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THE BREAKDOWN OF THE CONTROL MECHANISM IN ICSID ARBITRATION

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As is well known, much of what occurs in contemporary international arbitration is not available in the literature but is transmitted, like the folklore of many professions, orally. I am indebted to many of the people who were involved in many of the cases that are discussed here for their willingness to discuss and share analyses of the cases with me. I wrote opinions in several of the cases discussed here. This article concerns the constitutive aspects of those decisions as they impact on the control system of ICSID and not on their merits. Nevertheless, the reader should examine those cases with the knowledge that, for some of the cases discussed, the author was a participant and an observer.

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I. INTRODUCTION

Arbitration is a delegated and restricted power to make certain types of decisions in certain prescribed ways. Any restricted delegation of power must have some system of control. Controls are techniques or

mechanisms in engineered artifacts, whether physical or social, whose function is to ensure that an artifact works the way it was designed to work. In social and legal arrangements in which a limited power is delegated, control systems are essential; without them, the putative restrictions disappear and the limited power may become absolute. The impulse to establish control systems in political processes imports a dynamic conception of social and political processes on which, as is well-known, the United States constitutional experiment is based.

In socio-legal arrangements, controls may be internalized or externalized, or combinations of both techniques may be used. Internal legal systems of control have ranged from the inculcation, certification, and application of craft skills by key actors to collegiate decision structures in which tasks and roles are distributed among a number of participants, as well as to the insistence that decisions be accompanied by the manifest reasoning on which they were based as a way of monitoring cameral deliberations, to peer pressure, and to devices such as reliance on supernatural intervention (for example, by the use of oaths or rituals).

External controls have included devices such as checks and balances exercised by co-equal or coordinate decision entities or complex hierarchical arrangements, with each successive level providing some supervision and potential review of the preceding. Controls effected by power balances may dispense with hierarchies, but they depend for their effectiveness on contextual power parities. For several centuries, the international political system used the mechanism of "balance of power" as its control device. Although these discussions often use the language of mechanics and hydraulics, all legal controls, one should remember, must be effected by people.

Some control systems are genetic, in the sense that they are designed as part of the original conception of the process to whose functioning they contribute. Others are added on, as experience reveals that the process is encountering factors that had not been considered at the time of its creation. In response, new control arrangements—new fuses, new governors, another set of emergency brakes—are created. The biological evolution of life on our planet has apparently followed this trial-and-error approach. In social and legal arrangements, efforts are almost always made beforehand to plan controls, but subsequent corrections or additions are often required. In our national constitutional scheme, for example, some control systems are built into the genetic constitution. Others, such as judicial review, were added on by the initiative of some

participants whose appraisal persuaded them that additional controls were required.¹

When physical control systems break down—the brakes fail, the thermostat cuts off, or the governor pops—the system may stop functioning, go out of control, or destruct. When social and legal control arrangements break down, the decision process does not necessarily fail. But it certainly changes as more power shifts to the now comparatively less-controlled decisionmakers. Breakdowns in legal controls are not necessarily calamitous or even systemically dysfunctional. Depending on the values of the appraiser, some breakdowns may be viewed as positive. If oligarchical controls break down, for example, those who have been freed may characterize the change as democratizing and liberating. Conversely, when the controls designed to restrain capital from creating concentrations which might reduce competition break down, the beneficiaries may similarly characterize the change as liberating.

From the perspective of actors such as these, controls may be viewed as costly and even intolerable restraints; from a broader perspective, the ultimate evaluation of their utility (if not indispensability) is their contribution to the effective operation of the system of which they are a part. In international law, one of the traditional controls on the exercise of power by states in which foreign investments had been made was the insistence that putative applications of local law be subject to international review under a variety of criteria. When many of the developing states, in a movement called the New International Economic Order,² resolved that henceforth they could expropriate without international controls and control themselves in their own courts, they characterized the movement as a liberation.³ But it appears that the very foreign investors who were necessary for both local development and the application of jurisdiction were, as a consequence, more restrained about new investments and even began to withdraw.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); see also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-33 (2d ed. 1986) (describing how "the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped and maintained").

2. *Declaration on the Establishment of a New International Economic Order*, G.A. Res. 3201, U.N. GAOR, Supp. (No.1) at 3, U.N. Doc. A/9559 (1974).

3. Article II(2)(c) of the Charter of Economic Rights and Duties of States specifies that each State has the right:

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.

G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, 52 U.N. Doc. A/9631 (1974).

When control systems break down and the result is a reduction in the effectiveness of the decision process of which they are a part—for example, by a reduction in participation—the breakdown must be characterized as a pathology. When changes in control mechanisms occur that appear to have negative effects on the system to whose operation they are supposed to contribute, it becomes appropriate, if not urgent, to inquire into causes and to seek better alternatives. This is particularly the case in arbitration. With controls, arbitration remains a delegated and restricted power. Without controls, it may become arbitrary and capricious. Thereafter, the arbitrator, like the Roman Emperor, may be tempted to say “*quod voluit arbiter habet vigorem legis.*” Yielding to that temptation may have longer-term systemic implications. When we deal with formal international decision processes that are, for the most part, voluntary and consensual and in which the expectation of a specific control mechanism is an important factor in deciding to use a particular process, a control breakdown such as this is likely to induce many actors to reconsider and henceforth refrain from using that process.

A. *National Judicial Control Systems*

In domestic adjudication in some political systems, a hierarchical judicial bureaucracy operates as the control system for state-sponsored dispute resolution. Successive levels of the judicial bureaucracy appraise and reappraise the general workings of the system as well as the accuracy, consistency, and justice (the calculus of rectitude of the system and its envioning culture) of particular applications. Higher levels make adjustments in particular lower decisions or in general decision procedures where they seem appropriate. Higher judicial levels are comprised of a permanent staff that is recruited to the bureaucracy, inculcated with organizational values and itself subjected to effective policing and disciplinary mechanisms. A distinct legislative bureaucracy provides an additional, contingent system of control, intervening when its own appraisals indicate that the judicial bureaucracy is performing some of its assigned tasks unsatisfactorily.

“An ounce of prevention . . .” as the old nostrum has it. In terms of economy, the preferred control system is always internalized and prospective rather than externalized and retrospective. Judicial control is better accomplished, for example, within the court system, rather than by the legislature, and better accomplished by the legislature than by extra-legislative agitation. It is better that the system anticipate problems, rather than repair them after they occur. Where control is vital for system survival, and it is probable—following Murphy’s renowned law—that some initial efforts at control will, as a matter of statistical

probability, not accomplish their task, back-up control systems are devised. Hence the common phenomenon of multiple, sequential control levels, found both in nature and in human artifacts, is not necessarily a redundancy or itself a product of faulty planning or oversight.

All control systems involve costs. Judicial control systems have costs in terms of the funds needed to establish and maintain them and in terms of the time that must be expended in successive levels of appeal before a dispute is finally resolved. It is arguable (but far from established) that the more hierarchical layers of protection a bureaucracy has, the more likely it is to get things right, in terms of systemic goals. But here, as elsewhere, there is no free lunch. The expenses of maintaining the vast control superstructure are passed through to users, raising the costs of justice in terms of money and time and, for some marginal actors, pricing them out of the very system that was supposed to offer them an opportunity to protect their rights. At the same time, other actors, calibrating the rising nuisance value provided by the sequential appeal options, may be encouraged to start dubious actions with the plausible expectation that settlement at an early point will appear more cost-effective to those harassed than vindication of their legal rights.

Added layers of control also increase time-costs: the length of the interval between claim and disposition. The old adage "justice delayed is justice denied" is often true in the particular sense that a delayed victory may deprive the winner of substantial economic value and in the general sense that confidence in the efficiency and fairness of the system is eroded. All the added costs generated by control systems are imposed on the parties, who must pay to defend their positions in the control mechanism and whose treasure is immobilized pending final decision, and on the community which must partially underwrite the control system and itself is deprived, pending the final decision, of many of the benefits of the values frozen in dispute.

Considerations such as these generate a tension between two control system policies: justice and finality. The old Roman maxim said *interesse rei publicae ut sit finis litium*. That maxim imports a clear cut-off point, an arbitrary "enough-is-enough" point. To the contrary stands Abraham Lincoln's statement that "nothing is final until it's right," which rejects any arbitrary cut-off point. His statement may have been based as much on political realism as on moral conviction since diffused popular indignation over a decision perceived as wrong or unjust can acquire, right or wrong, a common vector and become political power. In response, new arrangements to regain social stability may be required. The interest in finality means that some arbitrary limit for control systems must be established. The interest in justice means simply that jus-

tice must be done, no matter what the cost or how long it takes. Control systems perforce strike compromises between these interests.

B. *Control Systems in International Arbitration*

For a new and rapidly growing category of events that we often call, for lack of a better term, "transnational,"⁴ international commercial arbitration (broadly understood) now performs many of the functions of domestic adjudication. But international arbitration lacks a set of bureaucratic institutions comparable to the levels of domestic adjudication that might perform its control functions. International arbitration has approached the control problem in an entirely different way.

In international law, the basic theory of arbitration is simple and rather elegant. Arbitral jurisdiction is entirely consensual. As in Roman law and the systems influenced by it, arbitration is a creature of contract. The arbitrator's powers are derived from the parties' contract. Hence, in the classic sense, an arbitrator is not entitled to do anything unauthorized by the parties: *arbiter nihil extra compromissum facere potest*.⁵ An arbitral award rendered within the framework of the common agreement of the parties is itself part of the contract and hence binding on them. Conversely, a purported award which is accomplished in ways inconsistent with the shared contractual expectations of the parties is something to which they had not agreed. The arbitrator has exceeded his power or, to use the technical term, committed an *excès de pouvoir*. If the allegation of such an excess can be sustained, the putative award is null, and may be ignored by the "losing" party.

Arbitration is advantageous to parties because it gives them an additional contractual option for resolving disputes without engaging community structures. It is also advantageous to the community: it allows economical resolution of private disputes that are often diversions from productive activity, without more general disruption and without direct cost to the community. The doctrine of *excès de pouvoir* functions as an indispensable control mechanism in this scheme. Without it, arbitration would lose its character of restrictive delegation and the arbitrator would become a decisionmaker with virtually absolute discretion; whatever limits may have been prescribed by the parties would become meaningless

4. The term appears to have been coined by Myres McDougal, but it was given its greatest currency by the late Judge Philip Jessup in his *Transnational Law*. See P. JESSUP, *TRANSNATIONAL LAW* (1956). The term is useful for designating economic relationships that cross national political boundaries but do not engage, as direct parties, nation-states or their various agencies. In this respect, it can be a designative term to distinguish commercial relationships which are not national but, strictly speaking, are not "international."

5. Digest IV, 8-332-21.

because the arbitrator would be answerable effectively to no one. *Excès de pouvoir* thus is the conceptual foundation of control for arbitration.

This kind of control mechanism works well in an organized political-legal system with a hierarchical judiciary equipped with an effective compulsory jurisdiction to review allegations of *excès de pouvoir* and decide impartially the alleged nullity of the award. But the theory is susceptible to abuse in a system—like the international one—in which there is no such permanent and effective hierarchical structure. In the absence of a reviewing authority, a party alleging that an arbitrator did something not authorized by the agreement to arbitrate is simultaneously prosecutor, judge, and jury *in sua causa*. The potential for abuse in this system is obvious. Ironically, the very theory of nullity which serves in domestic contexts to police the arbitrator and thus encourages arbitration, has the potential to undermine arbitration in the international setting.

As long as arbitration was used infrequently and parties could discount losing before agreeing to submit to a tribunal, this system—while hardly optimum—worked. But when modern transnational arbitration increased as a function of the increase in transnational commercial activity, the inadequacy of this classical control mechanism became apparent. Arbitration was in danger of being undermined by its own control mechanism.

The apparent solutions were unsatisfactory.⁶ Efforts to make awards binding without regard to their possible *excès de pouvoir*—in effect abandoning all control systems—would discourage many prudent decision specialists from resorting to arbitration. But efforts to allow claims of nullity and to try to make them precise have been undermined by fears that they will be exploited by losers who will use them to undermine the authority of awards. A *leitmotif* of modern international arbitration has been the search for a way of breaking free of these equally unsatisfactory alternatives by devising some sort of institutional device to provide responsible and predictable control, while minimizing the potential for abuse of claims of nullity.

The possibilities of solving this problem are quite limited in the absence of some sort of permanent international institution or set of institutions, which, if not necessarily hierarchical, would at least be *there* when the need arose and could be authorized to decide a claim that an international award was null for some *excès de pouvoir*. An unratified treaty between the United States and the United Kingdom signed on January

6. The history of that search for a solution can be traced from 1874, when the Institute de Droit International undertook a study of the problem. See W. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 31-34 (1971).

11, 1897, indicates the limits of non-institutional possibilities: if members of the tribunal were not unanimous with regard to claims exceeding a designated amount, either party, as the draft provided, "may . . . demand a review. . . . In such a case the matter in controversy shall be submitted to an Arbitral Tribunal, consisting of five jurists of repute"⁷ But the establishment of this second tribunal required the agreement and cooperation of the parties, and if one of them calculated that it would lose the award it had just gained, it had little incentive to cooperate in forming the tribunal.

C. Policy Considerations

Contemporary international arbitration must coopt or invent its own control system. In doing so, it faces a number of intertwined practical and policy problems that differ from domestic adjudication and make counter-productive any direct and unqualified imitation or cooptation of domestic control institutions. A major incentive for international commercial arbitration, it will be recalled, is its promise of simplicity, economy, supra-national neutrality and speed. The fact that the parties can shape the tribunal, and, if they so decide, individually appoint one of the arbitrators with the expectation that their designee will be sympathetic to their view, is an important factor in their selection of this mode of dispute resolution over adjudication in an alien national court system. Many would say that properties such as these are international arbitration's very *raison d'être*.

These features militate against an elaborate type of control mechanism like those used in domestic contexts; such a mechanism would, as it does in domestic practice, temporally extend and raise the cost of dispute resolution. Similarly, these desired features militate against exclusive or heavy reliance on domestic courts as control institutions. Yet one cannot rely, as an alternative, on the social controls inherent in face-to-face relationships which are effective in small groups. The very scale and spatial distribution of transnational events reduces the efficacy of such controls. National legal and general cultural heterogeneity, the larger number of actors, and the increased randomness of combinations, all of which are characteristic of contemporary international arbitration, mean that latent social controls such as peer pressure, common training, and common values of personal conscience are likely to be ephemeral and marginally effective, if at all. The absence of a viable alternative control mechanism could encourage violations and ultimately undermine resort to interna-

7. Treaty of General Arbitration, Jan. 11, 1894, United States-Great Britain, arts. IV, V, reprinted in G. DEMARTENS, 28 NOUVEAU RECUEIL GENERAL DES TRAITES (2d ser.) (Fr.) No. 12, at 90, 92 (1902).

tional arbitration. The absence of effective controls would leave the international arbitral system a prey to "moral hazard,"⁸ unable to correct those serious injustices whose probability of occurrence is increased by the very absence of controls.

D. *Appeal and Control*

In national judicial bureaucracies, key parts of the control system may be lodged in the hierarchical network of courts of appeals. The conflation of appeal and control should not lead students or actors to assume that the functions are identical. Appeal is concerned with what is right for the parties and is initiated by the parties. Control is concerned with maintenance of the minimum conditions necessary for the continuation of the process of decision itself. Appeal, as viewed from within the system, is concerned with rectifying any (but not necessarily all) of a broad range of errors and putting the decision in question into conformity with the key policies of a community. In its most general terms, the requirement for discharge of the control function is a broader macro-organizational perspective since control is concerned with the very existence of the community, its decision process, and its continuing efficient operation.

The control and appeal functions sometimes may apply similar criteria and reach identical conclusions. But in many cases, the key issues of concern on appeal will not be relevant to the control function in the sense that however the appeal may be decided, none of the concerns of control will be implicated. Indeed, a control system may enforce an award that would be struck down, (and indeed, should be) had it been a judgment on appeal. The point, which is elusive in a national setting because of the location of control functions in part of the judicial bureaucracy, is clearer in international arbitration. The comparatively limited grounds on which an award may be attacked, as opposed to the broader grounds on which an appeal of a judgment may be lodged, signal these different concerns.

E. *The Objectives of This Lecture*

Modern international commercial arbitration, in its broad acceptance, continues to experiment with a number of types of control systems. Although each was devised at a different moment in the past, in a different institutional context, and with a different *problematik*, they have all interacted and interstimulated, since many of the problems have been the same and the experience of one effort has been pertinent and sometimes

8. Grubel, *Risk, Uncertainty and Moral Hazard*, 38 J. RISK & INS. 99, 106 (1971).

valuable to others. Because most of these control systems still operate, they together constitute a type of living museum of comparative law and organization, its successes, and its pathologies. For different reasons, most of the experiments are in crisis.

In this lecture, I propose to guide you through the museum. It has an international wing and, you will be surprised to discover, a very substantial national wing. The latter is inescapable. Even those who resist the idea of systemic controls for international commercial arbitration have appreciated that in the final phases of the arbitral process, the assistance of national courts is often necessary for enforcement. The expectation of the probability of that enforcement proves to be a key factor in "voluntary" compliance. Some of the exhibits mix both international institutions and national systems. National systems are expected to accommodate international agreements expressing mandatory international control policies and potentially divergent national legislative instruments and policies which must operate in tandem with international agreements.

Behind each exhibit, whether international, national, or mixed, is the classic arbitral control device of a unilateral claim of *excès de pouvoir*. This control functions as a "failsafe," the final back-up control device designed to kick into operation when all the others are exhausted. Failsafes are hardly an optimal control mechanism. Some—like Kubrick's "Doomsday Machine" or its contemporary reincarnation, "Mutual Assured Destruction"—are supposed to operate by destroying the system and all its participants.

My purpose in this lecture is not to provide a guided tour of curiosities and exotica. Legal scholarship learns in order to improve. Its contribution here can be particularly important. To a remarkable extent, modern arbitration is much less a creation of the state and more the handiwork of the academic and practicing bar. If there are problems in its current operation, they are either ours to solve or they will remain unsolved.

II. THE ICSID EXPERIMENT: THE BREAKDOWN OF INTERNATIONAL INSTITUTIONAL CONTROL MECHANISMS

One of the major objectives of international commercial arbitration has been to keep dispute resolution out of the courts of one or the other of the parties and protect litigants from the costs of plodding through the long corridors of national judicial bureaucracies, having to stop to rehear all or part of the case in each successive cubicle. The optimum control institution for international commercial arbitration would be self-contained at the international level so as to avoid completely the national

courts, but it would perform all necessary control requirements. This sort of optimum control institution has proved elusive. It is now relatively easy to establish workable international arbitral institutions. It has proved much more difficult to create comparably workable explicit control institutions, whether through some form of review or appeal.

A. *The Background of ICSID*

World Bank arbitration, thanks to the opportunities presented by its structure and the imagination of its conceivers, provides us with an example of an entirely internal and international control mechanism.

1. *The ICSID Control Scheme.* In 1963, the International Bank initiated a conference to create a system of international arbitration associated with the Bank.⁹ The nexus between an international development bank and international arbitration may not be immediately apparent, but, in fact, it is very close. The purpose of the planned arbitration center was closely related to the major purpose of the Bank: to encourage and accelerate economic development in the poorer countries. Since it had become apparent that available public funds were insufficient for the task, the Bank sought to recruit private capital by encouraging direct foreign investment in developing countries. But, at a time when a synergy of recent independence and radical ideology was generating expansive claims of sovereignty and national rights, which were used to justify expropriation of foreign property, potential investors had become skittish about investing in poorer countries.

The new arbitral center sought to create an impartial and reliable system of arbitration under the aegis of the World Bank for disputes between direct foreign investors and host governments. The assurance of such a system, it was thought, would assuage the anxieties of foreign investors and encourage them to invest while at the same time cooling the enthusiasm of host governments for expropriatory actions. The fundamental idea underlying the ICSID experiment was brilliantly simple: developing countries anxious to induce private foreign investment would agree to submit investment disputes to a tribunal, while the governments of foreign investors would agree to refrain from what is often euphemistically called "diplomatic protection."

As in all international commercial arbitration, the designers of the World Bank scheme knew that they had to provide a neutral forum that would avoid both the courts of the host state, which the foreign investor

9. See generally, 2 CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (documents concerning the origin and foundation of the Convention) [hereinafter ICSID CONVENTION].

usually felt could be prejudicial to his interests, and the courts of the foreign investor, which the host government would usually assume to be less than sympathetic to its aspirations. For many states, the prospect of submitting to the jurisdiction of a foreign court seemed an affront to its sovereignty and national dignity.

The International Centre for the Settlement of Investment Disputes or "ICSID," as the World Bank system came to be acronymically known, addressed both of these problems. Sensitive to the political elements in the cases it would be processing, it also sought to reduce the role of national courts in enforcement even more than in other available systems of private international arbitration by providing for direct enforcement with no possibility of challenging an award in national courts in which enforcement otherwise would have been sought. The developing countries that were anxious to attract foreign investment would have been loath to submit to the jurisdiction of a foreign court in an enforcement action. From the perspective of the foreign investor, such enforcement, as of 1963, hardly looked worth the effort. If the developing country even had assets in an industrialized state, those assets were probably protected by the then still broad doctrine of sovereign immunity.

The question then arose: how police the many normative requirements and standards of the proposed Convention? To have used national courts, as does the control system for non-institutional private international arbitration, would have defeated the very purpose of ICSID to avoid national courts. The drafters of ICSID took an entirely different tack by drawing on an idea that had gestated since 1928.

In the past, most international tribunals were formed for a particular dispute or class of disputes and then, *functus officio*, dissolved after they had rendered their awards. Their members would return, often by comparatively primitive means of transportation, to their distant countries. Not only were there no existing control institutions; it was virtually impossible to reconvene the tribunal that had rendered the award for even the limited purpose of award clarification or rectification. Unless special provision had been made, the tribunal no longer existed legally or factually. If one sought an organized control mechanism, one had to create a new tribunal.

The creation of the Permanent Court of International Justice in 1920 opened new opportunities that were quickly appreciated. The idea of employing the Court as a review or appeal authority was first forwarded by Szyon Rundstein, the Polish member of a Committee of Jurists which the League of Nations had established to study the possible revision of the Statute of the Permanent Court. In 1928, Rundstein proposed that states interested in averting the problems caused by claims of

arbitral nullity could make a Declaration, under Article 36(2) of the Statute of the Court, that would commit them in advance to submit to the Permanent Court claims of excessive jurisdiction and violations of rules of international law by arbitral tribunals. The Permanent Court was to act as a *cour de cassation*; after its decision, the original tribunal would modify its award in the light of the Court's ruling.

Point 5 of Rundstein's draft provided:

Eventual revision of an award belongs to the competence of the international arbitral or judicial tribunal which has been established by the signatory parties, except where they confer on the Permanent Court of International Justice jurisdiction as a tribunal for revision.¹⁰

Note the assumption that the original tribunal was still in operation and had not become *functus officio*. Rundstein assumed that the original tribunal would still be operating but would suspend itself until the contested issue was resolved by the Court. Apparently, Rundstein was thinking of institutions like the Mixed Arbitral Tribunals of the Peace Treaties of the First World War.¹¹ His assumption made his proposal relevant only to a limited number of what proved to be ephemeral international arbitral phenomena.

In 1929, Finland proposed that the question of enfranchising the Permanent Court with an arbitral review competence be placed on the League agenda.¹² Shortly thereafter, the Assembly asked the Council to consider:

What should be the most appropriate procedure to be followed by States to enable the Permanent Court . . . to assume in a general manner, as between them, the functions of a tribunal of appeal from international tribunals in all cases where it is contended that the arbitral tribunal was without jurisdiction or exceeded its jurisdiction.¹³

Meanwhile, the idea was being explored in non-governmental fora. At its 1929 meeting the Institut de Droit International recommended:

States, in their conventions on arbitration, as well as in the *clauses compromissoires* signed by them, agree to submit to the Permanent Court of International Justice for decision all disputes between them

10. 10 LEAGUE OF NATIONS O.J. 1125, 1126 (1929) (memorandum submitted to the Committee of Jurists by M. Rundstein, Member of the Committee).

11. See generally RECUEIL DES DECISIONS DES TRIBUNAUX ARBITRAUX MIXTES (Fr.) (1922-30).

12. *Proposal of the Government of Finland to Confer on the Permanent Court of International Justice Jurisdiction as a Tribunal of Appeal in Respect of Arbitral Tribunals Established by States*, Annex 6, LEAGUE OF NATIONS, O.J., Spec. Supp. 76, at 82.

13. *Report of the Committee Appointed by the Council*, League of Nations Doc. C.338 M.138 1930V (1930).

relating to either the competence of the arbitral tribunal, or to an *excès de pouvoir* by the latter alleged by one of the Parties.¹⁴

In 1930, the Committee of Jurists, which had been appointed by the League Council, submitted a report and proposed three alternative draft protocols, each of which incorporated and developed the earlier proposals.¹⁵ Under Article 3 in each of the alternatives, a party alleging the nullity of an award for specified grounds had to submit its allegation to the Permanent Court. Common Article 4 provided:

The Permanent Court of International Justice shall declare the award which is impeached to be null, in whole or in part, if it recognizes the application to be well founded. By such annulment, the parties to the dispute shall be replaced in the legal position in which they stood before the commencement of the proceedings which gave rise to the award which has been impeached. . . .¹⁶

The idea languished during the rest of the League period but was revived, after the formation of the United Nations, by the late Professor Georges Scelle, when he was Rapporteur for the International Law Commission's project on international arbitration.¹⁷ Scelle was instructed by the Commission to prepare a comprehensive code of international arbitration that would clarify unified standards for every phase of the process. Confronted with claims about improper actions on the part of the tribunal, the subject-matter of control systems, and challenges to or refusals to comply with awards because of improper actions, Scelle decided to revive the abortive League plan. In his conception, the International Court of Justice would be enfranchised to act as the final review tribunal for challenges to arbitral awards.¹⁸

The Scelle plan, like its predecessor, was stoutly resisted. When the ILC draft with its innovative control system was submitted to the General Assembly, the Assembly refused to adopt it. Thereafter, the ILC concluded the project by transforming it into a set of "Model Rules."¹⁹ The question of exactly who they were to be a model for was not addressed. But the idea behind the Scelle plan was not dead.

14. *Resolutions Votées par l'Institut au cours de la XXXVI Session*, ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (1929) Vol. II, at 304 (translation by the author).

15. September 25, 1929, *cited in* Report of the Committee of Jurists, League of Nations Annex 122 ¶ 338.

16. *Id.*

17. Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, prepared by the Secretariat U.N. Doc. A/C.N./9.

18. *Arbitral Procedure, Report of Int'l L. Comm'n*, 7 U.N. GAOR, Supp No. 9, ch. II, UN Doc. A/CN.4/109 (1957).

19. MODEL RULES ON ARBITRAL PROCEDURE, adopted by the International Law Commission, Report of the International Law Commission Covering the Work of Its Tenth Session Apr. 28 - July 4, 1958, U.N.G.A.O.R. 13th Sess. Supplement No. 9 (A/3859) [hereinafter ICSID MODEL RULES].

In designing their control system, the drafters of the ICSID Convention drew upon the experience of both the League and the United Nations International Law Commission. But they modified it in a critical way. Rather than incorporating the International Court of Justice, as did the proposal of Rundstein and then Scelle only to founder in the League and the United Nations, the new Convention created its own internal, international review instance.

ICSID Convention Article 52(1) broke no new ground in setting out the grounds for annulment of an ICSID award. It stated:

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

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.²⁰

Article 52 thus authorizes either party to request the Secretary General of the Arbitration Centre to annul an award rendered by an ICSID tribunal for a limited number of specified reasons comprised of the familiar terms of art of arbitral nullity: if the original tribunal was improperly constituted; if it exceeded its powers; if there was corruption on the part of a member of the tribunal; if there was a serious departure from a fundamental rule of procedure; or if the award failed to state the reasons on which it was based. The application for annulment had to be made within 120 days of the date on which the award was rendered.

The innovation in ICSID is the control entity to which claims for nullification are to be submitted. Once the request has been lodged, the Secretary-General of ICSID appoints an *ad hoc* Committee of three persons from a panel of names proposed by states' members and kept by the Secretary-General, none of whom may have the nationality of the state or the foreign investor.²¹ Notwithstanding its name, the Committee is in effect another tribunal following the same procedures prescribed in the Convention for the original tribunal²²—even though its mandate is more circumscribed than the tribunal whose award it is reviewing. In the course of its proceedings, the Committee may stay enforcement of the award.²³ If it finds that there has been a violation of one or more of the standards, the *ad hoc* Committee is authorized to annul the award in

20. ICSID CONVENTION, art. 52(1), *supra* note 9, at 230.

21. *Id.* art. 52(3), at 234.

22. *Id.* art. 52(4), at 238.

23. *Id.* art. 52(5), at 238.

whole or part. If the award is nullified by the Committee, either party may submit the dispute to a new tribunal that is constituted in accordance with the Convention.

B. Kloeckner: *Arbitral Review Amok*

ICSID began operation in 1966. By 1983, it had entertained fourteen arbitrations, five of which had proceeded to award. Throughout this period, no use was made of the review option provided by Article 52. The ICSID control scheme existed on paper as a general possibility, but without rich background material, doctrinal illumination, or analogues in other operating arbitral systems that might have given users of the Convention an idea of how it would actually operate.

The situation changed dramatically with the case of *Kloeckner v. United Republic of Cameroon*.²⁴ The essential relationships between the parties in this case were concisely described by the tribunal in the first phase of the case:

This was a joint venture between Kloeckner, a multinational European Corporation, and a developing country. The plant to be built was an example of imported modern technology and engineering. Cameroon had no experience in manufacturing fertilizer products. The factory was to be acquired with the Government's guarantee of payment; its output being of major importance for the country's agriculture, and agriculture being in turn the very foundation of Cameroon's economic ambitions. Cameroon counted on Kloeckner to supply all that was necessary to ensure the success of the project. Kloeckner had carried out the initial feasibility study. It had designed the plant and carried out the technical studies. Kloeckner had undertaken to organize the long-term financing, over ten years, of the project. It built or bought from others all the machinery and all the material. It coordinated the work of suppliers and sub-contractors. It was to execute, operate, and manage the project, procure necessary raw materials, and organize the marketing of output. By accepting—and indeed seeking out—these responsibilities, Kloeckner had taken on a serious obligation. Kloeckner claimed to be capable of supplying all the know-how, all the material, and all the management skills necessary to ensure the project's success,

24. *Kloeckner GmbH. v. United Republic of Cameroon* (ICSID Case No. ARB/81/2) [hereinafter *Kloeckner Award*]. Excerpts from the original French text of the award are published in 111 *JOURNAL DE DROIT INTERNATIONAL* 409 (1984). The full text of the award in English translation is appended to J. PAULSSON, *THIRD WORLD PARTICIPATION IN INTERNATIONAL COMMERCIAL ARBITRATION* (1984). Subsequent references to the award will be to Paulsson, *The ICSID Kloeckner v. Cameroon Award: The Duties of Partners in North-South Economic Development Agreements*, 1 *J. INT'L ARB.* 145 (1984). The award is also examined in 1 *News from ICSID* No. 2, at 5 (1984).

An English translation of the portion of the award dealing with the issue of jurisdiction is reprinted in *Arbitral Award of Oct. 21, 1983*, 10 *Y.B. COM. ARB.* 71-78 (1985).

Substantial parts of the Dissenting Opinion appear in Niggemann, *The ICSID Kloeckner v. Cameroon Award: The Dissenting Opinion*, 1 *J. INT'L ARB.* 331 (1984).

the Government's only role being to supply a site and to guarantee payment of the contract price.²⁵

These relationships were made concrete in a network of agreements. In 1971, Kloeckner and the government of Cameroon had concluded a so-called "Protocol of Agreement" ("Basic Agreement"); it created a type of joint venture in the form of a Cameroonian company, SOCAME, to construct and manage a fertilizer plant. Kloeckner was to control SOCAME, owning fifty-one percent, while the government was to hold forty-nine percent. The Basic Agreement assigned to Kloeckner the responsibility "for the technical and commercial management of the Company (SOCAME) under a Management Contract for at least 5 years, from start-up, with an option to renew."²⁶ The Basic Agreement also contained an arbitration clause, referring to ICSID.

Three months later, Kloeckner and Cameroon signed another contract, this one a turn-key contract for the factory to be built or supplied by Kloeckner; in the subsequent disputes, this was referred to as the "Supply Contract." SOCAME would pay Kloeckner for the factory, but the Government of Cameroon guaranteed SOCAME's payments. This turn-key or supply contract also contained an ICSID arbitration clause.

In 1973, the Cameroon Government and SOCAME, now in operation and controlled by Kloeckner, concluded another agreement, the so-called "Convention," defining additional rights and obligations of the parties and referring to all the previous agreements. The Convention also contained an ICSID clause. In 1977, Kloeckner and SOCAME, which Kloeckner still controlled, concluded a management contract. This new contract referred to the previous contracts in which the fundamentals of the management agreement had been set out and further elaborated those management responsibilities.

While each of the other contractual documents chose ICSID arbitration, the management contract contained an arbitration clause referring to the International Chamber of Commerce. This curious and belated reassignment, of part of the dispute-resolving competence of an integrated operation to a different arbitration system may not have been an accident, as we will see in a moment. Certainly, by the time the management contract was concluded, arbitration was no longer a remote contingent possibility: Kloeckner had known for some time that there were serious difficulties with the project and that it could not be profitable as originally envisaged. (In the arbitration, Cameroon presented evidence, which apparently persuaded the tribunal, that throughout its life, the factory barely attained thirty percent of its promised capacity.) But

25. Paulsson, *supra* note 24, at 154.

26. *Id.* at 147.

Kloeckner did not share this information with the Cameroonian Government.

After the factory started up, output fell far below projections. By 1978, the Cameroonian Government sought the views of an outside consultant, who recommended that the factory be redesigned in order to modify its processes. Cameroon invited Kloeckner to participate, but Kloeckner refused to make any additional capital contributions to SO-CAME and instead yielded its majority shareholding.

Even after the supplementary investment and redesign, the factory proved unworkable and SOCAME refused to pay for it. Kloeckner then initiated arbitration against the Government of Cameroon for payments it had guaranteed. Because the various arbitration clauses now referred different parts of the transaction to two different arbitral systems, Kloeckner confined its claim to a demand for the guaranteed payment for the turn-key delivery of a factory (the supply contract), a matter subject to ICSID jurisdiction, while contending that claims based on allegations about violation of its management obligations had been assigned by the parties to another arbitral system and, hence, could not be heard in ICSID. Kloeckner insisted that it had no obligations with regard to the workability of the factory. Cameroon counter-claimed for violations of obligations under the various agreements. It insisted that it was entitled to a factory that worked, and not just a factory. Its counter-claims raised matters concerning management that, Kloeckner insisted, had been assigned to the International Chamber of Commerce in Paris and not to ICSID in Washington.

Kloeckner's demurrer to these counter-claims was one of the most interesting aspects of the case. It will be recalled that the final management contract, which spelled out the details of the management relationship that had been expressed more generally in some of the previous instruments, incorporated an ICC rather than ICSID arbitration clause. This inclusion may not have been an accident. If the factual account in the first award is accepted, Kloeckner realized as early as 1973 that the original projections of profitability prepared for the Cameroonian Government, which were apparently the basis for the decision about the transaction, were obsolete. Even with additional funds, it was not at all certain that the planned enterprise could turn a profit. Kloeckner, by this time in control of SOCAME, did not share this information with the government. In a sense, the success or failure of the factory may not have been of central urgency to Kloeckner because its payments were guaranteed by the government of Cameroon and backed-up, as it were, by an ICSID clause.

It is possible—though this is pure speculation—that Kloeckner, in 1977 when it was still in charge of SOCAMÉ, inserted the ICC clause in the management contract as a worst-case contingency. It may have hoped that if Cameroon concluded that it had been treated unfairly and refused to pay its guarantee, and Kloeckner then initiated arbitration under the ICSID clause, the only issue over which ICSID would have jurisdiction would be the question whether or not a factory was delivered. All of the questions about Kloeckner's management behavior and, in particular, whether it had concealed vital information that might have permitted Cameroon to reduce its exposure or even to cut its losses by aborting the project earlier, would not be subject to ICSID jurisdiction if, according to this gambit, they had been assigned to the ICC. A favorable jurisdictional decision would have been substantively outcome-determinative.

If this was Kloeckner's strategy, it was confounded by the ICSID tribunal, which concluded, over the strong dissent of Kloeckner's party-appointed arbitrator, that the tribunal had jurisdiction over management issues by virtue of the Basic Agreement.²⁷ Kloeckner's second line of defense, assuming arbitral jurisdiction, was that its only obligation was to supply a factory. It had no obligation to supply a factory that worked.

In turning to this latter question, the tribunal held that Cameroonian law applied. Because Cameroon had been divided during the colonial period between Britain and France and had inherited systems of British common law and French civil law that continued to operate in its two component parts, the tribunal applied Cameroonian conflicts of law and concluded that French civil law as incorporated in Cameroonian law applied.²⁸ This law, the tribunal held, included the obligation of a party to disclose to the other party material information of interest.

We take for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under the other national codes which we know of. This is the criterion that applies to relations between partners in simple forms of association anywhere. The rule is particularly appropriate in more complex international ventures, such as the present one.²⁹

Within that normative framework, the Tribunal concluded:

In the present case, as we have suggested, we do not feel that Kloeckner had dealt frankly with Cameroon. At critical stages of the project, Kloeckner hid from its partner information of vital impor-

27. *Id.* at 149-52.

28. *Id.* at 153.

29. *Id.* at 157.

tance. On several occasions it failed to disclose facts which, if they had been known to the Government, could have caused it to put an end to the venture and cancel the contract before the expenditure of the funds whose payment Kloeckner now seeks to obtain by means of an award. When a partner in a financially complex international venture learns of certain facts which could influence the attitudes and the actions of the other partner with respect to the project; when the first partner fails to disclose this information to the other; and the second thereupon continues with the project and incurs additional costs, the first partner has not acted frankly and loyally vis-a-vis his partner, and he cannot rightly present a claim to funds whose expenditure would perhaps never have been necessary if he had been frank and candid in his dealings. In a very significant sense, the fault is his. The fact that the funds were spent becomes his responsibility and not that of his partner. In this respect, we decide that Kloeckner violated its fundamental contractual obligations and may not insist upon payment of the entire price of the Turnkey Contract.³⁰

Cameroon argued that Kloeckner's failure to perform had relieved Cameroon of its own obligation to pay Kloeckner. It invoked the French version of the continental legal principle of *exceptio non adimpleti contractus*, which permits one party to a contract to refrain unilaterally and lawfully from performing its obligations under the contract when faced with material non-performance by the other party.³¹ Kloeckner, according to the majority of the Tribunal, had failed to perform in a way that justified Cameroon's application of the exception.

The issue of adequacy of performance turned on whether the obligation was to supply a factory that worked or simply to supply a factory, without regard to whether it was operable. Kloeckner argued that it had fulfilled its requirements under the contract by supplying a factory. The Tribunal held: "In order to perform the relevant contracts correctly, it was not sufficient to supply a fertilizer factory; the factory had to have the required capacity and had to be managed in the manner necessary to obtain the proposed goals."³²

Kloeckner had undertaken to ensure continuous functioning and maintenance of the factory (technical management) as well as to perform its commercial management. The most conclusive proof of Kloeckner's failure to perform its duty of technical and commercial management results simply from the shutdown of the factory in December 1977 by decision of Kloeckner personnel sent to Cameroon and after 18 months of underproduction and operating losses.³³

30. *Id.* at 157-58.

31. *Id.* at 158-61.

32. *Id.* at 162.

33. *Id.* at 163.

Accordingly, the tribunal decided by majority to reject Kloeckner's claim and the counter-claim. In effect, the award was a victory for Cameroon.

The award was unquestionably problematic in terms of craftsmanship and reasoning. Kloeckner's party-appointed arbitrator, Professor Dominique Schmidt, appended a fifty-three page dissenting opinion. Ordinarily, dissents express a different legal view leading to a different outcome. Professor Schmidt did not dissent in this sense. He stated that the award was null because of, in the words of its author, "important mistakes, the numerous contradictions and failures to state the grounds, and the misrepresentation of contractual clauses"³⁴

Kloeckner promptly applied to the Secretary-General of ICSID for nullification of the award under Article 52 of the Convention, essentially on the grounds spelled out in Professor Schmidt's dissent. The Secretary-General appointed an *ad hoc* Committee of three distinguished professors and eminent arbitrators from Switzerland, Austria, and Egypt.

The *ad hoc* Committee's decision³⁵ was extremely long (176 typed pages), elaborate, and careful. In places, it is stunning and brilliant, but it is also marked by a tendency toward hair-splitting—or "legal purity" as the Committee put it, without, it would appear, any intended irony. It justified its purist approach on theoretical grounds.³⁶ There are good arguments to be made for strict application of a review procedure. But, as is often the case, any legal approach which resolutely avoids reality runs the danger of colliding head-on with it.

As the first *ad hoc* Committee operating under the Convention, its members were manifestly sensitive to the fact that their decision would profoundly shape expectations about control systems of arbitration in general, and ICSID review, in particular. On its own motion, the Committee purported to issue an authoritative interpretation of the control procedure of ICSID. It took up this burden, it said, in view of the fact that this was "the first Application for Annulment ever lodged against an

34. Niggeman, *supra* note 24, at 348.

35. The decision of the *ad hoc* Committee was published in the ICSID REVIEW—FOREIGN INVESTMENT LAW JOURNAL, from which all citations are taken. See Kloeckner v. Cameroon: *Decision of the Ad Hoc Committee*, 1 ICSID REV.—FOREIGN INVESTMENT L.J. 89 (1986) [hereinafter *Kloeckner Decision*]. For commentary on the decision, see Branson, *Annulment of "Final" ICSID Awards' Raise Questions About the Process*, NAT'L L.J. Aug. 4, 1986, at 25, col. 1; KAHN, LE CONTROLE DES SENTENCES ARBITRALES RENDUE PAR TRIBUNAL CIRDI; Redfern, *ICSID—Losing Its Appeal*, 3 ARBITRATION INT'L 98 (1987); Thompson, *The Kloeckner v. Cameroon Appeal—A Note on Jurisdiction*, 3 J. INT'L ARB. 93 (1986); Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REV.—FOREIGN INVESTMENT L.J. 85 (1987).

36. *Kloeckner Decision*, *supra* note 35, at ¶ 151.

ICSID award” and in view of the “interest to the parties and to the new Tribunal that may be constituted under Article 52(6)”³⁷

The Committee’s conception of its longer-term mission was not modest. Even after nullifying the award, it appended a long *obiter dictum*, comprising almost two-thirds of its decision. The purpose of the excursus was explained in a grandiloquent style, by now familiar to readers of this unusual document.

While it is superfluous here to return to each criticism of the Award, it is incumbent upon the Committee, in the interest of the Tribunal itself and in the higher interest of the arbitration system set up by the Washington Convention, not to leave any of the Claimant’s essential complaints unanswered.³⁸

The fact that a matter had nothing to do with the Committee’s mandate under the Convention was apparently no reason to refrain from commenting on it. Even matters such as “particularities of structure and presentation of the Award”³⁹ were favored with gratuitous evaluations. Nor was it only the award that was graded by the Committee. The states-parties to the ICSID Convention themselves were graciously advised about how they might go about revising the Rules.⁴⁰

1. *Constitutive Rulings.* At the most basic level, the Committee made what amount to four constitutive rulings about ICSID review. These rulings would have a decisive effect on the disposition of the *KloECKner* case and were also designed to shape all future procedures under Article 52. Let us consider them briefly.

a. *The presumption in favor of the validity of the award under review.* The Committee posited a presumption in favor of the validity of the award under question. In cases in which doubts were raised, “analysis should be resolved in favorem validitatis sententiae.”⁴¹ This particular holding, to which the Committee returned on a number of occasions in its decision, appears to be mandated by the structure of ICSID review. The alternative, that the award does not enjoy such a presumption, would, in effect, reopen the procedure under Article 52 to *de novo* arbitration. If the award did not enjoy a presumption of validity, and the burden of proof was not on the challenging party, the procedure would be rearbitration.

37. *Id.* at ¶ 82.

38. *Id.* at ¶ 96.

39. *Id.* at ¶ 107.

40. *Id.* at ¶ 113, 119-20.

41. *Id.*

b. Hair-trigger: the automatic technical discrepancy standard. The second constitutive holding was that review was to be technical and mechanical; the *ad hoc* Committee was to have no prudential competence. In keeping with that conception, the Committee posited an automatic requirement of nullification if a defect were established. The gravity or significance of a particular defect was not to be taken into account.⁴² In effect, this requirement made Article 52 into a hair-trigger, a mechanism of extraordinary sensitivity that would set off nullification at the slightest provocation without regard to the magnitude of the defect established.

The Committee was, in effect, adopting a "rule" approach rather than a "standard" approach. In situations in which a large number of similar cases come to a decisionmaker and the value of any case is substantially less than the transaction costs involved in deciding it, considerations of economy may dictate that each case be decided by a "binary" rule that fixes many variables *a priori* and allows the decisionmaker only two choice options—on the order of "a" or "non-a." A rule approach is effected by evidentiary limitations circumscribing what is needed to establish the relevance of the rule to the case at hand. All other evidence is simply inadmissible.

The "rule" approach may be contrasted with a "standard" approach in which each case is examined in terms of its special facts and consequences and related to and decided in accord with the full array of community policies it engages. A much wider array of evidence is perforce admissible in a standard approach. Sometimes a rule approach may be dictated by intense policy demands. Some defects, for example corruption of a chairman, may be deemed *per se* to require nullification even if the consequences are minimal. In many contexts, the preferability of a "rule" over a "standard" approach is arguable. However, the proliferation of similar cases and need for economy, factors on which the rule approach is based, can hardly apply to the limited number of cases with widely varying complex fact-patterns that come to ICSID tribunals.

The *Kloeckner* Committee's constitutive decision was neither inferred from jurisprudence nor tested by practice. It was derived essentially from an interpretation which it developed of the Convention. Article 52(3) of the ICSID Convention states that "the Committee shall have the authority to annul the award . . ." From this interpretation, the Committee concluded that if it found a defect, it was obliged to nullify the award.⁴³ This is a doubtful interpretation. It would appear from the language of that provision, in the context of the Convention as a

42. *Id.* at ¶ 179.

43. *Id.*

whole, that its purpose was not to install a rule of compulsory nullification but rather to confirm *who* nullifies. Article 52(3) establishes that the Committee *does not* report back to the Secretary-General with a recommendation or opinion, on the assumption that the actual competence to annul is located in the permanent administrative apparatus of ICSID. Instead it is the Committee that makes the decision on annulment. Such an interpretation would have allowed a Committee some discretion as to whether and to what extent to nullify. The *Kloeckner* Committee construed the provision as an injunction to it to annul an award even if there was no injury to the other party or no substantial cause for grievance.⁴⁴

c. The expansion of grounds for nullification. In a third constitutive ruling, the Committee rejected the notion that its role was to test the award only in terms of the grounds listed in Article 52.⁴⁵ Article 52, it will be recalled, does not simply say that *any* departure from any of the prescriptions of the Convention warrants nullification. Instead, it lists specific grounds, some of which differ in language and scope from coordinate sections of the Convention. For example, Article 52(1) establishes the various grounds under which a party to an arbitration that has produced an award may request annulment. A party may request annulment under Article 52(1)(e) on the ground that "the award has failed to state the reasons on which it is based." Article 48, which is comprised of a series of instructions to the tribunal seised of the case, states in subparagraph 3 that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." Article 52(1)(e) is plainly narrower than Article 48(3). *Stricto sensu*, nullification would be inappropriate under Article 52(1)(e) if the reasons for the award reached were stated, but the award neither dealt with every question submitted to the tribunal nor set out the reasons for the particular disposition of each question.

The Committee decided to ignore the clear differences between the language of Article 52(1) and other sections of the Convention and, instead, chose to coordinate sections of the Convention with Article 52(1) by reading that provision as a type of *renvoi* to the rest of the Convention. The Committee interpreted the Convention as authorizing and requiring it to examine a challenged award's compliance with *all* the standards set out in the rest of the Convention.⁴⁶ While we will consider the soundness of the Committee's interpretation later, here we are concerned with the implications of the holding for *Kloeckner* and subsequent

44. *Id.*

45. *Id.* at ¶¶ 58-59.

46. *Id.* at ¶ 58.

cases. A strict reading would have limited the ambit of the control function to the enumeration in Article 52(1). The Committee's interpretation greatly enlarged its own work as well as expanded future possibilities for challenging awards. Implicitly, it also affected the latent compromising function of arbitration, a matter which will be considered below.

d. A formal rather than substantive test of reasons. In a fourth constitutive ruling, the Committee adopted a formal rather than substantive requirement for adequacy of reasons. In the Committee's view, as long as the tribunal's "answers seem tenable and not arbitrary, *they do not constitute a manifest excess of powers . . .*"⁴⁷ In case of doubt, as noted earlier, "analysis should be resolved *in favorem validitatis sententiae*."⁴⁸

This formalistic approach, which seemed to have been designed to help sustain challenged awards, actually reduced the effect of the presumption in favor of validity by leading to a curious passivity and unwillingness to try to penetrate the thinking of the tribunal whose award was under attack. Thus, in elaborating its conception of its mandate, the Committee said:

[I]t is not for the Committee to imagine what might or should have been the arbitrators' reasons, any more than it should substitute "correct" reasons for possibly "incorrect" reasons, or deal "ex post facto" with questions submitted to the Tribunal which the Award left unanswered. The only role of the Committee here is to state whether there is one of the grounds for annulment set out in Article 52 of the Convention, and to draw the consequences under the same Article. In this sense, the Committee defends the Convention's legal purity . . .⁴⁹

What emerges, then, is a formalistic approach that eschews a real effort at reconstruction of the objectives or deeper ratiocination of the award under review. Under such an approach, a Committee would theoretically nullify an award for faults in logic somewhere between first premise and conclusion, even though it might be arguable, even clear, that the conclusion was correct.

This particular construction of the Convention is textually plausible and not inconsistent with the core idea animating arbitral review. The alternative, a substantive test, runs the danger of sliding into appeal. But the Committee's construction is not informed by any sense of the control function of arbitration and, as a result, is not without risk for the future of ICSID arbitration. Due to varying levels of personal ability and diverse legal culture, different arbitrators perceive and analyze legal ques-

47. *Id.* at ¶ 52.

48. *Id.*

49. *Id.* at ¶ 151.

tions differently, reason differently and at extraordinarily different lengths, and write judgments with greatly varying degrees of skill and elegance, often in a language to which they are not native. If a subsequent *ad hoc* Committee, composed in part of people from still different legal cultures, decides that it is not obliged to try to “get into the skin” of the tribunal and reconstruct the reasoning of the award it is reviewing, and it does not approach its task with full recognition of the difficulties of construing any human communication, *a fortiori* transnational legal communications, the probability increases of nullifying on grounds of inadequate reasons. And if the Committee is unwilling to try to determine whether, reasons notwithstanding, a plausible and defensible (if not wise) answer was reached, nullifications with formal but no material justification will occur.

e. Appeal rather than review consequences. The Committee postulated constitutive rulings that restricted substantive inquiry, and was at pains to emphasize that it was involved in a review of particular grounds established in Article 52 of the ICSID Convention and not an appeal on the wisdom or “correctness” of the award. Nevertheless, it tended to slip into appeal. In addition to finding that there were defects in the award warranting a nullification, the Committee made certain key decisions on some legal issues of the merits, some of which it even suggested might be used by a subsequent tribunal.⁵⁰ This is an interesting though radical redefinition at the constitutive level of the review function. We will consider its implications below.

Although the *ad hoc* Committee reaffirmed a commitment *in favorem validitatis sententiae*, the net consequence of its constitutive holdings was a weakening of that presumption and a marked tilting of review in favor of the challenging party.

2. *Substantive Holdings.* Kloeckner, it will be recalled, had challenged the validity of the entire award on jurisdictional grounds, contending that the tribunal had exceeded its jurisdiction by basing its award on alleged violations of management responsibilities. Kloeckner averred that allegations about those matters were subject to the ICC jurisdictional clause in the management contract. Because the tribunal had purported to decide them, it had exceeded its jurisdiction and its award was null.

The Committee purported to examine every possible construction of the two jurisdictional clauses. It did not conceal its serious doubts about the tribunal’s jurisdictional conclusions. Nevertheless, the Committee

50. *Id.* at ¶ 82.

did not substitute its own judgment for that of the tribunal and did not find a ground for nullification here.

Such an interpretation of the agreements and especially of the two arbitration clauses, whether correct or not, is tenable and does not in any event constitute a manifest excess of powers. To this extent, the complaint, while admissible, is unfounded.⁵¹

Although the Committee did not find the tribunal's reasons persuasive, they were not implausible. Hence they benefitted from the presumption in favor of validity.

[T]he Tribunal refused to accept, in the absence of completely precise and unequivocal contractual provisions, that the parties to the Management Contract wanted to "derogate" from the Protocol's ICSID clause. The Tribunal may have implicitly accepted that the ICSID clause constituted for both parties an "essential jurisdictional guarantee," the relinquishment of which could neither be presumed nor accepted in the absence of clear evidence.⁵²

This was a liberal and extremely tolerant holding. And in light of the rest of the Committee's decision, it is puzzling. The tribunal's jurisdictional decision was probably the most questionable part of its award. The parties had decided to structure their transaction in four agreements and to assign arbitral jurisdiction over different parts of the agreements to different arbitral institutions. The tribunal effectively had looked at the integrated transaction as a factual matter and used that perspective to override contractual options plainly adopted by the parties. The Committee asked itself whether this arrangement was "tenable," without determining whether governing legal systems might make other judgments. "Tenability," absent reference to an encompassing system of law, can become quite subjective. The Committee's conclusion is all the more puzzling in that a contrary finding on the tribunal's jurisdictional decision would have been outcome-determinative in a more economical fashion than the methods actually selected by the Committee. It also would have done less injury to the review function of ICSID. One may note in passing that arbitrators at the present time rarely, if ever, find themselves without jurisdiction.

The minimum standard of plausibility and the presumption in favor of validity did not avail the award on other matters. Kloeckner had attacked the award on the ground that the tribunal had not applied the proper law. The tribunal, as will be recalled, had explicitly designated that part of Cameroonian law based on French law as the applicable law. Kloeckner had been particularly offended by the tribunal's use of the "obligation to disclose everything to a partner." The tribunal had said:

51. *Id.* at ¶ 52(b).

52. *Id.*

We assume that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with his partner in a frank, loyal and candid manner is a basic principle of French civil law, as is indeed the case under other national codes which we know of⁵³

Kloeckner's gravamen, it appeared, was not the selection of the proper law as such, but whether the tribunal had made a mistake in applying that proper law.

In an arbitral review format, this was a difficult, even tricky argument for Kloeckner to make. The usual practice of review instances has been well summarized by a U.S. federal court.

To vacate an arbitration award for manifest disregard of law there must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply. . . . Plaintiff has not demonstrated, as it must, that the majority arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did.⁵⁴

The *Kloeckner* tribunal had certainly *identified* the proper law (or laws). The claim that it might have mistakenly applied that law, a legitimate ground for appeal, would not have been admissible in review because it would have required the Committee to redecide the merits.

In light of the Committee's tolerant treatment of the tribunal's jurisdictional holding, one might have thought that the tribunal's holding would satisfy the requirements of the ICSID Convention, especially if it were buttressed by a presumption in favor of validity. But the Committee found it wanting.

It may immediately be noticed that here the Tribunal does not claim to ascertain the existence (of a rule or a principle) but asserts or postulates the existence of such a "principle" which (after having postulated its existence) the Tribunal *assumes* or takes for granted that it "is a basic principle of French civil law."⁵⁵

The Committee was particularly troubled by the award's observation that "this is the criterion that applies to relations between partners in simple forms of association anywhere";⁵⁶ "the rule is particularly appropriate in more complex international ventures, such as the present one";⁵⁷ and the arbitrators declared that they were "convinced that it is particularly important that *universal requirements* of frankness and loy-

53. *Id.* at ¶ 66.

54. *Sidarma Societa Italiana di Armamento SPA v. Holt Marine Indus.*, 515 F. Supp. 1308-09 (S.D.N.Y. 1981).

55. *Kloeckner Decision*, *supra* note 35, at ¶ 67.

56. *Id.*

57. *Id.*

alty in dealings between partners be applied in cases such as this one"⁵⁸

The Committee felt that it was insufficient to refer to a "basic principle" without more specific references.⁵⁹ It also was troubled by the failure to distinguish between "rule" and "principle."⁶⁰ In keeping with its own constitutive holdings, the Committee did not attempt to discover, for itself, whether the tribunal's reference to a "basic principle" could in fact be related to rules in the governing law which would have established that the tribunal was correct but careless in its method of citation. The defect, in the view of the Committee, was fatal.

[I]n the absence of any information, evidence or citation in the Award, it would seem difficult to accept, and impossible to *presume*, that there is a general duty, under French civil law, or for that matter other systems of civil law, for a contracting party to make a "*full disclosure*" to its partner. If we were to "presume" anything, it would instead be that such a duty (the basic idea of which may, of course, be accepted as it follows from the principle of good faith; *cf.* Article 1134, para. 3 of the French Civil Code) must, to be given effect in positive law, have conditions for its application and limits!⁶¹

As a result, the Committee concluded that a ground for nullification had occurred.

[I]n its reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied "the law of the Contracting State." Strictly speaking, it could not be said that it made this decision without providing reasons, within the meaning of Articles 48(3) and 52(1)(e). It did, however, act outside the framework provided by Article 42(1), applying concepts or principles it probably considered equitable⁶²

The Committee concluded that the award was a single unit and that this ground necessitated a total annulment.⁶³

Citation method is certainly an important part of our science, but international commercial law draws perforce on lawyers trained in many different legal systems, each of which has a different style or dialect of citation, ratiocination, and redaction. Some systems redact judgments in what Karl Llewellyn called "the Grand Style"⁶⁴— the style of the International Court, for example, of which the chairman of the *Kloeckner*

58. *Id.*

59. *Id.* at ¶ 68.

60. *Id.*

61. *Id.* at ¶ 75.

62. *Id.* at ¶ 79.

63. *Id.* at ¶ 81; *see also id.* at ¶ 179 ("The contested arbitral Award must therefore be annulled . . . in its entirety").

64. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 402 (1960).

tribunal had been the President. Other systems—for example, the United States in its current practice—use idiosyncratic and highly particularistic citation methods. Citations are sprinkled to support even the most self-evident of propositions with the abandon of an Eskimo throwing an epic potlach.

Strictly speaking, the tribunal had fulfilled the requirements of both Article 52 and Article 42. It provided reasons for its judgment which sounded in the applicable law. The tribunal's reference to other systems of law was neither optional nor incorrect.⁶⁵ By also referring to international and "general principles," the Tribunal demonstrated that Cameroonian law was not inconsistent with international law and hence continued to apply. If there had been a conflict, Cameroonian law, under one theory of the ICSID Convention, would have had to yield to international law.

This part of the decision of the Committee is cast in terms of inadequate reasons and thus avoids the appearance of an appeal of a mistaken application of law. Although the Committee was at pains to distinguish this claim from a claim of an erroneous application (*error in iudicando*), it is difficult to escape the impression that the real thrust of the Committee's concern was that the tribunal's legal conclusion of an obligation imposed on Kloeckner *de tout reveler* constituted a mistake in law. Of course, the Committee could not frame its objections in those terms, for that would have transformed the review into an appeal. Perhaps that limitation accounts for the Committee's tortured and ultimately unpersuasive formulation.

Had it been as sensitive to the formative effect of its work on the ICSID control system as it said it was, the Committee might have reflected that the route it was taking was really the worst of possible worlds. It served as precedent for review of the wisdom and correctness of an award, *as well as* for a very detailed technical examination of awards. If its conception of control was to become authoritative, the probability of future nullifications would increase without a corresponding increase in desirable control.

Failure in conception of the control function is also apparent in the Committee's treatment of procedure. Kloeckner had petitioned for nullification on grounds of procedural violations. Although the Committee implied that some of the procedures undertaken by the tribunal may have compromised Kloeckner's procedural rights, it determined that Kloeckner's claim was barred since Kloeckner had not promptly raised objections. Such a holding could act to increase procedural factiousness

65. *Kloeckner Decision*, *supra* note 35, at ¶¶ 68-79.

in future ICSID arbitrations, since the holding seems to require a litigant to argue each procedural matter it feels is or may be improper the moment it arises. If it does not, pace the Committee, it may be barred from raising such procedural matters at the review phase. Happily, this implication appears to have been decisively reversed by the Secretariat of ICSID, which reportedly rejected a request for an *ad hoc* Committee to review an interim award in a subsequent case and indicated that the proper moment for review of all issues was at the end of the procedure.⁶⁶

Because the *ad hoc* Committee nullified the entire award, a second arbitration initiated by *Kloeckner* was, in principle, obliged to relitigate everything. There was no *res judicata* remaining from the first award. A second tribunal was empaneled and did render an award which has not been published. It has been reported to have been in favor of *Kloeckner*, although giving it only a fraction of the amount it claimed. That award has been challenged in another Article 52 procedure. The *ad hoc* Committee in this case, chaired by Professor Sompong Sucharitkul and composed of Judge Mbaye of the International Court and Professor Girardini of Italy, has not yet rendered a decision.

III. *AMCO* AND THE EFFORT TO REPAIR THE ICSID CONTROL FUNCTION

Some students of international commercial arbitration feared that *Kloeckner*, as a precedent authorizing a detailed scrutiny of awards, could encourage losers in subsequent ICSID arbitrations to challenge their awards. Whatever the reason, the very next award decided by an ICSID tribunal, *AMCO v. Republic of Indonesia*⁶⁷ (*AMCO*), was promptly brought by the loser, Indonesia, to the Secretary-General with a petition for annulment under Article 52.

The *AMCO* case was in many ways the paradigmatic dispute about contemporary direct foreign investment. Indonesia was in the hapless but classic position of a developing country: resource rich and capital poor and thus desperately seeking foreign capital to jump-start productive economic activity. Indonesia had developed a broad program to attract foreign investment by awarding licenses with concessions and incentives to approved foreign investors. Each foreign investment was

66. *AMCO Asia Corp (Delaware, U.S.A.) v. Republic of Indonesia*, Case ICSID (ARB/81/1), [hereinafter *Amco Award*]. The full text of the award is published in 1 INT'L. ARB. REP. 601 (1986), excerpts are reprinted in 24 I.L.M. 1022 (1985). For the text of an interlocutory decision see 10 Y.B. COM. ARB. 61 (1985), reprinted in 23 I.L.O.M. 351 (1984). For doctrinal notes see Curtis, 83 Am. J. Int'l L. 106 (1989); Brauson, *Another ICSID Arbitral Award Annulled*, 18 CORPORATE COUNSEL'S INT'L ADVISER 9 (1986).

67. *AMCO Award*, reprinted in 1 INT'L ARB. REP. 601, *supra* note 66, at ¶ 155.

negotiated separately but they were all similar in general terms. In return for a commitment to invest a prescribed amount of foreign capital in Indonesia for an approved project, the government would grant a package of concessions, tax holidays and other inducements.

AMCO, a U.S. company, negotiated this type of model agreement with Indonesia. AMCO committed itself to build and manage a hotel in Jakarta in collaboration with an Indonesian private joint-venture company largely organized by military officers. AMCO promised to invest three million dollars of foreign currency in Indonesia as part of its program. The agreement contained an ICSID arbitration clause.

After the hotel was built, the Indonesian joint venturer lodged many complaints. At the same time, the Indonesian Government alleged non-payment of the capital sums that AMCO had agreed to introduce into Indonesia. AMCO did not respond. On the night of March 30, 1980, police and military personnel seized the hotel and expelled the management. Shortly afterwards, the competent Indonesian government agency concluded that AMCO had not fulfilled its foreign capital obligations and terminated its license. After unsuccessful efforts to have the decision reversed in Indonesian courts, AMCO exercised its right of ICSID arbitration, claiming not less than nine million dollars plus interest.

The ICSID tribunal's award considered two basic claims: expropriation and breach of contract. The tribunal concluded as a matter of fact:

[O]n or about the critical period there was a taking of Claimants' rights to the control and management of the land and all the Kartika Plaza Building . . . present at the hotel premises on the 1st [sic] April, 1980 and by their very presence assisted in the successful seizure from P.T. AMCO of the exercise of its lease and management rights.⁶⁸

As a taking *per se* is not necessarily an unlawful act attributable to a state, the tribunal proceeded to examine whether this taking "amounts to an expropriation which according to Indonesian Law and to International Law can give rise to a claim for compensation."⁶⁹ The first question was whether Indonesia itself was the agent of the taking. The tribunal held that the Indonesian Government had not expropriated: "The taking was instigated by P.T. Wisma and was carried out for the benefit of the same."⁷⁰ The tribunal was not provided with any evidence that the takeover of the hotel, and thereby the taking of the Claimants' exercise of their rights to control and manage the property, were due to a governmental decision.

68. *Id.* at ¶ 156.

69. *Id.* at ¶ 159.

70. *Id.* at ¶ 160.

This reasoning may have been a courtesy to sovereign sensibilities, for the award still concluded that Indonesia had failed to protect an alien from suffering these acts,⁷¹ that the take-over was unlawful,⁷² and that the Indonesian Court ruling did not purport to legitimize the act.⁷³

With regard to AMCO's claim for breach of contract, the tribunal found that the relationship between AMCO and Indonesia was more in the nature of a license, though "not alien to the general concept of contract."

Being an agreement aimed at producing legal effects in the economic field, creating obligations for the applicant and obligations for the State, even if in the latter case they are conditional, the legal combination formed by the application and by the approval thereof is not alien to the general concept of contract according to Indonesian law. Nor is it alien to general principles of law.⁷⁴

However, it is not *identical* to a private law contract, due to the fact that the State is entitled to withdraw the approval it granted for reasons that could not be invoked by a private contracting entity, or to decide and implement the withdrawal by utilizing procedures different from those that can and have to be utilized by a private entity.⁷⁵

Indonesia was entitled to terminate such a relationship for, among other things, non-fulfillment of its terms,⁷⁶ but to be lawful, the termination had to meet procedural requirements and be substantively justified.⁷⁷

71. *Id.* at ¶ 172 ("A State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens If such acts are committed with the active assistance of state-organs, a breach of International Law occurs.").

72. *Id.* at ¶¶ 172-73 ("[A]n internationally wrongful act was committed . . . this act is attributable to the Government of Indonesia which therefore is internationally responsible. . . . [T]he takeover of the hotel . . . was an act of illegal self-help").

73. *Id.* at ¶ 176 ("[J]udgements [of the Indonesian Supreme Court] of January 12, 1982 and November 28, 1983, on the merits . . . do not purport to legitimize the unilateral acts").

74. *Id.* at ¶ 188.

75. *Id.* at ¶ 189 ("[A] State may terminate such a relationship either for reasons of public interest and welfare—which is inconceivable in the case of a private law contract—or for reasons of nonfulfillment by the foreign applicant of its obligations").

76. *Id.* at ¶ 192:

[T]o be lawful, the withdrawal of an administrative act which terminates a bilateral relationship between a State and a private party, which relationship has created reciprocal legal obligations on both sides, has to satisfy two requisites

. . . [P]rocedural ones, as set up by the applicable law and which are to be in accord with the fundamental principle of due process

. . . [T]he substantial requirement that the revocation be based on grounds that justify it legally.

77. *Id.* at ¶¶ 242, 244 ("[I]ndependently from this examination and its conclusions, the mere lack of due process would have been an insuperable obstacle, to the lawfulness of the revocation").

. . . .

. . . The withdrawal of the investment authorization, decided without due process being granted to the investor, and for reasons which did not justify it in substance, permits the liability of the

AMCO had not met its full requirement of foreign capital, which was a violation, but the tribunal found that this was immaterial. Even if the violation had justified termination, Indonesia had to terminate in accord with international due process and, under its own law, give certain prescribed warnings. If it had violated due process, it was liable, the tribunal found, even if the termination had been substantively justified.⁷⁸ And Indonesia had violated AMCO's due process rights, for though written warnings had been given,⁷⁹ they had not emanated from the right agency nor used the proper language.⁸⁰

The tribunal decided not to inquire into the cogency of other grounds for revocation that had been considered by the appropriate Indonesian authority since the act was already held to be unlawful.⁸¹

Republic of Indonesia under Indonesian as well as under international law, that is to say under the two systems of law applicable in the instant case.

78. *Id.* at ¶ 199 (“[I]nfringement of the due process principle is met again when examining the manner in which the revocation was prepared . . .”); *id.* at ¶ 201 (“[T]he revocation of the approval of the investment application was unlawfully and therefore wrongfully decided, whatever the reasons on which it was based, and even if, as a matter of substance, said reasons could have justified it”).

79. *Id.* at ¶¶ 194, 198:

[T]he State's right to withdraw the approval where the recipient does not fulfill its obligations (provided . . . the failure is material); derives from the very nature of the legal relationship established by the application; and the approval thereof . . .

. . . .
 . . . [T]he warning (or warnings) are an element of due process . . . established by Indonesian law to protect the investor, in particular where a sanction as—and indeed, irremediable—as a revocation is envisaged against him. In the instant case, this protection was not made available to the Claimants, who were thus deprived of due process, contrary to Indonesian law as well as contrary to general principles of law.”

80. *Id.* at ¶ 205:

Thus, the other grounds for a suggested “review” of the authorization put forward in Mr. Usman's Summary (namely: the failure to report to Bank Indonesia concerning transfers abroad; the failure to report to BKPM concerning the realization of AMCO's capital investment; alleged tax manipulation; assets owned by the hotel allegedly given in guarantee for obtaining a loan, without the approval of the owner, P.T. Wisma Kartika: see above, ¶¶ 118-23), are not mentioned in the decision of July 9, 1980, in spite of said grounds having been, in essence, repeated in Mr. Harun's Memorandum of May 10, 1980 (Resp. Exh. to C.M. Vol. IV No. 89; see above, para 14), and in the Request for Guidance presented on May 12, 1980 by the Chairman of BKPM to the President of the Republic (Resp. Exh. to C.M., no. 90; see above ¶ 126).

81. *Id.* at ¶ 205:

Accordingly, the Tribunal does not have to consider these grounds, since they have not been relied upon in the legal act which pronounced the revocation.

It might be that the Chairman of BKPM considered that it was not necessary to refer to them, because he may have thought that the two grounds ultimately invoked (i.e. the transfer of the management to AEROPACIFIC and the nonfulfillment of the obligation to invest in the amount promised) were sufficient to justify the revocation. However, it might also be that the Chairman considered that in the circumstances of the case, the other grievances would not have justified the revocation.

Be that as it may, it is not for the Tribunal to build hypotheses, nor to try to guess thoughts which the author of the revocation did not express. The Tribunal has to evaluate the lawfulness of a legal decision and the Tribunal can do so by evaluating it as it is, and as it has been drafted by the Indonesian authority that issued it; the Tribunal has not to supplement the decision in question by adding to it grounds which it does not contain, although they were invoked in the preparatory documents of the decision.

The tribunal awarded the Claimant \$3,200,000 plus six percent interest, a sum considerably less than it had claimed. Indonesia had counterclaimed for all the monies, except for the tax holiday granted by the license, which the Claimants should have paid as taxes and import duties. The tribunal rejected the counterclaim: "[S]ince the Tribunal finds that the revocation of the license was unlawful, as a consequence, the revocation of the tax facilities was unlawful as well."⁸²

The award was unanimous and, given the fraction of the claim actually awarded, bore the signs of an internal tribunal compromise. Compromise is a curiously unstable phenomenon in arbitration. There are pressures for and against it and structural costs when it is fashioned. The selection of party-appointed arbitrators introduces and implicitly endorses an infra-cameral dynamic for compromise, whereas the requirement of a thoroughly motivated judgment restrains it. If reasons are viewed, at least in awards that are obviously a compromise, as, in key part, a ritual rather than as a verifiable record of the actual ratiocination of the tribunal, the compromise dynamic can operate. But if this is done, then the control function achieved through the requirement of manifest reasons is sacrificed.

If the *AMCO* award was a compromise, it would help to explain the award's curious reasoning, which was laconic in some parts and opaque and puzzling in others. To cite one dramatic example, the tribunal found that *AMCO* indeed had not invested the three million dollars of foreign currency that it had committed itself to bring into the project as part of the terms of the license it had secured. The shortfall, according to the tribunal's calculation, was some sixteen percent. Under its own theory, this shortfall would have justified the termination. But the tribunal summarily concluded that this was not "material," without explaining why or under what legal system materiality was being tested!⁸³

If compromise is to work, its crafters must correctly identify and accommodate the essential concerns of each of the parties. When more than money is involved, a viable compromise may be more than a matter of numbers. It is precisely in this sense that the *AMCO* compromise was problematic. The award was unanimous, amounted to substantially less than *AMCO* had claimed, and might have been viewed from Indonesia's perspective as less than the nuisance cost of continuing the dispute. Indonesia apparently felt that it had to challenge the award because if a country establishes a program to induce foreign investment and grants

Accordingly, the Tribunal will consider only the two grounds of revocation on which the decision is expressly based.

82. *Id.* at ¶ 287.

83. *See id.* at ¶ 241. For a discussion on the insufficiency of the investment, see *id.* at ¶¶ 220-43.

licenses on the basis of that program, but discrepancies of as much as sixteen percent of the foreign commitment to invest are internationally determined to be irrelevant such that the host government may not terminate the license, that country will find itself in the position of being unable to enforce its own law.

On Indonesia's application, the Secretary-General of ICSID established an *ad hoc* Committee. Its Chairman, Professor Seidl-Hohenveldern of Austria, had been a member of the *KloECKNER ad hoc* Committee. A prominent Philippine lawyer—now a Justice on the Supreme Court—and an Italian professor were the other members of the Committee.⁸⁴ In 1986, the Committee annulled the original award in part.⁸⁵ It found that the shortfall of sixteen percent had been understated. Of the three million dollars that AMCO had been expected to invest, the Committee believed that less than one million dollars had actually been invested.⁸⁶ But the Committee did not nullify the entire award. It confirmed many of the factual and legal holdings of the Tribunal.

A. Constitutive Rulings

The fact that the case immediately after *KloECKNER* was also being challenged was plainly not lost on the *AMCO* Committee. The *KloECKNER* Committee had been sensitive to the constitutive dimension of its operation, but it had developed a theory of the control function that facilitated challenges to awards, thanks to its constitutive holdings and, in particular, to the large number of detailed grounds it made available. Without acknowledging *KloECKNER*'s authority or openly entering the lists against it, and without enunciating its own explicit constitutive principles, the *AMCO* Committee addressed the problem throughout its decision, making some implicit constitutive rulings that would have revised *KloECKNER*.

By implication, the *AMCO* Committee confirmed the presumption *in favorem validatis sententiae*. It appears to have ignored the *KloECKNER* Committee's expansion of the grounds for nullification and moved quite far from *KloECKNER*'s technical and formal approaches. It will be recalled that the *KloECKNER* Committee had denied itself a prudential competence:

84. In addition to the Chairman, Professor Ignaz Seidel-Hohenveldern, the other members of the Tribunal were Judge Florentino P. Feliciano and Professor Andrea Giardina.

85. It has been published in full in 1 INT'L. ARB. REP. 649 (1986) [hereinafter *AMCO Decision*]. For commentary on the decision, see Pirrwitz, *Annulment of Arbitral Awards Under Article 52 of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 23 TEXAS INT'L L.J. 73 (1988); Feldman, *The Annulment Proceedings and the Finality of ICSID Arbitral Awards*, 2 ICSID REVIEW-FOREIGN INV. L.J. 85 (1987); Branson, *Annulments of "Final" ICSID Awards Raise Question About the Process*, Nat'l L.J., Aug. 4, 1986, at 25, col. 1.

86. *AMCO Decision*, *supra* note 85, at ¶ 97.

after posing the question of whether it could refrain from annulling if it found that the first tribunal's departure was of no consequence, the *Kloeckner* Committee concluded that the Convention gave it no discretion in the matter and established instead a hair-trigger.⁸⁷ The *AMCO ad hoc* Committee did not accept this theoretical position. In a number of places, as we will see, the *AMCO* Committee found certain things in the award to be technical discrepancies in terms of one of the grounds specified in Article 52 but refused to nullify because it found that the matter was *obiter dictum*.⁸⁸ In other places, the Committee noted the existence of a ground of nullity but refused to nullify because the discrepancy was *de minimis*.

Thus the *ad hoc* Committee refused to nullify on the ground that an alleged international principle of due process was violated. The Committee found that although the tribunal had made the wrong choice of law and had based this part of the award on a norm from the wrong legal system, the *content* of the international principle that the tribunal had applied was materially the same as the applicable law, Indonesian law. This time the relevance of the tribunal's holding was not minimized by calling it *obiter dictum*. The tribunal's failure to apply the law as prescribed by the ICSID Convention was confirmed. It was technically a violation of Article 52. But since the Committee concluded, from the testimony of the parties, that the proper law would have yielded exactly the same result if it had been applied, it refrained from nullifying on that ground.⁸⁹

In a sense, *Kloeckner* and *AMCO* join issues here. *Kloeckner* and *AMCO* present, *grosso modo*, two different interpretations of the competence and functions of an ICSID *ad hoc* Committee. One approach may be referred to as the "technical discrepancy" approach. That approach is

87. See *Kloeckner Decision*, *supra* note 35, at ¶ 179.

88. See *AMCO Decision*, *supra* note 85, at ¶ 104; see also *id.* ¶¶ 114, 118, and 120.

89. *Id.* at ¶ 58; see also ¶¶ 75, 78, 79:

[T]he Tribunal . . . held in effect that P.T. Amco was denied a fair and adequate hearing in the course of BKPM's revocation procedure, a denial which the Tribunal held to be contrary "to the general and fundamental principle of due process."

The general standards which Indonesian counsel affirms are part of Indonesian administrative law and which an Indonesia court would apply in resolving a challenge to the validity of an act of an administrative agency by a private person aggrieved thereby, involve the purpose and tenor of the relevant statute[s] as well as the concepts of reasonableness, proportionality, lack of arbitrariness and conformity with community notions of substantial justice. It appears to the *ad hoc* Committee that these general standards of Indonesian law are not qualitatively different from, and seem equivalent in a functional sense to, what the Tribunal appears to have had in mind in referring to "the general and fundamental principle of due process."

For these reasons, the *ad hoc* Committee holds that this portion of the Award is not vitiated by a failure to apply the applicable law amounting to a manifest excess of power on the part of the Tribunal, nor by failure to state reasons.

highly technical and rests on the conviction that a Committee must declare nullification if it finds a technical discrepancy from the Convention, without regard to whether the technical discrepancy caused injury to the party alleging it or distorted the award. The other approach may be referred to as the "material violation" approach. Such an approach would ignore a technical discrepancy if, in the context of the case, it did not constitute a material violation of the standards of the Convention. This approach is consequentialist and consistent with the doctrine *de minimis non curat praetor*.

Each of these approaches involves a different *modus operandi*. The technical discrepancy approach obliges the Committee that applies it to do no more than determine if something done by the tribunal rendering the award violates one of the grounds itemized in Article 52(1). Any technical violations of the Convention require nullification *per se*. There is no need to explore whether the "mistake" causes an injury to the party alleging nullity nor, in such an inquiry, to assess whether the correct discharge of the arbitral function would have yielded the same result. For this reason, there is also no reason for an *ad hoc* Committee to assess what the correct answer would have been in order to determine whether the violation of Article 52(1) is significant. By definition, there can be no violation of the Convention that is not significant. There is neither the need nor an authorization to think in terms of control function.

In contrast, the material violation approach explores what the correct component of the award, in terms of its premises, would have been to determine whether a ground of nullity of sufficient consequence and injury to the party initiating the review warrants a total or partial nullification of the award or may be ignored. This approach necessitates not merely interpretation of the explicit award, but requires efforts at reconstructing the real ratio of the tribunal whose award is under review. While classical arbitral review prohibits examination of the merits of the dispute, the material violation approach does involve an inquiry into the "right" answer. But the examination is purely instrumental and is undertaken only if the preliminary finding of a technical violation has been made. *Kloekner*, it will be recalled, would nullify at the moment a violation was found, without regard to whether or not the technical discrepancy led to a material discrepancy. In contrast, *AMCO* would examine whether the technical discrepancy constituted a material violation. The purpose of this investigation is not to substitute the Committee's view for that of the tribunal. It is only to stop the Committee from nullifying an award on technical grounds when the award itself is materially correct.

The method of inquiry employed in the material violation approach is marked by both negative and affirmative formulations, and perforce statements of correct answers that would be revisory in consequence were the Committee endowed with the competence to substitute its view as a new award binding on the parties.

B. *Substantive Holdings*

A central part of the dispute was whether Indonesia could lawfully revoke AMCO's license. The core question here was the substantive lawfulness of the revocation. That lawfulness depended, according to the original tribunal and both of the parties, on compliance by AMCO with its commitments to Indonesia. The award found compliance: discrepancies between obligations of investment in Indonesia and actual performance were deemed not to be material.⁹⁰

The *ad hoc* Committee nullified this part of the award for failing to apply fundamental provisions of Indonesian law and failing to state reasons.⁹¹ The award had established a number of common points between the parties:

[I]f the failure to fulfill their obligation, as alleged by Respondent, could be established, the revocation of the license could be justified⁹²

[A] contract can be terminated by one of the parties where the other party does not fulfill its obligations.⁹³

[T]he revocation of the investment applications approval by the host State can be justified only by *material* failures on the part of the investor [T]he sub-lease agreements between P.T. AMCO, ASIA, and P.T. AEROPACIFIC were not, in any event at the date of the revocation, a material failure justifying the same.⁹⁴

[T]he applicant undertook to invest the sum of U.S. 3,000,000.⁹⁵

[T]he full capital of P.T. Amco Indonesia (that is to say the investment to be made) was to be paid within ten years⁹⁶

The critical question with regard to the lawfulness of Indonesia's revocation was whether these requirements, which both parties accepted, had been fulfilled.

The parties agreed that there had not been compliance. Issue was joined over the magnitude of the discrepancy between the investment required and the funds actually committed, and its legal significance. Of

90. *AMCO Award*, *supra* note 66, at ¶¶ 220-43.

91. *AMCO Decision*, *supra* note 85, at ¶ 98.

92. *AMCO Award*, *supra* note 66, at ¶ 212.

93. *Id.* at ¶ 213.

94. *Id.* at ¶ 218.

95. *Id.* at ¶ 230.

96. *Id.* at ¶ 232.

the two versions presented, the tribunal, it will be recalled, had accepted the smaller shortfall and found it was legally immaterial.⁹⁷ The *ad hoc* Committee nullified this portion of the tribunal's award:

[I]t was, firmly established, in the view of the *ad hoc* Committee, firstly that according to relevant provisions of Indonesian law, only investments recognized and definitely registered as such by the competent Indonesian authority (Bank Indonesia) are investments within the meaning of the Foreign Investment Law⁹⁸

. . . It was also clearly established . . . that P.T. Amco failed to obtain definitive registration with Bank Indonesia of all the amounts claimed to have been invested by it in the Hotel project. . . .⁹⁹

. . . The evidence before the Tribunal showed that as late as 1977, Amco's investment of foreign capital duly and definitely registered with Bank Indonesia in accordance with the Foreign Investment Law, amounted to only US \$983,992. . . . The Tribunal in determining that the investment of Amco had reached the sum of US \$2,472,490 clearly failed to apply the relevant provisions of Indonesian law. The *ad hoc* Committee holds that the Tribunal manifestly exceeded its powers in this regard and is compelled to annul this finding.¹⁰⁰

. . . .

. . . If it be assumed that BKPM's finding that P.T. Amco's share capitalization figure of US \$1,399,000 had in fact included US \$1,000,000 of loan funds was correct, then the Tribunal had effectively failed to apply Article 2 of the Foreign Investment Law which limits qualified foreign investment to investment of equity capital. The Tribunal, in any case, failed to state reasons for counting the entire US \$1,399,000 as equity capital and not merely US \$399,000 If, upon the other hand, it be assumed that the BKPM finding was *not* correct and the entire US \$1,399,000 had somehow become "equity capital", then the Tribunal had still failed to apply Article 2 of the Foreign Investment Law and to state reasons¹⁰¹

. . . [T]he *ad hoc* Committee feels obliged to consider that the Tribunal manifestly exceeded its powers in failing to apply fundamental provisions of Indonesian law and failed to state reasons for its calculation of P.T. Amco's investment.¹⁰²

97. *Id.* at ¶ 240-41:

[T]he investment amount which the Tribunal finds the Claimants have produced sufficient evidence of is US \$. . . 2,472,490.

. . . It is thus established that the Claimants did not realize an investment of U.S. \$3,000,000 in the framework of Law No. 1/1967. . . .

. . . [T]he insufficiency was of slightly more than 1/6th of the amount Claimants had undertaken to invest. . . .

[T]his insufficiency is not material enough to justify the revocation of the license.

98. *AMCO Decision, supra* note 85, at ¶ 93.

99. *Id.* at ¶ 94.

100. *Id.* at ¶ 95.

101. *Id.* at ¶ 97.

102. *Id.* at ¶ 98.

The method used here is a good example of the material violation approach. It necessarily generates affirmative conclusions because it tests claims of nullity not on the purely technical grounds of Article 52(1), but rather on grounds of whether the alleged nullification really makes any difference in the context of the case. The nullity of the award is established by reference to the substantively accurate position. Hence the *AMCO* Committee concluded not simply that the award was null on the formal ground of absence of reasons, but also that the tribunal's ruling was wrong on material grounds because the investor actually brought an amount far less than required (indeed less than the award found). Hence the license had been properly revoked.

A number of consequences flowed directly from nullification of this part of the award. First, the award's finding of non-materiality of the discrepancy between *AMCO*'s obligation and *AMCO*'s performance was nullified by necessary implication.¹⁰³ Second, the tribunal's conclusion that BKPM (the Indonesian financial control agency) was unjustified in revoking *AMCO*'s license also had to be annulled.¹⁰⁴ This too was the result of a material test. For the *ad hoc* Committee, Indonesia's failure to protect adequately against a taking by unauthorized personnel, though procedurally defective, was substantively justified. If the *Kloeckner* Committee's theory had been applied, this issue probably would have been decided otherwise because, in a technical sense, it was a violation. Under the *AMCO* Committee's theory, though, it would not. Indeed, the Committee found that a material approach was mandated by Indonesian law:

The fundamental character of Indonesian administrative law seems, to the *ad hoc* Committee, to be such that a conclusion on the legality of an act of an Indonesian public authority, and on its implications for responsibility for damages, can be reached only after an over-all evaluation of the act, including consideration of its substantive bases.¹⁰⁵

Because the revocation was substantively lawful, the *ad hoc* Committee found that the tribunal's award of compensation for procedural violations also had to be nullified.¹⁰⁶

103. "Because the *ad hoc* Committee has annulled the conclusions of the Tribunal on the calculation . . . and on the amount of P.T. Amco's investment . . . it follows that the Tribunal's ruling on the non-materiality of the shortfall of P.T. Amco's investment must also fall" *Id.* ¶ 103.

104. For the reasons set out above in paras. 95 and 103, the conclusion of the Tribunal (Award ¶ 241) that BKPM was not justified in revoking Amco's license on account of the shortfall of the investment, which the Tribunal calculated without regard to the applicable law and held immaterial, has to be annulled. *Id.* ¶ 105.

105. *Id.* at ¶ 81.

106. However, if BKPM was not unjustified in revoking the license on substantive grounds, then, according to the findings of the Award itself (*supra* ¶ 74), no compensation was due for the lack of three warnings and for other procedural defects of the revocation order. Therefore, the part of the Award granting P.T. Amco damages on this account has to be annulled. *Id.* ¶ 106.

The previous nullifications appeared to entail nullifications with regard to the temporal extent of AMCO's claim to manage the hotel.¹⁰⁷ This too nullified a key part of the award and confirmed, by implication, the temporal limits of any subsequent claim.¹⁰⁸

Indonesia had contended that the award should be nullified such that the tribunal should have accepted Indonesia's warnings to AMCO as sufficient within the meaning of Indonesian law. The *ad hoc* Committee rejected this contention.¹⁰⁹ But the "Warning" and "Hearing" issues were then deprived of legal consequence, for they constituted a technical rather than material violation.¹¹⁰ As a consequence of the method the Committee developed, part of the *AMCO* award was nullified.¹¹¹ The only issue remaining to be relitigated by a new tribunal, if it were established, would be the question of damages (if any) for the non-feasance from the time of the taking until the time of the justified and lawful revocation of the license.

C. AMCO II

Shortly after the *ad hoc* Committee in *AMCO* partially annulled the award, AMCO, as entitled under the ICSID Convention, applied for a new arbitration. A new tribunal was established, chaired by Professor Rosalyn Higgins of London. One of the first issues it had to deal with was just how much of the dispute that had been before the first tribunal would be heard again: what matters had been nullified by the *ad hoc* Committee and what matters had not and were, hence, *res judicata* and

107. As the withdrawal of the investment license cannot be considered unjustified, the resulting effect of such withdrawal cannot be considered unjustified either, i.e. P.T. Amco's inability to exercise its right to manage the Kartika Plaza Hotel as of the day of issuance of the revocation order, (July 9, 1980), whatever would have been the outcome of the litigation begun by P.T. Wisma against P.T. Amco before the Jakarta Courts. *Id.* at ¶ 107.

108. The damage caused to P.T. Amco by the action of Army and Police personnel came to an end on the day of the revocation of P.T. Amco's license, i.e. on July 9, 1980. Consequently, the *ad hoc* Committee annuls the grant of damages to P.T. Amco . . . for the period beyond July 9, 1980. *Id.* at ¶ 109.

109. *Id.* at ¶ 71:

Indonesia argued . . . that a series of letters from the Bank of Indonesia . . . to P.T. Amco over the years repeatedly reminding the latter of the registration, or lack thereof, of the investment made or claimed to have been made by P.T. AMCO . . . should be regarded as substantially equivalent to the warnings contemplated in BKPM decree 01/1977. The Tribunal . . . refused to regard the letters . . . as substantial compliance Whatever one may think as to the necessity or propriety of the literalness with which the Tribunal interpreted . . . the BKPM decree, . . . the *ad hoc* Committee does not believe itself justified in annulling this portion of the Award for failure to apply the applicable law.

110. *Id.* at ¶ 106 ("[I]f BKPM was not unjustified in revoking the license on substantive grounds, then, according to the findings of the Award itself . . . no compensation was due for the lack of three warnings and for other procedural defects of the revocation order. Therefore, the part of the Award granting P.T. Amco damages on this account has to be annulled.")

111. *Id.* at unnumbered paragraph 126 (X-Award).

not available for relitigation. The framework within which the *ad hoc* Committee addressed this question was the proper scope that should be attributed to the concept of *res judicata* in international arbitration.

Certain possible resolutions of these issues could shift the ICSID structure from one of party equality or symmetry in arbitration to one inclining towards the losers in each successive phase, which, in turn, could have a major impact on the parties, in the instant case no less than on parties in future arbitrations. Though there were a few analogies to be gleaned from older cases, this was, in many ways, a question of first impression.

The question that the second *AMCO* tribunal (*AMCO II*) had to answer, then, even before addressing its central function, was the extent of *res judicata* effect to be accorded the premises and reasoning of the *ad hoc* Committee. If the mode of nullification adopted by the *AMCO* Committee were endorsed and effect were given to its explicit and implicit confirmations of parts of the original tribunal's award, the scope of the new arbitration would be quite narrow. In the second phase of the case, *AMCO* then would be allowed to argue for little more than compensation for the period from March 31-April 1 (when the unlawful taking actually occurred), until the time when the license was terminated (some three months later) by the competent Indonesian court. Damages would have been quite small.

A broad conception of *res judicata* would limit what the plaintiff *AMCO* could get, but such a conception posed so many dangers in the form of counterclaims to the plaintiff that it might have deterred the plaintiff from even reinitiating the arbitration. Indonesia would have been entitled to counterclaim for many concessions it had made to *AMCO* under the license, which even the first tribunal had concluded *AMCO* had violated. Indonesia also had substantial tax claims that would become actionable. The broad conception of *res judicata* also would have had consequences for future cases, since the margin for relitigation in successive tribunals would always be narrower.

If, in contrast, *res judicata* were interpreted narrowly to exclude the reasoning and its premises, as well as implied confirmations of the *ad hoc* Committee decision, the margin for relitigation could, in many cases, be much broader. It would, thus, provide a greater incentive to the losing party to seek recourse under Article 52, which, in turn, would have implications for the ICSID control system.

The *AMCO II* tribunal's problems were further aggravated by the apparent compromise character of the *AMCO* award. A compromise is necessarily a package of concessions to each of the parties. But the effect of a partial nullification was to strike down some of the concessions made

by one of the parties while confirming those by the other. Thus, to cite one example, the significance of the sixteen percent shortfall, which had been ignored in the original compromise, was reestablished by the *ad hoc* Committee. But the coordinate component of the compromise—the face-saving holding that Indonesia had not expropriated AMCO—was not nullified. A strict application of a doctrine of *res judicata* in these circumstances could create a very uneven field for litigation in the second phase.

In grappling with these problems during the first phase of the case, the *AMCO II* tribunal showed a great sensitivity to the scope of its own future jurisdiction, but less to the control dimension of the decision it was making. It adopted a narrow approach to the *res judicata* effect of the findings of the *ad hoc* Committee.

If the present Tribunal were bound by “integral reasoning” of the *Ad hoc* Committee, then the present Tribunal would have bestowed upon the *Ad hoc* Committee the role of an appeal court. The underlying reasoning of an *Ad hoc* Committee could be so extensive that the tasks of a subsequent Tribunal could be rendered ineffectual, and not consistent with its authority—as indicated in Article 52(6), which speaks of “the dispute” being submitted to a new Tribunal.¹¹²

This reasoning is not without problems. It rests on two grounds to support its conclusion. The first ground concerns the long-standing fear of a transformation of international arbitral review into appeal.¹¹³ This appellate role is certainly undesirable and possibly injurious to arbitration when the second instance is a national court; the danger is less apparent when the second instance is international and contained within the arbitration system the parties had accepted. Even assuming that the evolution of a quasi-appellate role is a development to be avoided, it is not an *ad hoc* Committee’s reasoning in support of its conclusions, which is required by the Convention in any case, that transforms a review into an appeal. Nor is there a transformation of review into appeal because effect is given by subsequent tribunals to the integrated reasoning of the *ad hoc* Committee. More fundamentally, it may be urgent to rethink whether policies designed to limit the role of national courts in international arbitral review should apply automatically and fully to internal international review or whether other policy considerations should be taken into account.

The second reason invoked by the *AMCO II* tribunal was that assigning *res judicata* effect to the *ad hoc* Committee’s reasoning could

112. 27 I. L. M. 1281 (1988). See also *AMCO v. Republic of Indonesia: Resubmitted Case—Decision Jurisdiction*, 3 ICSID REV.—FOREIGN INV. L.J. 166 (1988).

113. Cf. K. CARLSTON, *THE PROCESS OF INTERNATIONAL ARBITRATION* 245-46 (1946) (discussing extent to which a system of appeal should be established).

drastically reduce the scope of relitigation for a subsequent tribunal. A consequence of a choice cannot be a reason for or against that choice unless and until one has established by reference to law or policy that this consequence is itself desirable or undesirable in terms of a specified policy. What, then, is the policy here?

AMCO II does not address the policy issue in explicit fashion, but rather reasons that giving effect to the rationale of the *ad hoc* Committee by means of a broad conception of *res judicata* would be inconsistent with the Convention, which allows either party to resubmit the "dispute." As part (and possibly a large part) of the dispute would not be resubmittable if one adopted a broad concept of *res judicata*, Convention-granted rights, according to this line of reasoning, would be violated.

Consider the difficulties in this line of reasoning. If such reasoning is valid, then there can be no place for *res judicata* in the ICSID control scheme because any *res judicata* effect—whether broad or narrow—must reduce the arbitrability of what constituted the "dispute" (whatever its parameters may have been) in the initial arbitration phase. But there must be a place for *res judicata* here by virtue of an *ad hoc* Committee's Convention-granted power to annul only partially. Otherwise, we must ignore the explicit power of an *ad hoc* Committee to annul only part of an award and conclude that even in cases in which an *ad hoc* Committee partially annuls, a subsequent tribunal must treat it as a total nullification and hear the dispute *de novo* to avoid infringing the Convention-granted right to bring the "dispute" to a new tribunal. Elsewhere, the *AMCO II* tribunal affirms the operation of *res judicata*. *AMCO II*'s reasoning here must lead it to strike out of the Convention the power of partial nullification.

The issue is one of policy. *AMCO II* rejected a broad conception of *res judicata*, including integral reasoning, because it feared that such a conception would limit the jurisdiction and ambit of operation of subsequent tribunals, which may be empaneled after a nullification to rehear the same case. That would be the consequence. The question is whether limitation is in fact desirable on policy grounds.

I submit that it is, since a broad conception of *res judicata* would attenuate, at each successive phase, the matter in dispute. It also would obviate the rehearing of matters that were not defective, not nullified, and hence not entitled to rehearing, thereby reducing the incentive of abusive review. Yet such a conception would not, in any way, insulate from review matters that should be reviewed. In the absence of an approach that restricts the scope of subsequent panels, each successive tribunal would have to decide *pro hac vice* how much *res judicata* effect to

accord the previous arbitral tribunal's decision. As litigants will not know in advance, one party will usually have good reason to try its luck.

D. *ICSID Control Out of Control*

Since *Kloeckner*, no ICSID award can be assumed to be final. AMCO, as we have seen, reinstated its claim. Having resolved the preliminary question in favor of a narrow conception of how much of the original award remains *res judicata*, thus leaving broad latitude for how much must be decided anew, the second phase of the arbitration is presently underway. In the meanwhile, the *second* award in *Kloeckner v. Cameroon* has been rendered.¹¹⁴ The loser and the winner have asked for its review under Article 52! Another *ad hoc* Committee has been empaneled and is hearing argument. In addition, an award rendered against the Government of Guinea in another case has been challenged.¹¹⁵

In a superficial sense, one may say that the ICSID control system is "working." In fact, it is not. The function of a control system is neither to undermine the operation of a dispute mechanism by extending disputes *ad infinitum* nor to deter potential litigants from incorporating this mode of dispute resolution in their agreements.

The international arbitration bar, properly and quite professionally, has digested the opportunities presented by Article 52 procedures as construed by *Kloeckner* and has transformed ICSID arbitration into a sequence of two-phased proceedings. The first phase of the first sequence is classically arbitral. Each party may select an arbitrator and participate in the selection of the chairman of the tribunal. In the second phase, the results of the first phase may be challenged before another tribunal that uses ICSID procedures but is called a Committee. In this phase, the Secretary-General selects *all* the decisionmakers. Only if the Committee upholds the award in its entirety does the arbitration end. If there is a re-arbitration, more, rather than less, is still in dispute.

If this pattern becomes a routine feature of ICSID arbitration, it will signal a far-reaching qualitative change. Henceforth, the first tribunal, in effect, will become something of a trial court of first instance, while the second tribunal—the *ad hoc* Committee—will evolve into something between a court of cassation and a court of appeals. Which of these two characteristics will be dominant is as yet unclear. The parties will only be able to influence the composition of the first and less important phase. The multi-tiered arrangement also will affect the way "first-instance" ar-

114. See *Disputes Before the Center*, 6 NEWS FROM ICSID 2 (Winter 1989).

115. See *Disputes Before the Center*, 6 NEWS FROM ICSID 2 (Summer 1989)

bitrators see their role and the way they draft awards. The dispute will now ultimately be decided by three neutral arbitrators, none of whom has been appointed by either party. Precisely because the institution of the party-appointed arbitrator tends to reassure states and corporations nervously contemplating the downside of big-ticket arbitrations, ICSID arbitration may come to look less attractive than other options.

The emerging jurisprudence encourages these developments. If the technical discrepancy and hair-trigger approach of the first *Kloeckner* Committee is widely used, there will always be a better than even chance that at least part of the award will be nullified. If there is a partial nullification and the successive tribunals adopt the approach of *AMCO II*, the *res judicata* effect of the unnullified parts of the previous decision will be construed narrowly, to the advantage of the party attacking the award.

Given the fact that ICSID Article 52 procedures are more likely to proliferate, the efficacy of ICSID and its survival as a meaningful dispute-resolving mechanism will depend upon a sound control theory. If whenever an *ad hoc* Committee deems an award to be defective in severable part, it necessarily and automatically entails the nullification of a greater part of the labor of the parties and the first tribunal, the parties will have to invest major resources in a relitigation of matters that, in the view of the first tribunal and an *ad hoc* Committee that scrutinized its work, are untainted (directly or indirectly) by a ground of nullity and hence had been decided within the terms of arbitral jurisdiction.

Control is indispensable for international arbitration, but even an institutionalized system of control, if wrongly designed or wrongly applied, can undermine the institution it is supposed to protect. The losing party to a second arbitration may request the installation of an *ad hoc* Committee in the hope that even a minor, technical defect will, pace the *Kloeckner* Committee, entail nullification of the entire award and provide a potentially infinite series of opportunities to win or at least to stave off losing and paying. The utility of the Convention's system of partial nullification and its implied corollary of a broad *res judicata* is that each subsequent arbitration will be permitted to hear only the annulled portions of the preceding award, thereby reducing the incentive and rewards for abuse at each successive stage.

Nor should the financial consequences of mandatory total relitigation be minimized. Arbitral costs may total millions of dollars, sums that developing countries can often ill afford. If the prospective costs are so great as to require the country to settle for substantially less than its legal entitlement, then Article 52 becomes a weapon for extortion and undermines ICSID's mission. Investors also may be prejudiced because heavy litigation costs may make private investors decide that ICSID and possi-

bly a particular private investment in a foreign country are no longer attractive.

To contend, as a matter of policy, that the doctrine of *res judicata* should insulate those matters decided by a first tribunal that were not nullified, as well as the broader reasoning of the *ad hoc* Committee, is of course only part of the problem. How a subsequent tribunal discharges its obligations under the Convention and under international law and how, in particular, it interprets those parts of the prior award that are deemed to have survived the partial nullification decision of an *ad hoc* Committee, no less than how the Committee decision itself is to be interpreted, is another matter.

Future losers in ICSID arbitrations will be hard-pressed not to exercise their option under Article 52. The very availability of the procedure, as it has developed, virtually requires the professionally ethical counsel to recommend its vigorous exploitation. If this situation continues, the long-term future of arbitration at the World Bank seems uncertain. Until now, ICSID has enjoyed a rather rapid subscription, but it is doubtful that prudent counsel will continue to recommend to their clients a system of dispute resolution that no longer economically resolves disputes.

IV. REPAIRING THE BREACH IN THE ICSID CONTROL SYSTEM

A viable and useful dispute resolving instrument is now in peril because its control system has spun out of control. Several types of remedies, however, are available. Adjustments by arbitrators and *ad hoc* Committee members could repair the problem most economically, insofar as these adjustments can be accomplished in ways that do not themselves violate the Convention. In addition, a variety of institutional changes—some more costly in terms of time and political capital—may be undertaken.

The ICSID Convention is a constitution and as such it could do little more than establish institutions that could elaborate the scheme through time. The designers of the system could not think through all of the implications and ramifications of the control system and provide, whether in the Convention or in its legislative history, detailed instructions about the mission assigned to the committees. Whatever the mode of repair, a thorough reconsideration of the basic policies of the ICSID control system is most urgent. The core purpose of control in international arbitration is functional and not textual. It is to ensure that arbitral awards and the processes that precede them are fair and consistent with the expectations of the parties and the pertinent prescriptions of the community, such that confidence in arbitration as a method of dispute resolution is sustained. Without that expectation, the flow of private

funds to developing countries is likely to be restrained. It serves well to remember that this was the intended contribution of ICSID arbitration to the larger mission of the World Bank.

In this context, control is not a question of protecting the "purity" of a Convention in the sense in which the *Kloeckner* Committee conceived its mission. It is rather a question of maintaining the vitality 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. A control system which tests an award against every jot and tittle of the Convention and creates a series of sequential arbitrations, nullifications, and successive arbitrations that extend *ad infinitum* is an absurdity because it undoes the very *raison d'être* of international arbitration—rapid, economical, and fair dispute resolution that does justice to the parties and encourages productive economic processes.

With these policies in mind, a number of initiatives may be taken by arbitrators, committee members, the ICSID administration, and the States-Parties to the Convention.

A. *Modifications in Approach by Committee Members*

The Committees that have precipitated part of the problem are, given the structure of ICSID arbitration, the most appropriate avenues for remedying it. Probably the most urgent matter on the ICSID agenda is for future *ad hoc* Committees to rethink their function and the principles they should apply in ICSID arbitration. The task is not unlike that Justice Marshall faced in *Marbury v. Madison*.¹¹⁶ One would imagine that this searching inquiry is already underway. To contribute to it, I would propose a number of changes that future Committees might consider undertaking.

1. *Restrict Nullification Grounds to Those Explicitly Set Out in Article 52(1)*. There are, as we saw, discrepancies between the general procedural instructions in the ICSID Convention (only some of which are mandatory) and the specific grounds for nullification set out in Article 52. One possible interpretative response to this discrepancy is a conclusion of "exclusivity," i.e., the drafters intended Article 52 procedures to be limited to what was stated in Article 52: *expressio unius est exclusio alterius*. Another possible interpretation is "inclusivity," i.e., that the drafters intended Article 52 to be read with and to incorporate other pertinent parts of the Convention. Both interpretations are plausible.

116. 5 U.S. (1 Cranch) 137 (1803).

Each would have different consequences for the ICSID control system. Whereas the exclusive interpretation restricts the grounds for nullification, the inclusive interpretation expands them. In cases in which textual construction produces a type of interpretative equipoise between two textually plausible readings, interpreters usually inquire as to the objects and purposes of the legislative exercise.

This is exactly what the *KloECKner* Committee did not do. The *KloECKner* Committee, it will be recalled, opted for the inclusive interpretation, deciding that the grounds of nullification set out in Article 52(1) could be illuminated by reference to coordinate provisions in other parts of the Convention.

Obviously, and in accordance with principles of interpretation that are recognized generally—for example, by Article 31 of the Vienna Convention on the Law of Treaties—Article 52 on the annulment of awards, must be interpreted in the context of the Convention and in particular of Articles 42 and 48, and vice versa. It is furthermore impossible to imagine that when they drafted Article 52, the Convention's authors would have forgotten the existence of Articles 42 or 48(3), just as it is impossible to assume that the authors of provisions like Articles 42(1) or 48(3) would have neglected to consider the sanction for non-compliance.¹¹⁷

As an exercise in textual interpretation, this statement of interpretative method is problematic because it overlooks the plain meaning of the provision and ignores the possibility (usually presumed, as a matter of minimum courtesy, in deference to the intelligence of the drafter) that the difference in language was intentional and not accidental or frivolous. It is far from certain under the canons of international interpretation that Articles 41 to 47 themselves should be read into Article 52(1).

But even if one sets aside the possibility that manifest differences in the language of Articles 52 and 42 and 48 were intentional, the Committee's interpretation is not the most plausible construction of the Convention. The unstated premise which is necessary for the Committee's construction is that the rest of the Convention was intended to be incorporated in Article 52, since it is all non-suspendable. The Convention says the opposite. According to Article 44 of the Convention, only Articles 41 to 47 *may not* be suspended by agreement of the parties.¹¹⁸ The other procedural norms are dispositive and may be set aside by the par-

117. *KloECKner Decision*, *supra* note 35, at ¶ 58.

118. Article 44 of the ICSID Convention provides:

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

ICSID Convention, art. 44, *reprinted in* ICSID CONVENTION, *supra* note 9, at 188-99.

ties. In case of doubt or dispute, the tribunal seised of the case is the arbiter of its own procedures. In making such decisions, only the procedures expressed in Articles 41 to 47 are peremptory. Thus with the exception of Articles 41 to 47, there is nothing in the Convention to support the proposition that Article 52(1) should be read to incorporate the other parts of the Convention. Quite the contrary.

Most disturbing, the *Kloekner* Committee's interpretation did not even consider the objects and purposes of the control system. Article 52(1), like all law, is a human artifact designed to achieve some objective. One would expect, at a minimum, curiosity about the objective and the context in which it is to be achieved.

The *Kloekner* Committee's interpretation invited and entertained claims for nullification of the award that sounded in other parts of the Convention. Precedentially, it makes departures from any pertinent part of the Convention a potential basis for a ground of nullity. This problem is further aggravated by the technical discrepancy and hair-trigger approach taken in *Kloekner*, which will be appraised below. I am not persuaded that this interpretation serves the purposes of the ICSID control system and would urge that it be replaced by an exclusive interpretation of Article 52(1).

The implications and consequences of this suggestion may be demonstrated by reference, once again, to the issue of reasons. Consider the linguistic differences between Article 52(1)(e) and Article 48(3).

Article 48 deals with the components of the award. Paragraph 3 of that provision states: "[T]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based." Note should be taken of the fact that no consequences follow departures from Article 48. The nullification provision, Article 52, does not replicate the language of Article 48 but simply says that a party may request annulment *inter alia* on the ground "that the award has failed to state the reasons on which it is based." The difference between the two provisions is not trivial, and the fact that the drafters adopted, within the same instrument, such materially different formulations regarding the requirement for reasons cannot be ignored. It is, of course, Article 52 and not Article 48 that controls in this matter.

The desiderata in the redaction of an award prescribed by Article 48 are considerably reduced in Article 52. That reduction is consistent with scholarly views. Carlston, the major authority in this area, states:

[A]rbitration is a judicial process. The requirement that a decision be reached by a formally stated process of reasoning would, therefore, seem to be essential. It need not be in meticulous detail; a statement indicating in a general way the legal reasons upon which the award is based will be valid and binding. The circumstance, however, that upon

certain aspects of the opinion reasons were lacking cannot reasonably be considered to result in the nullity of the entire decision.¹¹⁹

In an earlier study, I wrote:

A detailed justification of every premise, every step in a process of inference, and every subsidiary conclusion, is unfeasible. Excluding *per curiam* decisions, which are a rare international phenomenon, few, if any, international judgments and awards have been "fully reasoned."¹²⁰

Jurisprudence, while less explicit, would appear to be consistent with these views. In the *Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*,¹²¹ which was decided by the International Court of Justice in 1960, Nicaragua sought to impugn an award rendered by the King of Spain on a number of grounds, including the alleged inadequacy of its reasons.¹²² The award was short by current standards, seven and one-half pages long, of which some five pages involved reasoning. The Court dealt summarily with the claim:

[A]n examination of the Award shows that it deals in logical order and in some detail with all relevant considerations and that it contains ample reasoning and explanations in support of the conclusions arrived at by the arbitrator. In the opinion of the Court, this ground is without foundation.¹²³

The Court did not require the award to deal with all considerations, but only all "relevant" considerations. Nor did it require that every *question* raised be dealt with in a reasoned fashion but only that "the conclusions arrived at by the arbitrator" be supported by reasons. As for the quantum of reasons, the standard was not full but "ample."

The policy reasons accounting for this requirement in the context of a claim for nullification are hardly recondite. International arbitration perforce takes place in an international and transcultural environment in which, as noted above, lawyers from many different legal systems and cultures interact. Many of these cultures have different conceptions of what constitutes adequate reasoning in general, and, in particular, what constitutes appropriate judicial reasoning. These variations in legal culture are multiplied by the extraordinary range of variation in the styles and detail of ratiocination that can be attributed to individual subjective

119. K. CARLSTON, *supra* note 113, at 53 (footnote omitted).

120. W.M. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS 618 (1971).

121. 1960 I.C.J. 192 (Nov. 18, 1960).

122. Arbitral Award Made by H. M. Alfonso III, King of Spain, in the Border dispute Between the Republics of Honduras and Nicaragua, on 23 December 1906, Pleadings, Oral Arguments, Documents, Vol. I, Annex II, at 18-26.

123. *Honduras v. Nicaragua*, 1960 I.C.J. at 216.

factors. In this varied context, an insistence on a very detailed standard and a culturally unique ratiocinative style for the reasoning requirement would open up many awards to challenges of nullification and undermine the entire process of international arbitration. Hence there would appear to be very compelling reasons for the substantially reduced requirement found in international arbitral practice and adopted in the text of Article 52 of the ICSID Convention.

The strict construction of Article 52 that I am proposing is consistent with the canons of treaty interpretation, has authority in past practice, and, most importantly, would contribute to better performance of the control function within ICSID arbitration.

2. *Use a Material Violation Rather than Technical Discrepancy Approach.* Enough has been said to indicate the reasons why a technical discrepancy approach undermines the control function of ICSID and should be replaced by a material violation approach. The late Professor Kenneth Carlston has stated the matter better than anyone:

Not all departures from the terms of the *compromis* will lead to nullity. It is a matter of the substantial character of the departure, the prejudice involved, the importance of the departure from the standpoint of the practice of tribunals, and whether the injured party has by failure to object and subsequent participation in the conduct of the arbitration waived its right to contest validity.¹²⁴

Professor Carlston's point is apparent in the formulation of the Convention. Thus, for example, Article 52(1)(d), which deals with procedural violations, prescribes nullification when "there has been a serious departure from a *fundamental* rule of procedure."¹²⁵ Note that the provision does not say that nullification follows when *any* procedural provision of *the Convention* has been violated. The procedural rule violated, whether found in the Convention or not, must be fundamental. The mere fact that there has been a violation is not determinative. The violation must be serious.

The recommendation being forwarded here is a complete rejection of this constitutive decision of the *Kloeckner* Committee.

3. *Where Appropriate, Use "Confirmatory" Formulations.* Because an Article 52 type procedure responds to claims of nullity, there is an assumption that the formulations of an *ad hoc* Committee should only be negative in consequence, i.e., that a ground of nullification has been found and that all or part of an award must be nullified. As a practical

124. K. CARLSTON, *supra* note 113, at 85.

125. 1 ICSID CONVENTION, art. 52, *supra* note 9, at 230 (emphasis added).

matter, it is almost impossible to escape using what I will call, with apologies for the lack of grace of the term, "confirmatory" formulations.

Some affirmative language is at times purely a matter of style, verbally affirmative but negative in consequence. In the dynamic context of an annulment process, affirmative language may be used for rhetorical variation. In the context of an inquiry as to whether there is water in a glass, it would be scholastic to search for the intended difference between statements like, "the glass is empty" and, "the glass has no water in it." Sometimes, diplomatic considerations dictate a mode of formulation. It is to be expected, especially in international arbitration where there is a potential national sensitivity that could complicate procedures, that an *ad hoc* Committee will vary its language and will sometimes say that a claim of nullification has not been sustained by using the language of "confirmation" of the original award.

In a more substantive sense, it is generally impossible to avoid affirmative formulations. A rejection of a particular claim for nullification confirms the validity if not the correctness of that part of the challenged award. A nullification by implication may arise in a number of ways. In the *Pious Fund* case, a tribunal of the Permanent Court of Arbitration noted the interdependence of the reasons and the operative parts of an award.¹²⁶ The interrelated character of some awards means that nullification of one part may automatically entail the nullification of other parts. In awards such as these, there can be a type of "domino" effect. For example, where parts of an award are related to each other in terms of premise and conclusion and the premise or the procedures by which the conclusion was reached is deemed null, the conclusion is nullified by implication. A comparable result may be achieved when part of an award which has been challenged is not considered by the *ad hoc* Committee because it becomes moot, as a result of the structure of the Committee's decision. While this is not a nullification, it is also not a confirmation.

Explicit confirmations speak for themselves. An award or part of an award for which a party seeks annulment may be expressly not annulled. Implied confirmations may be inferred from the context and the reasoning of the *ad hoc* Committee. For example, where part of an award is not challenged before the *ad hoc* Committee, not addressed by the Committee, and not nullified by implication, it may be deemed to have been confirmed by implication.

In some cases, an authority reviewing an arbitral award may not be able to avoid an affirmative finding. Consider the issue of jurisdiction. If

126. *Pious Funds Case (Mex. v. U.S.)*, Hague Ct. Rep. (Scott) 1 (Perm. Ct. Arb. 1902).

a first instance finding of jurisdiction is annulled because it was inadequately motivated or the decision was reached by a procedure that seriously departed from a fundamental standard, the reviewing authority makes no affirmative decision on the issue of jurisdiction in its nullification. Theoretically, either party may reinvoke the jurisdictional clause. But if a losing party claims *simpliciter* that there is no jurisdiction, the response of the reviewing authority is confirmatory. If it holds that there is no jurisdiction, the possibility of successive arbitrations based on it ends. Can that inquiry be undertaken without an independent consideration of the merits and a confirmatory decision?

There appears to be general doubt about an *ad hoc* Committee's confirmation authority, which is confused, as we saw in *AMCO II*, with the ever-present fear in arbitration that review might be transformed into appeal. The concern is misplaced. The ICSID Convention nowhere requires an *ad hoc* Committee to use only negative formulations. The only instructions as to the *modus operandi* of the Committee are: (i) the concluding sentence of Article 52(3) which states, "[t]he Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1)"; and (ii) Article 52(4) which states, "the provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee."¹²⁷ None of these provisions indicates that negative formulations alone are permitted and that affirmative formulations, confirming parts of the award under review, are prohibited.

It appears that the ICSID drafters did not exclude a confirmatory competence for *ad hoc* Committees. Article IV, Section 13 of the Preliminary Draft of October 15, 1963 said that the procedure contemplated "calls for an affirmative or negative ruling based upon one or the other of the three grounds"¹²⁸

I submit that *ad hoc* Committees may and, where appropriate, should engage in affirmations of parts of a contested award. In a later section, I will suggest, as a corollary to this proposal, that subsequent tribunals, in whole or in part, may give effect to both affirmative and negative formulations in their determination of the extent of the *res judicata* effect of the previous award and of the *ad hoc* decision nullifying it. In the control conception of the ICSID Convention, *ad hoc* Committees are part of a process of dispute resolution. They are not discrete from that process and they are its terminus only if they reject all claims of nullity, thereby confirming the challenged award. In case of partial or total nullification, the *ad hoc* Committee knows that either party may

127. 1 ICSID CONVENTION, art. 52(3)-(4), *supra* note 9, at 234-39.

128. *Id.* at 219.

reconstitute the arbitration before a second tribunal.¹²⁹ In case of a total nullification, the anticipation of a new phase of arbitration is not a major concern since the second tribunal must essentially start from scratch. But insofar as the *ad hoc* Committee is only partially nullifying, the Committee is cognizant of the fact that one of the parties has the option of resubmitting the surviving parts of the dispute to a new tribunal.

Both the *Kloeckner* and *AMCO* Committees were aware of this dimension of their role. The *Kloeckner* Committee, it will be recalled, referred specifically to this possibility and even assigned to itself the performance of certain functions for the potential new tribunal.¹³⁰ This action was startling, as *Kloeckner* involved a total nullification. *A fortiori*, an *ad hoc* Committee that issues a partial nullification may believe it is authorized and possibly obliged to clarify the parts of the award that survive. Such a method is required if the *ad hoc* Committee is also using the material violation approach. It is difficult to see why this approach would be inconsistent with the major purposes of Article 52. To insist that *ad hoc* Committees shroud the reasons for their decisions in Delphic obscurity would certainly be absurd and hardly consistent with the obligation to express the reasons on which decisions are based.

This approach will not transform Article 52 procedures into appeals. Recourse under Article 52 becomes an appeal only when a Committee confirms that a tribunal stated and intended a certain result and the procedures used and result reached do not fit any of the specific fact situations in Article 52(1), but the Committee disagrees with the tribunal's result and wishes to nullify it for that reason.

4. *Where Possible, Reconstruct a Tribunal's Reasoning.* *Kloeckner*, as we saw, developed what it called a *praesumptio in favorem validitatis sententiae* under which an award was to prevail if it expressed formal reasons.¹³¹ But the Committee in that case did not seek to reconstruct the reasons that may have motivated the tribunal whose award was under review. I would suggest, as a corollary to the material violation approach proposed above, that subsequent *ad hoc* Committees actively seek to get inside the skin of the tribunal whose award is under review and to track its explicit and implicit ratiocination before concluding its reasoning is insufficient.

5. *When There Are Indications That the Award Is a Compromise, Adopt a Flexible Approach to the Ground of Absence of Reasons.* Under

129. *Id.* at 240.

130. *Kloeckner Decision*, *supra* note 35, at ¶ 82.

131. *See supra* note 41 and accompanying text.

classic arbitration doctrine, a tribunal may not render a decision that departs from the law governing the transactions without an express authorization by the parties to decide *ex aequo et bono*. It is unfair to the parties and dangerous for the future of arbitration if arbitrators can arrogate to themselves a change of the rules once parties have selected a set of them to govern their transactions. For this reason, any decision by a tribunal that purports to decide by equity without authorization from the parties is a classic *excès de pouvoir* and may be nullified.

In practice, however, arbitrations sometimes seek to arrange compromises between the parties. The dynamic of compromise is almost forced upon a chairman of a tribunal when his two colleagues are party-appointed. The party-appointed arbitrator, under several codes of arbitral ethics, may espouse the views of the party appointing him. He may not, however, communicate with that party. Thus there are circumstances in which compromises may be affected within the tribunal and presented in the form of an award, without any direct communications with the parties. Larger changes in conceptions of the function of dispute resolution in the past decade have, if anything, accelerated this tendency. To an extent, conciliation and compromise have been woven into many of the processes of more explicit decision.

Securing a compromise is necessarily a delicate matter in itself, but it puts special stress on the formal reasons which are still required to appear in the final award. Framing a compromise decision in terms of law becomes a ritual and art that is significantly different from the usual presentation of reasons as a way of explaining the ratiocinations of a tribunal and providing guidance for future parties who may look to the tribunal as a source of law. A compromise does not present itself explicitly as a compromise. When it is a cameral rather than party product, it must still be decked out in the usual language of the law. As a result, such compromise awards are inevitably not as tightly reasoned—no matter how great the craft skills of the arbitrators drafting the award—as one achieved by strict application of the law. If a control system, such as that found in ICSID's Article 52, tests in a strict fashion what is essentially a compromise award, there is a high probability that the review Committee will demonstrate some inadequacy in the reasoning that purports to sustain the award. Anticipation of this result could chill the operation of the latent compromise function of this mode of arbitration.

I would propose that *ad hoc* Committees acknowledge the latent compromising competence of a tribunal and apply a different standard with regard to adequacy of reasons when there are indications that a

compromise has been struck. One of the most dramatic of such indicators is a unanimous award.

The danger of decisions that have been made *ex aequo et bono* but without party authorization is that they are effectively unreviewable. That danger need not arise for latent compromises if the *content* of the compromise is subjected to an *appropriate* test by the *ad hoc* Committee. The compromise may be tested by reference to the law and policies of the community that govern the transaction. While a unanimous award is often a signal of a compromise, it does not necessarily signal that the compromise struck is one that adequately meets the minimum requirements of both parties. It would appear that in *AMCO I*, the unanimous tribunal, in scaling down the claimant's demand from twelve million dollars plus interest to some three million dollars, thought it was fashioning an adequate compromise. But, as we saw, the longer-term implications of the award would have undermined Indonesia's competence (and, by analogy, that of other developing countries) to enforce its own law with regard to development projects. That was an intolerable situation to a country that had issued hundreds of such licenses and may have impelled Indonesia to seek nullification.

Ad hoc Committees faced with an award that bears all the hallmarks of a compromise should test it in terms of the viability and fairness of the compromise, and not in terms of strict textual reasoning. This proposal is, to be sure, quite radical in terms of arbitral theory, although not necessarily in terms of actual practice.

B. *The Role of Arbitrators in Subsequent Tribunals*

The reaction of arbitrators in subsequent tribunals to the previous phases of the case is an important link in the ICSID control system. Recommendations about how *ad hoc* Committees should behave with regard to the control problem will have little effect if their decisions are ignored or minimized by subsequent tribunals. The arbitrators in these subsequent tribunals should shape their conduct in ways that take account of control needs.

Theoretically, a second tribunal might deem itself authorized to review, in terms of Article 52(1), the *ad hoc* Committee's procedures and findings and accept only those that are not "null." That sort of *démarche* would be unauthorized. A subsequent tribunal is not empowered, under the ICSID Convention or general international law, to nullify findings of the *ad hoc* Committee. For a subsequent tribunal to identify particular parts of an *ad hoc* Committee decision as an *excès de pouvoir* because, for example, they used confirmatory rather than negative language, or because they clarified what was nullified and what was

confirmed in the award, or because they took the material violation rather than technical discrepancy approach, would elevate form over substance and, more serious, risk throwing the ICSID control system into even greater turmoil.

In my view, the proper role of a second tribunal is to accept the decision of the *ad hoc* Committee as binding, as a valid exercise of the Committee's duty to interpret the Convention, international law, and the award as it sees fit. The longer-term consequences of the alternative—an arrogated competence by the second tribunal to "review the reviewer"—would lead to an infinite regression of nullification action. Such a result would plainly be in violation of the purposes of the Convention and frustrate its control function.

This is not to say that a second tribunal is able to avoid or is discharged from interpreting the *ad hoc* decision. But a sharp line must be maintained between interpretation and review, and nullification. Interpretation of any legal communication is to be performed in good faith in terms of the ordinary meaning of its words and in the light of its objects, purposes, and context. A second tribunal should engage in interpretation but not second guessing.

What then are the hermeneutics that a subsequent tribunal should deploy in cases of partial nullifications? I would suggest a number of interpretative principles.

1. *Use a Broad Yet Supple Conception of Nullification.* A subsequent tribunal, obliged to determine which parts of the first award survived and are hence *res judicata* and which are not, must necessarily engage in a broader analysis of the *ad hoc* Committee's decision in the light of the previous award. In doing this, a Committee's use of devices such as the language of explicit confirmation should be viewed as an unequivocal rejection of a claim of nullification and, for purposes of subsequent arbitrations on the same dispute, a clear indication that the matter concerned is *res judicata* between the parties. Ordinary principles of construction and inference should lead a new tribunal to conclude that an *ad hoc* Committee may have confirmed certain points by implication. This particular recommendation will be difficult to apply in cases in which the award under review bears indications of a compromise. As we saw earlier, partial nullification of parts of a compromise may substantially deform subsequent arbitrations. Hence some adjustments may be required.

2. *Use a Broad and Inclusive Concept of Res Judicata.* A qualified nullification of an arbitral award, by definition, only nullifies those parts of it that are tainted, in some way, by the ground of nullity and those parts, if there are such, that depend for their validity on the tainted

parts. The point was probably made with greatest clarity and authority by Professor Heinrich Lammasch, the umpire in the review phase of the *Orinoco Steamship* case.¹³² His decision there is considered a *locus classicus*, both because of the cogency of its reasoning and the fact that Professor Lammasch was one of the great authorities on the nullification of international arbitral awards. He held:

[F]ollowing the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the arbitrator are not questioned; this being ground for pronouncing separately on each of the points at issue . . .¹³³

The view expressed by Professor Lammasch is reinforced by the common interest in minimization of the expenditure of resources in dispute resolution.

Res judicata has been described by the Franco-Venezuelan Mixed Claims Commission in the *Compagnie Générale de l'Orénoque*:

Every matter and point distinctly in issue in said cause and which was directly passed upon and determined in said decree, and which was its ground and basis, is concluded by said judgment, and the claimants themselves and the claimant government in their behalf are forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved in said decree.¹³⁴

The general principle, announced in numerous cases, is that a right, question, or fact distinctly put in issue and directly determined, by a court of competent jurisdiction as a ground of recovery, can not be disputed.

The application of the principle of *res judicata* depends upon the identity of three aspects of a case: (i) the parties; (ii) the subject matter of the dispute; and (iii) the *causa petendi*. ICSID Article 52 contemplates this identity with regard to all three components of the dispute since Article 52(6) allows for resubmission of the "dispute" to a new tribunal. The word "dispute" in section 2 of the same chapter of the Convention refers to the complex of issues between the parties. Insofar as all or part of the resubmission under Article 52(6) is not a new case, *res judicata* would appear to apply to the unannulled portions of the first award. But which parts of an international judgment or award are *res judicata* and which are not?

132. *Orinoco S.S. Co. Case (U.S. v. Venez.)*, Hague Ct. Rep. (Scott) 226 (Perm. Ct. Arb. 1902).

133. *Id.* at 231.

134. Ralston and Doyle, Report of French-Venezuelan Mixed Claims Commission of 1902, at 355.

Obviously, the "housekeeping" parts of a judgment or award, which are sometimes lengthy in an *ad hoc* arbitration, are not *res judicata*. They deal with the infrastructure of the tribunal and its process and, in the absence of a violation of some procedural norm that might constitute a ground of nullification, their importance ceases with the rendering of the award. Less obviously, *res judicata* does not extend to *obiter dicta*. Even judgment analyses in legal systems that ascribe precedential value to prior holdings ignore those matters that are not part of the *ratio decidendi*, but rather represent digressions by the tribunal. While the theoretical demarcation between *ratio* and *obiter* is clear, specifying what is *ratio* and what is *obiter* in particular cases is often difficult.

Where arbitrators are not obliged or are not permitted to give reasons for their award, it is plain that the *ratio* is only the *dispositif*. Where, however, the constitutive statute of the decision institution requires that reasons be supplied, and where the statute authorizes nullification for failure to state reasons, it is plain that the basis of the operative part of the decision and the ratiocination that supports it are inseparable parts of the decision. It will be recalled that ICSID Article 48(3) requires a statement of the reasons for decisions about every question submitted to the tribunal. This provision applies to both the proceedings of tribunals and *ad hoc* Committees. According to Article 52(1)(e), the failure of an award to state the reasons on which it is based is a ground for nullification. In institutional arrangements such as these, reasoning for the operative part of the award is integral to the award and must be considered part of it.

This encompassing conception of *res judicata* is consistent with a basic trend in international law. In the *Pious Fund* case, before the Permanent Court of Arbitration, the tribunal said:

[A]ll the parts of the judgement or the decree concerning the points debated in the litigation enlighten and mutually supplement each other and . . . they all serve to render precise the meaning and the bearing of the *dispositif* . . . and to determine the points upon which there is *res judicata* and which thereafter cannot be put in question [T]his rule applies not only to the judgments of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis*; [T]he same principle should for a still stronger reason be applied to international arbitration.¹³⁵

Judge Anzilotti is frequently cited as contrary authority for his well-known dissenting opinion in *Chorzow Factory*. In fact, Judge Anzilotti's position was quite indistinguishable from the classic formulation in the *Pious Fund*. Anzilotti, it will be recalled, wrote:

135. See *Pious Fund Case (Mex. v. U.S.)*, Hague Ct. Rep. (Scott) 1, 5 (Perm. Ct. Arb. 1902).

When I say that only the terms of a judgment are binding, I do not mean that only what is actually written in the operative part constitutes the Court's decision. On the contrary, it is certain that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part and above all to ascertain the *causa petendi*. But, at all events, it is the operative part which contains the Court's binding decision¹³⁶

If one examines international judicial discussions of the extent of *res judicata*, one will find that even statements that appear to limit the extent of *res judicata* usually are responding to some exceptional circumstance in the case at bar. When the Permanent Court said in *Polish Postal Service in Danzig* that "[i]t by no means follows that every reason given in a decision constitutes a decision,"¹³⁷ it was not implying that the operative parts of a decision are not *res judicata*.

The question posed after *AMCO* is not the general position of international law on the *res judicata* issue or the policy considerations that animate it, but whether the ICSID Convention, in its treatment of partial nullification, intended to depart from the approach taken by international law. The question is not an easy one to answer.

If an *ad hoc* Committee explicitly and without qualification nullifies all of an award ("the award," "*la sentence en tout*," "*anulación total*"), as was the case, for example, in the decision of the *Kloeckner* Committee, then theoretically nothing remains and a claimant party can elect to re-submit the entire dispute to another tribunal if it wishes. In fact, unless the award is nullified for complete absence of jurisdiction (in which case, a successive arbitration is unlikely) or the award is nullified for arbitral misconduct, which could taint all parts of the award, there may be much in terms of facts established and law applied to them that is untainted in the nullified award. If an *ad hoc* Committee issues a qualified nullification and annuls only part of an award ("any part thereof," "*annuler la sentence . . . en partie*," "*anulación parcial*"), it is not clear on the face of the Convention whether the *ad hoc* Committee's finding that part of an award is null results only in the nullification of the tainted part of the award or must result in the automatic nullification of the entire award. This lack of clarity is aggravated when the Committee does not use the Convention's language "in part" but instead, as in the case of *AMCO*, uses the phrase "with qualifications."

The lack of clarity is not dispelled by other paragraphs of ICSID Convention Article 52. Article 52(1) authorizes either party to request

136. Interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow, 1927 P.C.I.J. (ser. A) No. 11, at 24 (Dec. 16, 1927) (Dissenting opinion of Judge Anzilotti).

137. 1925 P.C.I.J. (ser. B) No. 11, at 31; see also J.J. SIMPSON & H. FOX, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 231 (1959).

“annulment of the award” but the English, French, and Spanish versions speak only of a total nullification without mention of a partial nullification. It is arguable that the drafters, if they ever thought seriously about this matter, may have assumed that a party could only ask for total nullification, whereas the *ad hoc* Committee could decide on a partial nullification. If this were the case, one might expect that references to the decisions of the *ad hoc* Committee would have noted the possibilities of total or partial nullification. But Article 52(6) provides: “If the award is annulled, the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.”

Paragraph 6 makes no reference to annulment of a part of an award, nor does it suggest that the word “dispute” is to be understood in a partial sense—i.e., limited to those elements of the award which were not nullified—rather than in the original, unlimited sense in which it is used in Article 42. Unfortunately, the ICSID Convention does not have a definitions section. The authentic language versions in section 2 of the ICSID Convention do not define “dispute.” The French version uses the word “*différend*.” The Spanish version uses the term “*diferencia*.” In all three of the authentic languages, “dispute,” “*différend*,” and “*diferencia*” are respectively the terms used to refer to the issues to be resolved by the tribunal.

Thus the core text and context of the Convention are not univocal with regard to the question we are addressing. While all three authentic texts, expressly and by implication, contemplate the *ad hoc* Committee nullifying only part of an award, all the texts are unclear as to whether: (i) a partial nullification necessarily entails the total demise of the old award and, as a consequence, the relitigation, at the option of the claimant, of all issues; or (ii) a partial nullification only permits a relitigation of those parts that were nullified.

The ICSID Rules of Procedure lay out the more detailed modes for the implementation of the broad language of the Convention. These rules are a particularly important evidentiary source for understanding the Convention, for they are not only an authorized and authoritative construction of the Convention and part of the “context” within the meaning of Vienna Convention Article 31(2)(a),¹³⁸ but in addition they can be viewed, in certain ways, as a continuing elaboration of the text of the Convention. As “subsequent” text, the Rules acquire a special contingent force in interpretation, for insofar as there is a lack of clarity in the Convention and it is dispelled by the Rules, it would appear that the

138. 1 ICSID CONVENTION, art. 52(6), *supra* note 9, at 230.

principle of *lex posterior* would hold in favor of the later expression of the parties' will.

The reason for this special status is to be found in the fact that the Rules are drafted by an Administrative Council, which under Article 4 is composed of one representative of each contracting state. The Administrative Council is empowered under Article 6 to "adopt the rules of procedure for conciliation and arbitration proceedings." Thus, in discharging this function, the Administrative Council is akin to a continuing conference in which all parties to the Convention are fully and equally represented. With one qualification, the parties have accepted beforehand the results of this continuing conference.

Rule 55(3) provides:

If the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled. It may, however, in accordance with the procedure set forth in Rule 54 [concerning stay of enforcement of an award] stay or continue to stay the enforcement of the unannulled portion of the award until the date its own award is rendered.¹³⁹

Plainly the Administrative Council reads ICSID Article 52(6) in the light of ICSID Article 52(3) and concludes that a partial nullification precludes the subsequent tribunal from relitigating those parts of the dispute decided by the first tribunal that have not been nullified.

The Secretariat, in its explanatory note to Rule 55, reads ICSID Article 52 in exactly the same way as does the Council in its Rules. Note D explains:

Paragraph (3) [of Rule 55] provides that if the original award had only been annulled in part, then the new Tribunal shall not reconsider any portion of the award not so annulled. This is in accordance with the first sentence of Article 53(1) of the Convention, which indicates that awards shall not be subject to appeal except as provided in the Convention. If an *ad hoc* Committee empowered to annul all of an award has decided to annul only a part thereof (as it is entitled to do under Article 52(3) of the Convention) then the only possible remedy with respect to the unannulled portion is a request for revision made pursuant to Article 51 of the Convention.¹⁴⁰

Thus there is ample authority in both international law and in the authoritative documents of ICSID to warrant a broad approach to *res judicata*. If such an approach were adopted by subsequent *ad hoc* Committees and subsequent second arbitral tribunals, it would substantially reduce the ambit of re-arbitrations, thereby limiting the parties' incentive to abuse the control procedure.

139. ICSID MODEL RULE 55(3).

140. *Id.* Rule 55 note D.

C. *Institutional Alternatives for Closing the Breach*

The administrative machinery of ICSID can play a role in control. It has the advantage of continuous identity and policy in contrast to the fluctuations in members of tribunals and *ad hoc* committees. A number of essentially administrative steps have been taken to try to remedy the control problems created by *Kloeckner* and *AMCO*. They have met with varying success.

1. *Bond Requirements.* After *Kloeckner*, ICSID responded by insisting that the loser who was initiating the recourse post a performance bond for the face of the award. This would have rendered the decision of the *ad hoc* Committee instantly self-executing in cases in which the first award was entirely sustained. The problems we have been considering do not derive from the possibility of a total confirmation of an award. Whatever the merits of this practice, it addresses a different problem and does not repair the control system of ICSID.

2. "*Jaw-Boning.*" The Secretary-General of ICSID has been trying to use verbal suasion to reduce the problem of re-arbitrations. At the twenty-second annual meeting of the Administrative Council of ICSID, held in Berlin from September 27 to 29, 1988, Dr. Shihata said:

It may be expected that use of the annulment procedure would be a rare event because of the seriousness of the shortcomings against which it is meant to be a safeguard. This still seems to be the case, since the annulment procedure has only been invoked in three disputes before the Centre. However, if parties dissatisfied with awards regularly seek annulment such a practice may put in doubt the features which make ICSID arbitration an attractive means of settling investment disputes—namely its speed, comparatively low cost, and its effectiveness. It is also wrong to confuse the annulment proceeding with an appeals process which is not possible in respect of awards issued by ICSID's tribunals.¹⁴¹

Such jaw-boning, an oft-used administrative technique in other contexts, would appear to be very risky in these circumstances. One wonders whether it is wise for the ICSID Secretary-General, who appoints the members of *ad hoc* Committees, to be issuing such statements when three committees are in operation, and one is the second successive Committee in the *Kloeckner* case.

3. *Consistent Caselaw Through Consistent Committees.* If the same jurists are appointed to each successive *ad hoc* Committee, there is a greater likelihood of policy consistency in their successive decisions. It

141. ICSID, Administrative Council, 1988 Annual Meeting, Berlin, Federal Republic of Germany, December, 1988, at 3 (copy available from author).

would appear that the Secretary-General of ICSID has, in fact, tried to secure more consistency in the decisions of *ad hoc* Committees by creating a type of "super" *ad hoc* Committee, which will be composed, insofar as possible, of the same members of each Article 52 action in every case. This appears to be a sensible move.

4. *Party Stipulation.* In the future, parties anxious to avoid the Article 52 gauntlet might try to stipulate in their submission agreement that only fraud or corruption could be raised in an Article 52 proceeding following their arbitration. This stipulation would be parallel to certain national developments limiting the review function by national courts of certain types of private international arbitral awards. In some national courts, such as those in the United Kingdom,¹⁴² a broad waiver for everything but arbitral misconduct is possible in international arbitration. In Switzerland all recourse may be waived for international arbitrations.¹⁴³ In Belgium, waiver or not, local courts may not play any post-award role in international arbitral cases whose venue was Belgium.¹⁴⁴

Arguably, parties would be competent under the terms of the ICSID Convention to waive Article 52 procedures. Article 44 of the Convention states that "[a]ny arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration." The section referred to is chapter IV, section 1, while Article 52 is in section 5. It is thus arguable that the text of the Convention does not prevent the parties from opting out of the procedures of Section 5. But the wisdom of encouraging such waivers is doubtful because the issue in control is often the aggregate system of arbitration and not simply the convenience of the parties.

5. *Advisory Opinion by the International Court.* The Centre itself might seek an advisory opinion from the International Court, as it is entitled to do under the Convention, either as to the competence of the parties to create a *lex specialis* by means of a waiver, or to receive an authoritative interpretation of Article 52. Given the Court's jurisprudence in the *Award of the King of Spain* case,¹⁴⁵ considered earlier, an advisory opinion might well narrow the ambit of ICSID review.

142. The Arbitration Act 1979, 18 I.L.M. 1249 (1979).

143. For the text, see Poncet & Gaillard, *Switzerland: Statute on International Arbitration—Introductory Note and Translation*, 27 ILM 37 (1988); see also Blessing, *The New International Arbitration Law in Switzerland*, 5 J. INT'L ARB. (June 1988), at 9.

144. Law of March 27, 1985, enacting *Code Judiciaire*, art. 1717.

145. 1960 I.C.J. 192 (Nov. 18, 1960); see also *supra* notes 122-23 and accompanying text.

6. *Amendment.* A more direct, although not necessarily more economical, method of rectification may be found in amendment. Articles 65 and 66 of the ICSID Convention provide a relatively economical procedure for amendments. Any member state may propose an amendment to the Administrative Council, and the proposal must be considered at the next meeting. If a majority of two-thirds of the membership of the Council agrees to accept the amendment, it is circulated to the contracting states and comes into effect thirty days after all of the contracting states have ratified their amendment. It appears that prior to universal acceptance, the amendment would be effective between contracting states that accepted it, but not between an accepting state and a state that had not yet accepted it. Pending its universal acceptance, a new state adhering to the Convention would have to indicate its acceptance of the amendment if it too were to be bound.

Reconvening a special international conference to deal with these problems would be cumbersome and expensive. But since the Administrative Council procedure does not require the convening of another conference, a legislative restriction of Article 52 is possible. If it is undertaken, I would propose that Article 52 be amended such that only the five grounds of nullification listed in its first sub-paragraph henceforth would be actionable. Every other feature of the Convention would be excluded. This could be accomplished simply by inserting the word "only" into Article 52(1). In addition, I would recommend that Article 52(3) be amended to instruct the *ad hoc* Committee to nullify only in case of a material violation and not in case of a technical discrepancy. Although this amendment would require the *ad hoc* Committee to make certain conclusions of its own about the correct legal answer—a function it is likely to be performing in any case by indirection—it also would bar nullifications for purely technical reasons and for differences in ratiocinative and citative style. By requiring a technique of interpretation of awards of *ad hoc* decisions in terms of both explicit and implied nullification and explicit and implied confirmation, the ambit of review by subsequent *ad hoc* Committees would be narrowed at each stage.

In addition, I would suggest that Article 52 be clarified to instruct subsequent tribunals convened after an *ad hoc* Committee has nullified an award in part not to reconsider any finding of law or fact that, explicitly or implicitly, has not been nullified. With the exception of nullification on grounds of total absence of jurisdiction or because of fraud or corruption of a member of the tribunal, even a total nullification decision is likely to indicate that there are findings of law or fact by the original tribunal that have not been nullified, whether because the moving party did not challenge them—they did not come within one of the

grounds of Article 52—or because the *ad hoc* Committee chose not to nullify. Principles of economy and fairness to the parties would suggest that subsequent tribunals dealing with the same dispute should not reconsider such matters.

7. *Party Consultation.* In the shorter term pending structural change, there are likely to be many more Article 52 procedures than were contemplated by the designers of ICSID. For these, the Secretary General might establish an informal procedure of consulting with the parties about the identities of two of the members of the *ad hoc* Committee as well as the acceptability of certain chairmen. While such consultations could not be binding on the Secretary General, they might alleviate some concern that ICSID had ceased to be a system of party-appointed arbitration.

V. CONCLUSION

There is virtual universal recognition of an increasingly interactive and interdependent world economy without a formal set of institutions for performing indispensable decision functions. Hence the urgent sense of need for reliable methods for resolving the disputes that appear inevitable in relationships which are both competitive and cooperative, and whose incidence will increase as a function of economic activity. There is a common feeling that for these international economic disputes, national decision institutions should be limited to a supporting role. Transnational tribunals should have primary competence. Arbitration, as a system of international dispute resolution, is accepted as an indispensable part of the evolving world order.

Arbitration, like all systems involving delegated and limited powers, cannot operate without systems of control. The healthy skepticism of lawyers, born of our cumulative experience, leads us as a routine matter to establish effective control institutions in every legal entity we create domestically and, when necessary, to mend their fences carefully. Internationally, this concern is even more urgent. Lawyers and professors, eloquent spokesmen for a world economy and world public order, must not lose sight of the necessary institutional underpinning of all public order: systems of control.