Ad hoc or ad arbitrium? An Audit of Recent ICSID Annulment Decisions
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The role of an ad hoc committee is to ensure the stability of the ICSID arbitration system, not to overthrow awards because of its disagreement with the arbitral tribunal. Otherwise, the annulment mechanism of Article 52 would slide into an appeal.
—Duke v. Peru, Annulment Decision, ¶ 165

I. INTRODUCTION

The limited purpose of this paper is to survey the ICSID annulment decisions between mid-2010 and mid-2011 and, more particularly, to audit whether the troubling drift of the decisions noted by one of the authors at the October 2010 IBA Vancouver meeting is continuing. Our conclusion: there are grounds to be cautiously optimistic.

The recently high annulment activity is indisputable. It is striking that of the 25 annulment decisions published between May 1985 and June 2011, seven were rendered by ad hoc annulment committees between June 2010 and June 2011, significantly more than during any other 12-month period

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1 The first published ICSID ad hoc committee annulment decision was in Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais, ICSID Case No. ARB/81/2 (Annulment Proceeding), On the Application for Annulment Submitted by Klöckner Against the Arbitral Award Rendered on October 21, 1983 (3 May 1985).
in ICSID history. In chronological order, those seven decisions were issued in the following ICSID cases: Helnan v. Egypt; Sempra v. Argentina; Enron v. Argentina; Vivendi v. Argentina (Vivendi II); Vieira v. Chile; Fraport v. Philippines; and Duke v. Peru. More striking is that four of the seven decisions—Sempra, Enron, Fraport, and Helnan—resulted in either partial or full annulment of the original awards. To put this number in context, there were 127 ICSID awards rendered between 1971 and 2010, with only eleven annulments. Most striking, to the authors, is that the ad hoc committees in several of the seven recent annulment decisions—whether annulling the original awards or not—ventured into analysis and obiter seemingly far outside of the limited mandate for committees articulated in Article 52(1) of the ICSID Convention.

To remind, the grounds for annulment of an ICSID award described in Article 52(1) are these:


4 ICSID Caseload—Statistics, Table 12.