(1)(b) of the ICSID Convention.***[88]

The award in *Sempra v Argentina* was annulled in full on the basis that the tribunal failed to apply the BIT to an issue relied on by the State. Argentina sought to rely on an essential security exception included at Article 11 of the United States-Argentina BIT. The tribunal's failure to apply Article 11 of the BIT and its decision to instead apply the customary international law standard for the '*state of necessity*' defence meant that the tribunal had "*failed altogether to apply the applicable law and, by failing to do so, has committed a manifest excess of powers.*"[89]

The award in *Mobil Corporation v Venezuela* was partially annulled on the basis that the tribunal failed to apply a compensation limitation in the relevant project contract when calculating compensation under the relevant BIT. The tribunal ignored that limitation for two reasons. First, Venezuela was not a party to the project contract (a State entity was) and the project contract therefore should not affect Venezuela's liability under the BIT. Second, the tribunal held that Venezuela could not, under international law, rely on domestic law (i.e. the project contract) to limit its obligations under international law (i.e. the BIT).

In response, the *ad hoc* committee held that resolving questions of international law under the relevant BIT may involve the application of domestic law and that the project contract (and its compensation limitation) affected the market value of the investment.[90] Further, the second ground was deemed irrelevant as there was no conflict between international and national law in the dispute at hand. Critically, the tribunal then calculated compensation based on customary international law and not based on the limitation in the project contract. The tribunal therefore had "*manifestly exceeded its powers to the extent that it held that general international law, and specifically customary international law, regulated the determination and assessment of the compensation due in place of the application of the provisions of the BIT.*"[91]

Incorrect Application of the Applicable Law

Ad hoc committees have regularly reiterated that the annulment process is not to be treated as an appeal process. Nevertheless, there is debate regarding the dividing line between non-application of the applicable proper law and its mere misapplication.

In *Tidewater v Venezuela*, it was noted that "[s]*ometimes, the line between non-application of the proper law and its misapplication may be difficult to draw but it exists and must be found.*"[92] However, other committees have accepted that a misapplication may be so grave as to constitute a non-application of the applicable law. For example, in *Soufraki v UAE*, it was held that while the "*wrong application or interpretation*

of the law is not a ground for annulment [...] its practical application to concrete sets of facts may at times not be self-evident."[93] On that basis, it was held that:

> ***Misinterpretation or misapplication of the proper law may, in particular cases, be so gross or egregious as substantially to amount to failure to apply the proper law. Such gross and consequential misinterpretation or misapplication of the proper law which no reasonable person ('bon pere de famille') could accept needs to be distinguished from simple error - even a serious error - in the interpretation of the law which in many national jurisdictions may be the subject of ordinary appeal as distinguished from, e.g., an extraordinary writ of certiorari. In the present annulment proceedings, both Claimant and Respondent have acknowledged during the oral hearing that an egregiously wrong interpretation of the proper law - though nothing short of that - may amount to annullable error.***[94]

The tribunal had, as required, applied Italian law to the issue of investor nationality. As part of that, and amongst other claims, the applicant argued that the tribunal had incorrectly interpreted the 'caso d'uso' clause in an office lease agreement. Such an asserted error was found to fall well short of the "egregiously wrong" standard postulated. It was it an ordinary error and was marginal to the final decision of the claim.[95]

The position that an egregious error may be sufficient to satisfy Ground 2 has been endorsed by other *ad hoc* committees.[96] Nevertheless, there are no publicly available decisions in which annulment has been granted on this basis.

Other Instances of Excess of Powers

The cases of *RSM v Saint Lucia* and *Helnan Hotels v Egypt* are illustrative of other issues falling within the scope of Ground 2. The committee in *RSM v Saint Lucia* partially annulled an award on the basis that the tribunal manifestly exceeded its powers by dismissing RSM's claims *"with prejudice"* as a result of the investor's failure to provide security for costs, meaning that the claim could not be recommenced. The committee explained that:

> ***[T]he Tribunal did more than discontinuing the proceedings before it. It dismissed the claims with prejudice. This was not just a discontinuation of the proceedings before the Tribunal because of a failure to provide security for costs. It was effectively a dismissal of the case on the merits, thereby preventing RSM from recommencing proceedings on its claims in the future should it be in a position to provide security for costs.***[97]

The tribunal manifestly exceeded its powers by effectively dismissing the case on the merits over a procedural issue and without actually hearing arguments on the merits.[98]

The committee in *Helnan Hotels v Egypt* also partially annulled the underlying award on the basis that the tribunal had incorrectly held that there was a requirement to exhaust local remedies before commencing ICSID proceedings.[99]

Definition of 'Manifest'

Under Ground 2, applicants must demonstrate that an excess of powers by a tribunal was 'manifest'. As explained in *MINE v Guinea, "Article 52(1)(b) does not provide a sanction for every excess of its powers by a tribunal but requires that the excess be manifest which necessarily limits an ad hoc Committee's freedom of appreciation as to whether the tribunal has exceeded its powers."*[100]

This distinction between 'manifest' and other excesses of power was illustrated in the *Mobil v Argentina* annulment proceedings, which found that the tribunal exceeded its powers by reading a *"non-contribution"* requirement into the essential-security-interests exception of the US-Argentina BIT. However, the *ad hoc* committee reasoned that this excess of powers did not warrant annulment since it was not 'manifest', as required by Article 52(1)(b) of the ICSID Convention.[101]

Further, the approach to defining the term 'manifest' has not been uniform and can be divided into two groups. First, some *ad hoc* committees have defined 'manifest' according to its plain meaning (i.e. that the excess of powers is obvious). As explained by one leading commentator:

> ***In accordance with its dictionary meaning, 'manifest' may mean 'plain', 'clear', 'obvious', 'evident' and easily understood or recognized by the mind. Therefore, the manifest nature of an excess of powers is not necessarily an indication of its gravity. Rather, it relates to the ease with which it is perceived. On this view, the word relates not to the seriousness of the excess or the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.***[102]

This approach has received widespread support and has been endorsed on at least 55 occasions. For example, the *ad hoc* committee in *EDF v Argentina* held that the "requirement that the excess of powers be 'manifest' refers to how readily apparent the excess is, rather than to its gravity."[103] The *ad hoc* committee in *Wena Hotels v Egypt* similarly held that the *"excess of power must be self-evident rather than the product of elaborate interpretation one way or the other. When the latter happens, the excess of power is no longer manifest."*[104]

Second, a smaller number of committees (at least 15 committees) have held that 'manifest' also involves an analysis of the gravity of the excess of powers. The committee in *Impregilo v Argentina* held that *"the excess of power has to be obvious, self-evident, clear, flagrant and substantially serious"*.[105] A similar approach was adopted in *El Paso v Argentina*.[106]

The impact of these differing approaches has been questioned. The *ad hoc* committee in *Soufraki v UAE* acknowledged the different approaches and held that *"a strict opposition between two different meanings of 'manifest' – either 'obvious' or 'serious' – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious."*[107] It was similarly held in *Malicorp v Egypt* that the *"Committee does not believe that these two terms are inconsistent to the extent that what has serious and substantial implications is also clear and obvious."*[108]

Conclusion

Committees have been willing to annul awards on the basis that the tribunal (i) wrongfully assumed jurisdiction or wrongfully declined jurisdiction or (ii) failed to apply the applicable law (though it appears that *ad hoc* committees have been less willing in recent years). It is open to question whether an egregious misapplication of the law can be tantamount to a failure to apply it. Although some have held that a manifest excess of powers also relates to the gravity of the excess of powers, the majority of committees have held that it only requires that the excess of powers must be obvious.

GROUND 3 – CORRUPTION ON THE PART OF THE TRIBUNAL

Article 52(1)(c) of the ICSID Convention provides that an award may be annulled if *"there was corruption on the part of a member of the Tribunal"*.

Overall Findings

Based on a review of publicly available decisions, Ground 3 has never been successfully invoked by a party in annulment proceedings.[109]

Elements of Ground 3

Ground 3 refers to improper personal conduct by an arbitrator and is aligned with ICSID Arbitration Rules, Rule 6. Rule 6 provides that an arbitrator who agrees to serve as a member of a tribunal, is required to declare that he or she *"shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the ICSID Convention."*[110] As a result, an arbitrator's conduct in breach of that declaration would likely lead to the annulment of an award.

During the drafting of Ground 3, various legal experts suggested that the reference to *"corruption"* should be replaced with *"misconduct"*, *"lack of integrity"* or a *"defect in moral character."*[111] There was an alternative suggestion that the ground should be limited to cases where the corruption was evidenced by a judgment of a court, or in instances where there was *"reasonable proof that corruption might exist."*[112] These proposals were put to a vote and dismissed by a large majority.[113] They therefore do not constitute limits on the potential application of Ground 3.

Article 52(2) of the ICSID Convention applies special time limits to claims under Ground 3. The time to seek annulment based on Ground 3 is 120 days from the discovery of the asserted corruption, but this is subject to a backstop of three years, in contrast to the general time limit of 120 days from the date of the award. As a result, an application for annulment under Ground 3 should indicate the date of discovery.[114]

Conclusion

The fact that Ground 3 has received so little attention is reassuring and it is hoped that it remains that way moving forward.

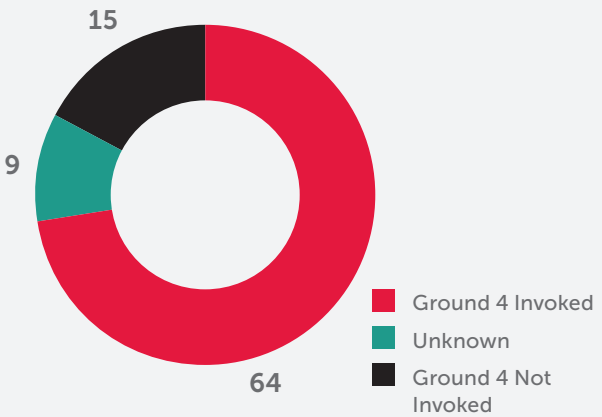
GROUND 4 – SERIOUS DEPARTURE FROM A FUNDAMENTAL RULE OF PROCEDURE

Article 52(1)(d) of the ICSID Convention provides that an award may be annulled if there has been a *"serious departure from a fundamental rule of procedure"*. This ground is generally linked to issues of fairness. These are largely encompassed by (i) what is known as the "right to be heard", (ii) the right of parties to "equality" or "equal treatment" and (iii) the need to ensure that fundamental principles of due process and natural justice are observed.[115] The broad nature of these principles may explain the popularity of Ground 4 among parties seeking to annul ICSID awards.

Overall Findings

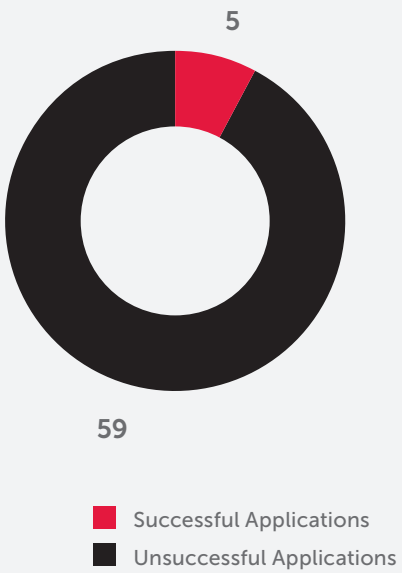
Ground 4 is one of the three most commonly invoked grounds for annulment under the ICSID Convention.[116] It has been invoked in 64 cases (or more than 70% of the 89 public decisions). States made over half the claims, investors made just under half the claims and in a few cases, claims were made by both parties.

Chart 31: Frequency of Ground 4 Claims



Ground 4 claims have only succeeded on only five occasions (i.e., in 8% of cases).[117]

Chart 32: Ground 4 Results



Of the five successful applications for annulment, two were rendered in favour of the investor[118] and three were rendered in favour of the State.[119] Ground 4 was first accepted in the early resubmission annulment decision of *Amco II*. The other successful applications are all recent: *Fraport I v Philippines* in 2010, *Pey Casado I v Chile* in 2012; *TECO v Guatemala* in 2016,[120] and most recently in *Eiser v Spain* in 2020.

Elements of Ground 4 and Relevant Case Law

Not every violation of a rule of procedure will result in the annulment of an ICSID award pursuant to Ground 4.[121] Two cumulative qualifying requirements must be satisfied. First, the rule of procedure must be "*fundamental*". Second, the departure from that fundamental rule of procedure must be "*serious*".

The most cited annulment decisions considering Ground 4 are *MINE v Guinea* and *Wena Hotels v Egypt*.[122] These decisions were among the earliest ICSID annulment applications. *MINE* is frequently cited on the standard of seriousness. *Wena Hotels v Egypt* is the most cited decision concerning what constitutes a "*fundamental*" rule. They have applied a conservative approach to interpreting Ground 4, consistent with Ground 4's limited purpose of safeguarding the integrity of arbitration proceedings, rather than requiring procedural perfection.[123]

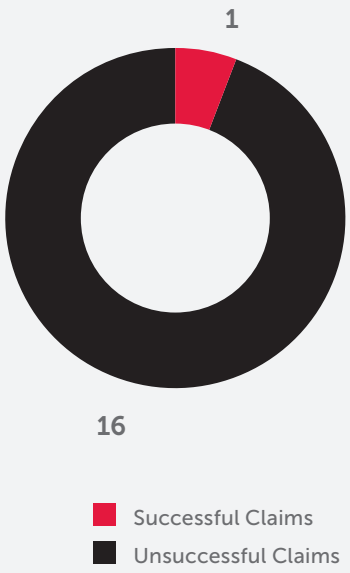
Fundamental Rule of Procedure

As explained in *Wena Hotels v Egypt*, a fundamental rule of procedure refers to a "*set of minimal standards of procedure to be respected as a matter of international law*".[124] That definition has been widely adopted.[125] *Ad hoc* committees have accepted the following as fundamental rules of procedure:[126] (i) the equal treatment of the parties;[127] (ii) the right to be heard;[128] (iii) the independence and impartiality of the tribunal;[129] (iv) the treatment of evidence (including the burden of proof);[130] and (v) the deliberation process.[131]

Equal Treatment of the Parties

Seventeen committees have addressed claims regarding the equal treatment of the parties.[132] The decision in *Amco II* remains the sole case in which the committee accepted an allegation on this basis.

Chart 33: Equal Treatment of the Parties



In *Amco II*, Indonesia successfully argued that the tribunal failed to treat the parties equally by not giving notice to Indonesia of Amco's request for supplemental decisions.[133] The tribunal had deliberated and issued a decision rectifying an arithmetical error in the award without giving Indonesia an opportunity to be heard.[134] The committee indicated that a decision by a tribunal on any request without notice to the other party would breach this rule of equal treatment.[135]

The (un)equal treatment of evidence has been raised in nine out of the 17 proceedings without success.[136] The *ad hoc* committee in *Azurix v Argentina* noted that it is *"only where it can be shown that a tribunal has applied inconsistent standards in the way that it has treated the requests of the different parties that there can be said to be inequality of treatment"*.[137]

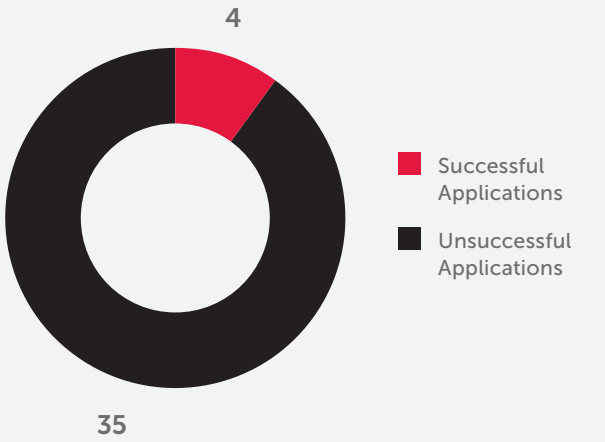
The Right to be Heard

The right to be heard is a fundamental rule of procedure.[138] It entitles parties to be heard before an independent and impartial tribunal.[139] This includes the right (i) to state a claim or a defence, (ii) to produce supporting arguments and evidence[140] and (iii) to respond adequately to the other party's arguments and evidence.[141]

However, *ad hoc* committees have observed that a party's right to be heard is finite. It was held in *Von Pezold v Zimbabwe* that, while a tribunal must make sure a party is given *"a reasonable opportunity to be heard"*, this is not *"an unlimited opportunity to be heard"*.[142] The interested party is expected to *"take advantage of that opportunity* [to be heard], *when provided."*[143] Generally, tribunals are not under any obligation to consider every single argument and submission made or admit every piece evidence provided by the parties.[144]

However, there may be a violation of the right to be heard where a tribunal refuses to allow the presentation of an argument or a piece of evidence.[145] A party alleging a violation has the burden of demonstrating that an argument or piece of evidence was sufficiently important. Parties have applied for annulment based on the alleged violation of the right to be heard on 39 occasions. Committees have accepted only four applications (in the decisions in *Amco II v Indonesia*; *Fraport I*; *TECO v Guatemala* and *Pey Casado v Chile*).[146]

Chart 34: The Right to be Heard



In *Amco II v Indonesia*, the tribunal applied a new framework of liability without notice to the parties. This was found to have deprived them of the right to be heard on issues which eventually deter*mine*d the outcome.[147]

In *Fraport v Philippines*, the tribunal considered a prosecutor's resolution which was disclosed after the conclusion of proceedings.[148] In particular, the resolution provided legal evidence on whether Fraport's investment had been made in violation of the law of the Philippines.[149] The parties were not provided with a chance to respond to its findings. The *ad hoc* committee held that the evidence had impacted the tribunal's reasoning regarding the Philippines' objection to ICSID jurisdiction and found a violation of Ground 4.[150]

In *TECO v Guatemala*, a breach was found based on the Tribunal's denial of interest on *TECO*'s unjust enrichment claim, where the appropriateness of the award of interest, if liability was established, had not been questioned by the State or raised by the tribunal in the arbitration."[151]

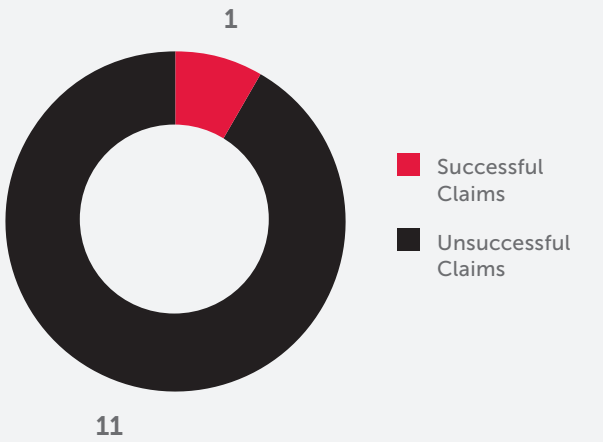
In *Pey Casado v Chile*, the *ad hoc* committee found that Chile was not given an opportunity to present its defence and evidence concerning damages for asserted breach of an investment treaty. The *ad hoc* committee annulled the damages part of the award.[152]

Claims Regarding the Independence and Impartiality of the Tribunal

The issue of the independence and impartiality of the tribunal has been raised in 12 proceedings.[153] In *EDF v Argentina*, the *ad hoc* committee stated that "[i]*t is difficult to imagine a rule of procedure more fundamental than the rule that a case must be heard by an independent and impartial tribunal*".[154] The scope of this right is subsumed within the scope of Ground 1, on its wider interpretation embodied in *EDF* (see *supra* the discussion of Ground 1). The Ground 4 right is narrower than the scope of Ground 1, as interpreted in *EDF*, as Ground 1 also provides for the possibility of annulment for breaches of arbitrator appointment procedures, even if the tribunal members are in fact impartial.

This sub-ground was accepted for the first and only time to date in 2020 in *Eiser v Spain*, where an arbitrator was found to have failed to make material conflict of interest disclosure (as discussed *infra*, a Ground 1 challenge also succeeded, for the only time to date).[155]

Chart 35: Independence of the Tribunal

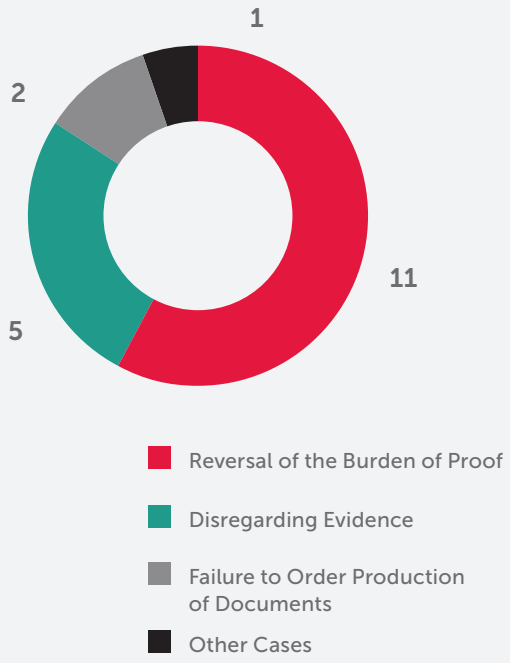


Claims Regarding the Treatment of Evidence

The ICSID Convention includes no detailed rules of evidence. Nevertheless, applicants have raised annulment claims under Article 52(1)(d) asserting a serious miscarriage in the treatment of evidence by the tribunal in 19 instances without success.[156] The evaluation of evidence is within the discretion of the tribunal.[157] The committee in *Wena v Egypt* declared that *"[I]rrespective whether the matter is one of substance or procedure, it is in the Tribunal's discretion to make its opinion about the relevance and evaluation of the elements of proof presented by each Party."*[158] According to the committee in *Tulip v Turkey, "an applicant's dissatisfaction with the way a tribunal has exercised its discretion in evaluating evidence cannot be a basis for a finding that there has been unequal treatment"*.[159]

Eleven of the 19 annulment applications asserted that the tribunal had applied the incorrect burden of proof.[160] Five related to claims that the tribunal had disregarded relevant evidence.[161] Two claims asserted that the tribunal had failed to order the production of documents.[162]

Chart 36: Treatment of Evidence



Burden of Proof

Committees have rejected assertions the tribunal applied the wrong burden of proof on all eleven occasions on which it was raised. One committee held that determining the burden of proof is not a fundamental rule of procedure, although a breach may arise when other rules are also implicated by the (mis)application of a burden of proof (e.g., equal treatment).[163]

In the annulment decisions in *Churchill Mining v Indonesia* and *Continental Casualty v Argentina*, both committees observed that tribunals are not obliged to apply or even articulate any specific burden or standard of proof.[164]

Disregarding Evidence

The second most commonly raised evidential issue on annulment is whether a tribunal incorrectly disregarded evidence. The committee in *Blusun v Italy* found that the failure to consider evidence could amount to an annullable error under Ground 4.[165] The committee in *Tulip v Turkey* also held that tribunals are required to consider all evidence submitted by the parties. It held that it is up to the tribunal to deter*mine* which evidence is material for the tribunal's findings.[166] The committee added that it is for the tribunal to make a free assessment of, and to weigh the evidence to reach its conclusions.[167] This ground is therefore closely related to the annulment ground for providing insufficient reasons. In this regard, the committee in *Tulip v Turkey* held that a summary of a tribunal's overall impression of evidence would be sufficient and did not require a detailed evaluation.[168] The committee added that the absence of convincing evidence on a particular point did not require either discursive substantiation by a tribunal.[169]

Failure to Order Document Production

In both *Azurix v Argentina* and *Mobil v Argentina*, the State alleged that the tribunal's refusal to make certain orders for document production denied the State access to fundamental evidence which, in turn, constituted a breach of a fundamental rule of procedure. Both committees dismissed the applications, stating that tribunal's powers to order document production is discretionary.[170]

Claims Regarding the Deliberations Among Members of the Tribunal

Claims under Ground 4 regarding the deliberations of tribunal members have been made in three proceedings.[171] None of them have been successful. Although deliberations are not referred to in the text of Article 52 of the ICSID Convention, the ICSID Arbitration Rules assume that tribunals will deliberate.[172] It was confirmed in *Klöckner I* that deliberation by the members of a tribunal is a "*basic rule of procedure*".[173] The rule will be breached where no deliberation in fact took place, however, given the private nature of deliberations, proof of this by an applicant raises delicate issues. Committees may be able to infer a lack of deliberation from the known facts. Conversely, the presence of dissenting or concurrent opinions indicates that the tribunal did deliberate[174] as does the circulation by the president of a tribunal of a draft award.[175]

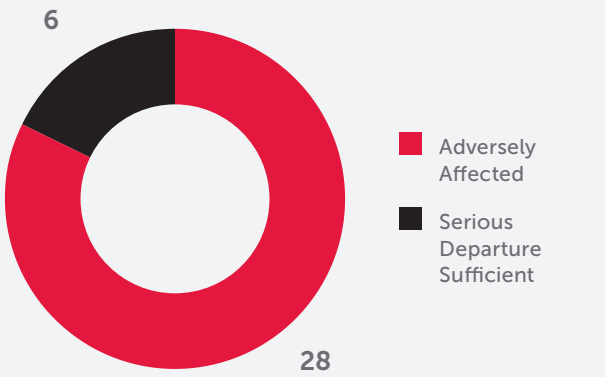
Claims Regarding the Rules of Representation

Claims regarding the rules of representation were raised in two cases: *Repsol YPF v Petroecuador*[176] and *Teinver v Argentina*.[177] In the former case it was claimed that Repsol was not authorised to represent the other companies in a consortium. In the latter, it was claimed that the investors' counsel's power of attorney was invalid after the investors became insolvent. In both cases, the committees rejected the claims holding that the ratification of the representation through letters by the relevant parties as well as their participation during the proceedings was evidence of their authorisation.[178]

Seriousness of the Violation

A successful application under Ground 4 must also establish that the departure from a fundamental rule of procedure was "*serious*". This qualifying standard has been addressed by 34 committees. 28 committees (82%) have held that the standard contains a requirement of causation. A party must establish that it was adversely affected by the asserted violation. In *MINE v Guinea*, the committee found that "*the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.*"[179]

Chart 37: Defining a Serious Departure



Committees have been split over how adversely affected an applicant must be (i.e. whether an applicant had to demonstrate that the final decision of the tribunal would have been different or could have been different). The committee in *Wena Hotels v Egypt* explained that "[i]*n order to be a 'serious' departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.*"[180] This high standard has been followed in a number of other annulment decisions.[181]

Other committees such as those in *CEAC v Montenegro* and *Pey Casado I* have found that if a tribunal's compliance with a rule of procedure *"could potentially have affected the award"* that this is sufficient for a breach.[182] The committee in *Pey Casado I* further stated:

> ***The impact will most likely be material and require an annulment if the departure affects the legal right of the parties with respect to an outcome-determinative issue. In other words, a finding that if the rule had been observed the tribunal could have reached a different conclusion.***[183]

Churchill Mining v Indonesia is an example of the 18% of decisions which do not appear to require any causative effect for breach.[184] The committee ruled that a departure from a fundamental rule of procedure was enough, given the nature of a violation of a fundamental rule of procedure which is inherently grave.[185]

Timely Objection Requirement

Ad hoc committees have held on five occasions that the applicant must raise a procedural irregularity at the time it occurred in order to be entitled to seek annulment based on it later.[186] Parties must object as soon as the asserted violation is apparent. Failure to act in a timely manner can constitute as a waiver of an applicant's right to object under Rule 27 of the ICSID Arbitration Rules.[187]

Conclusion

Despite being frequently invoked, Ground 4 challenges have rarely been successful. While there is no definitive list of which rules of procedure are "fundamental", matters including the equal treatment of the parties, the right to be heard and the independence and impartiality of the tribunal are included. Our analysis also shows that there are different views concerning how adversely affected an applicant must be by a demonstrated breach for annulment: whether an applicant must demonstrate that the final decision of the tribunal would have been different but for the breach, whether the final decision could have been different but for the breach, or whether the mere breach is sufficient for the award to be annulled.

GROUND 5 – REASONS IN AWARDS

The ICSID Convention obliges tribunals to provide reasons for their decisions. Article 48(3) of the Convention provides that "*The award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based*".[188] Article 52(1)(e) provides that a party may request annulment, in the same language as the latter part of Article 48(3), where "*the award has failed to state the reasons on which it is based*".

The need for tribunals to give reasons derives from the fundamental rule of law principle that decisions involving legal rights should not be arbitrary. The legitimacy of arbitration depends on its intelligibility and transparency. Tribunals accordingly have a duty "*to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision*".[189] Reasons also enable the assessment of whether a tribunal has manifestly exceeded its powers or not.

Neither Article 48(3) nor Article 52(1)(e) provides any specific guidance concerning when a failure to give reasons will have occurred, or the manner in which a tribunal's reasons should be stated. The core issue surrounding Article 52(1)(e) has accordingly been what standard of reasoning is required to avoid the annulment threshold. The insufficiency or inadequacy of reasons is a particularly subjective criterion, and *ad hoc* committees have wrestled with the precise application of the standard.

Overall Findings

Ground 5 has been invoked in 80% of decisions rendered by *ad hoc* committees.

Committees have granted partial or full annulment on this basis on nine occasions.

Chart 38: Frequency of Ground 5 Claims

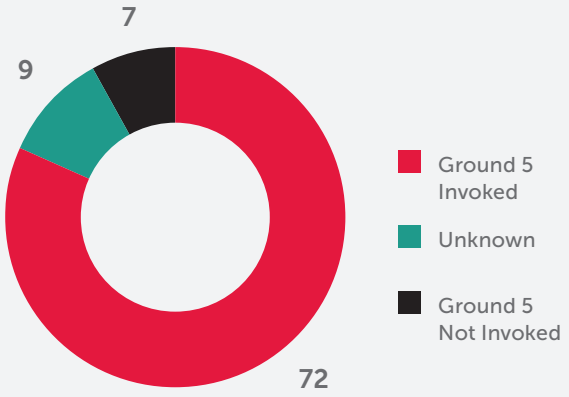
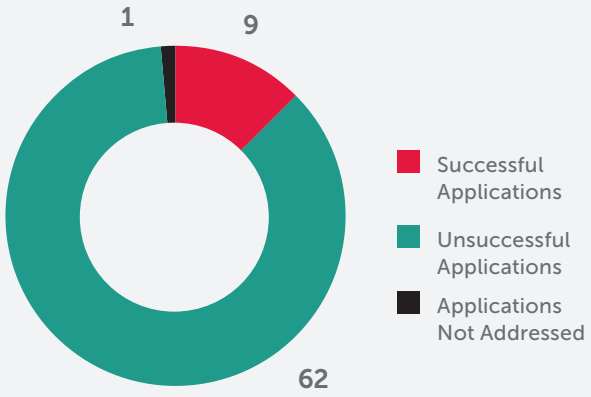
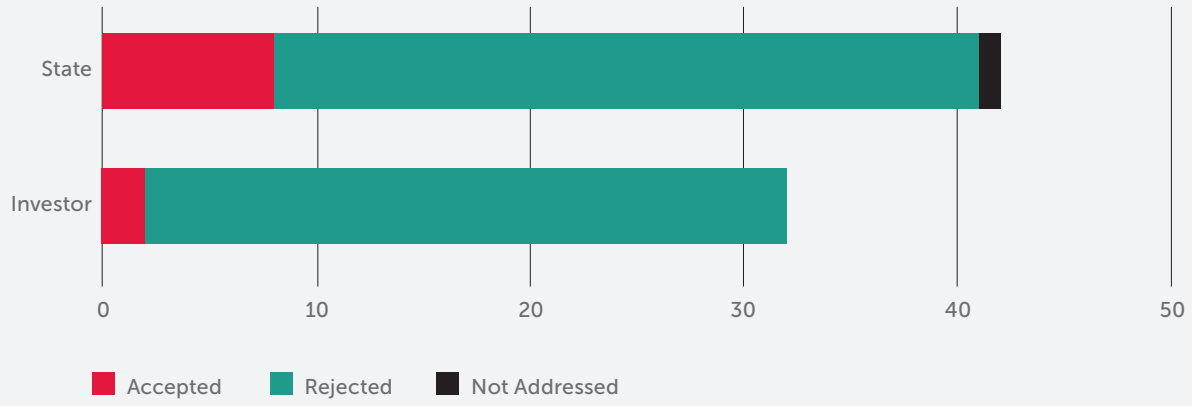


Chart 39: Ground 5 Results



Only three challenges succeeded in the period between 1984 and 2005: *Klöckner I* (1985) as the first ICSID annulment decision,[190] *Amco I*,[191] and *MINE v Guinea*.[192] Those three decisions have been joined by a further six partial annulments between 2006 and 2017.[193]

Chart 40: Ground 5 – Success Rate based on the Party Requesting the Annulment



Elements of Ground 5 and Relevant Case Law

This section will outline some of the main elements addressed by *ad hoc* committees hearing claims under Ground 5.

General Principles

Given the clear obligation on tribunals to give their reasons in Article 48(3), a total absence of reasons from a tribunal is highly unlikely (and indeed, this has never occurred). However, annulment applications routinely allege (i) an absence of reasons on particular points and (ii) other asserted serious defects in tribunals' reasoning.

The Prevailing Standard

The early decisions in *Klöckner I* and *Amco I* have come to be regarded as having adopted an inappropriately interventionist standard, which risks a re-evaluation of the award's assessment of the merits. This is inappropriate in ICSID annulment proceedings (as opposed to a full appeal).[194] In both decisions, the *ad hoc* committee identified a need for "*sufficiently pertinent*" reasons as required to avoid annulment.[195]

While the decisions are still referred to for early statements of principle, *MINE* has become a *locus classicus* in the emerging jurisprudence of this ground.[196] The test in *MINE* essentially requires that pertinent reasons exist and be intelligible:

> ***In the Committee's view, the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion, even if it made an error of fact or of law. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.***[197]

It was also observed in *MINE* that:

> ***[T]he requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. The adequacy of the reasoning is not an appropriate standard of review under paragraph (1)(e), because it almost inevitably draws an ad hoc Committee into an examination of the substance of the tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention.***[198]

Materiality

The *ad hoc* committee in *Vivendi v Argentina*, although it did not order annulment, provided a gloss which is also frequently referred to by other committees. The committee observed that to justify Article 52(1)(e) annulment, a point in relation to which a failure to give reasons is alleged must be a material one (emphasis added):

> *Annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the tribunal's decision.*[199]

Failure to Deal with Every Question

The Article 48(3) requirement for tribunals to deal with every question submitted is not expressly reflected in Article 52(1)(e) and its relevance to annulment is somewhat unclear. The wording of Article 49(2) allows parties to ask the tribunal to address unaddressed questions. This language arguably suggests that the provision was designed to deal with straightforward or mechanical errors or omissions. However, it has been understood, with some support from the Convention's drafting history,[200] as having a wider scope, and being capable of addressing a distinct, if complex, question not dealt with sufficiently in an award, such as quantum or interest.[201] Despite this broader reading, in at least some circumstances a supplementary decision under Article 49(2) may not be possible. In this context, *ad hoc* committees have been prepared to recognise an Article 48(3) failure to deal with a "*question*" as a failure to state reasons in terms of Article 52(1)(e).[202]

Discretion as to Annulment?

It has been suggested that, since the purpose of Article 52(1)(e) is to allow the parties to understand the tribunal's decision, *ad hoc* committees themselves may have discretion not to annul awards, despite finding that a failure in terms of Article 52(1)(e) exists. The principle is that, having had the benefit of the challenge application, in appropriate cases, an *ad hoc* committee may be able to further explain, clarify, or infer the reasoning of the tribunal itself, thereby essentially curing the breach.[203] This has never explicitly occurred in practice, although some commentators consider it has occurred in practice under the label of "inferring" the tribunal's reasons.[204]

Absent or Insufficient Reasoning

A successful application under Ground 5 must show that the underlying award contained no or insufficient reasoning on a particular point. Eight of the nine partial or full annulments were rendered on that basis.[205] Moreover, as discussed below, in three cases, awards were annulled on the basis of contradictory reasoning which was considered to be tantamount to a lack of reasoning.

Absence of Reasons

Ad hoc committees are generally reluctant to deter*mine* an absence of reasons in ICSID awards. A number of decisions demonstrate a willingness to "*infer*" or "*reconstruct*" reasoning which is not express in the award.[206]

Permissible inferences have, however, reasonable limits.[207] *CMS v Argentina* concerned an alleged breach of treaty obligations arising under an umbrella clause in relation to a license held by a subsidiary of CMS.[208] Under applicable Argentinian law, CMS had no right to enforce the obligations owed to the subsidiary licensee. The *ad hoc* committee annulled the finding of breach of obligations based on a failure to state reasons. This was because it was completely unclear how the tribunal had concluded that CMS could enforce the obligations owed to the subsidiary licensee. There was a "*significant lacuna*" on the point, which rendered it "*impossible for the reader to follow the reasoning on this point*".[209]

A tribunal must therefore address in some substance the legal and factual matters which are "*important*" or "*indispensable*" to the determination of all issues between the parties. This is so whether the tribunal is thought of as answering "*questions*" in terms of Article 48(3), or simply complying with the Article 52(1)(e) standard as explained in *Vivendi*. This will be necessarily informed by the arguments and evidence the parties emphasise.

Insufficient or Inadequate Reasons

In a significant conceptual overlap with an absence of reasons, a statement of reasons which does not in fact explain to a party how the tribunal came to its decision is not in truth a statement of reasons. Assessing whether reasons exist is, as noted, highly subjective, as this test inevitably involves a degree of substantive review of the adequacy and correctness of the reasons given.

Ad hoc committees have responded to the danger that the standard may lead to a full merits review in disguise, and have broadly adopted a standard which, while inevitably implicating qualitative concerns, is a standard considerably lower than a requirement that awards be "*fully reasoned*" (i.e., a "*correct*" or "*ideal*" full merits review).[210] There is a concomitant need to allow tribunals a degree of discretion in the way they express their reasons, whether distinctly, or at length, or even "*badly stated*"[211] and taking account of different legal traditions.[212]

The case law shows that reasons must be "*sufficient*" or "*sufficiently relevant*", that is, "*reasonably sustainable and capable of providing a basis for the decision*" (in *Klöckner I*)[213] or demonstrating a "*reasonable connection between the basis invoked by the tribunal and the conclusions reached by it*".[214]

In more recent decisions it seems that the conservative *MINE* test (which focuses on the intelligibility of reasons as the benchmark) has emerged as the dominant formulation. That test has even been narrowed. In the recent partial annulment in *Tidewater v Venezuela*, the committee observed that given the need to avoid reviewing the quality of reasons, the reference to "*frivolous*" reasons is a sub-category of insufficient reasons in the *MINE* test was inappropriate.[215] The relevant test, according to that committee, was whether a reasonable reader of the award would be able to understand the tribunal's motivation or not.[216]

Contradictory Reasoning

Committees have accepted that genuinely contradictory reasons can amount to a failure to state reasons, and therefore a ground for Article 52(1)(e) annulment.[217] Three awards were partially annulled on this basis.[218]

Reasons will be genuinely contradictory if they effectively cancel each other out.[219] This should not be mistaken, however, for the tribunal's reflection of conflicting considerations, which it must often struggle to balance.[220] As with failure to give reasons generally, the contradiction must avoid a merits review by scrutinising conclusions of fact, law or exercise of discretion and be serious enough to vitiate the tribunal's reasoning on a point as a whole.

In *Tidewater v Venezuela*, for example, the *ad hoc* committee annulled the part of the underlying award quantifying compensation for the expropriation of the claimant's business, on the ground that it was based on contradictory reasons.[221] Having adopted a Discounted Cash Flow methodology, the tribunal had identified with "*clarity and force*" six elements, as the basis of an "*informed estimation*" of market value, including the scope of the relevant business and a high country risk factor (of 14.75%). Despite this, instead of basing its compensation quantum conclusion on evidence in accordance with risk factor, the tribunal adopted a figure several times larger, which was taken from evidence based on a country risk premium of 1.5% (which the tribunal had rejected as being unreasonable).[222]

Conclusion

It is generally clear that *ad hoc* committees are alive to the need to avoid a merits review, or any standard approaching it. Further, *ad hoc* committee decisions relating to Ground 5 show a line of cases which are increasingly coherent in their approach, adopting and refining the *MINE* test. As a result, in order to succeed in a challenge, a party will have to show that material evidence or argument was not addressed at all by the tribunal. A party can also expect to succeed where, while some description of some matters may be present, the reasons are unintelligible – i.e. they do not enable a party to follow a tribunal's thought process from Point A to Point B, to the ultimate conclusion. Similarly, if elements of the award genuinely contradict each other on a material point, a party can expect annulment to follow on the basis that the reasons given are illusory. This honours the purpose of Article 52(1)(e): to safeguard the parties' right to understand why the award has been decided as it has.

Future outlook

The low success rate of annulment applications confirms that annulment remains an exceptional remedy under the ICSID system. Consistent with the aim of the drafters of the ICSID Convention, annulment has avoided becoming an appeal mechanism. However, despite the low success rate, annulment has been sought for nearly half of all ICSID awards. The report suggests that the number of annulment applications is likely to continue to grow.

It appears that there is a significant difference in success rates in ICSID and non-ICSID annulment proceedings. A follow-up study will explore this difference and the possible reasons for it. One obvious contributing reason, to be investigated, is that the annulment grounds under the ICSID Convention and the grounds in national arbitration laws are not identical.

The incentives for investors, States and arbitral tribunals when they deal with annulment proceedings also require additional examination. For example, why do some States always lodge annulment applications as a matter of course while other States are seemingly more reluctant to pursue annulment proceedings? Regarding decision makers, do *ad hoc* committee members' decisions affect their reappointment prospects? And if so, how? Or put another way, to what extent can the reluctance of *ad hoc* committees to annul awards be explained by the decision-makers' interest in obtaining their next appointment?

The evidence collected and analysed in this report can aid discussions regarding the possibilities for investor-State dispute settlement system reform. For example, the replacement of *ad hoc* members of *ad hoc* committees appointed by ICSID with tenured judges might have an important effect on their incentives and willingness to annul awards. Another important issue is how ICSID annulment proceedings can co-exist with annulment mechanisms under the New York Convention, in light of the ongoing discussions to reform the investor-State disputes system currently being considered by UNCITRAL Working Group III.

Finally, this report may also help States to reform their international investment treaties. Although such treaties cannot change the ICSID Convention, they can help clarify how States understand different annulment grounds, which potentially may affect the scope of their consent to arbitration.

Methodology

The first step of preparing this report was to formulate research questions regarding (i) the overall trends in ICSID and non-ICSID annulment proceedings (*i.e.*, subject matter of disputes, success rates for different parties, types of underlying agreements) and (ii) the specific grounds for annulment under Article 52 of the ICSID Convention (*i.e.*, questions relating to how *ad hoc* committees interpret annulment grounds and sub-issues).

The second stage was to locate and analyse ICSID and non-ICSID annulment proceedings and publicly available annulment decisions. Approximately 156 ICSID annulment proceedings and 100 non-ICSID annulment proceedings were analysed.

The third stage involved analysing both the empirical data and jurisprudential trends to formulate overall findings. The report was then drafted on that basis. The report was finalised after incorporating feedback from (i) panellists and attendees at the launch event held on 28 January 2021 and (ii) practitioners and colleagues.

The report is based on proceedings as at 31 January 2021.

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Annex – Table of ICSID Annulment Proceedings

	Case No.	Investor(s) // Claimant(s)	State // Respondent(s)	Outcome
1	ARB/17/18	*(DS)2, S.A., Peter de Sutter and Kristof De Sutter*	*Republic of Madagascar*	Pending
2	ARB/15/15	*9REN Holding*	*Kingdom of Spain*	Pending
3	ARB/09/9	*Adem Dogan*	*Turkmenistan*	Award Upheld
4	ARB/07/22	*AES Summit Generation Limited and AES-Tisza*	*Hungary*	Award Upheld
5	ARB/02/15	*Ahmonseto*	*Arab Republic of Egypt*	Proceedings Discontinued
6	ARB/15/8	*Aktau Petrol*	*Republic of Kazakhstan*	Award Upheld
7	ARB/08/13	*Alapli Elektrik B.V.*	*Republic of Turkey*	Award Upheld
8	ARB/14/26	*Albaniabeg*	*Republic of Albania*	Pending
9	ARB/18/2	*Almasryia*	*State of Kuwait*	Pending
10	ARB/14/28	*Alpiq*	*Romania*	Pending
11	ARB/81/1	*Amco Asia Corporation and others*	*Republic of Indonesia*	Annulled in Part
12	ARB/81/1 (Resubmission)	*Amco Asia Corporation and others*	*Republic of Indonesia*	Annulled in Part
13	ARB/10/4	*Antoine*	*Democratic Republic of the Congo*	Award Upheld
14	ARB/07/32	*Astaldi S.p.A.*	*Republic of Honduras*	Proceedings Discontinued
15	ARB/08/2	*ATA Construction, Industrial and Trading Company*	*Hashemite Kingdom of Jordan*	Proceedings Discontinued
16	ARB/01/12	*Azurix Corp.*	*Argentine Republic*	Award Upheld
17	ARB/14/35	*Baymina*	*Boru*	Proceedings Discontinued
18	ARB/10/15	*Bernhard von Pezold and others*	*Republic of Zimbabwe*	Award Upheld
19	ARB/12/20	*Blue Bank International & Trust (Barbados) Ltd.*	*Bolivarian Republic of Venezuela*	Award Upheld
20	ARB/14/3	*Blusun S.A., Jean-Pierre Lecorcier and Michael Stein*	*Italian Republic*	Award Upheld
21	ARB/10/25	*Border Timbers Limited, Timber Products International (Private) Limited, and*	*Republic of Zimbabwe*	Award Upheld
22	ARB/08/5	*Burlington Resources, Inc.*	*Republic of Ecuador*	Proceedings Discontinued
23	ARB/15/18	*Capital Financial Holdings Luxembourg S.A.*	*Republic of Cameroon*	Award Upheld
24	ARB/08/12	*Caratube International Oil Company LLP*	*Republic of Kazakhstan*	Award Upheld

25	ARB/13/13	*Caratube International Oil Company LLP and*	*Republic of Kazakhstan*	Proceedings Discontinued
26	ARB/09/19	*Carnegie Minerals (Gambia) Limited*	*Republic of The Gambia*	Award Upheld
27	ARB/02/14	*CDC Group plc*	*Republic of Seychelles*	Award Upheld
28	ARB/14/8	*CEAC Holdings Limited*	*Montenegro*	Award Upheld
29	ARB/12/14	*Churchill Mining Plc and Planet Mining Pty Ltd, formerly ARB/12/14*	*Republic of Indonesia*	Award Upheld
30	ARB/12/40	*Churchill Mining Plc and Planet Mining Pty Ltd, formerly ARB/12/*	*Republic of Indonesia*	Award Upheld
31	ARB/01/8	*CMS Gas Transmission Company*	*Argentine Republic*	Annulled in Part
32	ARB/09/17	*Commerce Group Corp. and San Sebastian Gold Mines, Inc.*	*Republic of El Salvador*	Proceedings Discontinued
33	ARB/04/5	*Compagnie d'Exploitation du Chemin de Fer Transgabonais*	*Gabonese Republic*	Award Upheld
34	ARB/97/3	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.*	*Argentine Republic*	Annulled in Part
35	ARB/97/3 (Resubmission)	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.*	*Argentine Republic*	Award Upheld
36	ARB/07/30	*ConocoPhillips*	*Bolivarian Republic of Venezuela*	Pending
37	ARB/00/6	*Consortium R.F.C.C.*	*Kingdom of Morocco*	Award Upheld
38	ARB/03/9	*Continental Casualty Company*	*Argentine Republic*	Award Upheld
39	ARB/15/29	*Cortec*	*Republic of Kenya*	Pending
40	ARB/15/20	*Cube Infrastructure Fund SICAV and others*	*Kingdom of Spain*	Pending
41	ARB/05/1	*Daimler Financial Services AG*	*Argentine Republic*	Award Upheld
42	ARB/12/9	*Dan Cake (Portugal) S.A.*	*Hungary*	Pending
43	ARB/09/2	*Deutsche Bank AG*	*Democratic Socialist Republic of Sri Lanka*	Proceedings Discontinued
44	ARB/03/28	*Duke Energy International Peru Investments No. 1 Ltd.*	*Republic of Peru*	Award Upheld
45	ARB/13/21	*Edenred*	*Hungary*	Award Upheld
46	ARB/03/23	*EDF International S.A., SAUR International S.A. and León*	*Argentine Republic*	Award Upheld
47	ARB/13/36	*Eiser Infrastructure Limited and Energía Solar Luxembourg*	*Kingdom of Spain*	Annulled in Full
48	ARB/03/15	*El Paso Energy International Company*	*Argentine Republic*	Award Upheld
49	ARB/09/4	*Elsamex*	*Republic of Honduras*	Proceedings Discontinued

50	ARB/01/3	*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P.*	*Argentine Republic*	Annulled in Part
51	ARB/16/5	*ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co.*	*Italian Republic*	Pending
52	ARB/14/14	*EuroGas*	*Slovak Republic*	Proceedings Discontinued
53	ARB/12/21	*Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A.*	*Bolivarian Republic of Venezuela*	Award Upheld
54	ARB/10/19	*Flughafen*	*Bolivarian Republic of Venezuela*	Award Upheld
55	ARB/13/38	*Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Fouad Mohammed*	*Hashemite Kingdom of Jordan*	Award Upheld
56	ARB/03/25	*Fraport AG Frankfurt Airport Services Worldwide*	*Republic of the Philippines*	Annulled in Full
57	ARB/11/31	*Gambrinus, Corp.*	*Bolivarian Republic of Venezuela*	Award Upheld
58	ARB/16/6	*Glencore International A.G. and C.I.*	*Republic of Colombia*	Pending
59	ARB/16/16	*Global Telecom Holding S.A.E.*	*Canada*	Pending
60	ARB/13/19	*Güneş*	*Republic of Uzbekistan*	Pending
61	ARB/09/15	*H&H Enterprises Investments, Inc.*	*Arab Republic of Egypt*	Proceedings Discontinued
62	ARB/05/19	*Helnan International Hotels A/S*	*Arab Republic of Egypt*	Annulled in Part
63	ARB/11/1	*Highbury*	*Bolivarian Republic of Venezuela*	Award Upheld
64	ARB/07/31	*HOCHTIEF*	*Argentine Republic*	Pending
65	ARB/02/7	*Hussein*	*United Arab Emirates*	Award Upheld
66	ARB/15/42	*Hydro Energy 1 S.à r.l. and Hydroxana Sweden AB*	*Kingdom of Spain*	Pending
67	ARB/15/28	*Hydro*	*Republic of Albania*	Pending
68	ARB/09/5	*Iberdrola Energía, S.A.*	*Republic of Guatemala*	Award Upheld
69	ARB/07/17	*Impregilo S.p.A.*	*Argentine Republic*	Award Upheld
70	ARB/03/4	*Industria Nacional de Alimentos, S.A. and*	*Republic of Peru*	Award Upheld
71	ARB/14/12	*InfraRed Environmental Infrastructure GP Limited and others*	*Kingdom of Spain*	Pending
72	ARB/13/31	*Infrastructure Services Luxembourg*	*Kingdom of Spain*	Pending

73	ARB/14/29	*Ioan*	*Romania*	Pending
74	ARB/05/20	*Ioan*	*Romania*	Award Upheld
75	ARB/05/18	*Ioannis*	*Georgia*	Proceedings Discontinued
76	ARB/16/9	*Italba*	*Oriental Republic of Uruguay*	Proceedings Discontinued
77	ARB/06/18	*Joseph C. Lemire*	*Ukraine*	Award Upheld
78	ARB/03/11	*Joy Mining Machinery Limited*	*Arab Republic of Egypt*	Proceedings Discontinued
79	ARB/13/1	*Karkey Karadeniz Elektrik Uretim A.S.*	*Islamic Republic of Pakistan*	Proceedings Discontinued
80	ARB/08/19	*Karmer*	*Georgia*	Proceedings Discontinued
81	ARB/10/1	*Kılıç*	*Turkmenistan*	Award Upheld
82	ARB/81/2	*Klöckner Industrie-Anlagen GmbH and others*	*United Republic of Cameroon and Société Camerounaise des*	Annulled in Full
83	ARB/81/2 (Resubmission)	*Klöckner Industrie-Anlagen GmbH and others*	*United Republic of Cameroon and Société Camerounaise des*	Award Upheld
84	ARB/11/19	*Koch Minerals Sàrl and Koch Nitrogen International Sàrl*	*Bolivarian Republic of Venezuela*	Pending
85	ARB/09/8	*KT Asia Investment Group B.V.*	*Republic of Kazakhstan*	Proceedings Discontinued
86	ARB/02/1	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc.*	*Argentine Republic*	Proceedings Discontinued
87	ARB/06/8	*Libananco Holdings Co. Limited*	*Republic of Turkey*	Award Upheld
88	ARB/11/5	*Longreef*	*Bolivarian Republic of Venezuela*	Pending
89	ARB/03/6	*M.C.I. Power Group, L.C. and New Turbine, Inc.*	*Republic of Ecuador*	Award Upheld
90	ARB/17/27	*Magyar Farming Company Ltd,*	*Hungary*	Pending
91	ARB/05/10	*Malaysian Historical Salvors, SDN, BHD*	*Malaysia*	Annulled in Full
92	ARB/08/18	*Malicorp Limited*	*Arab Republic of Egypt*	Award Upheld
93	ARB/11/24	*Mamidoil*	*Republic of Albania*	Proceedings Discontinued
94	ARB/84/4	*Maritime International Nominees Establishment*	*Republic of Guinea*	Annulled in Part
95	ARB/14/1	*Masdar Solar & Wind Cooperatief U.A.*	*Kingdom of Spain*	Proceedings Discontinued

96	ARB/04/16	*Mobil Exploration and Development Argentina Inc.*	*Argentine Republic*	Award Upheld
97	ARB/01/7	*MTD Equity*	*Republic of Chile*	Award Upheld
98	ARB/06/19	*Nations Energy, Inc. and others*	*Republic of Panama*	Proceedings Discontinued
99	ARB/14/11	*NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.*	*Kingdom of Spain*	Pending
100	ARB/06/11	*Occidental Petroleum Corporation and Occidental Exploration and Production Company*	*Republic of Ecuador*	Annulled in Part
101	ARB/11/25	*OI European Group B.V.*	*Bolivarian Republic of Venezuela*	Award Upheld
102	ARB/15/36	*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG*	*Kingdom of Spain*	Pending
103	ARB/12/35	*Orascom TMT Investments*	*People's Democratic Republic of Algeria*	Award Upheld
104	ARB/99/7	*Patrick Mitchell*	*Democratic Republic of the Congo*	Annulled in Full
105	ARB/08/6	*Perenco*	*Republic of Ecuador*	Pending
106	ARB/99/3	*Philippe*	*Malaysia*	Proceedings Discontinued
107	ARB/13/8	*Poštová*	*Hellenic Republic*	Award Upheld
108	ARB/06/2	*Quiborax*	*Plurinational*	Award Upheld
109	ARB/11/13	*Rafat*	*Republic of Indonesia*	Proceedings Discontinued
110	ARB/16/25	*Raymond Charles Eyre and Montrose Developments (Private) Limited*	*Democratic Socialist Republic of Sri Lanka*	Unknown
111	ARB/10/17	*Renée Rose Levy de Levi*	*Republic of Peru*	Proceedings Discontinued
112	ARB/01/10	*Repsol YPF Ecuador S.A.*	*Empresa Estatal Petróleos del Ecuador (Petroecuador)*	Award Upheld
113	ARB/07/15	*Ron Fuchs*	*Georgia*	Proceedings Discontinued
114	ARB/13/30	*RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux*	*Kingdom of Spain*	Pending
115	ARB/12/10	*RSM Production Corporation*	*Saint Lucia*	Annulled in Part
116	ARB/07/2	*RSM Production Corporation*	*Central African Republic*	Award Upheld
117	ARB/05/14	*RSM Production Corporation*	*Grenada*	Proceedings Discontinued

118	ARB/05/16	*Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.*	*Republic of Kazakhstan*	Award Upheld
119	ARB/12/13	*Saint-Gobain Performance Plastics Europe*	*Bolivarian Republic of Venezuela*	Proceedings Discontinued
120	ARB/04/4	*SAUR International*	*Argentine Republic*	Award Upheld
121	ARB/02/16	*Sempra Energy International*	*Argentine Republic*	Annulled in Full
122	ARB/07/29	*SGS Société Générale de Surveillance S.A.*	*Republic of Paraguay*	Award Upheld
123	ARB/02/8	*Siemens A.G.*	*Argentine Republic*	Proceedings Discontinued
124	ARB/04/7	*Sociedad Anónima Eduardo Vieira*	*Republic of Chile*	Award Upheld
125	ARB/14/20	*Sodexo Pass International SAS*	*Hungary*	Pending
126	ARB/15/38	*SolEs Badajoz GmbH*	*Kingdom of Spain*	Pending
127	ARB/84/3	*Southern Pacific Properties (Middle East) Limited*	*Arab Republic of Egypt*	Proceedings Discontinued
128	ARB/15/1	*Stadtwerke München GmbH, RWE Innogy GmbH, and others*	*Kingdom of Spain*	Proceedings Discontinued
129	ARB/10/12	*Standard Chartered Bank*	*United Republic of Tanzania*	Pending
130	ARB/10/20	*Standard Chartered Bank (Hong Kong) Limited*	*Tanzania Electric Supply Company Limited*	Award Upheld
131	ARB/03/17	*Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A.*	*Argentine Republic*	Award Upheld
132	ARB/03/19	*Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal*	*Argentine Republic*	Award Upheld
133	ARB/10/23	*TECO Guatemala Holdings, LLC*	*Republic of Guatemala*	Annulled in Part
134	ARB/09/1	*Teinver S.A., Transportes de*	*Argentine Republic*	Award Upheld
135	ARB/12/23	*Tenaris S.A. and*	*Bolivarian Republic of Venezuela*	Award Upheld
136	ARB/11/26	*Tenaris S.A. and*	*Bolivarian Republic of Venezuela*	Award Upheld
137	ARB/12/1	*Tethyan Copper Company Pty Limited*	*Islamic Republic of Pakistan*	Pending
138	ARB/10/5	*Tidewater Investment SRL and Tidewater Caribe, C.A.*	*Bolivarian Republic of Venezuela*	Annulled in Part
139	ARB/06/7	*Togo*	*Republic of Togo*	Award Upheld
140	ARB/04/1	*Total S.A.*	*Argentine Republic*	Award Upheld
141	ARB/07/12	*Toto*	*Lebanese Republic*	Proceedings Discontinued

142	ARB/11/28	*Tulip Real Estate and Development Netherlands B.V.*	*Republic of Turkey*	Award Upheld
143	ARB/07/6	*Tza Yap Shum*	*Republic of Peru*	Award Upheld
144	ARB/12/33	*UAB E*	*Republic of Latvia*	Award Upheld
145	ARB/14/4	*Unión Fenosa Gas, S.A.*	*Arab Republic of Egypt*	Pending
146	ARB/13/35	*UP and C.D Holding*	*Hungary*	Pending
147	ARB/13/11	*Valores Mundiales, S.L. and Consorcio Andino S.L.*	*Bolivarian Republic of Venezuela*	Pending
148	ARB/07/27	*Venezuela Holdings B.V. and others*	*Bolivarian Republic of Venezuela*	Annulled in Part
149	ARB/12/22	*Venoklim Holding B.V.*	*Bolivarian Republic of Venezuela*	Award Upheld
150	ARB/06/4	*Vestey Group Ltd*	*Bolivarian Republic of Venezuela*	Award Upheld
151	ARB/98/2	*Victor Pey Casado and President Allende Foundation*	*Republic of Chile*	Annulled in Part
152	ARB/98/2 (Resubmission)	*Victor Pey Casado and President Allende Foundation*	*Republic of Chile*	Award Upheld
153	ARB/05/15	*Waguih*	*Arab Republic of Egypt*	Proceedings Discontinued
154	ARB/15/7	*WalAm*	*Republic of Kenya*	Pending
155	ARB/15/44	*Watkins Holdings*	*Kingdom of Spain*	Pending
156	ARB/98/4	*Wena Hotels Limited*	*Arab Republic of Egypt*	Award Upheld

Endnotes

1 For other publications examining the topic, *see*, e.g. Caron, David D. "Reputation and reality in the ICSID annulment process: understanding the distinction between annulment and appeal." ICSID Review 7.1 (1992): 21-56; Gaillard, E., & Banifatemi, Y. (Eds.). (2004). Annulmewnt of ICSID awards (No. 1). Juris Publishing, Inc.; Kaufmann-Kohler, Gabrielle. "Annulment of ICSID awards in contract and treaty arbitrations: are they differences?" Annulment of ICSID Awards: a Joint IAI-ASIL Conference. Stämpfli, 2004; Schreuer, Christoph. "From ICSID Annulment to Appeal Half Way Down the Slippery Slope." The Law & Practice of International Courts and Tribunals 10.2 (2011): 211-225.

2 The full list is available in ANNEX – TABLE OF ICSID ANNULMENT PROCEEDINGS.

3 An initial Background Paper was published in August 2012.

4 Aron Broches, "Observations on the Finality of ICSID Awards" in Selected Essays: World Bank, ICSID, and Other Subjects of Public and Private International Law 299 (1995), at 354-355.

5 In addition to annulment, the ICSID Convention provides for four additional specific procedures to review an ICSID award: rectification (Article 49), supplementary decision (Article 49); interpretation (Article 50) and revision (Article 51). The scope of the present study is confined to annulment proceedings.

6 UNCITRAL, Possible reform of investor-State dispute settlement (ISDS): Consistency and related matters, 28 August 2018, A/CN.9WG.III/WP.150, available at https://undocs.org/en/A/CN.9/WG.III/WP.150.

7 All views expressed in this report are the authors' own.

8 *Holiday Inns S.A. and others v Morocco* (ICSID Case No. ARB/72/1).

9 *Adriano Gardella S.p.A. v Côte d'Ivoire* (ICSID Case No. ARB/74/1), Award, 29 August 1977.

10 *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2).

11 See C. H. Schreuer et al., *The ICSID Convention: A Commentary*, [2nd ed. 2009] Cambridge University Press, pp. 902-903. ("*Commentators concur that Art. 52(1) does not provide for annulment on the basis of "error of fact or law no matter how egregious". Despite this self-professed restraint, early decisions on annulment in Klockner I and Amco I have been criticized severely for crossing the line between annulment and appeal by reexamining aspects of the cases before them that lay outside the narrow confines of annulment. A similar criticism has been made of the Decision on Annulment dated 1 November 2006 in Mitchell v. DR Congo.*")

12 The six awards to be annulled in full to date are: (1) *Klöckner I*, (2) *Patrick Mitchell v Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Award, 9 February 2004 ("***Patrick Mitchell***"), (3) *Fraport AG Frankfurt Airport Services v Republic of the Philippines (I)* (ICSID Case No. ARB/03/25), Award, 16 August 2007 ("***Fraport I***"), (4) *Malaysian Historical Salvors, SDN, BHD v Malaysia* (ICSID Case No. ARB/05/10), Award, 17 May 2007 ("***Malaysian Historical Salvors***" or "***MHS***"), (5) *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Award, 28 September 2007 ("***Sempra***") and (6) *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36), Award, 4 May 2017 ("***Eiser***").

13 Those cases are: (1) *Amco Asia Corporation & Ors v Republic of Indonesia (I)* (ICSID Case No. ARB/81/1), Award, 20 November 1984 ("***Amco I***"), (2) *Maritime International Nominees Establishment v Republic of Guinea* (ICSID Case No. ARB/84/4), Award, 6 January 1988 ("***Maritime International Nominees***" or "***MINE***"), (3) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v Argentine Republic (I)* (ICSID Case No. ARB/97/3), Award, 21 November 2000 ("***Vivendi I***"), (4) *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005 ("***CMS***"), (5) *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3), Award, 22 May 2007 ("***Enron***"), (6) *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No. ARB/05/19), Award, 3 July 2008 ("***Helnan***"), (7) *Victor Pey Casado & President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2), Award, 8 May 2008 ("***Pey Casado I***"), (8) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador (II)* (ICSID Case No. ARB/06/11), Award, 5 October 2012 ("***Occidental II***"), (9) *TECO Guatemala Holdings LLC v Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013 ("***TECO***"), (10) *Tidewater Investment SRL and Tidewater Caribe, C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/5), Award, 13 May 2015 ("***Tidewater***"), (12) *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014 ("***Mobil Corporation***") and (13) *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), Award, 15 July 2016 ("***RSM v Saint Lucia***").

14 See *Enron*, Decision on Annulment, 30 July 2010.

15 *CMS v Argentina*, Decision on Annulment, 25 September 2007.

16 *RSM v Saint Lucia*, Decision on Annulment, 29 April 2019, at [193]-[201].

17 *Amco Asia Corporation & Ors v Republic of Indonesia (II)* (ICSID Case No. ARB/81/1), Award, 17 December 1992 ("***Amco II***").

18 In *Klöckner I* the dispute was resubmitted to a new tribunal, a second award was rendered and the subsequent application for annulment (submitted by both parties) was rejected. This represented a successful outcome for the investors. While the first tribunal had awarded no damages, the second tribunal awarded damages which, after setoff, amounted to some 26 million Deutsche Marks. In *Fraport I*, the dispute was resubmitted, a second award was rendered, and no party sought annulment. Successfully annulling the first award did not ultimately avail the investor, however, as the second tribunal denied jurisdiction over the dispute, as had the first tribunal.

19 In two cases (*Vivendi I* and *Pey Casado*), the dispute was resubmitted, a second award was rendered, and subsequent applications to annul the second award were unsuccessful. In *TECO*, the dispute was resubmitted, a second award was rendered, and no application has yet been submitted to annul the second award. In *Mobil Corporation*, the dispute was resubmitted, and the second arbitration proceedings are still pending. In *Enron* and *Maritime International Nominees*, the dispute was resubmitted, and the second arbitration proceedings were subsequently discontinued (the latter case as the result of a settlement). In *Amco I*, the outcome of both the first and second arbitrations was very similar: the first tribunal had awarded the investors USD 3.2 million in damages, while the second tribunal ultimately awarded damages of around USD 2.6 million. In *CMS*, *Helnan*, *Occidental II*, *Tidewater*, *RSM* and *Amco II*, the dispute was not resubmitted

20 References to "States", per article 25(1) of the ICSID Convention, includes Contracting States and *"any constituent subdivision or agency of a Contracting State designated to the Centre by that State."*

21 The number of annulment applications (161) is greater than the 156 annulment proceedings registered by ICSID, as a result of the five annulment proceedings in which both the investor and the State filed annulment applications.

22 Egypt, notably, has been the respondent State in 35 ICSID arbitrations but has only been involved in nine annulment proceedings and initiated four, while the investor has initiated five – an anomaly compared with other high-frequency States such as Argentina, Venezuela and Spain.

23 An additional 13 cases have also been brought against Venezuela under the ICSID Additional Facility Rules.

24 *HOCHTIEF Aktiengesellschaft v Argentine Republic* (ICSID Case No. ARB/07/31), Award, 21 December 2016 ("***Hochtief***").

25 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), Award, 25 July 2007 ("***LG&E Energy***").

26 *FEDAX N.V. v The Republic of Venezuela* (ICSID Case No. ARB/96/3), Award, 9 March 1998 ("***Fedax***").

27 *Autopista Concesionada de Venezuela, C.A. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/5), Award, 23 September 2003 ("***Autopista Concesionada***").

28 *Emilio Agustín Maffezini v The Kingdom of Spain* (ICSID Case No. ARB/97/7), Award, 13 November 2000 ("***Maffezini***").

29 *Slovak Republic v Achmea BV* (Case C-284/16). The Court ruled that the arbitration clause contained the 1991 Netherlands-Slovakia BIT was incompatible with EU law. EU Member States may consider themselves compelled to file for annulment as a result of the Achmea judgment and related developments (see, e.g., Article 7 of the Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union obliges EU Member States: *"Where the Contracting Parties are parties to Bilateral Investment Treaties on the basis of which Pending Arbitration Proceedings or New Arbitration Proceedings were initiated, they shall: (b) where they are party to judicial proceedings concerning an arbitral award issued on the basis of a Bilateral Investment Treaty, ask the competent national court, including in any third country, as the case may be, to set the arbitral award aside, annul it or to refrain from recognising and enforcing it."*).

30 The investor and State were both successful in *TECO*. As a result, **Chart 10** includes 20 successful applications, even though there are only 19 successful proceedings.

31 The number of concluded annulment applications (123) is, again, greater than the number of 121 concluded annulment proceedings, as a result of the five concluded annulment proceedings in which both the investor and the State filed annulment applications.

32 The grounds for annulment invoked in an annulment proceeding are typically not known until the publication of the annulment decision. Accordingly, the grounds of annulment relied upon in the 35 pending annulment proceedings are not yet known, nor the grounds invoked in any discontinued proceedings. In addition, one very recent annulment decision, *Eyre* and *Montrose Developments*, has not yet been publicly released and thus the grounds for annulment (as well as the outcome of the case) remain unknown.

33 This ground was first accepted by the *ad hoc* committee in *Klöckner I* in 1985, the very first annulment decision. The 11 annulment decisions to have upheld this ground of annulment have turned on a variety of manifest excesses of powers, including (i) a failure by the tribunal to apply the applicable law or the relevant provisions of the BIT, (ii) an improper finding by the tribunal that it has (or lacks) jurisdiction over the dispute, and (iii) the making of unsupported findings of law by the tribunal (e.g. that the investor was required to exhaust local remedies or that the State could not rely on the defence of necessity).

34 This ground was again first accepted by the *ad hoc* committee in *Klöckner I* in 1985. Of the nine annulment decisions to have upheld this ground of appeal, six concluded that the tribunal's reasoning was insufficient (*Klöckner I*, *Amco I*, *Maritime International Nominees*, P*atrick Mitchell*, *CMS* and *TECO*) and three concluded that the tribunal's reasoning was contradictory (*Pey Casado I*, *Tidewater* and *Mobil Corporation*), while the *ad hoc* committee in *Mobil Corporation* additionally held that the tribunal's reasoning was deficient.

35 This ground was again first upheld by the *ad hoc* committee in *Amco II* in 1992. Almost all of the annulment decisions to have upheld this ground of annulment have been based on a violation of the right to be heard (*Amco II*, *Fraport I*, *Pey Casado I* and *TECO*), while the fifth (*Eiser*) was based on a conflict of interest between a member of the tribunal and one of the claimant's experts.

36 Ground 1 has been invoked in at least 13 concluded annulment proceedings and succeeded in just one). Although this ground was first invoked in the annulment proceedings in *Azurix Corp. v Argentine Republic (Azurix Corp. v The Argentine Republic (I)* (ICSID Case No. ARB/01/12) ("***Azurix***")), it was not successfully invoked until the decision of the *ad hoc* committee in *Eiser* in 2020.

37 Those cases are: (i) *Eiser* (Ground 1 and Ground 4); (ii) *Klöckner I* (Ground 2 and Ground 5); (iii) *Amco I* (Ground 2 and Ground 5); (iv) *Patrick Mitchell* (Ground 2 and Ground 5); (v) *Mobil Corporation* (Ground 2 and Ground 5); (vi) *Pey Casado I* (Ground 4 and Ground 5); and (vii) *TECO* (Ground 4 and Ground 5). No annulment decision to date has annulled an award on three or more grounds.

38 *Astaldi S.p.A. v Republic of Honduras* (ICSID Case No. ARB/07/32); *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5); *Joy Mining Machinery Limited v Arab Republic of Egypt* (ICSID Case No. ARB/03/11); *KT Asia Investment Group B.V. v Republic of Kazakhstan* (ICSID Case No. ARB/09/8); *Renée Rose Levy and Gremcitel S.A. v Republic of Peru* (ICSID Case No. ARB/11/17).

39 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic* (ICSID Case No. ARB/02/1).

40 D. Bishop, S. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, UK, 2012, ¶12.17-12.28. For example: (i) *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), *Decision on the Respondent's Request for a Continued Stay of Execution,* ¶29; (ii) *Maritime International Nominees Establishment v. Republic of Guinea* (ICSID Case No. ARB/84/4), *Interim Order No. 1,* ¶¶13, 27-28; (iii) *Amco Asia Corporation and others v Republic of Indonesia* (ICSID Case No ARB/81/1), *Interim Order No 1,* ¶19. *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), *Procedural Order No 1,* ¶7(a). *Mr. Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), *Decision on the Stay of Enforcement of the Award,* ¶¶10, 17, 24, 28; (iv) *MINE, Interim Order No 1,* ¶27; (v) *MTD, Decision on the Respondent's Request for a Continued Stay of Execution,* ¶28; (vi) *MTD, Decision on the Respondent's Request for a Continued Stay of Execution,* ¶32. *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), *Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award,* ¶41; (vii) *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), *Decision on Applicant's Request for a Continued Stay of Enforcement of the Award,* ¶49. See also: *Total S.A. v Argentine Republic* (ICSID Case No. ARB/04/01), *Decision on Stay of Enforcement of the Award,* ¶81.

41 *Border Timbers Limited & Others v Republic of Zimbabwe* (ICSID Case No. ARB/10/25), *Decision on Stay of Enforcement of the Award,* ¶84; *Burlington Resources Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), *Decision on Stay of Enforcement of the Award,* ¶¶82-83; *Bernhard von Pezold & Others v Republic of Zimbabwe* (ICSID Case No. ARB/10/15), *Decision on Stay of Enforcement of the Award,* ¶84.

42 *Cube Infrastructure Fund SICAV and others v Kingdom of Spain* (ICSID Case No. ARB/15/20), *Decision on the Continuation of the Provisional Stay of Enforcement of the Award,* ¶¶138; *Eiser Infrastructure Limited & Energia Solar S.A.R.L. v Kingdom of Spain* (ICSID Case No. ARB/13/26), *Decision on of Enforcement of the Award,* ¶69; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* (ICSID Case No. ARB/14/1), *Decision on the Respondent's Application to Stay Enforcement of the Award,*¶132; *OperaFund Eco-Invest v Spain* (ICSID Case No. ARB/15/36), *Decision on the Request for the Continuation of the Stay of Enforcement of the Award,* ¶104.

43 Eight further decisions have been rendered by *ad hoc* committees revising their initial decision. In three of those revised decisions, the conditional stay of enforcement was terminated due to the State's failure to uphold imposed conditions.

44 ICSID Convention, Articles 52(4) and 61(2).

45 A full analysis of the non-ICSID annulment proceedings relating to investor-State awards is outside the scope of this report. This analysis will be presented in a sequel to this report.

46 As discussed in Section on Key trends and statistics regarding ICSID annulment proceedings , approximately 75% of existing ICSID annulment proceedings were initiated between 2010 and 2020.

47 Two out of the 96 annulment applications were discontinued due to a settlement amongst the parties.

48 Eighteen of the proceedings resulted in annulment of the award in full (19.14% of concluded proceedings), compared with full annulment in less than 7.95% of concluded ICSID annulment proceedings. Eight of the non-ICSID annulment proceedings resulted in the award being annulled in part (8.51% of concluded proceedings), compared with 13.63% of concluded ICSID annulment proceedings.

49 For example, the UNCITRAL Model Law, on which many national arbitration laws are based, contains a broader range of grounds for set-aside than the ICSID Convention, including allowing a measure of national idiosyncrasy in the non-arbitrability and public policy grounds.

50 Article 14(1) of the ICSID Convention sets out a requirement for independence, stating that arbitrators shall be "*Persons... who may be relied upon to exercise independent judgment*. A requirement of "impariality" is only spelled out in the Spanish text of Article 14, but is understood as implict in all texts. See also Article 40.

51 Rule 9 of the ICSID Arbitration Rules.

52 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment, 11 June 2020 ("***Eiser v Spain***").

53 See *Azurix*.

54 See *Carnegie Minerals*.

55 See *Victor Pey Casado & President Allende Foundation v Republic of Chile* (ICSID Case No. ARB/98/2), Award, 13 September 2016 ("***Pey Casado II***").

56 *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v Argentine Republic* (ICSID Case No. ARB/03/23), Decision on Annulment, 5 February 2016 ("***EDF v Argentina***"), at [145].

57 *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v Republic of Zimbabwe* (ICSID Case No. ARB/10/25) ("***Border Timbers***"); *EDF v Argentina; Eiser v Spain; Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v Argentine Republic* (ICSID Case No. ARB/04/16), Decision on Annulment, 8 May 2019 ("***Mobil v Argentina***"); *OIEG v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Annulment, 6 December 2018 ("***OIEG v Venezuela***"); *Suez v Argentina; Suez and Vivendi v Argentina; Pey Casado II; Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux) v Argentine Republic (II)* (ICSID Case No. ARB/97/3), Award, 20 August 2007 ("***Vivendi II***") and *Bernhard von Pezold and others v Republic of Zimbabwe* (ICSID Case No. ARB/10/15) ("***von Pezold and Others***").

58 See *Azurix*, Decision on Annulment, 1 September 2009, at [282].

59 At [281]. The committee opined that the only remedy would be revision of the award under Article 51.

60 At [126]-[128].

61 At [107]-[116], [134]. The *EDF* committee noted that independence and impartiality are closely related but distinct. Impartiality refers to the absence of bias while impartiality is characterised by the absence of external control (see at [108]) Versions of the IBA Guidelines on Conflicts of Interest in International Arbitration have been referred to by some *ad hoc* committees in their decisions but have been confirmed to represent non-binding guidelines only.

62 It suggested that this requirement would not be met when an arbitrator's partiality only arose after an award was finalised. The Committee did not accept that Vivendi II stood for the proposition that a challenge could not ever succeed where an award had been unanimous.

63 At [137]–[139].

64 At [145].

65 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v Kingdom of Spain* (ICSID Case No. ARB/13/36), Decision on Annulment, 11 June 2020.

66 See *Eiser v Spain*, at [45].

67 See *Azurix*; *Carnegie Minerals*; *Pey Casado II*.

68 See *Azurix*.

69 See *Carnegie Minerals*, Decision on Annulment, 7 July 2020, at [171].

70 *Pey Casado II*, Decision on Annulment, 8 January 2020.

71 See *Pey Casado II*, Decision on Annulment, 8 January 2020, at [557] and [612].

72 See *Eiser v Spain*, Decision on Annulment, 11 June 2020, at [190].

73 See *Eiser v Spain*, Decision on Annulment, 11 June 2020, at [190].

74 As previously noted, that figure may be higher on the basis that there are seven completed annulment proceedings where the specific grounds invoked are unknown.

75 *Patrick Mitchell*; *Malaysian Historical Salvors*; and *Occidental II*.

76 *Klöckner I*; *Amco I*; *Vivendi I*; *Enron v Argentina*; *Sempra v Argentina*; and *Mobil Corporation*.

77 *Helnan v Egypt*; and *RSM v Saint Lucia*.

78 See *Helnan v Egypt*, Decision on Annulment, 29 May 2010, at [41].

79 See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Chile* (ICSID Case No. ARB/01/7), Decision on Annulment, 21 March 2007 ("***MTD v Chile***") at [54]. This approach has been followed by other committees, including in *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan* (ICSID Case No. ARB/10/1), Decision on Annulment, 14 July 2015 ("***Kilic v Turkmenistan***"), at [55]; and *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Annulment, 19 May 2014 ("***SGS v Paraguay***"), at [140]. Similarly, the committee in *Hussein Nauman Soufraki v United Arab Emirates* (ICSID Case No. ARB/02/7), Decision on Annulment, 5 June 2007 ("***Soufraki v UAE***") held at [119] that "[a] *jurisdictional error is not a separate category of excess of power. Only if an ICSID tribunal commits a manifest excess of power, whether on a matter related to jurisdiction or to the merits, is there a basis for annulment.*"

80 See *C. H. Schreuer* et al., *The ICSID Convention: A Commentary*, [2nd ed. 2009] Cambridge University Press, p. 942.

81 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v Republic of Peru* (ICSID Case No. ARB/03/4), Decision on Annulment, 5 September 2007, ("***Alimentos v Peru***"), at [112].

82 See *Occidental II*, Decision on Annulment, 2 November 2015, at [266].

83 See *Malaysian Historical Salvors*, Decision on Annulment, 16 April 2009, at [61].

84 See *Malaysian Historical Salvors*, Decision on Annulment, 16 April 2009, at [74].

85 Claims regarding the applicable law have been raised in at least 61 proceedings regarding Ground 2.

86 See *Amco I*, Decision on Annulment, 16 May 1986, at [23].

87 See *Vivendi I*, Decision on Annulment, 3 July 2002, at [108].

88 See *Enron v Argentina*, Decision on Annulment, 30 July 2010, at [377].

89 See *Sempra v Argentina*, Decision on Annulment, 29 June 2010, at [165].

90 See *Mobil Corporation v Venezuela*, Decision on Annulment, 9 March 2017, at [183]-[184].

91 See *Mobil Corporation v Venezuela*, Decision on Annulment, 9 March 2017, at [188(a)].

92 See *Tidewater v Venezuela*, Decision on Annulment, 27 December 2016, at [129].

93 See *Soufraki v UAE*, Decision on Annulment, 5 June 2007, at [85].

94 See *Soufraki v UAE*, Decision on Annulment, 5 June 2007, at [86].

95 See *Soufraki v UAE*, Decision on Annulment, 5 June 2007, at [101].

96 See, e.g. *Libananco Holdings Co. Limited v Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Annulment, 22 May 2013 ("***Libananco v Turkey***"), at [97]; *Malicorp Limited v Arab Republic of Egypt* (ICSID Case No. ARB/08/18), Decision on Annulment, 3 July 2013 ("***Malicorp v Egypt***"), at [49]; *Sempra v Argentina*, Decision on Annulment, 29 June 2010, at [164]; *Adem Dogan v Turkmenistan* (ICSID Case No. ARB/09/9), Decision on Annulment, 15 January 2016 ("***Dogan v Turkmenistan***"), at [106].

97 See *RSM v Saint Lucia*, Decision on Annulment, 29 April 2019, at [193].

98 See *RSM v Saint Lucia*, Decision on Annulment, 29 April 2019, at [200].

99 See *Helnan Hotels v Egypt*, Decision on Annulment, 29 May 2010, at [51]-[57].

100 See *MINE v Guinea*, Decision on Annulment, 22 December 1989, at [4.06].

101 See *Mobil v Argentina*, Decision on Annulment, 8 May 2019, at [98]-[101].

102 See *C. H. Schreuer et al., The ICSID Convention: A Commentary,* [2nd ed. 2009] Cambridge University Press, p. 938.

103 See *EDF v Argentina*, Decision on Annulment, 5 February 2016, at [192].

104 See *Wena Hotels Limited v Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Annulment, 5 February 2002 ("Wena Hotels v Egypt"), at [25]. However, note that the *ad hoc* committee in *Occidental II* (which concluded that there had been a manifest excess of powers) disagreed with that final point, holding that the notion of manifest "*does not prevent that in some cases an extensive argumentation and analysis may be required to prove that the misuse of powers has in fact occurred*." See *Occidental II*, Decision on Annulment, 2 November 2015, at [267].

105 See *Impregilo SpA v Argentine Republic* (ICSID Case No ARB/07/17), Decision on Annulment, 24 January 2014 ("***Impregilo v Argentina***"), at [128].

106 See *El Paso Energy International Company v Argentine Republic* (ICSID Case No. ARB/03/15), Decision on Annulment, 22 September 2014 ("***El Paso v Argentina***"), at [142].

107 See *Soufraki v UAE*, Decision on Annulment, 5 June 2007, at [40].

108 See *Malicorp v Egypt*, Decision on Annulment, 3 July 2013, at [56].

109 Ground 3 was invoked but later withdrawn in *Vivendi II*, Decision on Annulment, 10 August 2010, at [201]. ("T*he controversies between the parties in the written and oral phases of the present proceedings arise foremost from Professor Kaufmann-Kohler's appointment to the Board of UBS* on 19 April 2006, […]. *A further ground for annulment under Article 52(1)(c) was withdrawn*").

110 *G. Sacerdoti and M. Recanati, Chapter 11: From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?, in Jorge A. Huerta-Goldman, Antoine Romanetti, et al. (eds)*, WTO Litigation, Investment Arbitration, and Commercial Arbitration, Global Trade Law Series, Volume 43 (© Kluwer Law International; Kluwer Law International 2013) pp. 327-356. See also, ICSID, *The History of the ICSID Convention*, Volume II, Part 2, p. 852.

111 See, ICSID, *The History of the ICSID Convention*, Volume II, Part 2, p. 852.

112 See, ICSID, *The History of the ICSID Convention*, Volume II, Part 2, p. 851.

113 ICSID, *Updated Background Paper on Annulment for the Administrative Council of ICSID*, 5 May 2016, pp. 7-8.

114 *D. R. Kalderimis, N. Rubins, et al., ICSID Convention, Chapter IV, Section 5, Article 52* [Annulment], in Loukas A. Mistelis (ed), Concise International Arbitration (Second Edition), 2nd edition (© Kluwer Law International; Kluwer Law International 2015), pp. 138-148.

115 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [89]; *Sociedad Anónima Eduardo Vieira v Republic of Chile* (ICSID Case No. ARB/04/7), Decision on Annulment, 10 December 2010 ("***Vieira v Chile***"), at [243] and [375]; M. Scherer, *ICSID Annulment Proceedings based on Serious Departure from a Fundamental Rule of Procedure*, at [01], p. 212.

116 See C. H. Schreuer et al., *The ICSID Convention: A Commentary,* [2nd ed. 2009] Cambridge University Press, p. 933; '*Chapter 5: The ICSID Review Regime*', in L. Ferguson Reed, J. Paulsson, et al., *Guide to ICSID Arbitration,* (Kluwer Law International 2010), pp. 163-164.

117 Other grounds were invoked in those same five cases.

118 See *Fraport I* and *TECO*.

119 See *Amco II*; *Pey Casado I*; and *Eiser v Spain*.

120 Arbitration proceedings were resubmitted on 3 October 2016 and the arbitral tribunal rendered its award on 13 May 2020.

121 See *MINE v Guinea*, Decision on Annulment, 22 December 1989, at [4.06]; *CDC v Seychelles*, Decision on Annulment, 29 June 2005, at [48]; *Fraport I*, Decision on Annulment, 23 December 2010, at [186].

122 *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002; *MINE v Guinea*, Decision on Annulment, 22 December 1989.

123 See Reed & Paulsson, *Guide to ICSID Arbitration*, (Kluwer Law International 2010), p. 162.

124 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57].

125 See e.g., *Orascom TMT Investments S.à r.l. v People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Decision on Annulment, 14 September 2020 ("***Orascom v Algeria***"), at [140]; *Iberdrola Energía, S.A. v Republic of Guatemala,* (ICSID Case No ARB/09/5), Decision on Annulment, 13 January 2015 ("***Iberdrola v Guatemala***"), at [105]; T*otal S.A. v Argentine Republic* (ICSID Case No ARB/04/1), Decision on Annulment, 1 February 2016 ("***Total v Argentina***"), at [173].

126 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57]; *Iberdrola v Guatemala,* Decision on Annulment, 13 January 2015, at [105]; See also *Impregilo v Argentina,* Decision on Annulment, 24 January 2014, at [163]-[165]; *Total v Argentina,* Decision on Annulment,1 February 2016, at [308]-[309].

127 See e.g., *Amco I*, Decision on Annulment, 16 May 1986, at [87]-[88].

128 See e.g., *Klöckner I*, Decision on Annulment, 3 May 1985, at [89]-[92]; *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57]; *CDC v Seychelles,* Decision on Annulment, 29 June 2005, at [49]; *Alimentos v Peru,* Decision on Annulment, 5 September 2007, at [71]; *Fraport I,* Decision on Annulment, December 23, 2010, at [197].

129 See e.g., *Klöckner I*, Decision on Annulment, 3 May 1985, at [95]; *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002, at [57]; *CDC v Seychelles*, Decision on Annulment, 29 June 2005, at [51]-[55].

130 See e.g., *Amco I*, Decision on Annulment, 16 May 1986, at [90]-[91]; *Klöckner I*, Decision on Annulment, 3 May 1985, at [6.80]; *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [59]-[61].

131 See e.g., *Klöckner I*, Decision on Annulment, 3 May 1985, at [84]; *CDC v Seychelles*, Decision on Annulment, 29 June 2005, at [58].

132 *Amco II; Dogan v Turkmenistan; Duke Energy International Peru Investments No. 1 Ltd. v Republic of Peru* (ICSID Case No. ARB/03/28) ("***Duke v Peru***"); *Gambrinus, Corp. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31) ("***Gambrinus v Venezuela***"); *Impregilo v Argentina; Kilic v Turkmenistan; Klöckner I; Libananco v Turkey; Malicorp v Egypt; MINE v Guinea; Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan* (ICSID Case No. ARB/05/16) ("***Rumeli v Kazakhstan***"); *Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited* (ICSID Case No. ARB/10/20) ("***Standard Chartered Bank v Tanzania***"); *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v Bolivarian Republic of Venezuela (II)* (ICSID Case No. ARB/12/23) ("***Tenaris v Venezuela***"); *Tulip Real Estate Investment and Development Netherlands B.V. v Republic of Turkey* (ICSID Case No. ARB/11/28) ("***Tulip v Turkey***"); *Venoklim Holding B.V. v Bolivarian Republic of Venezuela (I)* (ICSID Case No. ARB/12/22) ("***Venoklim v Venezuela***"); *Vivendi II*; *Wena Hotels v Egypt*.

133 *Amco II*, Decision on Annulment, 17 December 1992, of the 1990 Award and the 1990 Supplemental Award, at [5.27].

134 *Amco II*, Decision on Supplemental Decisions and Rectification, 17 October 1990, at [11].

135 *Amco II*, Decision on Annulment, 17 December 1992, of the 1990 Award and the 1990 Supplemental Award, at [9.08].

136 See *Impregilo v Argentina*; *Kilic v Turkmenistan*; *Rumeli v Kazakhstan*; *Tenaris v Venezuela*; *Standard Chartered Bank v Tanzania*; *Tulip v Turkey*; *Venoklim v Venezuela*; and *Wena Hotels v Egypt*.

137 See *Azurix*, Decision on Annulment, 1 September 2009, at [233].

138 See, e.g., *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002, at [57]; *Fraport I*, Decision on Annulment, 23 December 2010, at [185]; *Duke v Peru*, Decision on Annulment, 1 March 2011, at [168]; *Malicorp v Egypt*, Decision on Annulment, 3 July 2013, at [36]; *Orascom v Algeria,* Decision on Annulment, 14 September 2020, at [138]-[140].

139 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57].

140 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57].

141 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [57]; see also *Orascom v Algeria*, Decision on Annulment, 14 September 2020, at [138]-[140].

142 See *von Pezold and others*, Decision on Annulment, 21 November 2018, at [255].

143 See *von Pezold and others*, Decision on Annulment, 21 November 2018, at [255].

144 See *Helnan*, Decision on Annulment, 29 May 2010, at [38].

145 See *Tulip v Turkey,* Decision on Annulment, 30 December 2015, at [82].

146 *Amco II*, Decision on Annulment, 17 December 1992; *Fraport I*, Decision on Annulment, 23 December 2010; *TECO v Guatemala*, Decision on Annulment, 5 April 2016; *Pey Casado I*, Annulment Decision, 18 December 2012.

147 See *Amco II v Indonesia*, Decision on Annulment, 17 December 1992, of the 1990 Award and the 1990 Supplemental Award, at [5.22].

148 See *Fraport I*, Decision on Annulment, 23 December 2010, at [241].

149 See *Fraport I*, Decision on Annulment, 23 December 2010, at [243] and [245].

150 See *Fraport I*, Decision on Annulment, 23 December 2010, at [187].

151 See *TECO v Guatemala*, Decision on Annulment,5 April 2016, at [183].

152 See *Pey Casado I,* Annulment Decision, 18 December 2012, at [175].

153 *Border Timbers*; *EDF v Argentina*; *Klöckner I*; *Libananco v Turkey*; *OIEG v Venezuela*; *RSM v Saint Lucia*; *Suez v Argentina*; *Suez and Vivendi v Argentina*; *Vivendi II*; *von Pezold and others*; and *Eiser v Spain*.

154 See *EDF v Argentina*, Decision on Annulment, 5 February 2016, at [123].

155 *Eiser v Spain*, Decision on Annulment, 11 June 2020.

156 *Azurix; Blue Bank v Venezuela; Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v Italian Republic,* (ICSID Case No. ARB/14/3) ("***Blusun v Italy***"); *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia* (ICSID Case No. ARB/12/40 and 12/14) ("***Churchill Mining v Indonesia***"); *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9) ("***Continental Casualty v Argentina***"); *Daimler Financial Services AG v Argentine Republic* (ICSID Case No. ARB/05/1) ("***Daimler v Argentina***"); *Impregilo v Argentina; Kilic v Turkmenistan; Mobil v Argentina; MTD v Chile; Rumeli v Kazakhstan; SAUR International v Argentine Republic* (ICSID Case No. ARB/04/4) ("***SAUR v Argentina***"); *Standard Chartered Bank v Tanzania*; *Tenaris v Venezuela*; *Tulip v Turkey*; *OIEG v Venezuela*; *Venoklim v Venezuela*; *Vivendi I*; and *Wena Hotels v Egypt*.

157 See *Tulip v Turkey*, Decision on Annulment, 30 December 2015, at [80].

158 See *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002, at [65].

159 See *Tulip v Turkey,* Decision on Annulment, 30 December 2015, at [85].

160 *Churchill Mining v Indonesia*, *Continental Casualty v Argentina*, *Daimler v Argentina*, *Impregilo v Argentina*, *Kilic v Turkmenistan*, *Rumeli v Kazakhstan*, *SAUR v Argentina*, *Tenaris v Venezuela*, *OIEG v Venezuela*, *Wena Hotels v Egypt* and *Standard Chartered Bank v Tanzania*.

161 *Blusun v Italy*, *MTD v Chile*, *Tulip v Turkey*, *Venoklim v Venezuela* and *Vivendi I*.

162 *Azurix* and *Mobil v Argentina*.

163 See *Tenaris v Tanzania*, Decision on Annulment, 28 December 2018, at [93].

164 See *Churchill Mining v Indonesia*, Decision on Annulment, 18 March 2019, at [214]; *Continental Casualty v Argentina,* Decision on Annulment, 16 September 2011, at [135].

165 See *Blusun v Italy*, Decision on Annulment, 13 April 2020, at [318].

166 See *Tulip v Turkey*, Decision on Annulment, 30 December 2015, at [148].

167 See *Tulip v Turkey*, Decision on Annulment, 30 December 2015, at [219].

168 See *Tulip v Turkey*, Decision on Annulment, 30 December 2015, at [98].

169 See *Tulip v Turkey*, Decision on Annulment, 30 December 2015, at [98].

170 See *Mobil v Argentina*, Decision on Annulment, 8 May 2019, at [120]. See also, *Azurix*, Decision on Annulment, 1 September 2009, at [207].

171 (i) *Daimler v Argentina*; (ii) *Klöckner I*; and (iii) *Venoklim v Venezuela*.

172 See C. H. Schreuer et al., *The ICSID Convention: A Commentary,* [2nd ed. 2009] Cambridge University Press, at [318], p. 991.

173 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [84].

174 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [84]; *Venoklim v Venezuela*, Decision on Annulment, 2 February 2018, at [276].

175 See *Daimler v Argentina*, Decision on Annulment, 7 January 2015, at [300].

176 *Repsol YPF Ecuador S.A. v Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on Annulment, 8 January 2007 ("***Repsol YPF v Petroecuador***").

177 *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Annulment, 29 May 2019 ("***Teinver v Argentina***").

178 *Repsol YPF v Petroecuador.* Decision on Annulment, 8 January 2007, at [80]; *Teinver v Argentina*, Decision on Annulment, 29 May 2019, at [181].

179 See *MINE v Guinea*, Decision on Annulment, 22 December 1989, at [5.05].

180 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [58] [emphasis added].

181 To date, *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [58] has been quoted for example in *CDC v Seychelles*, Decision on Annulment, 29 June 2005, at [49]; *Repsol YPF v Petroecuador,* Decision on Annulment, 8 January 2007, at [81]; *Azurix v Argentina,* Decision on Annulment, 1 September 2009, at [51] and [234]; *Enron v Argentina,* Decision on Annulment, 30 July 2010, at [71]; *Continental Casualty v Argentina,* Decision on Annulment, 16 September 2011, at [101].

182 *CEAC Holdings Limited v Montenegro* (ICSID Case No. ARB/14/8), Decision on Annulment, 1 May 2018 ("***CEAC v Montenegro***") at [93].

183 See *Pey Casado I,* Annulment Decision, 18 December 2012, at [80].

184 See *Churchill Mining v Indonesia,* Decision on Annulment, 18 March 2019, at [180].

185 See *Churchill Mining v Indonesia,* Decision on Annulment, 18 March 2019, at [180].

186 *Border Timbers; Klöckner I; Joseph Charles Lemire v Ukraine (II)* (ICSID Case No. ARB/06/18), Decision on Annulment, 8 July 2013 ("***Lemire v Ukraine***"); *Vieira v Chile*; *von Pezold and others.*

187 See *Lemire v Ukraine,* Decision on Annulment, 8 July 2013, at [272]. Further, n *Von Pezold and Others & Others v Zimbabwe*, the *ad hoc* committee held that the state had had ample opportunity to challenge the arbitrator after it became aware of the alleged basis for disqualification. As a result, the state's decision to not raise that objection at that time constituted a waiver of that right.

188 Rule 47(1)(i) of the ICSID Arbitration Rules provides that a tribunal's award must contain its decision on every question submitted and the reasons upon which the decision is based (emphasis added).

189 See *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [79] (no annulment on the facts) approved of in *Tidewater v Venezuela,* Decision on Annulment, 27 December 2016, at [163]–[164], noting the particular importance of the documentation of the arbitral process in investor-state arbitration.

190 *Klöckner I*, Decision on Annulment, 3 May 1985.

191 *Amco I*, Decision on Annulment, 16 May 1986.

192 See *MINE v Guinea*, Decision on Annulment, 22 December 1989.

193 *Patrick Mitchell,* Decision on Annulment, 1 November 2006; *CMS Gas Transmission Company v Republic of Argentina* (ICSID Case No. ARB/01/08), Decision on Annulment, 25 September 2007 ("***CMS v Argentina***"); *Pey Casado I,* Annulment Decision, 18 December 2012; *TECO v Guatemala,* Decision on Annulment, 5 April 2016; *Tidewater v Venezuela*, Decision on Annulment, 27 December 2016; and *Mobil Corporation*, Decision on Annulment, 9 March 2017.

194 See e.g., A. Broches, *Observations on the Finality of ICSID Awards*, (1991) ICSID Review 321, at [364]-[366], and further below under "Absent or Insufficient Reasoning".

195 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [120] and Amco I, Decision on Annulment, 16 May 1986, at [43].

196 Note that the *ad hoc* committee in *MINE v Guinea* was presided over by Mr Aron Broches, the "architect" of the ICSID Convention.

197 See *MINE v Guinea,* Decision on Annulment, 22 December 1989, at [5.09] [emphasis added].

198 See *MINE v Guinea,* Decision on Annulment, 22 December 1989, at [5.08] [emphasis added].

199 See *Vivendi I*, Decision on Annulment, 3 July 2002, at [65].

200 In the drafting of the Convention the failure to deal with every question was proposed and rejected as a distinct ground for annulment: ICSID, *The History of the ICSID Convention*, Volume II, Part 2, p. 849.

201 See *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002, at [80]; *MINE v Guinea,* Decision on Annulment, 22 December 1989, at [5.12].

202 See *Klöckner I,* Decision on Annulment, 3 May 1985, at [137]. This has also been recognised as giving rise to an arguable serious departure from fundamental procedure: *Klöckner I,* Decision on Annulment, 3 May 1985, at [115] and *Amco I,* Decision on Annulment, 16 May 1986, at [32].

203 See *Wena Hotels v Egypt,* Decision on Annulment, 5 February 2002, at [83] cited in *CMS v Argentina,* Decision on Annulment, 25 September 2007, at [56], and, compare with *MINE v Guinea,* Decision on Annulment, 22 December 1989, at [5.13].

204 See Stephanie Mullen and Elizabeth Whitsitt "Quantum, annulment and the requirement to give reasons: analysis and reform" (2015) 32 Arbitration International 59 at 65.

205 *Klöckner I, Amco I*, Decision on Annulment, 16 May 1986, *MINE v Guinea*, Decision on Annulment, 22 December 1989, and *Patrick Mitchell*, *CMS v Argentina*, *TECO v Guatemala* and *Mobil Corporation*.

206 See *MINE v Guinea*, Decision on Annulment, 22 December 1989, at [6.104 where the State asserted that the tribunal had failed to give reasons for awarding preaward interest in USD at bank rates. The *ad hoc* committee found the justification of that currency and bank rate of interest was apparent from the fact that the US dollar was the currency of the subject contract.

207 See *Rumeli v Kazakhstan,* Decision on Annulment, 25 March 2010, at [83]. "*[I]f reasons are not stated but are evident and a logical consequence of what is stated in an award, an ad hoc committee should be able to so hold. Conversely, if such reasons do not necessarily follow or flow from the award's reasoning, an ad hoc committee should not construct reasons in order to justify the decision of the tribunal.*"

208 *CMS v Argentina,* Decision on Annulment, 25 September 2007.

209 See *CMS v Argentina,* Decision on Annulment, 25 September 2007, at [97]. The *ad hoc* committee also noted that the fact that possible reasons might exist (i.e. that the umbrella clause might have been broad enough to create obligations in favour of CMS) would not prevent annulment (see at [91]).

210 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [150]; and the useful summary in *The Government of Sudan v The Sudan People's Liberation Movement/Army* (PCA Case No 2008-07), 22 July 2009, at [528].

211 See *Tidewater v Venezuela,* Decision on Annulment, 27 December 2016, at [168].

212 See *Vivendi I,* Decision on Annulment, 3 July 2002, at [64], quoted in *Pey Casado I*, Annulment Decision, 18 December 2012, at [83]-[84], noting the similar views of other tribunals.

213 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [120] summarised in *Wena Hotels v Egypt*, Decision on Annulment, 5 February 2002, at [78] in which the *ad hoc* committee identified this language as "similar" to the *MINE* test.

214 See *Amco I*, Decision on Annulment, 16 May 1986, at [43].

215 See *Tidewater v Venezuela,* Decision on Annulment, 27 December 2016, at [166]-[169]. Compare *Patrick Mitchell*, Decision on Annulment, 1 November 2006, at [65], which, while adopting the *MINE* test, at [19], observed, although in relation to an analysis of expropriation which it did find supported by reasons that annulment is warranted "*even in respect of a question on the merits*" if reasoning is "*inadequate or contradictory*". Inadequacy appears to be inconsistent with the *MINE/Vivendi* standard. *Patrick Mitchell* did find "*incomplete and obscure*" support for the conclusion that a law firm was an "*investment*" constituted a lack of reasons.

216 See *Tidewater v Venezuela*, Decision on Annulment, 27 December 2016, at [169].

217 See *Klöckner I,* Decision on Annulment, 3 May 1985, at [115].

218 *Pey Casado I*, *Tidewater v Venezuela* and *Mobil Corporation*.

219 See *Klöckner I*, Decision on Annulment, 3 May 1985, at [116].

220 See *Vivendi I*, Decision on Annulment, 3 July 2002, at [64]-[65] cited in *CMS v Argentina*, Decision on Annulment, 25 September 2007, at [54].

221 *Tidewater v Venezuela,* Decision on Annulment, 27 December 2016.

222 It seems that an application for rectification under Article 49(2) would have been appropriate (see *Tidewater v Venezuela*, Decision on Annulment, 27 December 2016, at [42]-[43]), but none was made. Instead, an application for revision under Article 51 was made which was inapposite.

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