

**IV Annual Forum for Developing Country Investment Negotiators**

Background Papers

New Delhi, October 27-29, 2010

**Annulment of ICSID Awards:  
Recent developments**

Lise Johnson

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## Background

The ICSID Convention States that awards rendered under it “shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in [the] Convention.”<sup>1</sup> The ICSID Convention further requires each contracting State to recognize awards rendered under the Convention as “binding” and to enforce the awards as if they were “final judgment[s] of a court in that State.”<sup>2</sup> The primary avenue the Convention provides any disputing party to challenge an award is through seeking “annulment” of the award *within* the context of the ICSID system; and it limits such relief to specific and narrow grounds.<sup>3</sup> These features differ from those applicable under other types of arbitration regimes, which may allow for review of awards before national courts at the seat of arbitration based on applicable domestic law, and which provide for enforcement pursuant to the New York Convention. Such procedures allowing for external review permit disputing parties to challenge awards based, among other grounds, on the ground that enforcing the award would be inconsistent with that jurisdiction’s public policy.<sup>4</sup> In contrast, the ICSID Convention restricts outside review of awards and strictly limits the grounds on which the awards can be annulled, erecting strong shields around tribunals’ awards, and raising the stakes of investor-State arbitration for respondent States even higher.

Against that background, this paper examines grounds and possibilities for annulling ICSID awards. It does so by reviewing recent ICSID decisions on parties’ applications for annulment. Between September 1, 2009 and September 1, 2010, ICSID annulment committees issued eight such decisions—a significant number given that, prior to September 1, 2009, only sixteen annulment decisions had ever been issued in ICSID cases.<sup>5</sup>

<sup>1</sup> International Convention on the Settlement of Investment Disputes between States and National of Other States (entered into force 14 October 1966), Art. 53(1).

<sup>2</sup> *Ibid.*, Art. 54(1).

<sup>3</sup> *Ibid.*, Arts. 52 & 53. Apart from annulment, the ICSID Convention also permits interpretation and revision of awards. The former may be requested when a dispute arises between the parties as to the meaning or scope of an award. (Art. 50). The latter may be requested upon “discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant’s ignorance of that fact was not due to negligence.” (Art. 51[1]).

<sup>4</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (entered into force 7 June 1959), Art. V.

<sup>5</sup> This figure is based on information available on the ICSID website, the Investment Treaty Arbitration website, and a review of ICSID annulment decisions. It does not include those cases in which applications for annulment were filed, but the proceedings were discontinued before the committee issued a decision. The sixteen decisions, not all of which are publicly available, are the following: (1) *Klockner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Application for Annulment, 3 May 1985; (2) *Klockner Industrie-Anlagen GmbH v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Application for Annulment, 17 May 1990; (3) *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment, 16 May 1986; (4) *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on Application for Annulment, 22 December 1989; (5) *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1,

With the exception of one, *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabon*,<sup>6</sup> all of those recent annulment decisions are publicly available and are addressed in this paper. The seven recent annulment decisions are *Sempra v. Argentina*,<sup>7</sup> *Enron v. Argentina*,<sup>8</sup> *Vivendi v. Argentina*,<sup>9</sup> *Rumeli Telekom v. Kazakhstan*,<sup>10</sup> *Helnan International Hotels v. Egypt*, *Azurix v. Argentina*,<sup>11</sup> and *MCI v. Ecuador*.<sup>12</sup>

Five of the seven applications for annulment were brought by the respondent host state. In *Sempra* and *Enron*, the ad hoc annulment committees granted Argentina's applications for annulment in full or in significant part. In *Vivendi* and *Azurix*, the committees rejected Argentina's applications, and in *Rumeli* the annulment committee rejected Kazakhstan's application for annulment.

In the remaining two cases, it was the unsuccessful investors that sought to annul the tribunals' awards. In *MCI*, the ad hoc committee rejected the investor's application. And in *Helnan International Hotels*, the ad hoc committee granted the investor's application in part, but did not set aside the tribunal's decision on the merits of the dispute.

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Decision on Annulment, 17 December 1992; (6) *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002; (7) *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Application for Annulment, 3 July 2002; (8) *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment, 29 June 2005; (9) *Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on Application for Annulment, 1 Nov. 2006; (10) *Consortium RFCC v. Kingdom of Morocco*, ICSID Case No. ARB/00/6, Decision on Application for Annulment, 18 Jan. 2006 (not publicly available); (11) *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/01/10, Decision on Application for Annulment, 8 Jan. 2007; (12) *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007; (13) *Hussein Nauman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Application for Annulment, 5 June 2007; (14) *Industria Nacional de Alimentos and Indaisa Peru, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Application for Annulment and Dissenting Opinion, 5 Sept. 2007; (15) *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Application for Annulment, 25 Sept. 2007; (16) *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Application for Annulment and Dissenting Opinion, 16 April 2009. <sup>6</sup> ICSID Case No. ARB/04/5, Decision on Application for Annulment 11 May 2010.

<sup>7</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16 (dispatched to the parties 29 June 2010).

<sup>8</sup> *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (dispatched to the parties 30 July 2010).

<sup>9</sup> *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3 (dispatched to the parties 10 August 2010).

<sup>10</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16 (dispatched to the parties 25 March 2010).

<sup>11</sup> *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12 (dispatched to the parties 1 September 2009).

<sup>12</sup> *MCI Power Group LC and New Turbine Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment (dispatched to the parties 19 October 2009).

Together, the decisions addressed four of the five limited grounds for annulment permitted under Article 52 of the ICSID Convention: Articles 52(1)(a), (b), (d), and (e). Article 52(1) provides that parties may seek annulment of a tribunal's award, but may only do so based on one or more of five grounds:

- a) that the tribunal was not properly constituted;
- b) that the tribunal has manifestly exceeded its powers;
- c) that there was corruption on the part of a member of the Tribunal;
- d) that there has been a serious departure from a fundamental rule of procedure; or
- e) that the award has failed to state the reasons on which it is based.

Article 52 further states that the applications will be decided by an ad hoc committee of three individuals appointed by the Chairman of the ICSID Administrative Council.

In the seven decisions, the parties seeking annulment had argued that the tribunals had made a wide range of annulable errors. These errors included errors arising from the tribunals' acceptance of jurisdiction, their findings regarding applicable law and application of that law, their admission and evaluation of evidence, their handling of discovery requests, calculations of damages, and matters relating to arbitrator independence and impartiality.

In their treatment of the annulment applications, the seven recent decisions illustrate development and crystallization of some principles regarding interpretation and application of Article 52.<sup>13</sup> The decisions, however, also evidence continued uncertainty and inconsistency in interpretation and application of the ICSID Convention and international investment agreements. This note briefly summarizes some of the key themes and notable aspects of the annulment decisions. First, it looks at the annulment committees' interpretation and performance of their roles within the ICSID system. Second, it examines the committees' interpretations and applications of the Article 52 grounds for annulment.

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<sup>13</sup> International Convention on the Settlement of Investment Disputes between States and National of Other States.

## The Role of an Annulment Committee: Its Purpose, Powers and Discretion

In several of the decisions, the annulment committees opined on the nature of their role and the availability of annulment within the context of the ICSID system. The *Vivendi* committee, for instance, stated that its purpose was to “protect the integrity of the system” (para. 200). It further stated that protecting the “integrity of the ICSID process as a whole [...] is the clear and undisputed underlying concern of Article 52 of the ICSID Convention” (para. 206), and that “all grounds invoked for annulment [...] have to be addressed in the light of this paramount policy consideration” (para. 200).

The *MCI* committee reasoned that one means of “contributing to ensuring trust in the ICSID dispute settlement system” was to ensure “consistency and legal certainty” of decisions. Nevertheless, the *MCI* decision and the subsequent *Enron* decision took the view that the role of an annulment committee was not to “bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law,” they declared, “rests primarily with the investment tribunals” (para. 65).

With respect to the authority of an annulment committee, each decision emphasized that the ICSID Convention circumscribed the committee’s powers of review. Uniformly, the committees stated that they could only annul awards based on the limited grounds set forth in Article 52(1). The committees also declared that they were not “courts of appeal,” and were not empowered to substitute their judgments for the judgments of the tribunals.<sup>14</sup>

One decision, *Vivendi*, however, departed from the others when it hinted that, in some circumstances, an ad hoc committee’s role may be akin to an appellate court’s. More specifically, the *Vivendi* annulment decision stated that, in contrast to other provisions of Article 52(1), “Article 52(1)(e) is cast more in terms similar to an ordinary appeal” (*Vivendi*, para. 247).

In *Sempra*, the committee addressed its powers to review new arguments or evidence on the merits when evaluating an annulment application. It stated that “[n]ew arguments or evidence on the merits will [...] be irrelevant for the annulment process, and therefore not admissible. It cannot be excluded, however, that evidence, particularly expert evidence, may exceptionally be accepted in annulment proceedings insofar [as] it is specifically relevant for the annulment grounds listed in

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<sup>14</sup> See, for example, *Sempra*, para. 73; *Vivendi*, para. 247; *Rumeli*, paras. 70, 72.

Article 52(1) of the Convention (insofar invoked by a party)” (para. 74). The committee in *Enron* apparently adopted a broader view of its authority to consider new arguments and/or evidence. When annulling the award, it stated that it was doing so in part on arguments that the parties “do not appear to have expressly identified and argued” before the tribunal (para. 375).

Some of the decisions also referred to, and adopted different stances on, what deference to accord or level of scrutiny to apply to awards. The *Vivendi* committee stated that it would accord tribunals a “margin of appreciation” (para. 247) and the “benefit of the doubt” (para. 255). In *Sempra*, in contrast, the committee stated: “As for the interpretation of grounds for annulment there is compelling support for the view that neither a narrow nor a broad approach is to be applied. Nor is there any preponderant inclination” or presumption in favour of the award’s validity (paras. 75–76).

Several of the committees addressed the discretion they possess when deciding whether to grant applications for annulment. In *Vivendi*, the committee explained that even if it found an annulable error (which it did), it had “a measure of discretion under Article 52(3) in ordering annulment or in refusing to do so” (para. 252). Applying that discretion, it declined to annul the award. In *Sempra*, the committee likewise noted that “annulment may be a matter of discretion,” but found that due to the nature of the error and its impact on Argentina’s rights, the award had to be annulled (para. 222).

The *Rumeli* decision also stated that annulment committees have “discretion to annul an award upon finding one or more of the grounds of annulment” (para. 75). It rejected the applicant’s argument that it would be required to annul the award if it found there had been a non-trivial annulable error.

## **52(1)(a): Improper constitution of the tribunal**

In three of the seven decisions, *Vivendi*, *Azurix* and *Sempra*, the applicant (in each case, Argentina), sought annulment on the basis that the tribunal had been improperly constituted. In none was the applicant successful in securing annulment on this ground.

In *Vivendi*, Argentina argued that one of the arbitrators, Gabrielle Kaufmann-Kohler, lacked the independence and impartiality required by the ICSID Convention due to her contemporaneous service as an arbitrator in the dispute and service on the board of UBS, the single largest shareholder in claimant *Vivendi*. Argentina further argued Kaufmann-Kohler should have been disqualified, but did not disclose the information necessary for Argentina to have challenged her appointment.

In a decision strongly critical of Kaufmann-Kohler’s judgment in failing to investigate and disclose information to the parties relating to her potential conflicts of interests, the committee agreed with Argentina that the tribunal was not properly constituted, and that annulment under Article 52(1)(a) could be supported. It then reasoned that because (1) Kaufmann-Kohler’s exercise of independent

judgment was not actually impaired, (2) it would be unjust to deny the claimants the benefit of the award due to the arbitrator's failures, and (3) the lengthy proceedings (which were initially filed in 1997) should "come to an end," the committee should decline to annul the award (paras. 238–241).

In *Azurix*, Argentina argued that the tribunal was not properly constituted because its president, Andres Rigo Sureda, "was immersed in various conflicts of interest which cast reasonable doubts on his impartiality" (para. 250). Those conflicts allegedly arose from the fact that Sureda's law firm (from which he later resigned) had appointed an attorney for *Azurix* to be an arbitrator in a separate investor-State dispute, and was also concurrently acting as an advisor to *Azurix* and *Azurix's* parent company in other matters. Argentina added that Sureda had failed to comply with his duties to investigate and disclose possible conflicts, and that the arbitrator's bias was reflected in certain procedural orders issued in the case. Argentina had sought to disqualify Sureda during the proceedings but the tribunal rejected the challenge. According to Argentina, the tribunal's decision on the challenge was erroneous.

When evaluating Argentina's arguments, the committee declined to consider the substance of Argentina's complaints regarding Sureda's conflicts of interests, or the correctness of the challenge decision. It focused instead on whether the *procedures* set forth in the ICSID Convention and ICSID Arbitration Rules for permitting and responding to arbitrator challenges were followed. It stated that it could not "decide for itself whether or not a [challenge decision] was correct, as this would be tantamount to an appeal against such a decision. All that an ad hoc committee can consider is whether the provisions and procedures [...] were complied with" (para. 281). Noting that the relevant provisions and procedures appeared to have been followed in accepting and deciding on the challenge proposal, the committee rejected Argentina's Article 52(1)(a) ground for annulment.

Producing uncertainty regarding implications of arbitrators' failures to make required disclosures, certain statements in *Azurix* suggest that the *Azurix* committee, in contrast to the *Vivendi* committee, would not have viewed Kaufmann-Kohler's conduct as supporting annulment. More specifically, the *Azurix* committee opined that "[i]n the event that [a] party only became aware of the grounds for disqualification of the arbitrator after the award was rendered, this newly discovered fact may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in the Committee's view, such a newly discovered fact would not provide a ground of annulment under Article 52(1)(a)" (para. 281).

In *Sempra*, the annulment committee annulled the decision on other grounds and did not examine whether annulment was also warranted under Article 52(1)(a).



## 52(1)(b): The tribunal manifestly exceeded its powers

In each of the seven decisions, the applicants argued that the tribunal in question had manifestly exceeded its powers. The excesses alleged involved diverse aspects of the proceedings, including the tribunals' assumption of jurisdiction, admission and evaluation of evidence, legal findings, and handling of procedural matters. In the three successful annulment applications—Argentina's successful applications in *Sempra* and *Enron*, and the investor's successful application in *Helnan*—the committees relied on this ground (at least in part) to annul the awards.

Drawing from previous annulment decisions, the seven decisions set forth the same general principles regarding application of Article 52(1)(b). These principles are that a manifest excess of powers will be found where the tribunal lacked jurisdiction or failed to decide a question over which it had jurisdiction, where it disregarded the applicable law, or where it based the award on a law other than the applicable law. The decisions also repeated the refrain that although a failure to apply the applicable law can support annulment, an erroneous interpretation of that law will not. Further, the decisions noted that to be “manifest,” the tribunals' errors had to be evident or apparent on the face of the award without requiring the committee to engage in in-depth reconsideration of the evidence or law before the tribunal.<sup>15</sup>

While the committees' overall readings of Article 52(1)(b) are similar, there are, nevertheless, some notable differences evident in the decisions. Perhaps most significant, in contrast to the common pronouncements that erroneous interpretation or misapplication of the applicable law will not support annulment, a few committees hypothesized that in certain cases those errors could in fact warrant annulment. In *Sempra*, the committee stated that it did “not wish totally to rule out the possibility that a manifest error of law may, in an exceptional situation, be of such egregious nature as to amount to a manifest excess of powers” (para. 164). In *Vivendi*, the committee adopted the view that “erroneous findings of law and fact can be considered grounds for annulment [...] but only if they rise to the exacting standards for annulment as expressed in Article 52(1)” (para. 251). And, in *MCI*, the committee explained that “the freedom which the tribunal enjoys in the application of the law is not unlimited” and that “[m]isinterpretation 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” (paras. 42–43, quoting *Soufraki v. UAE*, *supra*, n. 5). It further explained that to be egregious, the misinterpretation of the law would have to be a “departure from a legal principle or legal norm which is clear and cannot give rise to divergent interpretations. Any other type of violation would not amount to a manifest excess of powers” (para. 51).

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<sup>15</sup> See, for example, *Rumeli*, para. 96; *Azurix*, para. 68.

Moreover, although committees may assert that there is an important distinction between non-application and erroneous application of the applicable law, the decisions indicate that the line between the two types of errors is difficult to define and malleable. In *Helnan*, for instance, after stating that a misapplication of applicable law will not support annulment (para. 41), the decision annulled part of the award on the implicit ground that the tribunal's legal findings were unreasonable and untenable. The *Helnan* tribunal had determined that, because the claimant had never challenged the allegedly wrongful conduct before Egypt's administrative courts, such conduct could not be seen to rise to the level of a treaty breach. After considering the possible "serious" "consequences" such a finding would have on investment treaty law, the committee rejected this particular aspect of the tribunal's award (para. 52, see also para. 47), stating:

The problem with the Tribunal's reasoning is that this is to do by the back door that which the Convention expressly excludes by the front door. Many national legal systems possess highly developed remedies of judicial review. Yet it would empty the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a precondition to arbitration, such a requirement were to be read back in as part of the substantive cause of action. (para. 47)

In *Enron* and *Sempra*, the annulment committees similarly found fault with the tribunals' legal conclusions, and in both cases cast the tribunals' errors as amounting to a failure to apply the applicable law.

More specifically, in *Enron*, the committee found that the tribunal manifestly exceeded its powers when it determined Argentina could not rely on the defense of "necessity" set forth in either the BIT or under customary international law. According to the committee, the tribunal erred by too simply and quickly drawing legal conclusions from economists' expert reports, and by evaluating Argentina's defenses under international law and the BIT in a manner that was so cursory, conclusory and incomplete, it amounted to a failure to apply the applicable law.

In *Sempra*, the committee rejected the tribunal's legal conclusion that the defense of necessity under the BIT between the United States and Argentina was coextensive with, and should be interpreted based on, the defense of necessity under customary international law. According to that committee, the tribunal's legal error in interpreting the treaty defense constituted a failure to apply that law.

In the four decisions in which the applicants' 52(1)(b) arguments were rejected, the committees appeared to take a very narrow view of their roles. These decisions emphasized the notions (1) that annulment committees were able only to check to make sure that the correct law was applied, not that the correct law was correctly applied; and (2) that, to be annulable, errors had to be "manifest" or obvious.

### **52(1)(c): There was corruption on the part of a member of the tribunal**

None of the seven annulment decisions involved discussion of this ground.

### **52(1)(d): There was a serious departure from a fundamental rule of procedure**

Each annulment decision, except *MCI*, involved claims by the applicants that annulment was warranted under Article 52(1)(d). Arguments for annulment under this provision included assertions that the tribunals had failed to accord parties proper opportunities to present their claims or defenses, had improperly accepted and/or evaluated evidence, and lacked the required independence and impartiality. Only in *Vivendi* did the annulment committee determine that there had in fact been a serious departure from a fundamental rule of procedure, which arose from Kaufmann-Kohler's alleged conflicts of interests. Yet, as noted above, the committee declined to annul the award on this ground.

The annulment decisions suggest that a major barrier to annulment on this provision is the requirement to establish a “departure.” This is because, under the ICSID Convention and Arbitration Rules, tribunals have a significant amount of discretion to conduct the case and admit and evaluate evidence. As stated by the *Azurix* and *Enron* committees when rejecting applicants' arguments, “A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an exercise of that rule of procedure, and not a departure from that rule of procedure” (*Azurix*, para. 210; *Enron*, para. 191). Similarly, as support for their decisions not to annul the awards on Article 52(1)(d) grounds, the *Rumeli*, *Helnan* and *Vivendi* committees referred to the wide latitude tribunals have to conduct the proceedings, admit evidence and draw their own conclusions based on that evidence.<sup>16</sup>

In addition to there being a “departure,” the various annulment committees' decisions have stated that for annulment based on Article 52(1)(d) to be appropriate, the procedure rule must have been “fundamental” and the departure from it must have been “serious.” Although the decisions do not elaborate much on what constitutes a “fundamental” rule of procedure, some of the committees adopted the position taken in earlier annulment decisions that, to be “serious,” the departure from it must have substantially impacted the tribunal's decision or deprived “a party of the benefit of protection which the rule was intended to provide” (*Enron*, para. 71, citing *MINE v. Guinea*, *supra*, n.5).<sup>17</sup>

<sup>16</sup> See, for example, *Rumeli*, para. 104; *Helnan*, paras. 24–27, 38, 64–65; *Vivendi*, paras. 249, 255, 265; see also, *Sempra*, para. 18.

<sup>17</sup> See also, *id.* (citing *Vivendi* and *Wena Hotels v. Egypt*, *supra* n.5); *Azurix*, para. 51 (citing *Wena Hotels v. Egypt*, *supra*, n.5).

The significance of this “seriousness” requirement can be seen in *Enron* and *Azurix*. In *Enron*, the committee supported its rejection of Argentina’s request for annulment under Article 52(1)(d) by stating that Argentina had not shown that the tribunal’s allegedly improper admission of evidence deprived Argentina of the protections granted to it under the ICSID Arbitration Rules; the committee also determined that the tribunal’s allegedly premature closure of the proceedings could not justify annulment because Argentina had not established that such action “may have affected the outcome of the Award” (*Enron*, paras. 197, 211).

In *Azurix*, Argentina had argued in part that the award should be annulled under Article 52(1)(d) because the tribunal improperly and unfairly denied its requests for discovery. The committee, however, responded that the tribunal’s denial of Argentina’s discovery requests did not warrant annulment. According to the committee, Argentina’s arguments failed because the committee was “not satisfied [...] that it was reasonably likely that the documents requested by Argentina, had they been available in the proceedings, would have caused the Tribunal to reach a substantially different result” (para. 238).

Representing a slightly different approach, in *Vivendi*, the committee did not interpret the “serious departure” language as requiring proof that the procedural violation actually impacted the decision. Nevertheless, the committee’s view that the procedural violation did not affect the outcome of the case was one of the factors it considered when declining to annul the award.

### **52(1)(e): The award failed to state the reasons on which it was based**

This ground was raised and addressed in each of the seven decisions. In none, however, did the committee find that it supported annulment.

Article 48(3) of the ICSID Convention requires an award to “state the reasons upon which it is based.” Failure to do so can support annulment under Article 52(1)(e). One of the decisions, *Azurix*, also suggested that although nothing in the ICSID Convention specifically requires tribunals to state reasons for their decisions on arbitrator challenges, such a duty might be implicit and, if not complied with, also support annulment under Article 52(1)(e) (para. 290).

Drawing from previous annulment decisions, the committees in these seven decisions recited fairly consistent—and narrow—interpretations of this ground for annulment. The common formula is that:

[This] ground obtains if there is a total absence of reasons [...]. [Moreover, t]he reasons [given] must be coherent and allow ‘the reader to follow the arbitral tribunal’s reasoning, on facts and on law’ and enable ‘one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion.’ (*Rumeli*, para. 80, citing *Klockner and MINE*, *supra* n. 5)<sup>18</sup>

The reasons stated do not have to be clear, convincing or correct.<sup>19</sup> Yet if the reasons are so contradictory that they “completely cancel each other out” (*Rumeli*, para. 83), a failure to state reasons may be found.<sup>20</sup>

Additionally, a “failure to deal with a question which would have altered an important finding of the tribunal or would have rendered the award unintelligible amounts to a failure to state reasons” (*Rumeli*, para. 82; see also, *Azurix*, para. 178). Nevertheless, tribunals are not required to explicitly “deal with all the arguments raised by the parties” (*Rumeli*, para. 84).<sup>21</sup>

Even if reasons are not stated, annulment may not necessarily be the appropriate remedy. “[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” (*Rumeli*, para. 83). The *Vivendi* committee added that if the committee “deems it necessary, [it may] further explain, clarify, or supplement the reasoning given by the Tribunal rather than annul the decision” (para. 248). Yet, as cautioned in *Rumeli*, “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” (para. 83).

The applicants’ petitions for annulment based on this ground involved claims that the tribunals failed to state reasons for coming to certain factual and legal conclusions regarding jurisdiction, the merits, and damages. Yet, as noted above, applying deferential standards of review under Article 52(1)(e), the committees uniformly rejected the seven applications for annulment on this ground.

<sup>18</sup> See also *Azurix*, para. 178; *Sempra*, para. 167.

<sup>19</sup> See *Vivendi*, *supra* n.5, paras. 64–65; *Rumeli*, paras. 82–83, 137; *Enron*, para. 74; *Azurix*, para. 178; *MCI*, para. 82

<sup>20</sup> *Vivendi*, *supra* n.5, paras. 64–65; *Azurix*, para. 178;

<sup>21</sup> See also *Helnan*, paras. 36–37; *Enron*, para. 72; *Azurix*, para. 178; *MCI*, para. 67.

## Conclusion

The year running from September 1, 2009 to September 1, 2010 was an active one for ICSID annulment decisions, with eight applications for annulment being decided. Overall, the decisions evidence that applicants for annulment face low chances of success. Tribunals' discretion under the ICSID Convention and Arbitration Rules, and annulment committees' interpretation and application of their narrow roles, erect strong shields around ICSID awards. Nevertheless, in several cases, the annulment committees did accept parts of the applicants' arguments; and, in *Enron* and *Sempra*, these decisions had significant practical ramifications, collectively releasing Argentina from the obligation to pay more than US\$200 million in damages.