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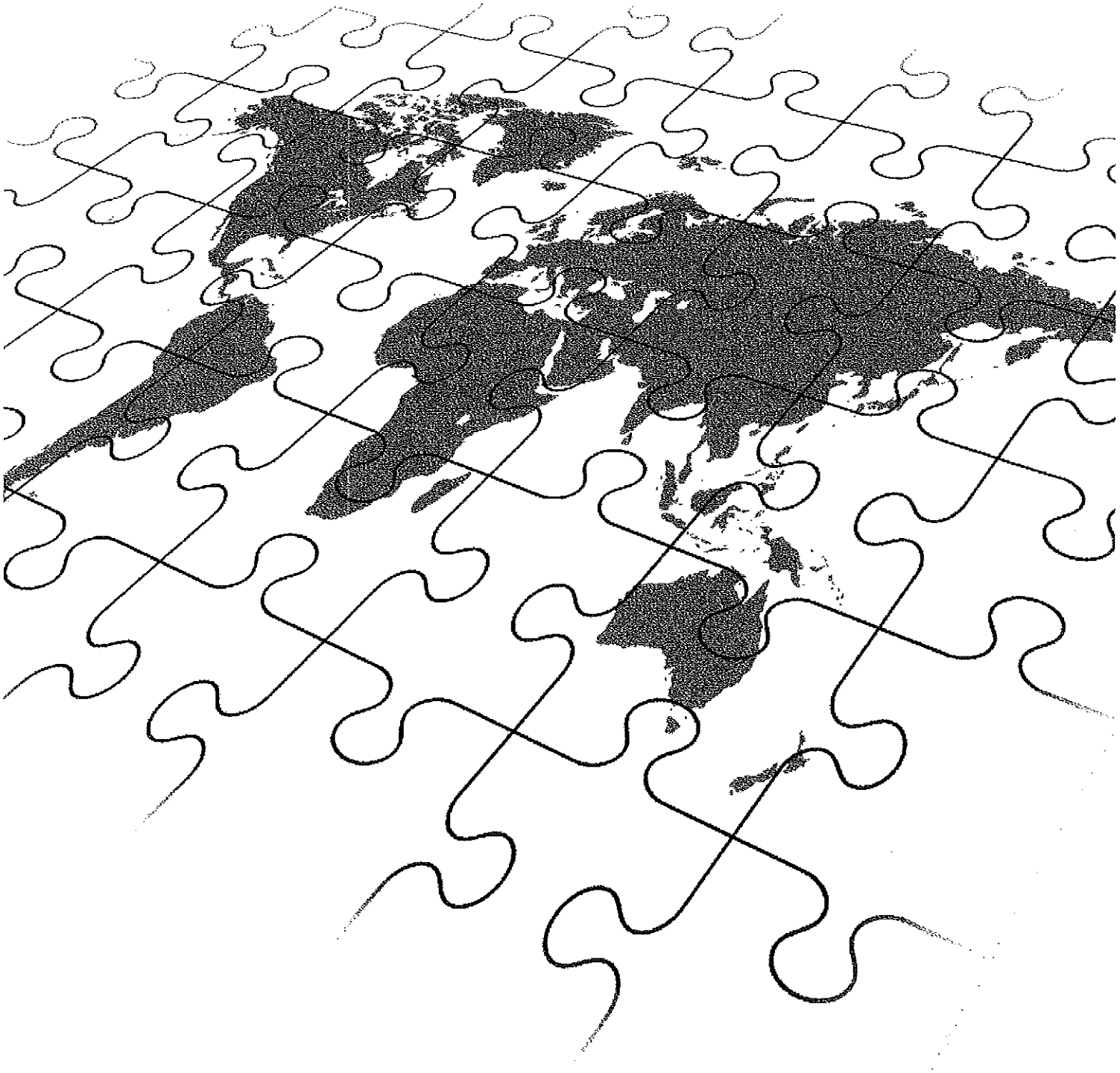

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From the Co-Chairs 5

Editor's note 6

Committee Officers 8

IBA Annual Conference – Dubai, 30 October – 4 November 2011: Our Committee's sessions 9

Conference reports – IBA Arbitration Day

Managing the arbitration proceedings 12

Transnational regulation of ethics in international arbitration: is there a need and how might it be met? A debate 13

Ex officio powers and jura novit curia 15

An interview with three leading arbitrators 18

Investment Arbitration

Case summary: *Joseph Charles Lemire v Ukraine* 20
Markian Malskyy and Volodymyr Yaremko

Current developments in ICSID annulment proceedings: annulment of the award under Articles 52 (1)(b), (d), (e) of the ICSID Convention 22
Hector Anaya and Alfred Escher

Country developments

Africa

Some procedural challenges in running an ICC arbitration in Africa 27
John Miles

Ugandan arbitration and statutory support for the arbitration process 29
Jimmy Muyanja

Ugandan High Court enforces AAA clause 31
Jimmy Muyanja

Is Sudan's Arbitration Act receptive to international commercial arbitration? 34
Ahmed Bannaga

Asia: East & Pacific

The rise of arbitration in financial transactions: key issues for users and practitioners 36
Sylvia Ko and Andrew Pullen

The risks of Arbitration-Mediation: Hong Kong Courts decline to enforce PRC arbitral award 40
Su Yin Anand

How bad does an arbitration clause need to get before a Singapore court refuses to enforce it? 43
Lawrence Teh

One step forward, one step back: Part I 46
I-Ching Tseng and Khory McCormick

The Tokyo District Court's recent ADR decisions that reinforce its pro-arbitration stance 49
Yukukazu Hanamizu

Asia: South & Central

Arbitration in India: the challenges of the 21st century 51
Christopher Gardner QC

The position of Indian Courts with regard to arbitration 54
H Jayesh and Amruta Kelkar

Challenges to named arbitrators in government contracts in India 57
Vikram Nankani and Alok Jain

Europe

The new French Arbitration Act: an ambitious liberalism 60
Vincent Béglé

Dallah v Government of Pakistan 65
Richard Bamforth and Geraldine Roch

Challenge of international arbitration awards in Switzerland for lack of independence and/or impartiality of an arbitrator 68
Luca Beffa

Enforcement of declarations and conflicting decisions: *West Tankers* still afloat 72
Andrew Tweeddale and Keren Tweeddale

Set-off claims may be raised again in proceedings for recognition and enforcement of foreign arbitral awards 75
Markus Burianski and Jan Skibelski

Russian Supreme Arbitrazh Court suggests that mistaken choice of law may result in annulment of award on public policy ground 78
Andrey Panov

The Swedish *Yukos* saga 80
Dan Engström and Cornel Marian

Arbitration and the right of inquiry under Dutch law in the context of international joint ventures 83
Guus Kemperink and Sander Maarschalkerweerd

Amendment of the Spanish Arbitration Act 86
Jorge Angell

Culture clash: e-disclosure v European data protection law in international arbitration 88
Mark C Hilgard, Jan Kraayvanger and Armineh Gharibian

The challenge to expert accounting/financial witnesses 92
Antoinette Pincott

Objection of lack of valid arbitration agreement permissible in enforcement proceedings in Germany even if no setting-aside proceedings are initiated in the country of origin 95
Stephan Wilske and Claudia Krapfl

Continued overleaf

Europe (continued)

No judicial review of 'award' by arbitral tribunal finding that it lacks jurisdiction 97
Justyna Szpara

Time and cost in arbitration: a Finnish perspective 99
Ilona Aro, Marko Hentunen, and Karen Ramm-Schmidt

Romania: is arbitration still an option for public contracts related disputes? 102
Luminita Popa and Alina Popescu

Failure to challenge a foreign award abroad does not preclude a respondent from invoking the invalidity of an arbitration agreement in enforcement proceedings in Germany 105
Hans-Patrick Schroeder

The pros and cons of arbitration in Finland: a practitioner's point of view 108
Tero Kovanen

Latin America

Arbitrating disputes under FIDIC forms of contract governed by Brazilian law 111
Pedro Soares Maciel and Carlo de Lima Verona

The Brazilian Superior Court of Justice has now confirmed that the seat of arbitration determines the nationality of the arbitration award 114
Rafael Villar Gagliardi and Guilherme Fontes Bechara

Colombia: an arbitration friendly forum 116
Laura Sinisterra, Catalina Echeverri and Sebastián Mantilla

The following articles (p121 onwards) are available online at tinyurl.comlibaarbnewssept2011

Middle East

Israeli Supreme Court signals a new standard for respecting arbitration agreements 121
Joseph Benkel, Ofer Larlsch and Maya Kaplan

Developments in enforcement of awards 123
Alec Emmerson, Sapna Jhangiani and Keith Hutchison

The arbitrability of disputes arising out of commercial agency agreements governed by Lebanese law: Decree No 34 of 1967 127
Jihad Rizkallah, Samia El Meouchi and Hala Okeili

Egypt post-revolution: to invest or to arbitrate? 130
Mohamed Madkour

Book review: Habib Al Mulla, Gordon Blanke & Karim Nassif, *Comparison of Gulf International Arbitration Rules*, Juris November 2010 133
Samaa A Haridi

North America

Has the Supreme Court of Canada changed its attitude towards arbitration? 134
Martin Valasek and Michael Kotrly

US Court of Appeals for the Second Circuit declines to stay Chevron's arbitration against Ecuador 137
Jeffrey Dine and Bruce Paulsen

AT&T Mobility LLC v Concepcion: US Supreme Court upholds the validity of class action arbitration waivers 140
B Ted Howes and Jason Casero

New York courts make it easier to seize assets to satisfy an award 143
Alden Atkins and Adrianne Goins

Arbitration Institutions

Sweeping changes at the Korean Commercial Arbitration Board 146
Tom Moxham

A new era for International Chamber of Commerce arbitration 148
José Ricardo Feris, Cheng-Yee Khong and Victoria Orlowski

News from the LCIA 151
Rémy Gerbay

The International Institute for Conflict Prevention & Resolution 153
Olivier P André

The Stockholm Chamber of Commerce in brief 156
Johan Lundstedt

Still a need for change: next steps in the promotion of settlement in international arbitration 157
Karl Mackie and Kate Jackson

The practice of the Danish Institute of Arbitration on impartiality and independence of arbitrators 158
Steffen Pihlblad

Salient features of the new CRCICA Arbitration Rules 162
Mohamed Abdel Raouf

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From the Co-Chairs

Another Newsletter so full of rich content that it is bursting at the publishing seams testifies to the fantastic job our Newsletter Editor (Julie Bédard) has done and reflects the extraordinary activity level of the Arbitration Committee.

In the few short months since publication of our last Newsletter, the Arbitration Committee has either alone or jointly with other organisations sponsored three highly successful conferences. With the warm and enthusiastic support of the host committee and local bar organisations, more than 350 people attended the 2011 Arbitration Day in Seoul, South Korea. The Arbitration Day is your Committee's signature annual event outside the Annual Conference. Over time it has attracted satellite programmes from other institutions that have transformed it into one of the year's finest and highest quality multi-day opportunities to meet with colleagues in the arbitration community to explore ideas, exchange experiences and keep up with the latest developments. We should also mention that during the conference in Seoul your Committee received the first annual Global Arbitration Review Award for Sustained Contribution to the Arbitration Community.

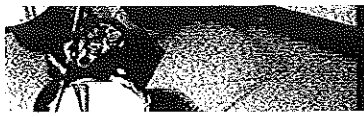
In addition to the Arbitration Day, the Committee jointly organised two programmes in New York. In conjunction with the London Court of International Arbitration and the Corporate Counsel in International Arbitration Group, we sponsored a Corporate Counsel Symposium. The event, open only to in-house counsel, featured a free-ranging discussion about current arbitration practice and how it might be improved to better suit their needs and to respond to concerns about the cost and time associated with commercial arbitration. The Committee looks forward to organising similar sessions in other locations to continue this healthy dialogue with the corporate users of arbitration. We also teamed up with the American Arbitration Association and its International Centre for Dispute Resolution to host a full day conference entitled 'Four Roundtables in Times Square – Putting the Spotlight on International Arbitration on Broadway'. A sell-out crowd filled the conference room and ensured a lively and informative event.

We look forward to seeing many of you at the IBA Annual Conference, which will be held from 30 October to 4 November 2011 in Dubai, UAE. Your Arbitration Committee is presenting (either by itself or with other Committees) a diverse menu of nine sessions. You can find these listed on pages 10-11, and you will see what an outstanding selection of topics have been planned. Please also join us at the Arbitration Committee dinner, which will take place on Wednesday 2 November.

In addition to these sessions, and the many social events offered during the annual conference week, your Arbitration Committee has arranged two special activities. First, on the morning of Wednesday 2 November, the Committee will have an open 'town hall' meeting at which Committee officers provide updates on Committee activities – including an introduction to the highly praised IBA Guidelines for Drafting International Arbitration Clauses that were released this year – and will address whatever thoughts, suggestions, comments or questions you may have about your Committee. Secondly, we will initiate an effort to reach out to local judges to exchange views about international arbitration. Depending on the success of this pilot programme, we hope to make such outreach a more regular aspect of your Committee's efforts to support international arbitration and increase acceptance of it around the world.

We are also planning next year's Arbitration Day. The Committee is delighted that this will take place in Stockholm, Sweden on 9 March 2012. Stockholm is a magnificent city with attractive sites and a long and distinguished tradition for international arbitration. Our host committee has also promised to arrange unseasonably warm weather for the Arbitration Day.

Presenting top quality conferences is, of course, only a part of what the Arbitration Committee does. We also support various projects aimed at improving international arbitration. These projects have in the recent past produced the revised IBA Rules on the Taking of Evidence in International Arbitration and the Guidelines for Drafting International Arbitration Clauses. Our Subcommittees on Recognition and Enforcement of Arbitral Awards and



rest are still pending. Previously Ukraine was quite successful in ICSID arbitration: two cases have been won by Ukraine (*Generation Ukraine Inc v Ukraine* and *Tokios Tokeles v Ukraine*) and two were concluded by amicable settlement (the first *Lemire* case and *Western NIS Enterprise Fund v Ukraine*).

Notes

1 *Yuridicheskaya Parktika*, No 15 (694), 12 April 2011, p 1 and p 25.

2 See for example, *State Property Fund of Ukraine v TMR Energy Limited*, United States Court of Appeals, District of Columbia Circuit, 17 June 2005, YBCA XXX (2005), pp 1179-1191; *TMR Energy Limited v State Property Fund of Ukraine*, Federal Court of Canada, 23 December 2003, YBCA XXIX (2004), pp 607-642.

3 See, Markian Malskyy, Volodymyr Yaremko, The largest Ukrainian arbitration case to date: *Naftogaz v RosUkrEnergo*; Arbitration News: Newsletter of IBA Legal Practice Division, Vol 16, No 1, March 2011, pp 83-85.

4 The first defeat of Ukraine in ICSID arbitration was recently in *Alpha Projektholding GmbH* case under which Ukraine has been ordered to pay $5,250,782 to an Austrian company (Award of 20 October 2010, Case No ARB/07/16).

Current developments in ICSID annulment proceedings: annulment of the award under Articles 52(1)(b), (d), (e) of the ICSID Convention

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The annulment of the award according to the ICSID Convention

The ICSID (International Centre for Settlement of Investment Disputes) Convention contains an annulment procedure in Article 52, Section 5 '*Interpretation, Revision and Annulment of the Award*', which sets out five different grounds upon which an ICSID award may be annulled by an ad hoc committee (Article 52(1)).[1] These grounds are limited and are applicable in specific cases.

The ad hoc committee may confirm the award or may partially or wholly annul it, giving the opportunity to submit the dispute to a new tribunal constituted in accordance with Section 2 of Chapter IV of the ICSID.

This article will concentrate on the analysis by two recent ad hoc committees, in *Sociedad Anónima Eduardo Vieira v Republic of Chile* (ICSID Case No ARB/04/7), decision dated 10 December 2010, and *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID Case No ARB/03/25), decision dated 23 December 2010, of the annulment grounds stated in Article 52(1) (b), (d) and (e) of the ICSID Convention.

Proceedings

Eduardo Vieira v Chile

The dispute in *Eduardo Vieira v Chile* concerns the fishing rights claimed by Eduardo Vieira, a Spanish company, within Chilean inner waters. Eduardo Vieira alleged that it had owned these rights since 1990 due to its 49 per cent participation in *'Construcciones y Carpintería Naval CONCAR SA'* (CONCAR). Since August 1990, CONCAR had been requesting that its fishing rights be modified and issued on different terms, which was eventually done in February 2001. A local trade organisation successfully petitioned for the revocation of those rights shortly afterwards.

Eduardo Vieira submitted a request for arbitration on 5 November 2003, relying upon the bilateral investment treaty between the Republic of Chile and the Kingdom of Spain of 1991 and effective since 29 March 1994 (the 'Spanish-Chilean BIT')[2] and Article 41(5) of the Arbitration Rules. The ICSID Tribunal rendered an Award on 27 August 2007, agreeing with the Republic of Chile that Article 2(2) and (3) of the Spanish-Chilean

BIT precluded its jurisdiction on the basis that the dispute arose before the entry into force of the Spanish-Chilean BIT.

On 15 December 2007, the claimant filed a request for annulment. The ICSID Secretary-General registered the request of annulment against the Award rendered on 27 August 2007, and followed the procedure described in Article 50(2) of the Arbitration Rules.

The claimant requested the annulment of the award based on the grounds stated in Article 52(1) of the ICSID Convention, arguing (by reference to the three relevant sub-articles of Article 52(1)), that:

(b) the controversy among the parties arose after – not before – the entry into force of the Spanish-Chilean BIT, according to Article 2(3), and that the Tribunal exceeded its powers in applying the *Lucchetti* test. The *Lucchetti* test 'consist[s] in an exam applied to distinguish whether two different facts constitute or not the same dispute'.[3] The claimant argued that the *Lucchetti* test is not part of customary international law or ICSID precedents coming from the interpretation of binding law for both parties. In addition, the claimant argued that the Tribunal only studied the first motive of the arbitration and that the Tribunal used in its reasoning the *quantum* requested from Chile as damages since 1990 even though that was only relevant to the merits of the case, not the jurisdictional issue;

(d) the tribunal departed from a fundamental rule of procedure that affected the claimant's rights of legitimate defence in the way it applied Chilean law and prejudged issues related to the merits of the matter; and

(e) the tribunal did not sufficiently address in the Award two of the issues advanced in the claim.

Fraport AG v the Philippines

In the second case, Fraport AG brought a claim regarding the concession contract for the construction and operation of the Ninoy Aquino International Airport Passenger Terminal III ('Terminal 3'). The concession agreement was concluded on 12 July 1997 between Philippine International Air Terminals Co (PIATCO) and the Philippine Department of Transportation and Communication (DOTC). From 6 July 1999 until 2001, Fraport acquired, directly and indirectly, the majority (61.44 per cent) of PIATCO's capital. The Supreme Court of the Philippines declared the concession agreements of Terminal 3 null and void *ab initio* because of violations of Philippine law[4] and public policy (in a decision of 5 May 2003).

The request for arbitration was submitted on 17 September 2003, pursuant to the BIT concluded between the Federal Republic of Germany and the Republic of the Philippines dated 18 April 1997 and effective since 2 February 2000 (the 'German-Philippine BIT').

The ICSID Tribunal rendered an Award on 16 August 2007 deciding to adopt the exception of jurisdiction *ratione materiae* filed by the Philippines and therefore declaring that it had no jurisdiction under its interpretation of German-Philippine BIT Article 1(1) and 2(1).[5] The Tribunal concluded that Fraport's interest did not qualify as an investment in terms of the mentioned agreement.

On 6 December 2007, the claimant filed a request for annulment. The ICSID Secretary-General registered the request for annulment against the Award rendered on 16 August 2007 and followed the procedure described in Article 50(2) of the Arbitration Rules.

The claimant requested the annulment of the award based on the grounds stated in Article 52(1) of the ICSID Convention. Essentially, and again by reference to the relevant sub-articles of Article 52(1), the claimant argued:

(b) that the Tribunal manifestly exceeded its powers in interpreting the German-Philippine BIT, because: (i) it considered as a prerequisite that the investments within the scope of the Treaty should be 'accepted' in accordance with Philippine Law and (ii) it then concluded that Fraport's investments were not in accordance with the Philippine Anti-Dummy Law (ADL);[6]

(d) the Award represented a departure from a fundamental rule of procedure due to: (i) the violation of the principles of *nullum crimen sine lege* and *in dubio pro reo* in relation with the ADL; and (ii) a denegation of the right to be heard in relation with to the admission of the Prosecutor Resolution regarding the compliance of ADL; and

(e) that there was a lack of reasoning in the aspects of the Award determining the application of ADL and Constitution.

Standards for the annulment of the Award

Tribunal manifestly exceeded its powers (Article 52(1)(b))

The ad hoc committee[7] in *Eduardo Vieira v Chile* stated that the ground of annulment within Article 52(1)(b) of the ICSID Convention can be present either when a Tribunal accepts or refuses to assume jurisdiction. The committee adopted the standard applied in *Wena Hotels v Egypt* where it was stated that '[t]he excess of powers must be self-evident rather than the product of elaborate interpretations one way or the other'.[8] In this regard, the committee stated that the method of interpretation used by the Tribunal was in accordance with Article 38 of the Statute of the International Court of Justice. Therefore, the application of the *Lucchetti* test extracted from an ICSID precedent did not amount to an error falling within the scope of Article 52(1)(b). The ad hoc committee concluded that the Tribunal is responsible for deciding the most convenient way to evaluate the facts in order to decide its jurisdiction. As a result, the ad hoc committee decided that the annulment ground was not established.

The ad hoc committee[9] in *Fraport AG v the Philippines*, following the decision in *Vivendi I*,[10] also confirmed that the failure to exercise jurisdiction could constitute an excess of powers. After studying several precedents,[11] the Committee concluded that 'manifest excess of power... should be demonstrable and substantial and not doubtful'.[12] The Committee observed that the Tribunal had focused on whether Fraport's investments were in violation of the ADL, rather than first considering the threshold question of 'whether the ADL itself, and Fraport's compliance with that statute, have a role to play in determining the Tribunal's jurisdiction.'[13] The committee said that the Tribunal 'should only consider the factual records to the extent necessary to make the determination regarding its own jurisdiction'.[14] However, the committee found that the interpretation of the Tribunal regarding the Treaty provisions cannot be considered as 'manifestly exceeded of its powers'.

Serious departure from a fundamental rule of procedure (Article 52(1)(d))

The ad hoc committee in *Eduardo Vieira v Chile* stated that the ground of annulment within Article 52(1)(d) of the ICSID Convention is an independent ground related exclusively to the minimum standards of due process. Therefore 'fundamental' is identified with subjects of impartiality and equality as well as the right to be heard and the rules protecting the deliberations.[15] In addition, the committee stated that claimant has the burden of proving the alleged violations with specific examples. However, the committee found that the claimant failed to prove facts relating to the alleged fundamental violations.

The ad hoc committee in *Fraport AG v the Philippines* considered that the ground of annulment within Article 52(1)(d) of the ICSID Convention 'is intended to denote procedural rules which may properly be said to constitute "general principles of law", insofar as such rules concern international arbitral procedure',[16] like the right to be heard and the adequate opportunity for rebuttal. The committee stated that the party's right to be heard was breached by the Tribunal by its direction of 14 February 2007 because it did not give them the opportunity to present their case in respect of the Prosecutor's Resolution that was used also to interpret the provisions of the German-Philippine BIT.[17] The committee therefore annulled the award.

Failure to state the reasons on which the award is based (Article 52(1)(e))

Addressing the ground for annulment in Article 52(1)(e), the ad hoc committee in *Eduardo Vieira v Chile* made a distinction between 'reasoning reasonably understandable, consistent and illustrative, reasoning with logical thinking and discernible and on the other hand, lack of reasoning or unintelligible reasoning'.[18] In this line of thinking, following the annulment decision of *CMS v Argentina*, the committee stated that an award should be annulled only when it is not possible to understand how the Tribunal arrived at its conclusion.[19] Here, the committee concluded that the Tribunal followed a logical line of interpretation and explanation in interpreting Article 2(3) of the Spanish-Chilean BIT, and that the award should not be annulled under Article 52(1)(e).[20]

The ad hoc committee in *Fraport AG v the Philippines* similarly concluded that there was no lack of reasoning in the award it was considering. In this regard, the committee, following Article 48(3) of the ICSID

Convention,[21] *MINE*,[22] and *Klöckner I*,[23] was of the opinion that the applicable standard consisted in 'the obligation of the Tribunal to give a reasoned award as guarantee that the Tribunal has not decided in an arbitrary manner'[24] and the obligation of the committee to analyse as it is and not for what the applicant would have wished the award to be.

Conclusions

Both ad hoc committees agreed that a decision not to assume jurisdiction is a decision which may be reviewed under Article 52(1)(b) of the ICSID Convention. The ad hoc committees considered the standard of 'manifestly' to be 'self-evident', 'demonstrable and substantial and not doubtful'. The error must be clear and unmistakable before annulment becomes available.

Considering the ground of annulment within Article 52(1)(d) of the ICSID Convention, the ad hoc committees also agreed that 'fundamental' is identified with subjects of impartiality and equality concerning procedural rules identified within international arbitral procedure, for instance, the right to be heard and the rules protecting the deliberations. In addition, there is a presumption of regularity; the applicant has the burden of proving the circumstances said to justify annulment.

Finally, regarding the ground of annulment in Article 52(1)(e) of the ICSID Convention, both ad hoc committees established that an award need not contain detailed and extensive reasoning on each and every point. It is sufficient if, on review, the committee is able to follow the tribunal's logical line of interpretation and explanation, such that it cannot be said that the result is unreasoned and arbitrary.

In summary, the decisions of the ad hoc Committees in *Eduardo Vieira v Chile* and *Fraport AG v the Philippines* are in line with the objectives of and prior jurisprudence on Article 52(1)(b), (d) and (e) of the ICSID Convention. Viewed in context, they do justify the commonly-expressed fear that excessive interpretations of the annulment grounds undermine the ICSID system.

Notes

1 Article 52 of the ICSID Convention:

'(1) 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.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an ad hoc Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) 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.

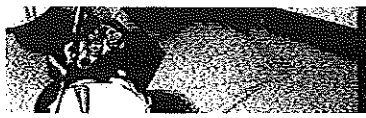
(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) 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.'

2 *Sociedad Anónima Eduardo Vieira v Republic of Chile* (ICSID Case No ARB/04/7) Decision on Annulment, 10 December 2010, at para 37, p 10: '2. This Treaty shall apply to investments made after its entry into force by investors of one Contracting Party in the territory of the other. However, they also benefit from investments made prior to their use and, under the laws of the Contracting Party concerned, had the status of foreign investment.
[...] 3. This Treaty shall not apply, however, to disputes or claims arising or settled prior to its entry into force'.

3 *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines* (ICSID Case No ARB/03/25), Decision on Annulment, 23 December 2010, para 54, pp14-15

4 Ibid, para 27, p12; Philippine Constitution and Commonwealth Act No 108, entitled 'An Act to Punish Acts of Evasion of the Laws on the Nationalization of Certain Rights, Franchises or Privileges', (the so-called Anti-Dummy Law (ADL).



5 *Fraport AG v the Philippines* (ICSID Case No ARB/03/25), decision dated 16 August 2007 para 335, p106. Article 1(1) of the BIT, in its relevant part, reads as follows: '[t]he term "investment" shall mean any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State.' Article 2(1) reads as follows: 'Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1, paragraph 1[...]'.
6 See above note 3, para 46, p 21.
7 Mr Christer Söderlund (President), Prof Piero Bernardini and Prof Eduardo Silva Romero.
8 *Eduardo Vieira v Chile* (ICSID Case No ARB/04/7) Decision on Annulment, 10 December 2010, at para 254, p 52.
9 Judge Peter Tomka (President), Judge Dominique Hascher and Prof Campbell McLachlan QC.
10 See above note 3, para 36, p 17.
11 *Wena Hotels Ltd v Egypt*, Decision on Annulment, 5 February 2002, 6 ICSID Reports, *CDC v Seychelles*, Decision on Annulment, 29 June 2005, 11 ICSID Reports, *Repsol v Petroecuador*, Decision on Annulment, 8 January 2007 in p 19, p 41 *Surface v UAE*, Decision on Annulment, 5 June 2007 p 20 para 44, all in *Fraport AG v the Philippines* (ICSID Case No ARB/03/25), Decision on Annulment, 23 December 2010, pp 19-21.
12 See above note 3, para 44, p 20.
13 Ibid para 85, p 36.
14 Ibid para 84, p 35.
15 See above note 2 at paras 375, 378, pp 83-84.
16 See above note 3, para 187, p 71.
17 Ibid paras 226-234, pp 84-86.
18 See above note 2, para 355, p 76.
19 Ibid para 355, pp 75-76.
20 Ibid paras 363, 364, 366, pp 78-80.
21 '[T]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based'.
22 *Maritime International Nominees Establishment (MINE) v Guinea*, Decision on Annulment, 22 December 1989, ICSID Reports, in *Fraport AG v the Philippines* para 249, p 91.
23 *Klöckner I v Cameroon*, Decision on Annulment, 3 May 1985, 2 ICSID Reports, in *Fraport AG v the Philippines* para 258, p 97.
24 See above note 3, para 250, p 92.