REASONS AND REASONING IN INVESTMENT TREATY ARBITRATION

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Many investment treaties require arbitrators to provide reasons for their awards. The reasons requirement is intended to fetter arbitrators' discretion within acceptable boundaries. It is also intended to provide arbitral parties with an explanation of why they won, and, especially, why they lost. However, the reasons requirement has not always achieved its purposes in investment treaty arbitrations. Treaties containing the reasons requirement often do not provide explicit guidance on what sorts of reasons are acceptable. Consequently, arbitral awards and annulment decisions have expressed divergent views about what quantity and quality of reasons are required.[3] In any arbitration, this inconsistency risks leaving parties in an arbitration feeling dissatisfied. Systemically, it risks undermining investment treaty arbitration as a preferred method of dispute resolution among host states and investors. The authors propose that the reasons requirement can be clarified, and, correspondingly, that confidence in investment treaty arbitration can be bolstered through two conceptual shifts. First, the reasons requirement should be understood to be a reasoning standard and not just a requirement to provide reasons. To determine whether arbitrators have given acceptable reasons, one needs to determine whether the methods of reasoning that led to the reasons for an award are acceptable. Second, the reasoning standard should not be regarded as immutable. Instead, the standard of scrutiny in an award's reasoning should be low in annulment decisions,

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3. For a discussion on the interpretation of the reasons requirement, see generally THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES (Guillermo Aguilar Alvarez & W. Michael Reisman eds., 2008) [hereinafter THE REASONS REQUIREMENT]; Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008).

and high when deciding whether to follow a prior award as persuasive.

Arbitrators almost never intend to arbitrarily prescribe an outcome in an investment dispute. Instead, they try to reach an outcome that is supported by reasons. These reasons, in turn, are derived from a process of legal reasoning. Most often, legal reasoning involves some combination of intellectual tasks: the interpretation and selection of relevant facts; the identification or derivation of applicable legal rules; the explicit or implicit consideration of equities or other broader policies; and the intermediation of laws, facts, and policies to reach an outcome.

A reasoning standard would distinguish between acceptable and unacceptable methods of reasoning. With a reasoning standard, observers and parties in an arbitration can determine whether an arbitral decision and the reasons provided for it are acceptable by inquiring whether the reasons were derived from a legitimate method of reasoning. This contrasts against a reasons requirement that explicitly requires reasons for awards, but does not inherently provide a basis for differentiating acceptable from unacceptable reasons.

By focusing on reasoning rather than just reasons, arbitrators and observers may also consciously apply different reasoning standards as appropriate when appraising awards for different purposes. When deciding whether to follow a prior arbitral award, arbitrators should adopt a high reasoning standard, entailing, inter alia, a reasonable and explicit balancing of aggregate global interests. A prior arbitral award that slavishly applies purported formal legal rules without regard to global policies could fail this reasoning standard and tribunals may elect not to follow the prior award if its outcome failed to properly balance relevant global interests. Conversely, when deciding whether to annul an award, the annulment committee should adopt a low reasoning standard that does not require the law or facts to be correct, so long as there is a line of reasoning from purported laws and facts to outcomes. An award that achieves a highly imperfect outcome but is nonetheless coherent might survive annulment under this low reasoning standard, in order to provide finality to investors and host states.

These prefatory comments are elaborated in four parts below. Part I identifies the policies behind the reasons requirement. Part II examines whether the reasons requirement

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achieves its policy goals by parsing investment treaties and annulment decisions to study how the reasons requirement has been applied. It concludes, based on the data examined, that the reasons requirement is inherently malleable and does not necessarily achieve its objectives. Part III proposes that the ambiguity in the reasons requirement can be reduced by reconceptualizing it as a reasoning standard that should be adjusted according to the task at hand. As regards an annulment proceeding, an arbitral award would only need to be coherently, though not necessarily correctly, reasoned. This low standard of reasoning would promote finality in arbitral disputes. As regards the application of an arbitral decision to future disputes, the decision would have to meet a higher standard of reasoning in which the law and policies are not merely coherent, but reasonably correct. This higher standard would contribute to the development of international investment laws that better promote shared global values. Part IV concludes by appraising this thesis in light of relevant conflicting policies.

I. Reasons for the Requirement

Investment treaty arbitration is a privately-sponsored system of dispute resolution in which a host state and investor agree that arbitrators shall adjudicate their disagreements and render an award enforceable in national courts. A strong reason for reasons in an arbitral award is that the parties paid for the award and want to know the arbitrators' reasons for their decision. Arbitrators are hired to render reasoned awards, and that is the service that arbitrators should deliver if they choose to accept an appointment to the arbitral tribunal.[4]

Losing parties particularly rely on a tribunal to state its reasons. Investors and host states have constituencies: shareholders and the electorate, respectively. In order for a losing party to explain to its constituencies why it should pay damages, and why it could not have done better at the arbitration, the party needs the tribunal to present its reasons. In order to decide whether to seek annulment, to oppose enforcement of the award, or to oppose the amount to settle the award, the losing

4. *Cf.* Guillermo Aguilar Alvarez & W. Michael Reisman, *How Well Are Awards Reasoned?*, *in* The Reasons Requirement *supra* note 3, at 31 (2008) ("parties . . . are entitled to fully reasoned awards as are their various internal constituents.").

party also needs to appraise the tribunal's reasons. It cannot do so if an award is so sparse as to be Delphic.

The need to provide reasons also helps to focus the minds of arbitrators in their decision-making. Without any requirement for reasons, arbitrators may unwittingly veer beyond their proper scope of discretion by accounting for immaterial and exogenous considerations or ignoring relevant issues. Conversely, the need to state reasons is a constant reminder that any outcome prescribed in an award must be justifiable by reasons. This need to articulate reasons is one way to encourage arbitrators to fully weigh the competing concerns of both parties and explain how it ultimately addressed them.

A reasoned award is thus more likely to be reasonable, which is particularly important in investment treaty arbitration. As compared to a purely private commercial arbitration, an investment treaty arbitration may be even more important because the aggregate consequences of the award do not affect merely the private litigants. Investment disputes often concern key public works, such as rehabilitating decaying urban areas,[5] developing tourist resorts,[6] and bringing natural gas to homes.[7] The resolution of these disputes will therefore affect the lives of thousands or millions of people in host states, and the need for a reasoned and wise award is consequently great.

For these reasons, if investment treaty arbitration is to continue developing as a viable international system of dispute resolution voluntarily subscribed to by host states and foreign investors, then arbitral awards must provide reasons. Not only does this build confidence among the users of investment treaty arbitration, it helps awards and their resulting jurisprudence promote shared global interests.

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5. *See, e.g.*, Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Final Award (Oct. 11, 2002) (deciding dispute arising out of commercial real estate development contract).

6. *See, e.g.*, Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Proceeding on the Merits (Dec. 8, 2000) (deciding dispute relating to seizure by Egyptian officials of hotels).

7. *See, e.g.*, LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (Oct. 3, 2006) (deciding dispute arising out of Argentina's plan to privatize natural gas transport and distribution monopoly).

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II. The Requirement for Reasons

The idea that arbitrators must provide reasons for their decisions is straightforward in theory, but difficult to implement in practice. It is a truism that a losing party that thinks it ought to have won will often feel that the tribunal did not fully explain its thought processes, did not account for relevant facts or laws, or that its reasoning was simply wrong and therefore incomprehensible. How many reasons (and of what quality) do arbitrators need to provide for their decision to be reasonable even if it is, or is believed to be, wrong? Investment treaties and annulment decisions do not appear at present to provide a conclusive answer to this question.

A. *Investment Treaties*

Many investment treaties contain a reasons requirement to act as a control mechanism,[8] but do not clarify how to meet the requirement. Article 48(3) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) provides that an "award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[9] Failure to state reasons provides grounds for annulment under Article 52(1)(e) of the ICSID Convention.[10] Additionally, Article 32(3) of the UN Commission on International Trade Law Arbitration Rules states: "[t]he arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given."[11]

Variations of the reasons requirement are also found in other treaties. Annex D of the Energy Charter Treaty (ECT) provides that "the final report shall deal with every substantial issue raised before the panel and necessary to the resolution of

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8. *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 Duke L.J. 739, 764 (1989).

9. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 48(3), Mar. 18, 1965, 575 U.N.T.S. 159.

10. *Id.* art. 52(1)(e); *see also* Energy Charter Treaty, Annex D, ¶ 4(c), 34 I.L.M. 374; Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C, art. 41(4), Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS]; North American Free Trade Agreement, U.S.-Can.-Mex., art. 2016(4), 2016(5), Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA] (providing for review of awards).

11. United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules of 1976, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

the dispute and shall state the reasons for the panel's conclusions."[12] Article 41.3 of the Agreement on Trade-Related Aspects of Intellectual Property states: "Decisions on the merits of a case shall preferably be in writing and reasoned."[13] Article 2016(2) of the North American Free Trade Agreement requires a panel to present a report on its decision containing findings of fact and a determination as to whether the measure at issue is consistent with the treaty.[14]

These codifications of the reasons requirement do not clarify what it entails.[15] Taken literally, the requirement that arbitrators must provide reasons for their awards is rather trite. International arbitrators almost always provide some reasons for their decisions, even if the reasons are incorrect or incoherent. If merely providing reasons, regardless of their incoherence, is sufficient to satisfy the reasons requirement, the requirement would not exert meaningful controlling authority over arbitrators and their awards. Interpreted in light of its purpose–to confine arbitrators' deliberations and conclusions within acceptable boundaries and provide explanations to the parties in an arbitration–the reasons requirement must require not merely that any reason is provided, but that the reasons are adequate to explain the decision or achieve the right decision, or both.

But herein lies the rub. Investment treaties usually do not specify what quality or quantity of reasons are required. The absence of guiding principles often leaves arbitrators to discern for themselves the precise contours of the reasons requirement.

B. Annulment Decisions

A survey of annulment decisions confirms that jurists and arbitrators have interpreted the reasons requirement differently. The high water mark for reasons was established in the first annulment decision in ICSID's history, *Klöckner v. Cameroon*,[16] which was decided in October 1983. The committee, chaired by Pierre Lalive, recommended a "searching and detailed examina-

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12. Energy Charter Treaty, *supra* note 10, Annex D, ¶ 4(a).
13. TRIPS, *supra* note 10, art. 41(3).
14. NAFTA, *supra* note 10, art. 2016(2).
15. Fauchald, *supra* note 3, at 305 ("These general statements [Articles 48(3) and 52] do not give tribunals much guidance on how to approach interpretive issues.").
16. ICSID Case No. ARB/81/2, Award (Oct. 21, 1983).

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tion of every aspect of the ICSID review process."[17] It also instructed that the reasons requirement could not be satisfied by "purely formal or apparent" reasons.[18] Instead, the tribunal must provide reasons "having some substance,"[19] based on identified sources of law and actual facts.[20] The committee believed an award should be annulled for a failure to state reasons when there is an absence of reasons "'sufficiently relevant', that is, reasonably sustainable and capable of providing a basis for the decision."[21]

In *Klöckner*, a West German multinational company, initiated ICSID arbitration against Cameroon for payments guaranteed under a supply contract to provide a factory for SOCAME, a fertilizer company, which proved unprofitable and unworkable.[22] The Tribunal decided in favor of Cameroon.[23] Klöckner filed an Application for Annulment and contested the Award for, inter alia, the failure to state reasons. The ad hoc committee accepted Klöckner's argument that the Tribunal failed to account for, inter alia, Klöckner's arguments regarding contractual limitations of Klöckner's warranties and liabilities, Cameroon's unconditional acknowledgement of its debt, and applicable French law limiting a supplier's liability for hidden defects and

17. Aguilar Alvarez & Reisman, *supra* note 4, at 5; *but see* CHRISTOPH SCHREUER, THE ICSID CONVENTION: A COMMENTARY 797 (2001) (discussing exhaustiveness of issues regarding questions submitted to tribunal).

> The explicit requirement that the award shall deal with every question submitted to the tribunal was not contained in the earlier drafts to the Convention (History, Vol. I, pp. 211/13). It was first raised in the context of introducing a remedy against an award that had failed to deal with every issue presented to the tribunal (History, Vol. II, p. 664). Mr. *Broches* suggested that the tribunal's duty to rule on every issue submitted to it should be stated expressly. A vote on this question showed unanimous approval but a motion to make a failure to comply with this duty a ground for annulment was defeated (at pp. 848/9, 864, 939)(see also Art. 52, paras. 298, 299).

Id.

18. Klöckner Industrie-Analgen GmbH v. Cameroon, ICSID Case No. ARB/81/2, Decision on Annulment, para. 119 (May 3, 1985).

19. *Id.*

20. *Id.*

21. *Id.* para. 120.

22. Klöckner Industrie-Analgen GmbH v. Cameroon, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983).

23. *Id.*

time barring claims.[24] The ad hoc committee concluded that consequently the Award must be annulled in its entirety.[25]

At the other extreme, a majority of ad hoc committees have expressed a preference for a low reasons threshold. This preference was first articulated by the ICSID annulment decision, *MINE v. Guinea*,[26] decided in January 1988, almost five years after *Klöckner*. The *MINE* committee stated that an award may be sufficiently reasoned if it is coherent. It explained that the reasons requirement "implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that."[27] In other words, it must enable "one to follow how the tribunal proceeded from Point A to Point B, and eventually to its conclusion, even if it made an error of fact or law."[28] Since then, no less than six ad hoc committees, comprising eminent jurists such as James Crawford,[29] Francisco Orrego Vicuna,[30] L. Yves Fortier,[31] Charles Brower,[32] Michael Hwang,[33] and Gilbert Guillaume,[34] have adopted this minimalist approach in the following arbitrations: *Wena Hotels Ltd. v. Arab Republic of Egypt*;[35] Compañiá de Aguas del Acon-

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24. *Klöckner Industrie-Analgen GmbH*, ICSID Case No. ARB/81/2, paras. 145, 151-52, 158, 164 (May 3, 1985).

25. *Id.* para. 179.

26. MINE v. Guinea, Decision on Annulment (Dec. 22, 1989), *in* 4 ICSID REPORTS: REPORTS OF CASES DECIDED UNDER THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES 79, 88 (R. Rayfuse ed., 1994) [hereinafter ICSID REPORTS].

27. *Id.*

28. *Id.*

29. Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002) (member of ad hoc committee); MTD Equity Sdn Bhd and MTD Chile SA v. Chile, ICSID Case No. ARB/01/7, Decision on Annulment (Mar. 21, 2007) (member of ad hoc committee).

30. Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment (Jan. 28, 2002) (member of ad hoc committee).

31. Compañiá de Aguas del Aconquija S.A., ICSID Case No. ARB/97/3, (member of ad hoc committee).

32. CDC Group plc v. Seychelles, ICSID Case No. ARB/02/14, Decision on Annulment (June 29, 2005) (President of ad hoc committee).

33. *Id.* (member of ad hoc committee)

34. *See MTD Equity Sdn Bhd*, ICSID Case No. ARB/01/7, para. 50 (Mar. 21, 2007); *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, para. 54 (Sept. 25, 2007).

35. *See Wena Hotels Ltd.*, ICSID Case No. ARB/98/4, para. 79 (Jan. 28, 2002) (rejecting reconsideration of reasons underlying Tribunal's decision).

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quija S.A. and Vivendi Universal v. Argentine Republic;[36] *CDC Group plc v. Seychelles;*[37] *Mitchell v. the Democratic Republic of Congo;*[38] *MTD Equity Sdn Bhd and MTD Chile SA v. Chile;*[39] and *Industria Nacional de Alimentos, S.A. v. Republic of Peru.*[40]

These annulment proceedings support the notion that finality is promoted when applying a low reasons threshold to decide an Application for Annulment.[41] Most of the six annulment

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> The ground for annulment of Article 52(1)(e) does not allow any review of the challenged Award which would lead the ad hoc Committee to reconsider whether the reasons underlying the Tribunal's decision were appropriate or not, convincing or not. As stated by the ad hoc Committee in *MINE*, this ground for annulment refers to a 'minimum requirement' only. This requirement is based on the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision. If such sequence of reasons has been given by the Tribunal, there is no room left for a request for annulment.

Id.

36. Compañiá de Aguas del Aconquija S.A., ICSID Case No. ARB/97/3, para. 64.

> Article 52(1)(e) concerns a failure to state *any* reasons with respect to all or part of an award, not the failure to state correct or convincing reasons. It bears reiterating that an ad hoc committee is not a court of appeal. Provided that the reasons given by a tribunal can be followed and relate to the issues that were before the tribunal, their correctness is beside the point in terms of Article 52(1)(e). Moreover, reasons may be stated succinctly or at length, and different legal traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning.

Id.

37. *CDC Group plc*, ICSID Case No. ARB/02/14, para. 70. "Article 52(1)(e) requires that the Tribunal have stated reasons, and that such reasons be coherent, *i.e.*, neither 'contradictory' nor 'frivolous,' but does not provide us with the opportunity to opine on whether the Tribunal's analysis was correct or its reasoning persuasive." *Id.*

38. Mitchell v. Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, para. 21 (Nov. 1, 2006). "[T]he ad hoc Committee is of the opinion that a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected." *Id.*

39. *MTD Equity Sdn Bhd*, ICSID Case No. ARB/01/7, para. 92 (Mar. 21, 2007). "In the end the question is whether an informed reader of the Award would understand the reasons given by the Tribunal and would discern no material contradiction in them." *Id.*

40. *See* Industria Nacional de Alimentos, S.A. v. Peru, ICSID Case No. ARB/03/4, Decision on Annulment, paras. 127–28 (Sept. 5, 2007). *But see* Industria Nacional de Alimentos, S.A. v. Peru, ICSID Case No. ARB/03/4, Decision on Annulment, para. 14 (Sept. 5, 2007) (Sir Franklin Berman, dissenting) (concluding Award failed to meet accepted requirement to state reasons).

41. *See infra,* Part III(B).

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proceedings concluded that there was not a failure to state reasons under Article 52(1)(e).[42] For example, in *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, MTD had entered into a contract with Chile regarding a mixed-use planned community on land that was currently zoned for agriculture.[43] MTD initiated ICSID arbitration against Chile after Chile denied MTD required zoning changes on the alleged basis that MTD's proposed plan was inconsistent with the government's urban development policy.[44] The Tribunal held that Chile breached the fair and equitable treatment standard under Article 3(1) of the Chile-Denmark bilateral investment treaty (BIT).[45] Chile then filed an annulment application on the basis that, inter alia, the Award failed to state the reasons upon which it was based.[46] Chile argued that the Tribunal failed to explain how it was in fact possible for MTD to have any expectations regarding its investment based on the approval of the project, and failed to specify the "urban policy" upon which the Tribunal relied.[47] The MTD ad hoc committee rejected this application for annulment. Even though gaps existed among the facts, the Tribunal's reasoning from these facts was sufficiently clear such that an informed reader would understand the reasons given by the Tribunal in reaching its conclusion.[48]

Notably, it is possible for an award to be annulled under the low threshold. In *Mitchell v. the Democratic Republic of Congo*, the Military Court of the Democratic Republic of Congo ordered the premises housing Mr. Mitchell's firm to be put under seals, seized compromising documents, and incarcerated two of

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42. *See* Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, para. 111 (Jan. 28, 2002) (concluding objections under Article 51(1)(e) unfounded); Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, para. 116 (July 3, 2002) (refusing to consider annulment based on failure to state reasons); *MTD Equity Sdn Bhd*, ICSID Case No. ARB/01/7, para. 92 (Mar. 21, 2007) (concluding Tribunal's reasons "sufficiently clear"); *Industria Nacional de Alimentos, S.A.*, ICSID Case No. ARB/03/4, para. 130 (concluding Awards not annullable for failure to state reasons).

43. *MTD Equity Sdn Bhd*, ICSID Case No. ARB/01/7, para. 11 (Mar. 21, 2007).

44. *Id.* para. 15.

45. MTD Equity Sdn Bhd v. Chile, ICSID Case No. ARB/01/7, Award, para. 166 (May 25, 2004).

46. *MTD Equity Sdn Bhd*, ICSID Case No. ARB/01/7, para. 2 (Mar. 21, 2007).

47. *Id.* paras. 82, 84.

48. *Id.* para. 92.

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the firm's lawyers in 1999.[49] Mr. Mitchell then filed an arbitration against Congo, alleging expropriation by the Democratic Republic of Congo in violation of Article III(1) of the Democratic Republic of Congo-United States BIT.[50] One of the key preliminary issues was whether the tribunal had jurisdiction over the dispute. The United States-Democratic Republic of Congo BIT provided that it applied to investments that contribute to the economic and social development of the host State.[51] Congo challenged the tribunal's jurisdiction, arguing that the services provided by Mitchell's firm failed to fall within the meaning of investment under the BIT.[52] The tribunal ultimately found that Mitchell had made an investment as defined under Article 1(c) of the BIT.[53] Upon Congo's application for annulment, the *Mitchell* ad hoc committee annulled the award.[54] It reasoned that the Award failed to state reasons explaining how Mitchell had made an investment.[55] All that the tribunal had stated was that the services provided by a legal consulting firm fell within the broad scope of the meaning of investment.[56] In the committee's view, "the inadequacy of reasons is such that it seriously affects the coherence of the reasoning as to the existence of an investment" in accordance with the BIT, on which the Tribunal relied for jurisdiction.[57]

While *Klöckner* and *MINE* represent opposite ends of the reasons requirement spectrum, the third ICSID annulment decision, *Amco Asia v. Indonesia*, which was decided in May 1986, took a middle position.[58] The ad hoc Committee in *Amco Asia*, which was chaired by Rosalyn Higgins, stated: "[T]here must be a reasonable connection between the bases invoked by a tribunal and the conclusions reached by it. The phrase 'sufficiently

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49. Mitchell v. the Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment, para. 1 (Nov. 1, 2006).

50. *Id.* para. 3.

51. *Id.* para. 36.

52. *Id.* para. 37.

53. Mitchell v. the Democratic Republic of Congo, ICSID Case No. ARB/99/7, Award, para. 57 (Feb. 9, 2004).

54. *Mitchell*, ICSID Case No. ARB/99/7, para. 67 (Nov. 1, 2006).

55. *Id.*

56. *Id.* para. 37.

57. *Id.* para. 41.

58. Amco Asia Corp. v. The Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986), 25 I.L.M. 1439 ("This decision also goes far beyond the intention of the Convention's drafters. . .").

pertinent reasons' appears to this ad hoc Committee to be a simple and useful clarification of the term 'reasons' used in the Convention."[59]

Unlike *Klöckner*, which explicitly stated that reasons were sufficiently relevant only if they were based on identified sources of law and actual facts,[60] *Amco Asia* reformulated the requirement as "sufficiently pertinent reasons" without necessarily requiring pertinent reasons to have been derived from actual rules of law or facts.[61] Unlike *MINE*, which simply required the tribunal to provide reasons that allow a reader to follow the tribunal's reasoning from Point A to Point B,[62] the *Amco Asia* committee required a reasonable relationship between the tribunal's findings and its conclusions.[63]

In *Amco Asia*, Amco Asia, a U.S. company, entered into an agreement with the government of Indonesia to manage and invest capital in a hotel.[64] Amco Asia initiated ICSID arbitration after Indonesia forcefully removed Amco Asia's hotel management, seized the hotel, and revoked Amco Asia's license.[65] The first *Amco Asia* Tribunal's Award found in favor of Amco Asia. In the annulment proceeding, the ad hoc committee annulled the award in its entirety after a review of the facts and substance of the applicable law.[66] Among several failures, the Tribunal had found that Amco Asia's investment of foreign capital amounted to US$2,472,490.[67] The ad hoc committee, however, concluded that Amco Asia'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, a shortfall of 67.20% of the requisite equity investment.[68] The committee believed the Tribunal failed to apply the relevant

59. *Id.* para. 43.

60. Klöckner Industrie-Analgen GmbH v. Republic of Cameroon, ICSID Case No. ARB/81/2, Decision on Annulment, para. 119 (May 3, 1985).

61. Amco Asia Corp. v. The Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment, para. 43 (May 16, 1986).

62. MINE v. Guinea, Decision on Annulment (Dec. 22, 1989) *in* ICSID REPORTS, *supra* note 26, at 79.

63. *Amco Asia Corp.*, ICSID Case No. ARB/81/1, para 43 (May 16, 1986).

64. Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, First Award, para. 3 (Nov. 20, 1984).

65. *Id.*

66. *Amco Asia Corp.*, ICSID Case No. ARB/81/1, para. 111 (May 16, 1986).

67. *Id.* para. 95.

68. *Id.* paras. 95, 103.

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provisions of Indonesian law in calculating the shortfall of investment, and found the Tribunal failed to state reasons for its calculation of Amco Asia's investment.[69]

To the extent that there appears to be a *jurisprudence constante* emerging,[70] the trend appears to favor a low threshold for the reasons requirement. However, it is too soon to conclude that the low standard first expressed by *MINE* will always be applied. As recently as 2007, the annulment committee in *Soufraki v. United Arab Emirates*[71] appeared to adopt the *Amco Asia* intermediate threshold. The *Soufraki* committee, comprising Florentino Feliciano, Omar Nabulsi and Brigitte Stern, stated that while a committee "cannot look into [the] correctness" of reasons by an arbitration tribunal, the committee "has to verify the existence of reasons *as well as their sufficiency*–that they are adequate and sufficient reasonably to bring about the result reached by the tribunal."[72]

In *Soufraki*, a dispute arose regarding the cancellation of a concession contract between Mr. Soufraki and the Dubai Department of Ports and Customs that entitled Mr. Soufraki to full concession over a Port "for the purpose of development, management and operation for thirty years."[73] The concession contract described Mr. Soufraki as a Canadian National.[74] ICSID arbitration was initiated under the Italy-United Arab Emirates BIT.[75] The Tribunal determined that the dispute fell outside of its jurisdiction because Mr. Soufraki failed to demonstrate he was an Italian national under the laws of Italy.[76] In turn, the ad hoc committee concluded that the Tribunal's reasoning on the absence of jurisdiction enabled one to understand how the Tri-

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69. *Id.* para. 98; *see also id.* para. 93 ("it 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 Law (Law No.1/1967)").

70. *See generally* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDAM INT'L L.J. 1014 (2007) (discussing how a system akin to precedent operates in investment treaty arbitration).

71. ICSID Case No. ARB/02/7, Decision on Annulment (June 5, 2007).

72. *Id.* (emphasis added).

73. *Id.* para. 4 (quoting concession contract).

74. *Id.* para. 5.

75. *Id.* para. 3.

76. Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Jurisdiction, para. 81 (July 7, 2004).

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bunal reached its conclusion, was not missing any essential points, and therefore was not open to annulment under Article 52(1)(e).[77] In particular, the *Soufraki* committee was able to follow the Tribunal's explanation that Mr. Soufraki was not an Italian national because Mr. Soufraki failed to prove to the satisfaction of the Tribunal that he reacquired Italian nationality, which would have been necessary for Mr. Soufraki to fall within the ambit of the Italy-United Arab Emirates BIT.[78] Mr. Soufraki did not submit a declaration of his intent to reacquire Italian nationality, nor did he reside in Italy for at least one year, as required under Italian law.[79] The *Soufraki* ad hoc committee determined that this reasoning sufficiently supported the Tribunal's result.

Further, even though the ad hoc committee in *CMS v. Argentina*[80] explicitly rejected the appellate review as appropriate in annulment proceedings, it proceeded to annul portions of the *CMS* award in which the Tribunal provided coherent reasons based on a literal reading on the relevant treaty provision.[81] According to Michael Reisman and Guillermo Aguilar-Alvarez, the *CMS* ad hoc committee appeared to annul that portion of the award not for incoherent reasons, but because the ad hoc committee regarded the tribunal's "plausible literal reasoning" as incorrect.[82] At issue was whether the *CMS* Tribunal failed to state its reasons in concluding the umbrella clause of the Argentina-United States BIT transformed a contractual obligation owed by Argentina into a treaty obligation under international law.[83] In its award, the Tribunal reasoned that purely commercial aspects of a contract may not become a treaty obligation pursuant to the umbrella clause provision of the Argentina-United States BIT, while government interference with the

77. *Soufraki*, ICSID Case No. ARB/02/7, paras. 132, 134 (June 5, 2007).

78. *Id.* para. 133.

79. *Id.*

80. ICSID Case No. ARB/01/8, Decision on Annulment (Sept. 25, 2007).

81. *Id.* paras. 45, 124-27 (Sept. 25, 2007) (citing *MINE v. Guinea, Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, and *Wena Hotels Ltd. v. Arab Rep. of Egypt* as the basis for determining what the duty to state reasons requires).

82. *See* Aguilar Alvarez & Reisman, *supra* note 4, at 23 ("the committee's problem was not the absence of reasons so much as the committee's conviction that even the [Tribunal's] plausible literal reasoning [of a treaty provision] was incorrect!").

83. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, para. 100 (Sept. 25, 2007).

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rights of the investor fall within the umbrella clause.[84] It made this distinction based on the wording of the umbrella clause, which stated: "each party shall observe any obligation it may have entered into with regard to investments."[85] The Tribunal interpreted these words to mean that not all contract breaches amount to treaty breaches and hence cannot be protected by this clause.[86] The Tribunal found that the measures complained of related to government decisions, and concluded the umbrella clause transformed the contractual breaches into treaty breaches for which Argentina incurred state responsibility under international law.[87]

The committee, however, found this line of reasoning unpersuasive.[88] It acknowledged the plausible explanation of the Tribunal's conclusion, yet believed there was a "significant lacuna" in the award which made it impossible for the reader to follow the Tribunal's reasoning from Point A to Point B to the conclusion.[89] In particular, the Committee stated that it was unable to decipher how the Tribunal reached its conclusion that CMS could enforce its contractual breaches under the BIT.[90] Although it acknowledged plausible interpretations by the Tribunal, the *CMS* ad hoc committee annulled the Tribunal's findings on the umbrella clause for failure to state reasons.[91]

Based on the forgoing, it remains uncertain which threshold annulment committees will apply in deciding whether an award has met the reasons requirement, or, indeed, what outcome might be reached when a particular threshold is applied to an award in an annulment application.

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84. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, para. 299 (May 12, 2005).

85. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, para. 86 (Sept. 25, 2007).

86. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, paras. 298-99 (May 12, 2005).

87. *Id.* paras. 301-02.

88. *CMS Gas Transmission Co.*, ICSID Case No. ARB/01/8, para. 96 (Sept. 25, 2007).

89. *Id.* para. 97.

90. *Id.* para. 96.

91. *Id.* para. 97.

III. Reasoning, Not Just Reasons

Although ad hoc committees have adopted no less than three different thresholds to meet the reasons requirement, they appear to have achieved unanimity on one important conceptual point: the reasons requirement is in fact a reasoning standard. Disagreements among committees about whether the standard should be high or low are not just disagreements about what sorts of reasons are acceptable. They are fundamentally about what methods of reasoning are acceptable. The high standard countenances only reasoning that is correct on the law and facts and the rational derivation of outcomes therefrom; the low standard tolerates reasoning that is incorrect due to mistakes in the law or facts, so long as the reasoning is internally consistent; and the intermediate standard requires coherence and permits errors of law and fact, so long as these errors are reasonable errors.

Given the range of possible reasoning standards, applying one universal standard for all situations might not be the best approach. Instead, the authors propose that the appropriate standard should depend on the purposes towards which the standard is applied in a particular situation. In the time period immediately following the issuance of an award, the parties will have to decide whether to seek annulment. If one party applies for annulment for failure to state reasons, an ad hoc committee will have to decide whether to nullify the award for insufficiency of reasoning. In the longer term, parties and tribunals in future investment disputes will have to decide whether they are persuaded by the award's reasoning and whether to apply the award's conclusions of law to their disputes. If many tribunals eventually follow the award, they could collectively imbue it with constitutive authority. Appraisals of reasoning in an award by ad hoc committees considering an application to annul the award should be a distinct inquiry from appraisals of reasoning in a prior award by subsequent arbitral tribunals considering whether to follow the prior award.

A. *The Reasoning Standard When Appraising a Prior Award*

The threshold for sufficiency of reasoning when deciding whether to accept a prior award as persuasive authority should be high. The public dimensions of investment treaty arbitration apply with full force here: following a wrongly-reasoned award

in future disputes amplifies the aggregate negative consequences that emanate from its distortions of law and policy.

An award should only guide the resolution of future disputes if it is coherently reasoned, and also correctly and wisely reasoned. To determine whether a prior award is coherent, the reader must be able to follow the line of reasoning.[92] To determine whether a prior award was correctly reasoned, arbitrators should closely examine whether the prior award was based on appropriately identified sources of legal authority and fully accounted for all relevant laws and facts. To determine whether a prior award was wisely reasoned, arbitrators would do well to consider, explicitly if possible and implicitly if necessary, the aggregate public policy consequences of prior decisions.[93]

This approach would not do violence to interpretative norms in international arbitration. Investment treaty arbitration lacks a formal system of precedent.[94] An award does not bind future disputes *ipso jure*. Therefore, arbitrators have broad latitude to consider policy dimensions in determining whether to follow a prior decision or treat it with benign neglect.

B. *The Reasoning Standard When Deciding an Annulment Application*

In contrast to a high reasoning standard in deciding whether to follow a prior award, the authors suggest that the reasoning standard for surviving an application for nullification should be more modest, so as to promote finality.[95] The potential for an annulment proceeding to stymie efforts at final resolution should not be underestimated. In *Amco Asia*, the first tribunal took nearly four years to render their award.[96] As a

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92. *See* MINE v. Guinea, Decision on Annulment (Dec. 22, 1989) *in* ICSID REPORTS, *supra* note 26, at 79 (explaining that coherently reasoned award must enable reader to follow line of reasoning).

93. *See* Aguilar Alvarez & Reisman, *supra* note 4, at 30 (quoting Myres S. McDougal).

94. *See* Cheng, *supra* note 70, at 1016 (noting arbitrators' freedom from a formal system of precedent).

95. The ad hoc committee in *Soufraki v. United Arab Emirates* stated, "[t]he limitation of recourse to the annulment mechanism to the few grounds listed in Article 52(1) serve to reinforce the finality and stability of ICSID awards." Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Annulment, para. 127 (June 5, 2007).

96. Amco Asia Corp. v. Rep. of Indonesia, ICSID Case No. ARB/81/1, Award, para. 281 (Nov. 21, 1984). On January 15, 1981, Amco Asia initiated ICSID Arbitra-

result of the annulment application and subsequent partial annulment of the first award, a second award was issued only after about five and a half more years from the date of the first award.[97] In order to avoid such substantial delays, ad hoc committees should avoid unnecessarily upsetting the award that they are charged with scrutinizing.

Additionally, an ad hoc committee that decides the low standard of reasoning has been met even though the law or facts may have been wrongly decided should be slow to express in *obiter dictum* their criticisms of the law or facts determined by the tribunal. In the *CMS* annulment decision, the tribunal stated, *obiter dicta*, that the tribunal has misinterpreted Article 27 of the International Law Commission's Articles on State Responsibility concerning the necessity defense,[98] but held that this error failed to rise to the level sufficient to annul that portion of the award finding against Argentina.[99] Even though the Committee's analysis might have been technically flawless, the practical consequence of this dicta is that it restricted the political space for the Argentinean government to pay the award. How can a government explain to its electorate that because of the technical review rule limiting annulment it should still be responsible for an award that was found to have been rendered in error? Correspondingly, the attempts of the *CMS* committee to clarify through *obita dictum* what it believed to be the law of the State Responsibility has placed tremendous hurdles before CMS to collect on the award.

A dispute does not end with an award. It ends when the losing party pays or settles the award. In order to swiftly reach a final outcome, an ad hoc committee should not only apply the low reasoning standard, it should also be parsimonious in its

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tion against the Republic of Indonesia. *Id.* The First Award was rendered on November 20, 1984. *Id.*

97. *Id.* The First Award was rendered on November 20, 1984. *Id.; see* Amco Asia Corp. v. Rep. of Indonesia, ICSID Case No. ARB/81/1, Decision on Annulment, paras. 95-106 (May 16, 1986) (explaining annulment justified). The First Award was annulled on May 16, 1986. *Id.* The Second Award was rendered on June 5, 1990. Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/8, Second Award (June 5, 1990).

98. CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Annulment, paras. 144-46 (Sept. 25, 2007).

99. *Id.* para. 150.

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criticism of the substance of the award if it believes the standard has been met.

A modest reasoning standard in annulment decisions might initially appear to contradict the policies supporting a robust reasons requirement that were outlined in Part I of these remarks. However, the need for finality in dispute resolution counsels against extending the requirement too far.[100] The continued vitality of investment treaty arbitration depends in large part on its ability to satisfy the demands of investors and host states who chose arbitration in their investment agreements and who pay for arbitration when intractable disputes arise. In a 2007 survey of "Foremost United States Attorneys" by the International Institute for Conflict Prevention & Resolution, respondents rated finality as the primary benefit for arbitration.[101] Although this survey was limited to U.S. lawyers and did not poll them specifically about international investment arbitration, many preeminent U.S. law firms represent host states and investors. It would not therefore be unreasonable to take this survey as indicating that a substantial body of counsel in investment treaty arbitration, and by extension, their clients, favor finality in arbitration over other considerations.

This survey is corroborated by the reported view of Grant Kesler, the former Chief Executive Officer of Metalclad. Mexico had expropriated Metalclad's investment in that country, and the arbitration panel eventually awarded Metalclad $17 million after five years of proceedings and $4 million in costs for Metalclad. Mr. Kesler stated that in retrospect he would not

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100. SCHREUER, *supra* note 17, at 893-94. Professor Schreuer discusses two competing principles at work in the arbitral process: the principle of finality and the principle of correctness. *Id.* Professor Schreuer argued that in international arbitration the principle of finality trumps the principle of correctness. *Id.* Professor Schreuer writes:

> Finality is designed to serve the purpose of efficiency in terms of an expeditious and economical settlement of disputes. Correctness may be an elusive goal that takes time and effort and may involve several layers of control . . . In international arbitration the principle of finality is often seen to take precedence over the principle of correctness. The desire to see a dispute settled is regarded as more important than the substantive correctness of the decision.

Id. at 893.

101. INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION, THE CPR SURVEY ON ALTERNATIVE DISPUTE RESOLUTION TRENDS 2 (2007), *available at* http://www.cpradr.org/Edit/News/tabid/45/ArticleType/ArticleView/ArticleID/13/Default.aspx.

have opted for arbitration, and would instead have favored informal settlement, because the arbitration had turned out to be "too slow, too costly, and too indeterminate."[102] If the five-year arbitration was too long for a primary consumer of investment treaty arbitration that won its claim, imagine how much greater parties' dissatisfaction could be when annulment proceedings further delay final resolution. This brief case study indicates that to at least some investors, a swift and final resolution of disputes is extremely important.[103]

A higher reasoning standard would encourage a losing party yearning for a second bite at the apple to apply for annulment, because it would stand a higher chance of success. Consequently, applying a higher reasoning standard in annulment applications risks prolonging disputes by increasing applications for annulment and failing to meet the expectations of investors and host states as consumers of arbitration.

A higher reasoning standard in annulment applications also threatens finality because it risks allocating to ad hoc committees uncontrollable margins of appreciation in deciding whether an award was sufficiently reasoned. A series of thought experiments demonstrates how raising the threshold for sufficiency of reasoning increases the uncertainty inherent to the reasons requirement. Imagine if a tribunal was required to determine the answer to: $X + Y = ?$, wherein the facts were: ($X = 1$, $Y = 2$). A tribunal may issue one of the following four awards:

Award One: Internally Incoherent Reasoning

Facts: $X = 1$, $Y = 2$

Rule: "+" represents the arithmetic addition (combination) of two numbers (terms) into a single number (the sum).

Reasoning: $X + Y = 1 + 2 = 4$

102. *See* Jack J. Coe, Jr., *Towards a Complementary Use of Concilation in Investor-State Disputes–A Preliminary Sketch*, 12 U.C. DAVIS J. INT'L L. & POL'Y 7, 7-8 (2005) (reporting views of Grant Kesler).

103. *But see* William H. Knull & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT'L ARB. 531, 531 (2000) (noting "speed and finality" come at a price); Thomas J. Kiltgaard, Presentation at the Seventh Annual Transnational Commercial Arbitration Workshop: The Transnational Arbitration of High-Tech Disputes (June 20, 1996) (stating "[s]peed and finality are virtues, but only if you win.").

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Award Two: Missing Rule

Facts: X = 1, Y = 2

Reasoning: X + Y = 1 + 2 = 3

Award Three: Missing Fact

Fact: X = 1

Rule: "+" represents the arithmetic addition (combination) of two numbers (terms) into a single number (the sum).

Reasoning: X + Y = 1 + 2 = 3

Award Four: Wrong Fact, Internally Coherent Reasoning

Facts: X = 1, Y = 3

Rule: "+" represents the arithmetic addition (combination) of two numbers (terms) into a single number (the sum).

Reasoning: X + Y = 1 + 3 = 4

In Award One, the tribunal correctly states the operative facts and rule, but its line of reasoning is incoherent because its arithmetic calculation is wrong. Consequently, it reaches the wrong outcome. Under any reasoning standard, this award would be subject to annulment for failure to state sufficient reasons because the reader would not be able to follow the tribunal's reasoning.

In Award Two, the tribunal correctly states the operative facts, its reasoning is flawless, and the right outcome is reached. Under a low reasoning standard, the award would be beyond reproach. However, should a committee impose a high reasoning standard, it could conceivably annul the award for failing to state an operative rule and explain how it was derived.[104] The tribunal could have, for example, stated the rule of addition and derived it from Fibonaci's LIBER ABACI,[105] but failed to do so.

Wena Hotels is an example of an award which failed to identify the rule on which its award was based. In *Wena Hotels*, the tribunal had added 9% compound interest onto the damages, citing only Egyptian bonds that yielded 10% interest, but

104. *Cf. supra*, Part II.B (discussing how the Amco Asia ad hoc committee annulled its award on basis that tribunal failed to account for Indonesian law). Unlike the model here, in which the correct outcome is reached in spite of failing to identify a legal rule, the Amco Asia committee believed that the tribunal vastly missed the correct answer as a result of its failure.

105. LEONARDO PISANO, LIBER ABACI (Laurence E. Sigler trans., Springer-Verlag 2002) (explaining arithmetic).

not citing any legal rule providing for benchmarking the interest rate to Egyptian bonds.[106] The *Wena Hotels* ad hoc committee accepted the result and, using a low reasoning standard, implied into the tribunal's award an explanation that 9% was close to but below the bond rate and was thus selected to provide adequate compensation.[107] Had the committee applied a high reasoning standard, it might not have inferred reasons into the award. Instead, it could have annulled the award for not explicitly providing reasons for its interest rate.[108] If the *Wena Hotels* committee had adopted a high reasoning standard, it would have delayed finality even though an acceptable substantive outcome had been reached in the first instance.

The potential for arbitrators to disagree on whether a tribunal has provided enough legal rules for its reasoning is not merely academic. In the annulment decision in *Lucchetti*, the majority stated that the tribunal had sufficiently explained its rejection of jurisdiction and thus denied the annulment application. The dissenting member of the committee, however, would have annulled the tribunal's decision. In his view, the tribunal had failed to explain the interpretative process it applied to the basic law and facts to decline jurisdiction.[109]

In Award Three, the tribunal reaches the right answer, but fails to explain the fact that $Y = 2$. Under a low reasoning standard, such an award, which reaches an acceptable answer, could avoid annulment, because the ad hoc committee might infer that $Y = 2$.[110] However, under a higher standard, an ad hoc committee could always require more facts to support the tribunal's analysis. For example, tribunals often cite prior decisions or the

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106. Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Award, para. 128, n.289 (Dec. 8, 2000).

107. Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, para. 96 (Jan. 28, 2002).

108. *See* Julie Maupin, *The Awards in Wena Hotels Limited v. Arab Republic of Egypt*, *in* THE REASONS REQUIRMENT, *supra* note 3, at 231, 254 (criticizing *Wena Hotels* committee for not requiring further explanations in award for how it derived 9% interest rate from Egyptian bond rate).

109. *See* Aguilar Alvarez & Reisman, *supra* note 4, at 19 (discussing *Lucchetti*).

110. *But cf.*, Mitchell v. Dem. Rep. Congo, ICSID Case No. ARB/99/7, Decision on Annulment, para. 39 (Nov. 1, 2006) (applying low reasoning standard and nevertheless annulling award's finding that Mitchell had made an investment in form of legal services, because tribunal had failed to state facts showing how legal services "concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing in investors."); *supra* Part II.B (discussing *Mitchell*).

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writings of jurists to support a legal rule that the tribunal relied on in its award. An ad hoc committee applying a high reasoning standard might annul the award if it disagreed with the legal rule, and justify its decision on the basis that the tribunal failed to provide factual evidence of state practice to justify the purported legal rule on which the tribunal relied.

One commentator has leveled this type of criticism in his appraisal of *Mondev International v. United States of America.*[111] In Mr. Julien Cantegreil's critique of *Mondev*, he admonishes the tribunal for its failure to explain how the United States' grant of immunity to the Boston Redevelopment Authority was not a denial of justice to Mondev under international law.[112] Cantegreil felt it was insufficient for the tribunal to have merely stated that customary law did not require a statutory authority to be generally liable for its torts and, therefore, that granting the Boston Redevelopment Authority immunity under U.S. law did not breach NAFTA.[113] In Cantegreil's view, the tribunal should only have reached its conclusion if it explicitly relied on evidence of state practice that supported a more directly applicable customary international law.[114]

In Award Four, the tribunal makes a false assumption that Y = 3 when in fact Y = 2, and consequently reaches the wrong result for X + Y, i.e., 4 instead of 3. Under a low reasoning standard, the award should survive annulment because a reader is able to follow the tribunal's line of reasoning and its arithmetic even though one of its underlying assumptions is wrong. Under a higher standard, however, an activist committee might annul the award on the basis that the reasoning was incoherent because it was based on a wrong reason, i.e., that Y = 3. This approach is similar, although perhaps not identical, to the one taken by the *CMS* Committee when it disagreed with the award's interpretation of the applicable umbrella clause.[115]

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111. ICSID Case No. ARB(AF)/99/2, Award (Oct. 11, 2002).

112. Julien Cantegriel, *The Final Award in Mondev International v. United States of America*, *in* THE REASONS REQUIREMENT, *supra* note 3, at 33, 45-50.

113. *Id.*

114. *Id.* at 47 ("[I]t remained a duty for the tribunal to state whether current practice would support Mondev's contention that municipal sovereign immunity is internationally wrongful, or whether customary international law leaves the state subject to a claim for denial of justice at an international level.").

115. *See supra* notes 88-91 (discussing Committee's rejection of Tribunal's reasoning).

These thought exercises illustrate the inherent uncertainty in the reasons requirement, and the magnification of chaos that may accompany increases in the standard of reasoning. If one is concerned with the legitimacy of international investment arbitration, then one should promote a primary goal of parties in an arbitration–finality–by favoring a low reasoning standard in annulment proceedings.

IV. A REASONABLE APPROACH

Emphasizing finality in international investment arbitrations should not obscure important constitutive considerations in dispute resolution. Arbitration awards can have a significant impact on other investors and states, as well as their constituents, all of whom may look to the award for guidance on international investment law.[116] But this impact is an externality that does not immediately or directly affect the disputing parties in the arbitration. The parties may legitimately object to bearing the costs and uncertainties that accompany a higher reasoning standard in annulment proceedings to the extent that it does not benefit them directly and instead benefits third parties. Just as the role of a trial judge is to decide disputes swiftly and fairly, rather than to issue grand elaborations of law, arbitrators are hired by disputing parties to adjudicate their dispute to enable the parties to move forward from their failed investment project, not to develop the law for the rest of the world community. For anyone, including the authors, concerned with developing the law to maximize aggregate global well-being, the limitation on the functions of arbitrators is regrettable. It is nonetheless inescapable.

Mr. Alvarez and Professor Reisman have suggested that citizens of a host state who have to bear the consequences of an award should be entitled to read, in plain language, why a decision was made.[117] This aspiration is compelling, particularly because it appeals to an idealized notion of a liberal democracy in which an educated and responsible *demos* participates actively

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116. *See* George Stephanov Georgiev, *The Award in Saluka Investments v. Czech Republic*, *in* THE REASONS REQUIREMENT, *supra* note 3, at 149, 190 (stating a well reasoned award "contributes to the finality of the dispute, creates models of reasoning that can be adopted by later tribunals, advances international investment law, and provides host states with much-needed, detailed guidance. . .").

117. Aguilar Alvarez & Reisman, *supra* note 4, at 1-2.

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in the formulation and appraisal of state policies. A corollary of this aspiration is that shareholders of corporations that enter into investment projects should also be entitled to understand the basis for a tribunal's decision concerning the projects.

However, as a practical matter, the highly sophisticated global economy and limited resources of every individual, particularly in less developed countries, favors specialization of skills and division of labor within the world community. Citizens and shareholders may prefer to delegate guardianship of their interests in investment projects to government officials and corporate officers, respectively. Under this allocation of responsibilities, citizens and shareholders may retain an interest only in the results of arbitration disputes, which are the bottom lines that affect them. Correspondingly, they may be content for the specialized entities and attorneys to which they have delegated responsibility for day-to-day operations to appraise the cogency of arbitral awards on their behalf. In recommending an appropriate standard for the reasons requirement in an application for annulment, scholars might consider that a sufficiently reasoned award may need only to enable counsel and their direct clients to understand the tribunal's reasoning.[118] The award need not be subject to annulment even if it may not make complete sense to third-party observers.

The distinction between sufficient reasoning for counsel and officials versus sufficient reasoning for citizens and shareholders can make a practical difference. Counsel may fully accept that an award omitted discussion of an apparently relevant prior decision because the decision was not pleaded in submissions or at the hearing, or because at the hearing consensus was reached that the prior award was not dispositive. By comparison, in many arbitrations, third-party observers do not attend hearings or have access to the submissions.[119] Consequently, the citizen, shareholder or scholar who devotes time to scrutinize the award may feel the award should have accounted for the omitted decision, and thus provided insufficient reasoning.

118. *See* Wena Hotels Ltd. v. Arab Rep. of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, para. 81 (Dec. 8, 2000) (stating that purpose of reasons requirement was to "ensure that *the Parties* will be able to understand the Tribunal's reasoning.") (emphasis added).

119. There are some exceptions to this practice norm, such as the U.S. State Department's publication of submissions in NAFTA arbitrations to which the United States is a party.

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Even in such a situation, a legitimate argument could be made that the award should still have met the reasoning standard applicable to annulment proceedings if the award is coherent to corporate officers and government officials who have the advantage of either participation in the arbitration or briefings by their counsel.

In closing, it is important to emphasize that a lower reasoning standard in annulment proceedings would not negate a higher reasoning standard in deciding whether to treat the award as generally constitutive of international investment law beyond the investment dispute itself. A low reasoning standard in annulment proceedings also does not contradict the normative position, on which we can all agree, that arbitrators should always strive to produce awards that are as well reasoned as possible. The motivation of arbitrators when writing an award should not be simply to avoid annulment. It should be, more nobly, to reach a decision that balances and maximizes the interests of the parties and the world community at large, and to explain their decision persuasively by providing coherent, correct and wise reasons. Ultimately, however, a determination of whether an award has provided adequate reasoning should turn on the purpose for which the award is being considered.

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