The Legitimacy and Limitation of the Ad Hoc Committee’s Factual Review of ICSID Awards
(An Analysis of the Annulment Grounds Under Articles 52 (1)(b) and (e) of the ICSID)

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1. INTRODUCTION

1.1. Statement Of The Problem

Time and time again, *ad hoc* annulment committees (hereinafter “*ad hoc committees*”) have emphasized that they are not an appeals mechanism. This is a necessary consequence of the provision that an ICSID award ‘shall not be subject to any appeal’. Thus, it has been held that an annulment proceeding is different from an appeal procedure and it does not entail the carrying out of a substantive review of an award. The annulment procedure is not a mechanism to correct alleged errors of fact or law that a tribunal may have committed, but a limited remedy to ensure fundamental fairness in the procedure. Article 52 of the ICSID provides:

Article 52

(1) Either party may request an annulment of the award by an application in writing addressed to the Secretary General on one or the more of the following grounds:

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

The ICSID annulment proceedings therefore follow a limited model review; a control mechanism that ensures that a decision has remained within the framework of the parties’ agreement to arbitrate and is a result of the process in accord with basic requirements of fair procedure.

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1 Article 52 (3) of the International Convention on the Settlement of Investment Disputes (ICSID) provides that upon receipt of the request for annulment of an award, the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons.

2 Paragraph 1 Article 53 ICSID


4 Alapli Elektrik BV v. Republic of Turkey, ICSID Case No. ARB 08/13 Decision on Annulment para. 32 July 10, 2014.

5 Tulip Real Estate and Development Netherlands v. Republic of Turkey B.V., ICSID Case No. Arb. 11/28, Decision on Annulment para 41, December 20, 2015
As held in the case of *Lemire v. Ukraine*: ‘The limited and exceptional nature of the annulment remedy provided under Article 52 of the ICSID forbids an inquiry on the substance of the case or the misapplication of the law or mistakes in analyzing the facts’. Ad hoc committees are thus reminded that annulment is an extraordinary remedy for unusual and important cases involving structure that are grossly illegitimate.

But how does one determine if the case is unusual and important and that its structure is grossly illegitimate? Evidently, awards refer to the parties’ factual submissions, thus exposing the *ad hoc* committees, to the pieces of evidence that the Tribunal has already passed upon. It is worth noting however that in ICSID annulment proceedings, *ad hoc* committees are not permitted to look into the merits of the case. On this matter, the decision of the *ad hoc* committee in the case of *Dogan v. Turkmenistan* is applicable, *to wit:*

> It is not within the *ad hoc* committee’s remit to re-examine the facts of the case to determine whether a tribunal erred in appreciating or evaluating the available evidence. A tribunal’s discretion in such matters of appreciation and evaluation of evidence is recognized by the ICSID system. An *ad hoc* committee cannot sit in appeal on a tribunal’s assessment of the evidence. If the committee were to proceed to a re-examination of the facts of the present case, an assessment of how the Tribunal evaluated the evidence before it, it would act as an appellate body. (Emphasis supplied)

Thus, the question, to what extent may an *ad hoc* committee examine the factual records of the case and determine the legitimacy of the process, without violating the well-enshrined principle that it is not an appeals body? Indeed, the significance of determining the extent of the *ad hoc* committee’s power to review the facts of the case is important to maintain the legitimacy of the ICSID annulment

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6 *Joseph C. Lemire v. Ukraine*, ICSID Case No. 06/18, Decision on Ukraine’s Application for Annulment para. 233, July 8, 2013
proceedings. This however should be balanced with the well-enshrined concepts that ICSID awards are final and are only subject to limited grounds for review.

The issue of whether ad hoc committees may legitimately review the facts of the case is the focus of this study. In this text, the terms “facts” or “factual records” of the case are used interchangeably, to refer to the pieces of evidence, documents and submissions that the Tribunal has already passed upon. As a sub-question, if annulment bodies are permitted to do so, the extent of this factual review is also scrutinized. The purpose of the analysis is to establish the limitation of the ad hoc committee’s discretion to review the factual matters set before it without violating the principle that it is not an appeals body.

1.2. Methodology And Delimitation

Based on the Updated Background on Annulment for the Administrative Council of ICSID dated 5 May 2016, the grounds (b) that the Tribunal has manifestly exceeded its powers; (d) that there has been a serious departure from a fundamental rule of procedure; and (e) that the award failed to state the reasons on which it is based, are the most frequently relied upon grounds for annulment and they are usually invoked cumulatively in support of the application to annul an award.9 Among these three, grounds (b) and (e), are the most successful grounds since they are the reasons mostly upheld by the ad hoc committees in partially or fully annulling awards.10

Of the 228 ICSID awards, 5 awards have been annulled in full and another 10 awards have been partially annulled.11 There have been 9 instances of partial or full annulment on the basis of Article 52 (1) (b) because of the Tribunal’s manifest excess of powers12, while the ground that the award failed to state the reasons on which it was based under Article 52 (1) (e) was upheld in 8 cases which resulted in

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9 Updated Background on Annulment for the Administrative Council of ICSID, 5 May 2016, page 53.
10 Id, Annex 2.
11 Id, page 63.
12 Id, page 56 citing Amco I (partial); Klöckner I (full); Vivendi I (partial); Mitchell (full); Enron (partial); Sempra (full); MHS (full); Helnan (partial); and Occidental (partial).
2 full and 6 partial annulments.\(^{13}\) In sum, only 2 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment.\(^{14}\)

Based on this data, it appears that the *ad hoc* committees have exercised their discretion to annul ICSID awards restrictively. However, on these rare occasions that they have decided to partially or fully annul an award, did they review or re-examine the facts already submitted and resolved by the Tribunal? If so, to what extent did they review the facts of the case? And in so doing, did they not cross the line of being and acting like an appeals body?

The annulment cases, which upheld grounds (b) and (e) which allege, that the Tribunal manifestly exceeded its powers and that the award failed to state the reasons on which it was based, respectively, are examined to answer these queries. As already pointed out, these two grounds, have been most successful in convincing the *ad hoc* committees in partially or fully annulling awards. Thus, limiting the analysis on these grounds provides a more focused illustration of how *ad hoc* committees exercised their power to look into the factual matters, when they do annul awards, wholly or partially. Although there is no doctrine of binding precedent in ICSID arbitration system, an examination of the decision making processes used by annulment committees in cases which upheld Articles 52 1 (b) and (e) as reasons to annul an Award, will help reveal a “standard operating procedure”, if any, which *ad hoc* committees used in dealing with the factual records of the case.

As aid in establishing the meaning of grounds (b) and (e), as intended and resolved by its drafters, reference to the Draft History of the ICSID is resorted to. This is consistent with Article 32\(^{15}\) of the Vienna Convention on the Law of Treaties.

\(^{13}\) *Id*, page 62 citing *Amco I* (partial), *Klöckner I* (full), *MINE* (partial), *Mitchell* (full), *CMS* (partial), *Enron* (partial), *Víctor Pey Casado* (partial); *TECO* (partial)

\(^{14}\) *Ibid*

\(^{15}\) Article 32

**Supplementary Rules of Interpretation**

Recourse, may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning within the interpretation according to Article 31.
(VCLT) providing for recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion to confirm the meaning resulting from ordinary meaning interpretation of treaties as stated in Article 31\textsuperscript{16} of the VCLT. By doing so, this writer aims to discover if the drafters of the ICSID have considered it within the discretion of the \textit{ad hoc} committee to look into facts of the awards. If the answer is in the affirmative, to what extent are \textit{ad hoc} committees allowed to do so?

1.3. Structure Of The Legal Analysis

The outline of the legal analysis contained in this paper is as follows:

A brief background of the ICSID annulment system is discussed at the onset. For this purpose, Article 52 of the ICSID providing the grounds for annulment in relation to Article 53 highlighting that ICSID awards shall not be subject to appeal is analyzed.

The next two chapters discuss Article 52 (1) grounds (b) and (e) \textit{in seriatim}. Each chapter is divided into three sections.

At the beginning of each chapter, the draft history of the ground subject matter of the analysis is discussed. For this purpose, the significance of the words used in the provision is analyzed based on the debates and resolution of the issues as recorded in the ICSID’s draft history. This section is concluded with a determination of whether there is anything in the draft history that instructs the \textit{ad hoc} committee on how to deal with the facts of the case.

The second section presents an analysis of the cases, which successfully invoked the ground subject matter of the chapter. This section begins with a summary of the

\begin{itemize}
  \item [a)] leaves the meaning ambiguous or obscure
  \item [b)] leads to a result which is manifestly absurd or unreasonable
\end{itemize}

\textsuperscript{16} \textit{Article 31}

\textit{General rule of Interpretation}

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.
facts of the case as found by the Tribunal. It is concluded with an analysis that is focused on the how or the manner upon which the ad hoc committee dealt with the factual matters, in resolving the ground for annulment presented to it. The substance or merits of the analysis of the ad hoc committee will not be taken into consideration but only the process used in reaching its conclusion to partially or wholly annul an Award.

As a conclusion, this paper answers the query of whether ad hoc committees may legitimately review the facts of the case based on the ICSID draft history and the cases analyzed. And if they can do so, the limitation of the ad hoc committee’s discretion to conduct factual review is presented bearing in mind that an ICSID annulment committee is not an appeals body.

2. BACKGROUND OF THE ICSID ANNULMENT SYSTEM

One of the main features of an ICSID arbitration is its provision ensuring the finality of the award. The ICSID Convention thus provides:

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except for those provided for in the Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52. (Emphasis supplied)

This provision has a twofold effect. First, it confirms that an award cannot be appealed and second, it excludes all other forms of review except those set out in the Convention.\(^{17}\) Thus, Art. 53 contemplates both finality and review exclusively

within the ICSID framework. Considering these, if an award is unchallenged, it is final and binding on the parties to the arbitration.\textsuperscript{18} If it is successfully challenged however, the decision annulling the award is likewise binding on the parties pursuant to the second paragraph of Article 53.

The concept of finality provided under the ICSID is attractive to both investors and States alike. The built-in annulment facility that goes with an ICSID arbitration is encouraging, as it gives the losing party, albeit limited, opportunity to present arguments why the award against it should be vacated.

To reiterate, Article 52 is a limited exception to the finality of awards contained in Article 53.\textsuperscript{19} Thus, there had been debates whether \textit{ad hoc} committees must interpret these grounds strictly. However, as it has been agreed upon, these grounds shall neither be interpreted restrictively nor liberally, but in accordance with the object and purpose of the provision.\textsuperscript{20} Such object and purpose being to regard the Award final unless exceptional matters exist to warrant its annulment.

Annulment is a remedy against the award and indirectly against the tribunal.\textsuperscript{21} It follows that either party may feel aggrieved by an award or the procedure leading towards it. To reiterate, the reasons for annulment as listed in Article 52 (1) are exhaustive.\textsuperscript{22} The \textit{ad hoc} committees in \textit{Klockner}\textsuperscript{23} and in \textit{MINE}\textsuperscript{24} pointed out that an application was not an occasion for a party to present, complete, and develop an argument which it could and should have made in the arbitral proceedings. Nor should a party present new contemporaneous evidence since annulment takes as its premise the record before the tribunal\textsuperscript{25}.

\textsuperscript{18} \textit{Ibid}.
\textsuperscript{19} ICSID Commentary [n 7] page 899, citing \textit{MINE vs. Guinea}, Decision on Annulment, 22 August 1989, para. 4.02
\textsuperscript{20} \textit{Id}, page 905.
\textsuperscript{21} \textit{Id}, page 916, citing \textit{Amco v. Indonesia}, Resubmitted case: Decision on Annulment 3 December 1992, para. 1.15
\textsuperscript{22} \textit{Id}, page 932.
\textsuperscript{23} \textit{Id} citing \textit{Klockner v. Cameroon}, Decision on Annulment 3 May 1985, para. 83
\textsuperscript{24} \textit{Id}, \textit{MINE v. Guinea}, Decision on Annulment, 22 December 1989, para. 6.42
\textsuperscript{25} \textit{Id}, page 932.
It is against this backdrop that *ad hoc* committees exercise their discretion to review the records of an arbitration proceeding. The ICSID annulment mechanism is not an appeals system. However, as a post-award proceeding, it is resorted to by the parties with an expectation that the *ad hoc* committee will truly examine the Award. It is through such examination that the losing party hopes that the *ad hoc* committee will find reasons to annul the Award wholly or partially. Without such expectation, going through an annulment proceeding, which costs significant amount of time and money, will just be a futile exercise.

It is noted that there is no presumption in favor of the validity of the Award. It has been observed that *ad hoc* committees refused to make a standard whether the grounds under Article 52 (1) must be applied restrictively or liberally. Given this, *ad hoc* committees are given the wide latitude to interpret the grounds in any way they can. They are also free to adopt their own methodology on how they could reach the decision of whether to annul an Award or not; and if they do annul, whether to annul it wholly or partially.

3. **ARTICLE 52 (1) (b) - THAT THE TRIBUNAL HAS MANIFESTLY EXCEEDED ITS POWERS**

3.1. **Draft History**

All drafts leading to the ICSID included “excess of powers” as a ground for annulment of awards. However, the Preliminary Draft to the Convention did not contain the word “manifestly”. It was observed that the proposal to include the word manifest was based on the fear that there might be frustration of awards.

Mr. Aron Broches, then General Counsel of the World Bank and Chair of the Regional Consultative Meetings and the subsequent meetings of the Legal Committee explained that the clause referred to cases where the tribunal would have

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26 *Id.*, page 905.
27 *Id.*, page 937.
29 *Id.*, citing History Vol. II, pp. 423, 850.
gone beyond the scope of parties’ agreement or *compromis* or would have decided points which had not been submitted to it or had been improperly submitted to it.  

The drafting history revealed that a decision on the merits by a tribunal that lacks competence is the most obvious example of an excess of power. The drafters opted not to elaborate on this point because they deemed the clause on excess of powers to be clear enough. Thus, a specific reference to jurisdiction or to the agreement of the parties was seen to be superfluous.

It was observed that drafts leading to the Convention contained no direct reference to the proper law among the grounds for annulment. Thus, a proposal was likewise made to clarify the concept of excess of powers by adding “including failure to apply the proper law” in that clause. Mr. Broches emphasized that the draft Convention did not provide for an appeal against an award hence mistake in the application of the law would not be a valid ground for annulment. But after further debate, he conceded that if the tribunal had applied a law different from that agreed by the parties, the award could be challenged on the ground that the arbitrators had gone against the terms of the compromise.

Professor Christoph Schreuer, thus concluded:

> Therefore, the preparatory work yield a distinction between failure to apply the proper law and an incorrect erroneous application of that law. Application of a law other than that agreed to by the parties constitutes an excess of power and is a valid ground for annulment. An error in the application of the proper law even if it leads to manifestly incorrect application of the law is not a ground for annulment.

30 *Id.*, page 937, History Vol. II, pp. 517, 850
33 *Ibid*.
38 *Id.*, page 955.
3.1.1. Conclusion from the Draft History

From the above discussion, it can be said that in drafting and adopting ‘that the Tribunal manifestly exceeded its power’ as a ground for annulment, the drafters did not discuss the extent to which ad hoc committees can review the facts of the award subject matter of the annulment proceeding. There was no reference as to which records or documents the ad hoc committee should refer to, to determine whether the Tribunal did exceed their powers or not. Neither was there a limit as to how in-depth the examination of the records should be before a committee can reach a conclusion.

However, ad hoc committees can be guided by how the drafters had intended and had resolved manifest excess of power to be, i.e. it pertains to situations when the Tribunal went beyond the scope of the arbitration agreement or had “gone beyond the scope of parties’ agreement or compromis or would have decided points which had not been submitted to it or had been improperly submitted to it”\textsuperscript{39}. Given this, it can be surmised that to reach a conclusion with respect to this ground, the ad hoc committee is duty bound to examine the relevant agreement of the parties, the BIT or multi-lateral treaty upon which the consent to arbitrate was given and the ICSID, since these instruments contain the parameters of the agreement to arbitrate.

It is also clear from the history of the drafting of Article 52 (1) (b), that the drafters considered the Tribunal’s failure to apply the proper law, as a way through which it can manifestly exceed its powers. Thus, if the tribunal had applied a law different from that agreed by the parties, the award can be challenged on the ground that the arbitrators had gone against the terms of the compromise.\textsuperscript{40}

This writer is however unable to find a reference in the records of the Draft History, when the drafters took into consideration the situation if the parties did not identify the law to be applied in their agreement. In such cases, Article 42 of the ICSID provides that the applicable law will be the law of the Contracting state, including its conflict of laws and applicable rules of international law.

\textsuperscript{39} See [n 35]
\textsuperscript{40} Ibid.
3.2 Awards That Were Annulled Under Article 52 (1) (b)

Based on the Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016, in ICSID’s history, manifest excess of powers has been invoked in every case seeking for annulment.\textsuperscript{41} However there are only 9 instances of partial or full annulment on this basis\textsuperscript{42}.

A short summary of the relevant facts and the decision-making process or the methodology used by the \textit{ad hoc} committees in dealing with the factual records of the cases\textsuperscript{43} where the ground that the Tribunal has manifestly exceeded its powers was upheld, are briefly described and analyzed in the subsequent paragraphs.

\textbf{3.2.1 Klockner Industrie- Analgen et al v. United Republic of Cameroon\textsuperscript{44} (Klockner I )}

In \textit{Klockner I}, the Tribunal found that the claimant \textit{Klockner} violated its duty of full disclosure and therefore it was not entitled to the contract price. Because the Tribunal already identified French law to be the applicable law, in order to verify if indeed the Tribunal applied the proper law, the \textit{ad hoc} committee found it necessary to determine if there was anything in the French civil law which required the exercise of such duty of full disclosure on the part of the contracting party. To answer this query, the \textit{ad hoc} committee did not see that it was its responsibility to know which rules of French civil law might be applicable. Instead, it ruled that it could only “take the award as it is”\textsuperscript{45}. The \textit{ad hoc} committee however noted that while it can examine the written pleadings filed during the arbitral proceeding for a possible exploration of the Tribunal’s approach, it is not required to do so.\textsuperscript{46} Thus, by simply referring to the award itself, which the \textit{ad hoc} committee found to be

\textsuperscript{41} Updated Background Paper [n 9], page 56.
\textsuperscript{42} See Annex II of the Updated Background Paper on Annulment for the Administrative Council of ICSID dated 5 May 2016
\textsuperscript{43} In the Annulment Decision dated 16 May 1986 of \textit{Amco Asia Corp., Pan American Development Ltd, PT Amco Indonesia v The Republic of Indonesia}, ICSID Case No ARB/81/1, the \textit{ad hoc} committee partially annulled the Award under Article 52(1) (b). This writer however was unable to get a copy of this annulment decision hence it was purposely not included in the discussion.
\textsuperscript{44} Klockner Industrie- Analgen et al v. United Republic of Cameroon, Decision of the Ad Hoc Committee downloaded from https://academic.oup.com/icsidreview/article_abstract/1/1/89/756279 accessed on May 9, 2019
\textsuperscript{45} \textit{Id}, para. 73
\textsuperscript{46} \textit{Id}, para. 74
without any “explanation, evidence or citation” of any French law, it found the Tribunal to have not applied the proper law.47

Thus, in Klockner I, in order to determine whether the allegation of the claimant was well-founded i.e. that the Tribunal failed to apply the proper law, the ad hoc committee limited its review to the wordings of the Award itself. It did not review the factual records of this case because as it held, it was not required to do so. By simply perusing the Award itself, the ad hoc committee found that the Tribunal did not apply the proper law because it did not expressly provide which provision of the French law it applied. Thus, the ad hoc committee held that the Tribunal had manifestly exceeded its power by not applying the proper law.

3.2.2. Compania de Aguas and Vivendi Universal S.A. v. Argentine Republic Case48 (Vivendi I)

In Vivendi I, the Tribunal assumed jurisdiction over the claims of the claimant against the Argentine Republic. However, after hearing on the merits, it expressly dismissed all such claims.49 Thus, as a ground for annulment, the claimant argued that ‘the Tribunal never actually considered the merits of their BIT claims at all, and by purporting to dismiss those claims without effectively considering them on their merits, the Tribunal manifestly exceeded its powers.’50

In resolving this issue, the ad hoc committee began its discussion firstly by having its own review and analysis of the provisions of the Argentina-France BIT and the Concession Agreement and secondly by determining how the Tribunal applied this provision. It thus ruled:

In dealing with these issues, it is necessary first to consider the relationship between the responsibility of Argentina under the BIT and the rights and obligations of the parties to the Concession Contract (especially those arising from Article 16(4), the exclusive jurisdiction clause); and secondly, to

47 Id, para. 75
49 Id, para. 10
50 Id, para. 16
consider precisely what the Tribunal decided with respect to the Tucumán claims.\textsuperscript{51}

\textbf{x x x}

From its analysis, the \textit{ad hoc} Committee found that under Article 8(4) of the BIT, the Tribunal had jurisdiction to base its decision upon the Concession Contract at least so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT\textsuperscript{52}. However, considering its repeated referral to allegations and issues which allegedly barred it from deciding the case based on Article 16(4) of the Concession Contract, the Tribunal did not exercise such jurisdiction.\textsuperscript{53} Thus, the \textit{ad hoc} committee concluded that the Tribunal exceeded its powers in the sense of Article 52(1)(b), because the Tribunal having jurisdiction over the claims, failed to decide those claims.\textsuperscript{54} The Tribunal even went on by saying that:

> Given the clear and serious implications of that decision for Claimants in terms of Article 8(2) of the BIT, and the surrounding circumstances, the Committee can only conclude that that excess of powers was manifest. It accordingly annuls the decision of the Tribunal so far as concerns the entirety of the Tucumán claims.\textsuperscript{55}

Thus, contrary to the approach taken by the \textit{Klockner I ad hoc} committee, the \textit{Vivendi I ad hoc} committee did not simply take the award as it is. Instead, it went a step further by analyzing not only the award itself, but also the pertinent documents submitted during the arbitration proceedings. To determine whether the claimant’s allegation that the Tribunal exercised its jurisdiction or not, the \textit{ad hoc} committee made its own assessment of what the BIT contained \textit{vis-à-vis} the Concession Agreement. In so doing, the \textit{ad hoc} committee, in effect made its own analysis of the evidence presented and substituted its own interpretation of the BIT provisions with what the Tribunal already concluded based on its own analysis of the facts at hand.

\textsuperscript{51} \textit{Id}. para. 94.
\textsuperscript{52} \textit{Id}. para. 110
\textsuperscript{53} \textit{Id}. para. 111.
\textsuperscript{54} \textit{Id}. para. 115.
\textsuperscript{55} \textit{Ibid}.
3.2.3. Patrick Mitchell v. Democratic Republic of Congo\textsuperscript{56} (Mitchell)

In \textit{Mitchell}, the respondent Democratic Republic of Congo (DRC) sought an annulment of an Award, on the ground of “manifest excess of powers with regard to the Arbitral Tribunal’s jurisdiction in respect of the definition of investment.”\textsuperscript{57} In the Award, the Tribunal found the claimant Mitchell’s “know-how” and ‘goodwill’ including ‘payments registered on the accounts of Mr. Mitchell in the United States’, were within the definition of investment in the DRC-United States (US) BIT\textsuperscript{58}. This considering that such payments were ‘based on bills for fees referring to legal consultations provided by Mr. Mitchell and his employees through the office “Mitchell & Associates” within the DRC’\textsuperscript{59}. Finally, on this issue the Tribunal observed that ‘in the absence of any indication directing to the exclusion from the scope of the Treaty of particular activities that may be considered as services, such a concept should be given a broad meaning, covering all services provided by a foreign investor on the territory of the host State.’\textsuperscript{60}

The \textit{ad hoc} committee disagreed with these findings. In its examination of the relevant provisions of the DRC-US BIT, it held that in Article I(c) of the BIT it was stated that the concept of investments included (vii) ‘returns which are reinvested.’\textsuperscript{61} Consequently, ‘non-reinvested’ returns could not be included in the concept of investment and be protected by the Treaty\textsuperscript{62}. The \textit{ad hoc} committee took note that the returns in question were, according to the Award itself (para. 48), registered on the accounts of Mr. Patrick Mitchell in the United States.\textsuperscript{63} Further, it observed that ‘Mitchell never referred to his returns before the Tribunal in order to establish ICSID jurisdiction’.\textsuperscript{64} And because the treatment of returns collected by the Claimant in the US as an investment ran counter to the clear and precise provision of the BIT, the \textit{ad hoc} committee held that the excess of power was

\textsuperscript{56} Patrick Mitchell v. Democratic Republic of Congo, Case No. ARB/99/7 Decision on the Application for the Annulment of the Award, November 1, 2006
\textsuperscript{57} Id., para. 17.
\textsuperscript{58} Id., para. 24
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid.
\textsuperscript{61} Id., para. 43.
\textsuperscript{62} Ibid.
\textsuperscript{63} Id., para. 42.
\textsuperscript{64} Ibid.
manifest. The *ad hoc* committee even highlighted that such manifest excess of power was evident on the first reading of the Award, even before examining the Treaty.

In resolving that the Tribunal manifestly exceeded its power, the *ad hoc* committee took into consideration the findings in the Award *vis-à-vis* the relevant provisions of the DRC-US BIT. It was from its examination of the Award itself and the provisions of the relevant BIT that it found the ‘manifest excess of power’ committed by the Tribunal.

### 3.2.4. Enron Creditors Recovery Corporation v. Argentine Republic\(^\text{67}\) (*Enron*)

In *Enron*, the Tribunal found that Article 25 of the International Law Commission Articles on State Responsibility (ILC Articles) although not a treaty provision or part of the customary international law, reflects the state of customary international law, thus the applicable law to the dispute. In ruling against Argentina, it found that the requirements provided under Article 25(1)(a) of the ILC Articles were not met because the measures adopted by respondent Argentina were not the only way available to Argentina to achieve the result, and because Argentina had itself contributed to the state of necessity.

Argentina sought annulment of the Award on the basis that, in relation to the findings that the measures complained of was ‘not the only way’ and that it ‘contributed to the state of necessity’, the Tribunal manifestly exceeded its powers in failing to apply the applicable law to the merits of the dispute.

In analyzing the Award, the *ad hoc* committee took note that the Tribunal merely accepted the expert evidence of a certain Professor Edwards to the effect that Argentina’s own ‘misguided’ policies contributed to the magnitude of the economic

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65 Id., para. 46.
66 Id., para. 47.
67 *Enron Creditors Recovery Corporation v. Argentine Republic* ICSID Case ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010
68 Id., para. 349, footnote omitted.
69 Id., para. 352.
Based from this assertion, the *ad hoc* committee found that the Tribunal directly concluded that the measures adopted by Argentina ‘contributed to the situation of necessity’.71

In criticizing Professor Edward’s expert report as the Tribunal’s basis in finding that the measures Argentina adopted were not the only way to safeguard an essential interest against grave and imminent peril, the *ad hoc* committee opined that:

On no view could Professor Edwards be said to have expressed an expert opinion on these questions. Professor Edwards is an economist and not a lawyer, and his report does not purport to address the principle of necessity under customary international law or the interpretation of Article 25 of the ILC Articles. When Professor Edwards states that Argentina had other options for dealing with the economic crisis, he so states as an economist, and does not suggest that these other options would have amounted to relevant alternatives for purposes of the “only way” requirement of Article 25 of the ILC Articles.72

Based on these quoted portions of the *Enron* annulment decision, it is clear that the *ad hoc* committee analyzed not only the Award itself but also the pieces of evidence relied upon by the Tribunal in reaching its conclusion. The *ad hoc* committee assessed the probative value of the expert opinion relied upon by the Tribunal. And in doing so, it made its own conclusion that such expert opinion did not deserve the credence the Tribunal gave it. It was from an in-depth examination of the award and the records of the arbitration proceedings including the pieces of evidence submitted to the Tribunal that the *ad hoc* committee was able to reach the determination that the Tribunal manifestly exceeded its powers by its failure to apply the applicable law.

3.2.5 *Sempra Energy International v. Argentine Republic*73

(*Sempra*)

The *Sempra* annulment proceedings involved similar facts with respect to the measures adopted by Argentina to the detriment of the claimant investor. Argentina

70 *Id.*, para. 392.
72 *Id.*, para. 374.
73 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for Annulment of Award, 29 June 2010
was the recipient of an adverse arbitral decision thus it instituted annulment proceedings and alleged that the Tribunal committed a manifest excess of powers by failing to apply the applicable law, Article XI of the BIT. In resolving this issue, the ad hoc committee took note of the conclusion reached by the Tribunal as reflected in the Award itself, pertinent portion of which stated:

Since the Tribunal has found above that the crisis invoked does not meet the customary law requirements of Article 25 of the Articles on State Responsibility, it concludes that necessity or emergency is not conducive in this case to the preclusion of wrongfulness, and that there is no need to undertake a further judicial review under Article XI given that this Article does not set out conditions different from customary law in such regard.

On the basis of the simple reading of the Award, the ad hoc committee was able to reach the conclusion that the Tribunal did not identify or apply Article XI of the BIT as the applicable law and that it failed to do so on the assumption that the language of this provision was somehow not legitimated by the dictates of customary international law. The ad hoc committee observed that the Tribunal adopted Article 25 of the ILC Articles as the primary law to be applied rather than Article XI of the BIT and in so doing, made a fundamental error in identifying and applying the applicable law. Thus, the ad hoc committee held that the excess of powers on the part of the Tribunal was manifest and that the Award must be annulled in full.

Thus, contrary to the approach taken by the Enron ad hoc committee, in Sempra annulment proceedings, the ad hoc committee did not find it necessary to examine or weigh the probative value of the pieces of evidence relied upon by the Tribunal in reaching its decision. Instead, the ad hoc committee limited itself to an examination of the award which by itself revealed that it did not apply Article XI of the BIT.

74 Id., para. 106.
75 Id., para. 207.
76 Id., para. 218
77 Id., para. 208.
78 Id., para. 218.
3.2.6. *Malaysian Historical Salvors v. Malaysia*\(^79\) (MHS)

In *MHS*, the sole arbitrator ruled that the resources spent by a company that contracted with the respondent Government of Malaysia to salvage a shipwreck did not constitute as an investment in the State within the meaning of Article 25(1) of the ICSID.\(^80\) Considering this, the Tribunal found it unnecessary to discuss whether the Contract was an “investment” under the Agreement.\(^81\) As a result, the claimant instituted an annulment proceeding on the ground that the Tribunal has manifestly exceeded its powers by not exercising its jurisdiction over the case.\(^82\)

The *ad hoc* committee identified the issue in the annulment proceeding to be the meaning of the treaty term “investment” as used not only in Article 25(1) of the ICSID—but also in Article 1 of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments (Agreement).\(^83\) The *ad hoc* committee took note that the Agreement was the instrument through which the Contracting States gave their consent to the exercise of jurisdiction of ICSID.\(^84\) Hence, it was necessary that it be likewise examined in determining the meaning of the term investment.

The *ad hoc* committee then proceeded with its finding that considering the non-exclusive enumeration in the Agreement of what constituted investment, there could be no other conclusion but that the Contract under consideration was an investment.\(^85\) The *ad hoc* committee took note that the Tribunal did not find that the Contract provided ‘a sufficient contribution to Malaysia’s economic development to qualify as an ‘investment’ for the purposes of Article 25(1) or Article 1(a) of the BIT.’\(^86\) However, the *ad hoc* committee disagreed that this was sufficient reason for the contract to be disregarded as an investment when the terms of the agreement provided otherwise. Thus, it was from the simple reading of the award itself and the relevant provisions of the Agreement that the *ad hoc* committee reached the

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\(^79\) *Malaysian Historical Salvors v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, April 16, 2009

\(^80\) *Ibid*, para. 23, footnotes omitted.

\(^81\) *Ibid*.

\(^82\) *Id*, para. 27.

\(^83\) *Id*, para. 58.

\(^84\) *Ibid*.

\(^85\) *Id*, para. 59-60.

\(^86\) *Id*, para. 60.
conclusion, that the Tribunal manifestly exceeded its power in not exercising its jurisdiction over the dispute.

3.2.7 *Helnan International Hotels A/S v. Arab Republic of Egypt*[^87] *(Helnan)*

In *Helnan*, the claimant sought the annulment of the portion of the Award which stated:

> The ministerial decision to downgrade the hotel, not challenged in the Egyptian administrative courts, cannot be seen as a breach of the Treaty by EGYPT. It needs more to become an international delict for which EGYPT would be held responsible under the Treaty.[^88]

Based on this quoted provision, the claimant alleged that the Tribunal manifestly exceeded its powers when it imposed a requirement to exhaust local remedies before the complained measure of Egypt could be treated as a treaty breach.[^89] According to the claimant, this constituted failure to apply the clear provisions of the applicable law i.e. the BIT and the ICSID.[^90]

In its annulment decision, the *ad hoc* committee stated that to determine whether or not the Tribunal exceeded its powers, reference must be made to the agreement of the parties, the BIT which constituted it and the ICSID Convention (which the agreement to arbitrate incorporates by reference).[^91] The *ad hoc* committee identified these three elements to constitute the arbitration agreement and therefore prescribed the parameters of the Tribunal’s powers.[^92]

In agreeing with the claimant, the *ad hoc* committee ruled that “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 pre-condition to arbitration, such a requirement were to be read back in as part of the

[^87]: *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the Ad Hoc Committee, June 14, 2010
[^88]: Ibid, para. 28.
[^89]: Id, para. 31
[^90]: Ibid.
[^91]: Id, para. 40
[^92]: Ibid.
substantive cause of action."\textsuperscript{93} Because the Tribunal went against the plain words of Article 9 of the BIT and Article 26 of the ICSID Convention, the provisions which conferred jurisdiction on the Tribunal, and described the mandate or powers conferred on it by the agreement of the parties, the \textit{ad hoc} committee ruled that the Tribunal exceeded its powers.\textsuperscript{94}

\textbf{3.2.8. \textit{Occidental Petroleum Corp. et al vs. Republic of Ecuador}\textsuperscript{95} (Occidental)}

In \textit{Occidental}, the Tribunal awarded 100\% of the value of the investment to the claimant as compensation.\textsuperscript{96} It found that even though 40\% of such investment was already transferred, ‘since the assignment of rights from the Participation Contract had not been authorized by the Ecuadorian Minister, such was null and void and has no validity.’\textsuperscript{97} The Tribunal further ruled that, ‘the assignment must therefore be disregarded by the Tribunal for purposes of determining the compensation to which claimants are entitled.’\textsuperscript{98}

Ecuador thus initiated an annulment proceeding on the ground that the Tribunal manifestly exceeded its powers when it wrongly assumed jurisdiction over the 40\% share of Claimants’ investment, because that portion already belonged to Andes, a Chinese investor not protected by the Treaty.\textsuperscript{99} In resolving this issue, the \textit{ad hoc} committee described the process that it would undertake, as follows:

\begin{quote}
As a first step, review in some detail the underlying facts and the applicable law (A.);

As a second step, it will analyse Respondent’s ground for annulment that the Tribunal exceeded its powers, and will come to the conclusion that by assuming jurisdiction over the investment now beneficially owned by the Chinese investor Andes the Tribunal indeed committed a manifest excess of jurisdiction (B.).\textsuperscript{100}
\end{quote}

\textsuperscript{93} Id, para. 47
\textsuperscript{94} Id, para. 54
\textsuperscript{95} \textit{Occidental Petroleum Corp. et al vs. Republic of Ecuador}, ICSID Case No. ARB/06/11, Decision on the Annulment of the Award, November 2, 2015.
\textsuperscript{96} Id, para. 141.
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid.
\textsuperscript{99} Id, para. 136.
\textsuperscript{100} Id, para. 189.
In its own analysis of the facts, the applicable law as well as the case laws relied upon by the Tribunal\textsuperscript{101}, the \textit{ad hoc} committee found that indeed the Tribunal manifestly exceeded its powers when it assumed jurisdiction over an investment which, at the relevant time, no longer belonged to the claimants, and to compensate claimants for 100\% of the value of the investment.\textsuperscript{102}

It is noteworthy that in reaching this conclusion, the \textit{ad hoc} committee made its own findings of fact by examining the records of the case. Moreover, the \textit{ad hoc} committee likewise analyzed the case laws that were relied upon by the Tribunal in its decision. In effect, the \textit{ad hoc} committee made a re-assessment of the records, through which it was able to conclude that the Tribunal manifestly exceeded its powers.

\textbf{3.2.9. \textit{SUMMARY OF FINDINGS}}

The above description and analyses of the cases which found that the Tribunal has manifestly exceeded its power as a ground for annulment are limited to the methodology used by \textit{ad hoc} committee in reaching its conclusion of partially or wholly annulling an award. From this short survey, it can be gathered that there is no exact way to which \textit{ad hoc} committees exercise their discretion to review the factual records of the case.

While the \textit{Klockner I ad hoc} committee preferred to take the award as it is, thereby limiting their analysis on what the award states, the \textit{Enron ad hoc} committee went into the records and examined the pieces of evidence submitted during the proceedings \textit{i.e.} expert opinions submitted by the parties. The \textit{Enron ad hoc} committee’s analysis even went a step further by analyzing the probative value of the submitted expert reports. The \textit{Mitchell, Sempra} and \textit{MHS ad hoc} committees on the other hand exercised restraint in their examination as they focused on the findings in the award and compared them with the terms of the agreement, BIT and the relevant provisions of the ICSID. Suffice it to say, these \textit{ad hoc} committees did not consider themselves bound by what was already found by the Tribunal. They

\textsuperscript{101} See paras. 190-240.  
\textsuperscript{102} \textit{Id}, para. 267.
made their own findings of facts and analysis, independent of what was already settled by the Tribunal. The Occidental ad hoc committee on the other hand also took another step by looking into the case laws referred to by the Tribunal in its Award and rendered an opinion as to their applicability.

4. **ARTICLE 52 (1) (e) - THAT THE AWARD HAS FAILED TO STATE THE REASONS ON WHICH IT IS BASED.**

4.1. **Draft History**

The International Law Commission’s 1958 Model Rules, upon which the Convention’s grounds for annulment was patterned, states that an award may be challenged if ‘there has been a failure to state the reasons for award or a serious departure from a fundamental rule of procedure’.\(^1\) The Preliminary Draft changed the wording of the ground however to ‘a serious departure from a fundamental rule of procedure, including a failure to state the reasons for award’.\(^2\)

In the First Draft which was presented during the regional consultative meetings in 1964 the ground ‘there has been a failure to state the reasons for award or a serious departure from a fundamental rule of procedure’ was divided into two separate grounds. It thus read:

\[
\text{x x x}
\]

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) failure to state the reasons for the award, unless the parties have agreed that reasons need not be stated.

It was initially intended that the possibility of raising ‘failure to state the reasons for the award’ as a ground of annulment was subject to the parties’ agreement on whether reasons for the award would have to be stated.\(^3\) The rationale for this discretion was to reconcile it with another provision which allowed the parties to agree that the award need not state the reasons.\(^4\) The qualification however was

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1. ICSID Commentary [n7], page 996.
4. ICSID Commentary [n 7], citing History at page 633.
deleted in the final version of Article 52 (1) (e) of the ICSID. There was also no indication that the drafters included contradictory or insufficient reasons to fall into this category for annulment of awards. 107

4.1.1. Conclusion from the Draft History

There was no indication, based on the above discussion, if the drafters of the ICSID considered the extent of the factual review which ad hoc committees may exercise for the purpose of determining whether the Tribunal has failed to state the reasons upon which the Award was based.

Drafting records revealed that there had been concerns about omissions in tribunal decisions that may lead to incomplete awards. 108 In the History of the Convention, it was noted:

“… a vote was taken on the question whether arbitrators should be required to rule on every issue presented, with 32 delegates voting in the affirmative and none against. The meeting then voted on the question whether a failure to comply with this duty would give the parties the right to seek annulment and the motion was defeated by 8 to 6…” 109

It was clear therefore that the delegates did not consider failure to deal with every issue as a ground for annulment. 110

4.2. Awards That Were Annulled Under Article 52 (1) (e)

Based on the Updated Background of the ICSID, the ground of failure to state the reasons on which the award is based has been invoked by parties in 50 proceedings leading to decisions. 111 The ground was upheld in 8 cases which resulted in 2 full and 6 partial annulments. 112 A short summary of the relevant facts and the decision-making process or the methodology used by the ad hoc committees in dealing with

107 Id, page 997.
108 Id, page 1013.
109 Id, pp. 1013-1014 citing History, Volume II, page 849, other footnotes omitted.
110 Id, page 1014.
111 Updated Background [n 9], page 62.
112 Ibid.
the factual records of the cases\textsuperscript{113} where the ground that the Tribunal has manifestly exceeded its powers was upheld, are briefly described and analyzed in the subsequent paragraphs.

\textbf{4.2.1. Klockner Industrie-Analgen et al v. United Republic of Cameroon\textsuperscript{114} (Klockner I )}

In \textit{Klockner I}, in addition to the ground already discussed, the \textit{ad hoc} committee likewise partially annulled the award on the ground of failure to deal with the questions submitted to the Tribunal; such being a species of failure to state the reasons as ground for annulment under Article 52 (1) (e) of the ICSID. Among the observations of the \textit{ad hoc} committee which led to the annulment of the award are as follows:

150. … nothing in the text of the award makes it possible to say with certainty that the Tribunal actually considered the question and considered it in this way. x x x

151. The Tribunal could for example have referred to or adopted the Respondent’s arguments in its Counter-Memorial of June 1982 (p. 116 et seq) (arguments on a “fundamental breach” and on the judge’s power to increase or moderate (the penalty) or could have used reasoning analogous to that which it employed on page 136 of the award to reject their counterclaim. x x x

157. The award does not mention this. To this extent, there is failure to state reasons and the complaint is well-founded. x x x

160. The award does not discuss these arguments and questions. x x x

162. In conclusion, it must be accepted that the Tribunal did not deal, at least expressly, with the questions submitted to it by Klockner.\textsuperscript{115}  

x x x

From these observations, it can be gathered that the \textit{ad hoc} committee simply examined the award and the questions which the Tribunal allegedly did not address.

\textsuperscript{113} In the Annulment Decision dated 16 May 1986 of \textit{Amco Asia Corp., Pan American Development Ltd, PT Amco Indonesia v The Republic of Indonesia}, ICSID Case No ARB/81/1, the \textit{ad hoc} committee partially annulled the Award under Article 52(1) (e). This writer however was unable to get a copy of this annulment decision hence it was purposely not included in the discussion.

\textsuperscript{114} \textit{Klockner I} [n 44]

\textsuperscript{115} \textit{Ibid.}
It did not make a further examination of the records to see if these questions were indeed raised by the party concerned. Nor did the ad hoc committee analyzed the significance of the question, in respect to the overall disposition contained in the Award. The examination made by the ad hoc committee was limited to mere “checking” of whether the allegations of the claimant were addressed or at least mentioned by the Tribunal. Because they were not, the ad hoc committee was constrained to annul the award partially for failure to deal with the questions submitted.

4.2.2. Maritime International Nominees Establishment v. Republic of Guinea Case\textsuperscript{116} (MINE)

In MINE, the respondent Republic of Guinea (Guinea) sought the annulment of that portion of the award that granted MINE’s prayer for damages\textsuperscript{117}. According to Guinea, the Tribunal failed to address pivotal questions which, if had been resolved in Guinea’s favor, would have reversed the Tribunal’s liability determination.\textsuperscript{118} In Guinea’s view, failure by an arbitral tribunal to deal with every question submitted to it as required under Article 48 (3) of the Convention affords a ground for annulment as a species of failure to state reasons, even though it is not specifically mentioned as such.\textsuperscript{119}

As a general comment, the ad hoc committee stated that:

\textquote{\textit{x x x the 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.}}\textsuperscript{120} (Emphasis supplied)

\textsuperscript{116} Maritime International Nominees Establishment v. Republic of Guinea Case ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award January 6, 1988
\textsuperscript{117} Id., para. 2.01
\textsuperscript{118} Id., para. 2.04
\textsuperscript{119} Ibid.
\textsuperscript{120} Id., para. 5.08
Thus, for the purpose of determining whether the Tribunal stated its reasons in coming up with a conclusion, the MINE ad hoc committee set the standard which has often been used by subsequent annulment bodies in resolving the issue of failure to state reasons, to wit:

5.09 In the Committee’s view the requirement to state the 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.\textsuperscript{121}

\section*{4.2.3. Patrick Mitchell v. Democratic Republic of Congo\textsuperscript{122} (Mitchell)}

In \textit{Mitchell}, the Tribunal found the payments registered in the name of the claimant Mitchell in the United States, to constitute an investment in DRC.\textsuperscript{123} In support of this conclusion, the Tribunal stated that ‘in the absence of any indication directing to the exclusion from the scope of the Treaty of particular activities that may be considered as services, such a concept should be given a broad meaning, covering all services provided by a foreign investor on the territory of the host State’.\textsuperscript{124}

In explaining why the Award should be annulled on the ground of failure to state reasons, the \textit{ad hoc} committee held:

40. The Award is incomplete and obscure as regards what it considers an investment: it refers to various fragments of the operation, without finally indicating the reasons why it regards it overall as an investment, that is, without providing the slightest explanation as to the relationship between the “Mitchell & Associates” firm and the DRC. Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses, to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.

41. The \textit{ad hoc} Committee thus concludes that the Award is tainted by a failure to state reasons, in the sense that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{121} \textit{Id}, para. 5.09
\item \textsuperscript{122} \textit{Mitchell} [n 54]
\item \textsuperscript{123} \textit{Id}, para. 24
\item \textsuperscript{124} \textit{Ibid.}
\end{itemize}
\end{footnotesize}
inadequacy of reasons is such that it seriously affects the coherence of the reasoning as to the existence of an investment in accordance with Article 25(1) of the Convention and the Bilateral Treaty between the United States of America and the Democratic Republic of Congo, on which relied the jurisdiction of the Arbitral Tribunal.\(^\text{125}\) (Emphasis supplied)

From the above quoted portion of the annulment decision, it appeared that the \textit{ad hoc} committee went beyond the determination if the Tribunal expressly stated its reasons for reaching its conclusion. Instead, the \textit{ad hoc} committee went further by analyzing the “coherence” of such reasoning which could be likened into inquiring into the adequacy of the reasons provided by the Tribunal.

4.2.4. \textit{CMS Gas Transmission Company v. Argentine Republic}\(^\text{126}\) (CMS)

In \textit{CMS}, the claimant relied on the umbrella clause of the US-Argentine BIT to give it a standing in the arbitration proceedings and to justify its demand for compensation. It argued that although it was not entitled as a minority shareholder to invoke those obligations of Argentina under Argentine law (not being the obligee), the effect of Article II(2)(c) was to give it standing to invoke them under the BIT.\(^\text{127}\)

The \textit{ad hoc} committee noted the manner used by the Tribunal in resolving this issue, \textit{to wit}:

93. In paragraph 303 of the Award, the Tribunal concluded that “the obligation under the umbrella clause of Article II(2)(c) of the Treaty has not been observed by the Respondent to the extent that legal and contractual obligations pertinent to the investment have been breached and have resulted in the violation of the standards of protection under the Treaty.”

94. It is implicit in this reasoning that the Tribunal may have accepted the interpretation of Article II(2)(c) referred to in paragraph 92 above. \textit{But the Tribunal nowhere addressed this point expressly. Instead it repeatedly referred back to the Decision on Jurisdiction of 17 July 2003, where this specific matter was not dealt with at all.} Further, the Tribunal’s extended discussion of whether CMS had a right to compliance

\(^{125}\) \textit{Id}, para. 40-41  
\(^{126}\) \textit{CMS Gas Transmission Company v. Argentine Republic}, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic  
\(^{127}\) \textit{Id}, para. 92.
with the terms of the License and of the Argentine Gas Law would have been unnecessary if the basis of its decision was that Article II(2)(c) gave CMS standing to invoke obligations owned to TGN. \(128\) (Emphasis supplied)

The ad hoc committee thereafter criticized the Tribunal’s reasoning and found that such was tantamount to not stating any reasons for that portion of the Award because:

In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognize it. \(129\)

In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that answers to the question raised “can be reasonably inferred from the terms used in the decision”; \(130\) they cannot. Accordingly, the Tribunal’s finding on Article II(2)(c) must be annulled for failure to state reasons. \(130\) (Emphasis supplied)

Thus, in annulling the award, the CMS ad hoc committee followed the standard set by the MINE ad hoc committee. Through its simple examination of the Award itself, the CMS ad hoc committee was able to conclude that the Tribunal was unable to explain how it reached Point A to Point B. Although, the ad hoc committee admitted that the reasons may be implicit from previous discussions, it ruled that such implicit reasoning would not suffice since reasons must be stated expressly in the Award.

**4.2.5. Enron Creditors Recovery Corporation v. Argentine Republic**\(131\) (Enron)

In Enron, the ad hoc committee annulled the Award on the ground of manifest excess of power because it found the Tribunal to have not applied the applicable

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\(128\) Id, para. 93-94  
\(129\) Id, para. 96.  
\(130\) Id, para. 97  
\(131\) Enron [n 65]
law. By simply relying on the expert opinion of Professor Edwards, an economist that the measures undertaken by Argentina were not the “only way” to address the “emergency”, the Tribunal held 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 found that this amounted to a failure to apply the applicable law, as ground of annulment under Article 52(1)(b) of the ICSID (Convention).”

Based on similar findings of fact, the ad hoc committee likewise annulled the award on the ground of failure to state reasons. As an explanation, the ad hoc committee ruled:

In this case, a reading of the cursory reasoning of paragraphs 300 and 308-309 of the Award clearly suggests that the Tribunal accepted the expert evidence of Professor Edwards over the conflicting expert evidence of Professor Nouriel Roubini, to the effect that Argentina had other options available to it for dealing with the economic crisis. From this, without any further analysis, the Tribunal immediately concluded, that the measures adopted by Argentina were not the only way.

The ad hoc committee went on to say that:

Even if, contrary to all appearance, the Tribunal did apply the “only way” requirement in Article 25(1)(a), the Committee considers that the Tribunal failed to state reasons for its decision. This constitutes a ground for annulment under Article 52(1)(e) of the ICSID Convention.

Clearly, the ad hoc committee identified the reason why the Tribunal ruled that the “only way” requirement of Article 25 (1)(a) was not met. It observed that the Tribunal relied on the expert opinion of Professor Edwards. However, the ad hoc committee opined that this was insufficient reason to justify the Tribunal’s findings that the “only way” requirement was not met. In this case, the Tribunal stated its reasons on which the Award was based but the ad hoc committee disagreed. Thus, the ad hoc committee reached the conclusion that the Tribunal failed to state the

132 Id., para. 377
133 Id., para. 376
134 Id., para. 378.
reasons on which the Award was based, not by mere looking if there were reasons given but if such reasons were convincing.

4.2.6. **Victor Pey Casado and President Allende Foundation v. Republic of Chile**\(^{135}\) (Victor Pey Casado)

In *Victor Pey Casado*, the *ad hoc* committee annulled that portion of the award granting claimant’s prayer for damages on the ground of contradictory reasons, a species of failure to state reasons.\(^{136}\) In reaching this conclusion, the *ad hoc* committee examined the award and found that the Tribunal had ruled that the expropriation claim was inadmissible. And yet the Tribunal awarded the claimant damages in an amount equivalent to the value of the property, had no taking took place. The *ad hoc* committee thus, explained:

> The Committee agrees with Chile that the Tribunal’s adoption of the expropriation-based calculation of damages under Decision No. 43 contradicts its determination that this basis of calculation was irrelevant since the Claimants’ claim for expropriation was outside the temporal scope of the BIT.\(^{137}\)

> In paragraph 688 of the Award, the Tribunal expressly stated that an evaluation of the damages allegedly suffered by the Claimants as a result of the expropriation was irrelevant and that all the allegations, discussion and evidence related to such damages could not be considered by the Tribunal ("*ne peuvent pas être retenues*")) because the expropriation in 1975 had occurred prior to the entry into force of the BIT and was thus outside the temporal scope of the BIT.\(^{138}\)

> The Tribunal’s use of the *expropriation-based damage calculation* is manifestly inconsistent with its decision a few paragraphs earlier that such an expropriation-based damage calculation is irrelevant and that all evidence and submissions relevant to such a calculation could not be considered.\(^{139}\) (Emphasis supplied)

With respect to contradictory reasons, a recognized form of failure to state reasons, the *ad hoc* committee likewise analyzed the reasoning behind the conclusion. However, the *ad hoc* committee reached this conclusion by mere examination of

\(^{135}\) *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile, 18 December 2012

\(^{136}\) *Id.*, para. 279

\(^{137}\) *Id.*, para. 282.

\(^{138}\) *Id.*, para. 283

\(^{139}\) *Id.*, para. 285
the contents of the Award itself. The factual findings of the Tribunal were not re-examined but were in fact just taken as they were. It was through an analysis of the reasons given and their relationship with the other parts of the Award, that the ad hoc committee was able to reach its conclusion, that contradictory reasons were indeed given by the Tribunal.

4.2.7 TECO Guatemala Holdings LLC v. Republic of Guatemala\textsuperscript{140} (TECO)

In TECO, the ad hoc committee annulled the Award for failure to state reasons because of the failure of the Tribunal to address the pieces of evidence set before it. The ad hoc committee thus observed:

The Committee takes issue with the complete absence of any discussion of the Parties’ expert reports within the Tribunal’s analysis of the loss of value claim. While the Committee accepts that a tribunal cannot be required to address within its award each and every piece of evidence in the record, that cannot be construed to mean that a tribunal can simply gloss over evidence upon which the Parties have placed significant emphasis, without any analysis and without explaining why it found that evidence insufficient, unpersuasive or otherwise unsatisfactory. A tribunal is duty bound to the parties to at least address those pieces of evidence that the parties deem to be highly relevant to their case and, if it finds them to be of no assistance, to set out the reasons for this conclusion.\textsuperscript{141}

Obviously, in order to resolve the issue of whether the Tribunal addressed the evidence presented by the parties, the ad hoc committee had to examine the records and see the evidence actually submitted by the parties. Thereafter, the ad hoc committee determined from the Award itself, if these pieces of evidence were addressed or considered by the Tribunal before reaching a conclusion.

\textsuperscript{140} TECO Guatemala Holdings LLC v. Republic of Guatemala (TECO), ICSID Case No. ARB/10/23, Decision on Annulment, April 5, 2016

\textsuperscript{141} Id, para. 133.
4.2.8. SUMMARY OF FINDINGS

Similar to the treatment made on the annulment cases which upheld the ground that the Tribunal had manifestly exceeded its powers, the above description and analyses of the cases which found that the Tribunal has failed to state reasons upon which the Award was based, are limited to the methodology used by the *ad hoc* committees in reaching their conclusion of partially or wholly annulling an award. Based on this short survey, it is observed that the *ad hoc* committees do not have one set of rules on how to examine an Award for the purpose of determining whether the Tribunal had indeed provided reasons upon which its conclusions are based.

The *Klockner I, MINE, CMS and Victor Pey Casado ad hoc* committees ostensibly adopted the same procedure of limiting their examination to what were stated in the Award itself. By simply looking at what the Tribunal expressed in the award, these *ad hoc* committees were able to ascertain whether reasons were given for the conclusion reached or if the questions raised by the applicant for annulment were addressed. The *Mitchell and Enron ad hoc* committees on the other hand were more extensive in their analysis, in the sense that although reasons were stated in the Award, they found them to be inadequate and unconvincing. It was by using this standard that they were able to conclude that the Award failed to state reasons upon which they were based. Finally, the TECO *ad hoc* committee’s methodology of scrutinizing the records of the case may be justified considering that the ground relied upon by the applicant for annulment was that the Tribunal failed to address the evidence submitted, which was considered to be another specie of failure to state questions. Indeed, the *ad hoc* committee had to verify the records in order to see if such pieces of evidence were indeed submitted for the Tribunal’s consideration. It is observed however that the *ad hoc* committee in this case had conceded that the Tribunal need not address or discuss every piece of evidence submitted to it. However, the *ad hoc* committee ruled that considering the significance of the evidence that was alleged to have not been addressed, the Tribunal was duty bound to analyze and express why such piece of evidence was found to be irrelevant to warrant consideration.
5. CONCLUSION

5.1. The Legitimacy of the Ad Hoc Committee’s Factual Review Of Awards

At the beginning of this paper, the question of whether ad hoc committees may legitimately review the facts of the case is identified as the focus of this study. As a sub-question, the extent of factual review they can exercise without violating the well-enshrined doctrine that an ICSID annulment proceeding is not an appeals mechanism is also raised. The purpose of the analysis is to establish the limitation of the ad hoc committee’s discretion to review the factual matters set before it without violating the principle that it is not an appeals body.

Based on the Draft History of the ICSID, there appears to be no express discussion on whether ad hoc committees may conduct factual review of the Award sought to be annulled. Corollary to this, there seems to be no prohibition for ad hoc committees to do so. This is apparent from the survey of cases described and analyzed in this paper. In the cases where the ad hoc committees partially or wholly annulled an Award on the grounds of Articles 52 (1) (b) and (e), the annulment bodies took the liberty of examining the facts of the cases. They however had different approaches in their treatment of the Award as well as the records, documents, and pieces of evidence submitted during the arbitral proceedings.

To reiterate, with respect to the ground that the Tribunal has manifestly exceeded its powers, in Klockner I, the ad hoc committee limited its analysis on the award itself, “taking it as it is”. This approach was diametrically opposed to the methodology adopted by the Enron ad hoc committee, which went into the records and examined the pieces of evidence submitted during the proceedings i.e. expert opinions submitted by the parties even analyzing their probative value. The Mitchell, Sempra and MHS ad hoc committees on the other hand exercised restraint in their examination as they focused on the findings in the award and compared them with the terms of the agreement, BIT and the relevant provisions of the ICSID. It was apparent however that these ad hoc committees did not consider themselves bound by the factual determination of Tribunal. Hence, they made their own
findings of facts and analysis, independent of what was already settled by the Tribunal. The Occidental ad hoc committee on the other hand also took another route by examining even the case laws referred and relied upon by the Tribunal in its Award and rendered an opinion as to their applicability.

As regards the ground that the Tribunal has failed to state the reasons upon which the Award is based, the Klockner I, MINE, CMS and Victor Pey Casado ad hoc committees were one in conducting the same procedure of limiting their examination to the Award itself. By simply looking at the expressions contained in the award, these ad hoc committees were able to ascertain whether reasons were given for the conclusion reached or if the questions raised by the applicant for annulment were addressed. On the contrary, the Mitchell and Enron ad hoc committees were more extensive in their analysis of the facts stated in award. Although on its face, the Awards they reviewed provided reasons upon which they were based, the ad hoc committees found them to be inadequate and unconvincing, thus the annulment of the Award. The TECO ad hoc committee on the other hand scrutinized the records of the case. While it observed that the ad hoc committee need not address or discuss every piece of evidence submitted, it still ruled that considering the significance of the evidence that was alleged to have not been addressed, the Tribunal was duty bound to analyze and express why such piece of evidence was found to be irrelevant to warrant consideration. Such explanation was not given by the Tribunal hence, the Award was annulled on the ground of failure to address evidence.

The obvious difference in the way ad hoc committees exercise their discretion to review the factual records of the case creates an uncertainty on the object and purpose of the ICSID annulment proceedings. It bears emphasis that annulment is not an appeals mechanism. The difference between annulment under Article 52
and ordinary appeals lies in two elements: 1) the result of the process and 2) the aspects of the decision under review.

On the first element, result of an annulment proceeding could only be to leave the original decision intact or its setting aside or invalidation. Thus, it has been held that an ad hoc committee may not amend or replace an award, by its own decision, whether in respect of jurisdiction or the merits. On the other hand, an appeals court may substitute its own decision on the merits that it has found to be deficient.

As to the second element, annulment is concerned only with the legitimacy of the process of the decision but not its substantive correctness. An appeal is concerned with both. In other words, annulment committee is only empowered to review whether the process in rendering the award was carried out correctly, and not whether it rendered a correct award. An appeal body however, because of its discretion to substitute its own judgment over the decision already made, must ensure that a correct judgment is given.

In theory, “legitimacy of the process” vis-à-vis “substantive correctness” of the decision seems to be readily distinguishable concepts. While the first can be confined on the “HOWS” of the decision-making, the latter can be defined by the “WHYs” of the decision itself. One is concerned with the procedure, the other with the reasoning.

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142 Article 52
143 ICSID Commentary [n 7], page 901
144 Ibid, citing Amco v. Indonesia, Resubmitted Case: Decision on Jurisdiction, 10 May 1988, ICSID Reports 552.
145 Ibid.
146 Ibid
Thus, because an *ad hoc* committee under the ICSID is not an appeals body, it is a reasonable expectation that in reviewing awards, an *ad hoc* committee should not engage in the examination of the reasons and motivations of the Tribunal in reaching its conclusion considering that it is not mandated under the Convention to determine if the Tribunal rendered a correct award. The role of an *ad hoc* committee is a limited one, restricted to assessing the legitimacy of the award and not its correctness.\(^{147}\) This should be balanced however with the fact that parties perceive the legitimacy of a process of dispute settlement in terms of the predictability with which decision makers appraise their factual submissions.\(^{148}\)

An ICSID tribunal has the sole power to make factual determinations.\(^{149}\) This is consistent with Article 34 of the ICSID Arbitration Rules which states that “the Tribunal shall be the judge of the admissibility of any evidence adduced and its probative value.” This does not mean however that *ad hoc* committees are devoid of any authority to review the facts of the case. In fact, to a limited extent, they are expected to do so because otherwise they will be remiss of their duty to ensure that the Tribunals carried out their mandate within the ICSID framework. The mission of annulment proceedings is to maintain the utility and integrity of a process of dispute resolution by providing the degree of supervision sufficient to correct violations of parties’ expectations in a way that sustains confidence in the efficiency and fairness of ICSID arbitration.\(^{150}\)

Considering all these, it is submitted that while *ad hoc* committees are not expressly prohibited to review the factual records of the Awards sought to be annulled, if they do so, they must do so restrictively. The limit on the extent of factual review depends on the ground/s relied upon by the parties. This study is limited however to the two grounds for annulment commonly upheld by *ad hoc* committees. Thus:

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147 MCI Power Group L.C. and New Turbine Inc. *vs.* Republic of Ecuador, ICSID Case No. ARB/03/06, Decision on Annulment para. 24 (October 19, 2009).
149 *Id*, para.12.12. footnotes omitted.
150 *Id*, para. 12.13, footnotes omitted.
5.2 The Limitation of the Factual Review Under Article 52 (1) (b)

It has been identified that the Tribunal may be found to have manifestly exceeded its power if it: a) exercised power beyond the provisions of the relevant agreement, BIT or multi-lateral treaty and/or the ICSID; b) did not exercise power provided under the relevant agreement, BIT or multi-lateral treaty and/or the ICSID; c) failed to apply the applicable law, whether as agreed upon by the parties or in the absence of which, in accordance with Article 42 of the ICSID.

Given this, to reach a conclusion with respect to this ground, the ad hoc committee must only examine the relevant agreement of the parties, the BIT or multi-lateral treaty and the ICSID, since these instruments contain the parameters of the agreement to arbitrate. 151

Thus, for the purpose of determining whether the Tribunal exceeded or failed to exercise its powers, the factual review of the ad hoc committee should be limited to the examination of the facts that could determine whether the dispute submitted for the resolution of the Tribunal fall or does not fall within the jurisdiction afforded to it by the agreement, BIT or multi-lateral treaty and the ICSID. If the dispute submitted for the resolution of the Tribunal does not fall within the jurisdiction afforded to it, as reflected in the instruments mentioned, and yet the Tribunal heard the case then the Tribunal manifestly exceeded its powers. 152 In the same manner, if the Tribunal refuses or fails to decide the dispute which falls within the instruments, then such will also constitute a manifest excess of power. 153 It may appear paradoxical that a refusal to exercise jurisdiction can amount to an excess of powers, but the term ‘excess of powers’ relates to a deviation from the arbitration agreement and not to a quantitative concept of jurisdiction. 154 The factual review and analysis of the ad hoc committee should not go beyond these limits. 155

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151 See [n 17] – The same conclusion was reached by this writer in the cited unpublished work.
152 Ibid.
153 Ibid.
155 Ibid.
With respect to the factual review if the Tribunal applied the law chosen by the parties, it is submitted that the ad hoc Committee could simply check if the law as reflected in the relevant BIT or multi-lateral treaty was the same law used by the Tribunal in resolving the dispute.\textsuperscript{156} Ad hoc Committees should not take a step further by analyzing how the Tribunal applied the given law.\textsuperscript{157} Because to do so, would be tantamount to examining the “correctness” of the application of the chosen law, from which the only conclusion would be either the Tribunal correctly or incorrectly applied the proper law.\textsuperscript{158} This analysis is consistent with what Broches had stated during the drafting of the Convention that a mistake in the application of the law would not be a valid ground for annulment, although the application of a law different from that agreed to by the parties could be challenged on the ground that the arbitrators had gone against the terms of the consent agreement.\textsuperscript{159}

In the same manner, if the parties failed to agree on the applicable law, in accordance with Article 42 of the ICSID, the factual review of the ad hoc Committee should be limited to simply checking and verifying if the Tribunal applied the laws of the contracting State, including its conflict of laws, and the applicable international law.\textsuperscript{160} The ad hoc Committee must not concern itself in examining whether these laws were properly applied or not.\textsuperscript{161} Because to do so, would be similar to examining the correctness of the Tribunal’s award, which is beyond the mandate of an ICSID annulment Committee.\textsuperscript{162}

5.3. \textbf{The Limitation of the Factual Review under Article 52 (1)(e)}

With respect to the ground of failure to state the reasons upon which the Award was based, it is submitted that the factual examination that may be exercised by the ad hoc committee should be limited to the four corners of the Award itself. At the risk of being superfluous, it is submitted that the reasons upon which the Award are

\textsuperscript{156} Ibid.
\textsuperscript{157} Ibid.
\textsuperscript{158} Ibid.
\textsuperscript{159} ICSID Commentary [n 7], page 955.
\textsuperscript{160} See [n 17].
\textsuperscript{161} Ibid.
\textsuperscript{162} Ibid.
based may either be expressed in the Award or not. Hence, if they are not expressed in the Award, then the failure to state the reasons upon which the Award was based, is established.

To verify this, the ad hoc committee need not examine the factual records or the pieces of evidence submitted by the parties. Because to do so would be tantamount to a review of the “reasons” instead of the mere presence of reasons required under the ICSID. The standard given in the MINE annulment proceeding provides the limitation of this factual review, to wit:

5.09 In the Committee’s view the requirement to state the 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.\footnote{See [n 113], para. 5.09}

With regard to the ground of failure to address the questions raised, this writer is aware of paragraph (3) Article 48 of the ICSID which provides:

The award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based.

However as reflected in the Draft History while there had been concerns about omissions in tribunal decisions that may lead to incomplete awards,\footnote{ICSID Commentary [n 7], page 1013.} drafters of the ICSID did not consider failure to deal with every issue as a ground for annulment.\footnote{Id, page 1014.} Thus, this writer opts not to discuss the limitation of the factual review an ad hoc committee must exercise if this is the ground relied upon by the applicant for annulment.

The statement of Professor Schreuer on this regard in applicable, to wit:

Neither Article 48 (3) nor Article 52 (1) e specify the manner in which the Tribunal’s reasons must be stated. The object of both provisions is to ensure that the Parties will be able to understand the Tribunal’s reasoning. This goal does not require that each reason be stated.
expressly. The Tribunal’s reasons may be implicit in the considerations and conclusions contained in the award, provided they can be reasonably inferred from the terms of the decision. 166

5.4. Final Remarks

Ad hoc committees are not prohibited from conducting factual review of Awards submitted for review. However, they must do so restrictively, lest they be accused of stepping into the line of acting like an appeals body.

As discussed, with respect to the ground under Article 52 (1) (b) that the Tribunal has manifestly exceeded its power, the factual review of the ad hoc committee should be limited to the examination of the facts that could determine whether the dispute submitted for the resolution of the Tribunal fall or does not fall within the jurisdiction afforded to it by the agreement, BIT or multi-lateral treaty and the ICSID. The same instruments can be examined for the purpose of determining whether the Tribunal applied the proper law chosen by the parties. If the parties failed to choose the applicable law, the ad hoc committee should limit itself in checking and verifying if the laws of the contracting State, including its conflict of laws, and the applicable international law were applied. 167 The analysis should not go beyond a prima facie determination. Ad hoc committees should exercise restraint and not go into determining whether such laws were correctly applied. 168

With respect to the annulment ground of failure to state reasons as enshrined under Article 52 (1) (e), the factual review of the ad hoc committee must be limited to the Award itself, and not to any other factual records submitted during the arbitral proceedings. It is in the Award itself where the reasons would be revealed, if they do exist.

This limited discretion of the ad hoc committee to conduct factual review of Awards is consistent with the object and purpose of an ICSID arbitration to render a final

166 ICSID Commentary [n 7], pp. 1000-1001.
167 See [n 17] – The same conclusion was reached by this writer in the cited unpublished work.
168 Ibid.
and binding award. Thus, it is incumbent upon the party seeking to annul an award to show a prima facie case that the ground/s, it relies upon exist/s. On the other hand, the ad hoc committee, in determining whether there are reasons to annul the award must exercise restraint and not go into an analysis of the WHYs of the award but merely its HOWs. To do otherwise, would be violative of the provision of the ICSID regarding the finality and unappealable nature of ICSID awards. In the absence of contrary provision, it is submitted that the duty of the ad hoc Committee is only to check if the award is rendered correctly and not to determine if the Tribunal rendered a correct award.

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