

# **POST-AWARD REMEDIES OF THE ICSID MECHANISM**

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## ABSTRACT

Globalization calls for investments and investments have always been surrounded by problems that need to be solved neutrally and impartially. The International Centre for Settlement of Investment Disputes (ICSID) functioning under the auspices of the World Bank has been providing investment arbitration for private-investor – Contracting states parties since 1966.

Because the ICSID Convention explicitly excludes any judicial recourse, the ICSID's most unique feature is its system of post-remedies including a possibility of annulment proceedings. While the ICSID Convention favors finality of the awards, the annulment being a limited exception to the principle of finality have raised a lot of questions whether finality or correctness of awards should take precedence in investment arbitration. This battle was expressed in particular in the reasoning of the *ad hoc* Committees during the very first annulment proceedings, when the *ad hoc* Committee members inclined to annul the awards while examining the merits. These acts raised a lot of criticism since these the *ad hoc* Committees had started to act like appeal courts, whereas the ICSID Convention explicitly excludes any form of appeal.

Hence, the battle of finality and correctness of awards has become the issue, as well as the future prospectives of annulment proceedings. Even if after these mistakes the *ad hoc* committees have learnt their lesson, it is undisputable that ICSID has been aware of these signals and calls for justice and has been trying to discuss and adopt necessary measures to balance the fairness and finality of the awards. However, the way to an official ICSID appellate body is difficult since adopting such a facility could undermine the whole ICSID system.

## INTRODUCTION

*“A domestic lawyer (...) might be forgiven for thinking it strange that the international community, apparently so well-equipped with means of judicial settlement, appears to lack what seems to be a natural or inherent feature of national judicial systems, namely, a comprehensive system of appeal.”<sup>1</sup>*

In traditional understanding commercial arbitration takes place between private parties. However, capital moves across the globe and consequently arbitration has become also a means of dispute settlement between parties that do not share equal position – host states and investors. The International Centre for Settlement of Investment Disputes (ICSID) presents a forum for such kind of disputes.

Since arbitration is a delegated power to make certain types of resolutions, it requires external or internal control devices to make sure the system works properly and preserves the interests of the parties; after all, the nature of the control mechanism may be crucial for the parties to take advantage of a particular process.<sup>2</sup>

The extraordinary feature of ICSID is an independent and radical remedy – an inner mechanism enabling the interpretation, revision and even the annulment of an award<sup>3</sup> - the interpretation and revision being relatively uncontroversial in comparison to the annulment. The common feature of these post-award remedies is that they are available only upon the request of one or both parties and they are subject to time limits (except of interpretation).

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<sup>1</sup> Lauterpacht, E., Aspects of the Administration of International Justice, p.99 , in Tams, Ch., J., An Appealing Option? The Debate about an ICSID Appellate Structure, Essays in Transnational Economic Law, No. 57/June 2006, p.2

<sup>2</sup> Reisman, W., M., *The Breakdown of the Control mechanism in ICSID Arbitration*, Duke Law Journal, September 1989, at 740-741

<sup>3</sup> Articles 50, 51 and 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington Convention); throughout the thesis the term “ICSID Convention“ shall be used

There is no such review mechanism known to any other arbitral institution<sup>4</sup> and it remains the most distinctive feature of the Washington Convention (ICSID Convention).<sup>5</sup>

In general, after the arbitration proceeding is over, the remedy available for the losing party to challenge the arbitral award is usually limited to judicial recourse<sup>6</sup>. This is not the case of investor-state dispute settlement under the auspices of ICSID: the losing party is barred to bring an ICSID award before the national courts, thus the role of the courts is limited only to recognition and enforcement of the award.<sup>7</sup>

The purpose of this special review system is to avoid the shaky ground of national courts in host states and to provide a forum for investor-host state dispute settlement that is completely neutral and without any political and diplomatic obstructions, to create an effective background for balancing the parties' interests and to promote investment, especially in developing countries. Since the drafters of the ICSID Convention meant to keep away the proceedings from all the political elements, they "also sought to reduce the role of national courts in enforcement even more than in other available systems of private international arbitration by providing for direct enforcement with no possibility of challenging the award in national courts in which enforcement otherwise would have been sought."<sup>8</sup> It follows that the ICSID awards are absolutely insusceptible to the New York Convention.<sup>9</sup> Under the ICSID

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<sup>4</sup> For example, Articles 35, 36 and 37 of UNCITRAL Arbitration Rules, 1976 also enable interpretation correction of the award and even an issue if an additional award. However, unlike the Washington Convention, the UNCITRAL Arbitration Rules exclude discovery of any new fact and therefore the original award cannot be replaced by a new one.

<sup>5</sup> The International Centre for Settlement of Investment Disputes was established pursuant to the Washington Convention (also called ICSID Convention) in 1966 to solve disputes between States and private investors. The Centre facilitates conciliation and arbitration of disputes arising out of investments. ICSID has two organs: the Administrative Council, in which all Contracting States have one representative and which is chaired by the President of the World Bank, and the Secretariat.

<sup>6</sup> Judicial control over an arbitral award occurs in the form of claim of setting aside or refusal to recognize and enforce an award

<sup>7</sup> Which means the ICSID arbitral awards are not dependent on the place of arbitration and the rule „the award may be set aside only in the country of locus arbitri“ does not apply.

<sup>8</sup> Reisman, W., M., *supra* note 2 at p.751

<sup>9</sup> Acronym for the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), according to which the recognition and enforcement may be refused for some given reasons (Art. V.). Article 54 (1) of the ICSID Convention says that "each Contracting State shall recognize an award rendered (...) as binding and enforce the pecuniary obligations (...) as if it were a final judgement of a court in that State".

system, in principle, there is no right to appeal to courts or other judicial review and the award is therefore deemed final unless the losing party does request the ICSID for review.

The ICSID system is a viable and working system, however, recently some problems have arisen, in particular in connection with the hypersensitive matter of state sovereignty<sup>10</sup> and the legal nature of the whole review system. However, only the second issue will be dealt with in the present thesis.

The thesis will focus on the post-award remedies and the serious questions they keep raising, particularly on the annulment proceedings. The questions that have come up in connection with annulment proceedings are whether finality of the awards should take precedence over justice or is the ICSID review mechanism a manifest of strength or its Achilles' heel? Furthermore, is the ICSID mechanism just a remedy-provider or a sophisticated appeal system and thus contradictory to the ICSID Convention?

Scholars and researchers have been trying to answer these questions for decades and the results vary, especially in a way whether an inner review system is or is not a dangerous precedence. Therefore, the present thesis is systematically divided into three chapters. The first one deals with the issues of finality and correctness and appeal and annulment, since appeal supports the fairness of an award whereas annulment observes the legitimacy of the process of rendering the award. Nevertheless, the core of the thesis is designed to analyze the main features of the ICSID's control mechanism through existing case-law<sup>11</sup> explaining how this unique apparatus works while pointing out its individuality, gaps and shortcomings as well.

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<sup>10</sup> Since sovereign prerogatives used to overrule private interests. change came in the 1980s, when the state control over the businesses was regarded bad, and the arbitrators were likely to interpret the scope of the investment agreements beyond their scope just to protect the investors, since it is almost always that the states are the defendants in the disputes.

<sup>11</sup> With emphasis on landmark cases such as Klöckner, Amco, MINE, Vivendi and Wena.

As the topic exceeds the capacity of this thesis, it is impossible to deal with every problem arising in connection with the ICSID review system. Consequently, the third chapter will suggest a brief outlook of possible future of the ICSID review system.

At the end of the day, the purpose of this thesis is not to cast bad light on the ICSID, but rather to indicate that uniqueness may mean caveat and new challenges.

I believe this thesis will serve as a good starting point for those interested in the issue.

## Chapter 1: ICSID and finality – crossing the line of appeal?

*“Nothing is final until it is right.”*

*Abraham Lincoln*

To define the meaning of the finality of awards in international arbitration is difficult, since the system works differently on the national level where the principles of *res iudicata* and *stare decisis* are deeply rooted<sup>12</sup>. National laws are inconsistent and courts tend to assign to arbitral awards different connotations and review them under various norms. One possible definition of finality of an award may be as follows: “if the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award, good, bad or indifferent, is final and binding on the parties”<sup>13</sup> and “is the final word on the facts and law of the case.”<sup>14</sup> Distribution of the final award means *functus officio* for the arbitral tribunal.<sup>15</sup>

The review of awards involves expenses and is time-consuming; therefore such deliberations are the battle of finality and justice. Sure, it is possible to get a final and just award, but since international investments are big businesses, the goal of investor and the state in investment arbitration, in particular, is to get a final award as soon as possible. Therefore, states have tried to emphasize the finality of arbitral awards as an quick and economical element over the correctness<sup>16</sup> – as observed during the *travaux préparatoires* of

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<sup>12</sup> The *res iudicata* effect of the ICSID arbitral awards occurs in the moment of exhaustion of all possible remedies available under the ICSID Convention. For further elaboration of the *res iudicata* effect see Chapter 2. The *stare decisis* doctrine does not apply for the ICSID’s decision-making, because the decisions are not publicly available without the consent of the parties, however, the tribunals and ad hoc Committees can refer and rely on their previous decisions.

<sup>13</sup> Redfern A., Hunter, M., *Law and Practice of International Commercial Arbitration*, (2004), at 432-433 as quoted in Clapham J., *Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?*, *Journal of International Arbitration*, (Kluwer Law International 2009 Volume 26 Issue 3), p.438

<sup>14</sup> Laird, I., Askew, R., *Finality versus Consistency: Does Investor-State Arbitration need and Appellate System?*, *The Journal of Appellate Practice and Process*, Fall 2005, p.290

<sup>15</sup> Redfern A., Hunter, M., *Law and Practice of International Commercial Arbitration*, (2004), p.373

<sup>16</sup> For example the Swiss private international law act of 1987, Chapter 12, International Arbitration, Art.190(1) states “the award is final once it has been communicated”.



such leading documents as ICSID Convention and UNCITRAL Model law.<sup>17</sup> In contrast, states in their national legislation do not provide for an appeal on the merits from an international arbitral award including a non-ICSID award, but rather adopt a remedy of setting aside an award on limited jurisdictional grounds<sup>18</sup>.

In other words, finality observes to establish limits for control mechanisms while concern for correctness represents the principle that justice must be done. Nevertheless, the world of international arbitration prefers to see rather a final award than a correct one, just to avoid multiple layers of control.

In the ICSID's point of view, an award is final when disposed of all questions submitted to the Tribunal, i.e. two cases – when the Tribunal decides it lacks jurisdiction upon the subject-matter, or when it decides all the substantive issues on the merits, i.e. an award confirming the jurisdiction and thus proceeding in the case shall not be deemed as a final award<sup>19</sup>. Then the discretion of domestic courts whether to recognize and enforce an arbitral award or not leaves the finality of the award intact, because “a denial of recognition may affect the effectiveness of the award but has no bearing upon its validity.”<sup>20</sup>

Under Art. 53(1) of the ICSID Convention the post-award remedies are as follows: “The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”<sup>21</sup> From this language it is obvious that the revision, interpretation and annulment proceedings which are available pursuant Section V. of the ICSID Convention are not deemed to be remedies rather than an appeal. This article

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<sup>17</sup> Clapham J., *Finality of Investor-State Arbitral Awards: Has the Tide Turned and is there a Need for Reform?*, Journal of International Arbitration, (Kluwer Law International 2009 Volume 26 Issue 3), p.437

<sup>18</sup> One possible exception could be the English Arbitration Act of 1996, which allows appeal from the award concerning a question of law (Art.69(1,2)) provided the parties agreed on the resort of appeal or a leave of court was granted.

<sup>19</sup> Reed, L.; Paullsson, J.; Blackaby, N., *Guide to ICSID Arbitration* (2004), p.97

<sup>20</sup> Delaume, G., *Reflections on the Effectiveness of International Arbitral Awards*, Journal of International Arbitration, (Kluwer Law International 1995 Volume 12 Issue 1), p.5

<sup>21</sup> Art.53(1) of the ICSID Convention.

deals with three issues altogether – one is the finality of the award, the other is its binding feature and the third one the exclusion of any external review.<sup>22</sup>

Whereas the binding nature of an award based on *pacta sunt servanda* principle seems to be prima facie clear, the exclusion of any external review system and the issue of finality are the biggest concerns of the ICSID Convention.

The significance of the concept of finality and correctness rests in splitting the review system into two categories – appeal, which encompasses review of the merits of the case, and other remedies which do not look on the merits, but are concerned with the procedural aspects. Beside the basic distinction between the appeal and annulment (the possible modification of the award), in this respect Prof. Caron mentions another two distinctive features, however he finds one of them to be false. The first one is the standard of the review process with regard to the legitimacy of the process and the substantive fairness, and the second one is based on the alleged assertion that annulment does not seek replacement of the original decision.<sup>23</sup> What ICSID proposes is an exclusive solution both for correctness and finality,<sup>24</sup> since its annulment proceedings are the preferred solution to balance these two objectives.<sup>25</sup> This balance, however, may weaken the boundary between appeal and annulment.

Weakening of finality is one of the biggest concerns within the ICSID review system. Art. 50 implies that in the case of a successful application for the interpretation of the award the finality stays intact. However, finality of an award can be impaired by the revision, because the appearance of new facts till then unknown to the applicant can seriously affect the award, which means the Tribunal would act as an appellate body. But this mutilation of

<sup>22</sup> Schreuer, Ch., H., *The ICSID Convention: A commentary*, (2001), p.1077

<sup>23</sup> Caron, D.D., *Reputation and Reality in the ICSID Annulment Process: Understanding between Annulment and Appeal*, 7 ICSID Review – Foreign Investment Law Journal 21 (1992), pp.23-26

<sup>24</sup> Feldman, M.B., *The Annulment proceedings and the Finality of ICSID Arbitral Awards*, ICSID Review – Foreign Investment Law Journal (1987), p.90

<sup>25</sup> Schreuer, Ch., H., *supra* note 22 at pp.891-894

finality is justified on the ground that the Tribunal would not have rendered the award had it known that particular essential fact.<sup>26</sup>

Yet, the annulment proceedings of the ICSID support the finality of the award, since the *ad hoc* Committee can annul the award without examination of the merits only upon limited jurisdictional grounds, while an appellate body may review the merits and even substitute the original decision by its own one.<sup>27</sup> It follows that the annulment covers only questions on legitimacy of the process and is not concerned about the substantive law issues – “its function is not correct errors of fact or law, but to police the integrity of the award and the process leading to the award.”<sup>28</sup> That is why this establishment of the self-contained dispute resolution machinery precluding the parties from challenging the awards at domestic courts shall be concerned by both correctness and finality.

From Art. 52, which enumerates five specified grounds for annulment, it can be seen that the drafters tried to focus on the due process during the arbitration proceedings and not on the correctness of the award rendered. However, the fifth ground (e)<sup>29</sup> dealing with the failure to state reasons on which the award is based blends in a test of correctness of the application of the substantive law. What follows is that the strong boundary between the appeal and the annulment becomes a blurred fine line. This matter is not a theoretical problem anymore, since the *ad hoc* Committee has already set aside awards while acting as an appellate body and seriously undermining the finality of awards in many ways. The ill-fated prologue of annulment proceedings in *Amco*<sup>30</sup> and *Klöckner*<sup>31</sup> cases brought uncertainty about the finality

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<sup>26</sup> Broches, A., *Observations on the Finality of ICSID Awards*, 6 ICSID Review – Foreign Investment Law Journal (1991), p.324

<sup>27</sup> Clapham J., *supra* note 17 at p.439

<sup>28</sup> Bjorklund, A. K., *The Continuing Appeal of Annulment: Lessons from Amco Asia and CME*, in *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral treaties, and Customary International Law* (Todd Weiler ed., 2005). p.473

<sup>29</sup> Art. 52(1)(e) states that an award may be annulled on the ground that “(it) has failed to state the reasons on which it is based.”

<sup>30</sup> *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1). In this case Amco, the investor, was obliged to invest at least three million US dollars to build and manage a hotel in Indonesia. After escalation of long-lasting disputes its local partner took over the hotel and consequently revoked Amco’s

of ICSID awards, because not only lasting too long, but even the *ad hoc* Committees in these cases manifestly ran counter to exclusion of review on the merits. In these cases the *ad hoc* Committee applied the fifth ground – failure to state reasons – for the annulment of the award rendered by the Tribunal, so it follows that at least one of the grounds for annulment provides a basis for the *ad hoc* Committee to act as an appellate body. Does it not violate one of the principal notions of the ICSID Convention that the award shall not be subject to any appeal? Indeed, it is. Hence, shall the ICSID’s annulment procedure be called appeal or remedy?

The answer for this question may be arguable, since the *ad hoc* Committees have been stressing the remedy-nature of the annulment system in all of their decisions that have been published. For example, the *ad hoc* Committee in the *Klöckner* case made, among others, a constitutive ruling adopting a formal rather than substantive requirement for statement of reasons – in case of doubt the case should be resolved in *favorem validitatis sententiae*,<sup>32</sup> since the *ad hoc* Committee was already then aware of sliding into appeal. Despite the struggle of the *ad hoc* Committees to avoid any feature of appeal, as will be seen in some examples in the next chapter, the reality is different and maybe it is just the question of time when ICSID will have to accept that there is a need for an appellate system.

Still, it is important to note that the ICSID Convention favors the finality of the awards, since the drafters tried to tailor these grounds very narrowly, in order not to depart from the required finality of the ICSID awards which is expressed by words such as “manifestly” and

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investment licence. In the following arbitration Amco requested damages and the ICSID Tribunal rendered an award in its favor. The *ad hoc* Committee annulled the award and the case was resubmitted to a new Tribunal. Although the both parties requested a second annulment, their applications were rejected by the second *ad hoc* Committee.

<sup>31</sup> *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais* (ICSID Case No. ARB/81/2). The case involved a sequel of contracts between the Cameroonian Government and Klöckner to build and manage a fertilizer factory. The factory was unprofitable and after a period was closed. Klöckner filed for ICSID arbitration and requested the balance of the price left while the Cameroonian Government requested damages. The ICSID Tribunal found that Klöckner’s acts violated principles of confidence and loyalty under the French law. Afterwards Klöckner applied for annulment and the whole award was annulled on the ground that the Tribunal did not deal with several questions submitted and thus, failed to state reasons under Art.52(1)(e) of the ICSID Convention. After resubmission the request for second annulment was refused.

<sup>32</sup> *Klöckner v. Cameroon*, Decision on Annulment, 3 May 1985, 1 ICSID Review – Foreign Investment Law Journal 89 (1986), para.52, p.108.

“serious.”<sup>33</sup> Nevertheless, as long as the change will come, the ICSID’s *ad hoc* Committees while deciding have to move between the rock upon which Scylla of finality dwells and the whirlpool of Charybdis of correctness, since desired equilibrium is hard to achieve.<sup>34</sup>

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<sup>33</sup> Art.52(1)(b) says the annulment is available under the ground that “ the Tribunal has manifestly exceeded its powers“ and Art.52(1)(d) “that there has been a serious departure from a fundamental rule of procedure“

<sup>34</sup> Houtte, H. van., Article 52 of the Washington Convention – A Brief Introduction., *Foreword*, published in Gailard E., Banifatemi Y., IAI International Arbitration Series No.1, Annulment of ICSID Awards (2004), p.15

## Chapter 2: Section 5 of Chapter IV. Of the ICSID Convention – the Control Mechanism

*„An ad hoc Committee is not a court of appeal“<sup>35</sup>*

The ICSID review system is deemed absolutely fundamental, because it reflects the international feature of its arbitration mechanism and poses a balance to its more extra basic aspects, hence the automatic recognition and enforcement of ICSID awards within the boundaries of the Contracting states and prohibition of any diplomatic protection.<sup>36</sup> The ICSID Convention has equaled the game of states and private parties on the international field – private parties are able to sue state sovereigns; however, the requirements for the jurisdiction – *ratione personae*, *ratione materiae* and consent of the parties - of the Centre must be met.<sup>37</sup>

The request for arbitration shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration shall be addressed to the Secretary-General who may register or refuse the request.<sup>38</sup> As soon as possible after the registration the Tribunal of a single arbitrator or of uneven number of arbitrators is constituted.<sup>39</sup> Once the tribunal has been formed, the arbitration shall be carried out under the provision of the ICSID

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<sup>35</sup> Vivendi v. Argentine, Decision on Annulment issued July 3, 2002, 19 ICSID Review—Foreign Investment Law Journal 89 (2004), available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552\\_En&caseId=C159](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552_En&caseId=C159), para. 64, p.118

<sup>36</sup> Arts.54 and 27 of the ICSID Convention as quoted in Giardina, A., *ICSID: A self-contained, non-national review system*, in Lillich, R., Brower, C., International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity? (1993), p.203

<sup>37</sup> Since, the disputes before the ICSID must be of legal nature (thus not economic or political), it follows that disputes must be concerning the legal rights and obligations of the parties stemming from a contract (*ratione materiae* or subject-matter jurisdiction). Meeting the *ratione personae* requirement means according to the Art. 25 of the ICSID Convention that the dispute must arise “between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State“. The consent for arbitration via ICSID may be given by one of three forms : by a clause in the investment agreement between the parties, by incorporation in the national legislation (e.g. in an investment code) or by a bilateral investment treaty between the host State and the State of investor’s nationality.

<sup>38</sup> Art. 36 of the ICSID Convention

<sup>39</sup> Ibid., Art. 37

Convention. The award is rendered by the majority of votes and shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.<sup>40</sup>

The ICSID's control mechanism provides several possible post-award remedies (among others supplementation and rectification by course of Art. 49(2)), and it works only with regard to final awards; therefore it shall be noticed that the prospective applicant shall first examine the feature of the decision rendered, i.e. whether it is an award, since the procedural measures and decisions can be awards as well, and if it is, whether this award is final. However, it shall be noted, that preliminary decisions (e.g. maintaining jurisdiction) cannot be subject to remedy of annulment, since allowing such measures would seriously delay the whole proceedings.<sup>41</sup> The final arbitral awards may be subject to three remedies according to the three Articles in Section 5 of Chapter VI. of the ICSID Convention - revision, interpretation and annulment all conducted strictly under provisions of the ICSID Convention and Rules of Procedure for Arbitration Proceedings (Arbitration Rules).

As it will be elaborated below, all three remedies differ from each other with respect to legal nature, time limits, legal consequences or panel conducting the particular procedure. The common features of all of them are that they are not *ex officio* remedies and a discretionary stay of enforcement by a tribunal or an *ad hoc* Committee upon the request of a party is available, whereas in the case of annulment and revision the stay is automatic upon request. If an applicant wishes to seek several remedies at once, he should apply for each one separately because of different time limits.

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<sup>40</sup> Ibid., Art.48

<sup>41</sup> For instance, in *SPP v. Egypt*, Egypt applied for annulment of the Tribunal's decision which upheld the jurisdiction that the Secretary-General refused stating that kind of decision is not an award for the purposes of Ar.52, but rather an interlocutory decision unable to trigger the annulment process. For further information see *SPP v. Egypt*, Decision on Jurisdiction II, 14 April 1988, 3 ICSID Reports.

## **2.1 Interpretation and Revision of the Award**

Normally, the interpretation of an award is a matter of formal procedure offered by the original adjudicatory body covered by the rules of procedure.<sup>42</sup> The principle has always been the same – to provide the parties a clear explanation over disputable matters of the award, i.e. the scope and the meaning. The basis for interpretation of the ICSID awards is Art. 50 of the ICSID Convention.<sup>43</sup> The essential prerequisite for the application for interpretation is the existence of a dispute about the scope and meaning of the award with some practical significance to the award's execution, a sheer argument concerning theoretical suggestions about the award's clarity would not suffice for a successful application.<sup>44</sup> The interpretation of the award shall have no impact on the finality, since new points are not allowed and the procedure was intended to be employed only in situations when the original tribunal has ceased its doings.

Unlike applications for other post-award remedies, the request for interpretation from one of the parties to the arbitration addressed to the Secretary-General of the ICSID is not time-limited with regard to the long-lasting investor - host State relations. It seems reasonable to submit the application for the interpretation to the very same tribunal that has rendered the original award (Art. 50(2) although, the precondition for the interpretation is the express willingness of the members of the tribunal to take part in the procedure, since the reconstitution of the same tribunal involves time and costs, and a majority of them does not suffice. Since the interpretation is not subject to time limit, the accessibility of the original

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<sup>42</sup> See for example Art. 33 of the UNCITRAL Model Law

<sup>43</sup> Art. 50 :“(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General. (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision“. Art.50 of the ICSID Convention shall be distinguished from the Art.64 which deals with the disputes concerning the interpretation of the whole ICSID Convention. These disputes are referred to the International Court of Justice according to the Vienna Convention on the Law of Treaties, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>44</sup> Schreuer, Ch., H., *supra* note 22, at pp. 857-858



tribunal becomes more complicated with lapse of time. Therefore, the Arbitration Rule 51(2) provides for a constitution of a new Tribunal.<sup>45</sup>

The ICSID Convention is silent about the legal nature of the interpretation procedure – it does not state that the decision on interpretation should be the part of the award; however, it provides that “for the purposes of the Section VI. on “Recognition and Enforcement of the Award”, award shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52<sup>46</sup>, it follows the award being recognized and enforced shall be interpreted in accordance with the Art. 50. The procedure of interpretation according to Art. 52(4) is not available for the decisions of *ad hoc* Committees, so it follows that any disputes requiring interpretation or revision shall be submitted to a new Tribunal constituted under Art. 52(6).

The revision of an award<sup>47</sup> includes according to Art. 51 possible alteration of the original award by a new one on the basis of a new fact before unknown which have been discovered and it works very similarly to the interpretation with few but still very significant exceptions. The procedure of revision does not require the existence of a dispute over the new facts, yet the applicant must specify the new facts which are about to change the original award and submit some evidence that the facts have not been known to the original tribunal and to the applicant and that his lack of knowledge was not due to negligence.

The contingency of revision is always dependent on the new element of law or fact discovered which has objectively existed at the time of signature and transmission of the award. This new fact, however, must be decisive, it follows it shall be able to change the award substantially.<sup>48</sup> The right for application is time-limited for the parties barred by a

<sup>45</sup> Art.51(3) of the Arbitration Rules :“If the Tribunal cannot be reconstituted in accordance with paragraph (2), the Secretary-General shall so notify the parties and invite them to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbitrators, and appointed by the same method, as the original one.”

<sup>46</sup> Art.53 (2) of the ICSID Convention.

<sup>47</sup> Ibid., Art.51

<sup>48</sup> For example, the calculation of the damages or even matters relating to the jurisdiction.

subjective and an objective term of performance. The applicant shall make his request for revision within 90 days after the finding of the decisive fact, but no later than three years after the date the award was dispatched to the parties.<sup>49</sup> If the application for revision is successful, then the automatic stay of enforcement of the award is granted, however, this automatic stay expires after 30 days after the Tribunal's constitution, but afterwards the Tribunal can renew the stay of enforcement.

## **2.2 Article 52(1) - the ICSID's stumbling-block?**

### **2.2.1 The basic policies of the procedure**

Art. 52 of the ICSID Convention dealing with the annulment is the very last of the three Articles in Section 5 of Chapter IV. of the ICSID Convention's Chapter IV. Annulment is the most radical, drastic, but very limited post-award remedy enabling to legally destruct the award. With regard to Art. 53, which excludes any form of appeal except those mentioned by the ICSID Convention, it constitutes a very limited exception to the principle of finality – it is concerned only with the legitimacy of the process and not with the substantive suitability. The *ad hoc* Committee in *MINE*<sup>50</sup> observed that the award is “final in the sense that even within the framework of the ICSID Convention it is not subject to review on merits.”<sup>51</sup> However, as indicated in the first chapter of this thesis and analyzed later by respective grounds for annulment, in some cases the *ad hoc* Committee unwittingly inclines to the review of the merits.

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<sup>49</sup> Under Art. 49(1) of the ICSID Convention, the award shall be deemed rendered on the date of its dispatch to the parties.

<sup>50</sup> Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4). The dispute concerned contracts for bauxite shipments. Despite of the fact that the parties had agreed on application of Guinean law, the ICSID Tribunal applied French law and granted *MINE lucrum cessans*. The *ad hoc* Committee annulled the award that dealt with damages, but insisted on breach of contract made by Guinea. After resubmission the parties reached a settlement of the dispute.

<sup>51</sup> *MINE v. Guinea*, Decision on Annulment, 3 May 1985, 5 ICSID Review – Foreign Investment Law Journal 95 (1990), para.4.2, p.101

The procedure of annulment is covered by Art. 52 and Rules 50, 52-55 of the Rules of Procedure for Arbitration Proceedings (Arbitration Rules). To take advantage of the annulment procedure, the request must come from one of the parties to arbitration (the parties may apply jointly as well) hoping for a better result, i.e. the commencement of annulment is subject of procedural autonomy and not an *ex officio* or *action popularis* matter. Usually, the losing party will wish to apply all the possible procedural remedies whether to avoid political responsibility (case of Contracting-state parties) or serious economical detriment. Thus, the right of request for annulment is discretionary, which means that right can be waived after rendering of the award, but this waiver must be done explicitly.<sup>52</sup>

The advance waiver of this right is rather problematic. The ICSID Convention contains a lot of articles that may be subject to further modifications by the parties, but Art. 52 does not plainly contain that possibility. But since the application for annulment is discretionary (expressed by the wording “either party may request...”) and with regard to long-lasting cases such as *Klöckner* and *Amco*<sup>53</sup> it appears efficient to eliminate annulment in advance, which is also in accordance with the contractual spirit of the ICSID arbitration and in proportion to some national laws authorizing exclusion agreements<sup>54</sup> which contract out any judicial review or annulment in arbitration involving one foreign party.<sup>55</sup> Another possibility for the parties to avoid the service of Art. 52 is to opt out only few of the provided grounds for annulment, in particular those relating to fraud and corruption, since these are standards upon which one shall insist (*ordre public*).<sup>56</sup> One possible approach could be the suggestion that the parties could exclude an annulment in matters upon which they can exercise control such as with regard to jurisdiction the parties would not commence annulment on the ground that the

<sup>52</sup> *Amco v.Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 523/4

<sup>53</sup> However, the applications made by the losing parties for annulment in these cases after rendering of the second set of awards were rejected.

<sup>54</sup> Exclusion contracts are like double axes, since it is always hard to predict to whose detriment they will be used.

<sup>55</sup> Delaume, G.,R., supra note 20, p.11 (with reference to English and Swiss law)

<sup>56</sup> Reisman, W., M., supra note 2 at 805

tribunal has gone beyond their consent<sup>57</sup>. Even though the ICSID Convention does not explicitly prevent the parties from exclusion agreements or avoidance of Art. 52, many commentators reject these ideas as being contrary to the whole ICSID system.<sup>58</sup>

The application must state that it seeks annulment as well as identify the award to which it relates and the parties to annulment shall present their grievances at this point. The applicant should not be able to limit the scope of review.<sup>59</sup> The application should be made no later than 120 days after the date on which the award was rendered. The only possible excuse for acceptance of an application after the absolute cut-off date of three years is a discovery of the corruption of the members of the Tribunal; otherwise, it shall be made up to three years after the delivery of the award.<sup>60</sup> In *Wena*<sup>61</sup>, the Respondent argued that some additional grounds for annulment invoked by Egypt were time-bared, since they were not included in the original application. The *ad hoc* Committee rejected this contention and adopted the statement that the ICSID Convention does not call for completeness of the application, but rather for presentation of one or more grounds for annulment and “thus does not preclude raising new arguments which are related to the ground of annulment invoked within the time limit fixed in the Convention.”<sup>62</sup>

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<sup>57</sup> Delaume, G.R., *How to draft an ICSID Arbitration Clause*, 7 ICSID Review - Foreign Investment Law Journal 168, (1992); as quoted in Schreuer, Ch., H., note 20 at 909

<sup>58</sup> Gailard, E., *Some Notes on Drafting of ICSID Arbitration Clauses*, 3 ICSID Review - Foreign Investment Law Journal 136, 142/3 (1988); Amerisanghe, C.F., *Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes*, 5 Journal of Maritime Law and Commerce 211, 245 (1973/74) as quoted in Schreuer, Ch., H., supra note 20 at 908

<sup>59</sup> Caron, D., D., supra note 23 at 36

<sup>60</sup> Art. 52 of the ICSID Convention

<sup>61</sup> *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4). The dispute arose in connection with two hotels in Egypt. A state-owned company leased these hotels to Wena, an English company, but after several months Wena was evicted from these hotels for breach of contractual obligations. After number of legal actions including arbitrations, in 1997 ICSID arbitration was commenced and an award was rendered in favour of Wena. Egypt filed for annulment, but the ad hoc Committee adopting a restrictive interpretation of its powers rejected Egypt's claims for annulment.

<sup>62</sup> *Wena v. Egypt*, Decision on the Application for the Annulment of the Award issued on December 8, 2000, published in Gailard E., Banifatemi Y., IAI International Arbitration Series No.1, Annulment of ICSID Awards (2004), para.19, p.378

The applicant requesting annulment shall pay to the Centre a non-refundable fee accord under the Administrative and Financial Regulation 16 (Fee for Lodging Requests).<sup>63</sup>

The application should state at least one alleged ground for annulment and indicate the defects of the award and after its registration the Secretary-General requests the Chairman of the Administrative Council (the President of the World Bank ex officio) to constitute the *ad hoc* Committee of three persons from the Panel of Arbitrators.<sup>64</sup> Unlike choosing the arbitrators at the first level, at this point the parties are not allowed to choose the members of the *ad hoc* Committee to, hence they have less influence over the proceedings, which can discourage the parties from employing the ICSID mechanism.<sup>65</sup>

The members of the *ad hoc* Committee have to meet certain exclusionary requirements, i.e. some categories of persons are precluded from serving on an *ad hoc* Committee to ensure the utmost possible objectivity. The *ad hoc* Committee members shall be absolutely impartial and unconnected to each other by nationality, they must not be of the same nationality as the investor-party or be from the State-party or designated to the Panel of Arbitrators by these States, and in addition, none of them shall have been a member of the Tribunal or shall have acted as a conciliator in the same dispute.<sup>66</sup>

Art. 52(4) specifies which provisions of the ICSID Convention governing the arbitration are or are not *mutatis mutandis* applicable for the procedure before an *ad hoc* Committee – the analogy can be applied e.g. for dealing with the evidence, default of a party, majority voting, written form, statement of reasons, individual opinions, publication of the awards and dispatch, supplementation and correction.<sup>67</sup> The references to Arts. 53 and 54 indicate that the decision on annulment is binding upon the parties and is not subject to any appeal and the

<sup>63</sup> Paying the fee is crucial, e.g. in *Philippe Gruslin v. Malaysia* the proceeding was discontinued for lack of payment of advances pursuant to Administrative and Financial Regulation 14(3)(d).

<sup>64</sup> Each Contracting State may designate up to four persons to the Panel who can be their own nationals.

<sup>65</sup> Schatz, S., *The Effect of the Annulment Decisions in Amco v. Indonesia and Klöckner v. Cameroon on the Future of the International Centre for Settlement of Investment Disputes*, American University Journal of International Law and Policy Vol. 3, p. 513

<sup>66</sup> Art.52(3) of the ICSID Convention and Rule 52(1) of the Arbitration Rules

<sup>67</sup> Articles 43, 45, 48 and 49 of the ICSID Convention

contracting States shall recognize and enforce such decisions. *Ex adverso*, this means self-exclusion of Art. 52, i.e. the decision on annulment is not subject to annulment and omission of Art. 50 and 51 implies prevention of interpretation and revision of such decisions.

The *ad hoc* Committee has the power only to annul the award based on procedural errors or leave it intact, it cannot amend it, replace it by its own decision nor confirm it. Given that the *ad hoc* Committee “shall have the authority to annul the award or any part thereof”<sup>68</sup>, it seems unreasonable to annul the whole award whilst only partial annulment has been requested. Alternatively, when annulment of the whole award is applied for, the *ad hoc* Committee has the power to annul a portion and let the other portion in effect.<sup>69</sup> Permitting annulment of a partial award remains still questionable; however, it should be able to generate annulment proceedings if clearly dealing with some definite part of the dispute and being severable from the rest of the arbitration and regarded as final.<sup>70</sup> Decisions of the *ad hoc* Committees are not subject to any review and can be enforced the same way as awards.<sup>71</sup>

As far as authority to annul the award is concerned, it is still not clear whether the wording of the last sentence of Art. 52(3) of the ICSID Convention means an obligation or a discretion for the *ad hoc* Committees. *Prima facie* the word “authority” would indicate it is a matter of discretion, but the decisions of *ad hoc* Committees are contradictory.<sup>72</sup> The *ad hoc* Committee in *Klöckner* analyzed the pros and cons of both obligation and discretion, but in the end it voted in favor of the obligation. Even if the *ad hoc* Committee would have observed some exceptions to this obligation, e.g. in cases when the Claimant would abuse his rights, it still kept on stressing that if “there is one of the grounds for annulment, Article 52(1) must in principle lead to total or partial annulment of the award, without the Committee having any

<sup>68</sup> Ibid., last sentence of Art.52(3)

<sup>69</sup> The *ad hoc* Committee accepted Guinea’s request for partial annulment in *MINE v. Guinea*, Decision on Annulment, supra note 47

<sup>70</sup> Caron, D.D., supra note 23 at 37

<sup>71</sup> Art.53(2) of the ICSID Convention

<sup>72</sup> Schreuer, Ch., H., supra note 22 at 1019

discretion“.<sup>73</sup> Michael W. Reisman called such a rule approach as “a hair-trigger, a mechanism of extraordinary sensitivity that would set off nullification at the slightest provocation without regard to the magnitude of the defect established”<sup>74</sup> and with regard to the interpretation of Art. 52 (3) stated that “its purpose was not to install a rule of compulsory nullification but rather to confirm who nullifies.”<sup>75</sup> Anyway, the *Klöckner* Committee interpreted Art. 52(1) as compulsory even in cases when no grievance or injury had happened to the Claimant, otherwise it would amount to excess of powers<sup>76</sup>. This approach, as criticized by Ross P. Buckley “is using a mallet to crush a mosquito: it may be efficacious but the side effects may be painful – particularly if the mosquito is on your leg.”<sup>77</sup>

On the other hand, the *ad hoc* Committee in *MINE* while analyzing the powers and obligations of *ad hoc* Committees inclined to the discretionary meaning and stated, that “the Convention does not require automatic exercise of that authority (...) and it [the *ad hoc* Committee] may, however, refuse to exercise its authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards.”<sup>78</sup> This material approach with emphasis on the size and practical impact of the defect (and thus finding of the violation) on the parties highlights the explicitness of the defect and thus of ground for annulment. The *ad hoc* Committee in *Vivendi*<sup>79</sup> explicitly recognized its discretion to annul and stated “this [Art. 48(3)] has been interpreted as giving Committees some flexibility in determining whether

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<sup>73</sup> *Klöckner v. Cameroon*, Decision on Annulment, *supra* note 32, para.179 , p.144

<sup>74</sup> Reisman, W., M., *supra* note 2 at 762

<sup>75</sup> *Ibid.*, p.763

<sup>76</sup> *Klöckner v. Cameroon*, Decision on Annulment, *supra* note 32, para.179 , p.144

<sup>77</sup> Buckley, R.P., *Now we have come to the ICSID Party: Are its Awards Final and Enforceable?* 14 *Sydney Law Review* 3 (1992), p.363

<sup>78</sup> *MINE v. Guinea*, *supra* note 51 at 103

<sup>79</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3). The case involved contracts on water and sewage services between an Argentine province and a French company. The Argentine authorities began to make unilaterally amendments to the contract which made it impossible for Vivendi to fulfill its contractual obligations. The ICSID Tribunal failed to decide Vivendi's claims for equitable treatment standard and consequently, Vivendi filed for annulment and the *ad hoc* Committee partially annulled the award on ground of manifest excess of powers.

annulment is appropriate in the circumstances. Among other things, it is necessary for an *ad hoc* Committee to consider the significance of the error relative to the legal rights of the parties.”<sup>80</sup> The material approach, however, calls for an explicit reasoning and interpretation, which involves the issue of reconstruction of the tribunal’s reasoning.

### 2.2.2 Grounds for annulment

The first paragraph of Art. 52 states that “either party to an arbitration proceeding may request annulment of an 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 the fundamental rule of the procedure;
- e) or that the award has failed to state the reasons on which it was based.”<sup>81</sup>

Clearly, grounds (a), (c) and (d) reach to the roots of the integrity and legitimacy of the arbitration process. Practice has shown that applicants for annulment have been trying their best and take advantage of this exhaustive list of grounds<sup>82</sup>, usually invoking a couple of them at once, while some other times they have been calling up only one of them. Some grounds, e.g. ground (c), have never been invoked.<sup>83</sup> Especially, grounds (b), (d) and (e) have been invoked most frequently and hence present troubles of application and interpretation with

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<sup>80</sup> The Decision of the Ad Hoc Committee in *Vivendi v. Argentina*, published in Gailard E., Banifatemi Y., IAI INTERNATIONAL ARBITRATION SERIES No.1, ANNULMENT OF ICSID AWARDS (2004), p.473 para.66

<sup>81</sup> Art.52(1)

<sup>82</sup> Under the Arbitration Rule 50(1)(c)(iii) this is a closed-list and parties cannot bring up new arguments whether of law or fact.

<sup>83</sup> Since this ground has never been invoked, therefore there will be no analysis of this ground in the present thesis.



regard to the finality of the awards.<sup>84</sup> On the basis of information available, in particular cases the following grounds were invoked:

*Amco Asia Corporation and others v. Republic of Indonesia*:<sup>85</sup>

- manifest excess of powers;
- serious departure from the fundamental rule of the procedure
- failure to state reasons.

*Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*:<sup>86</sup>

- manifest excess of powers;
- serious departure from the fundamental rule of the procedure
- failure to state reasons.

*Maritime International Nominees Establishment (MINE) v. Republic of Guinea*:<sup>87</sup>

- manifest excess of powers;
- serious departure from the fundamental rule of the procedure
- failure to state reasons.

*Wena Hotels Limited v. Arab Republic of Egypt*:<sup>88</sup>

- manifest excess of powers;
- serious departure from the fundamental rule of the procedure
- failure to state reasons.

*Patrick Mitchell v. Democratic Republic of the Congo*:<sup>89</sup>

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<sup>84</sup> According to the information on concluded cases available at ICSID's website <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases>

<sup>85</sup> *Amco v. Indonesia*, supra note 52 at p.512 et seq. Any information on the second application for annulment in this case was not published.

<sup>86</sup> *Klöckner v. Cameroon*, supra note 32 at p.93 et seq., p.116 et seq., p.124 et seq. The decision in *Klöckner II* remains unpublished.

<sup>87</sup> *MINE v. Guinea*, supra note 51 at p.102

<sup>88</sup> *Wena v. Egypt*, supra note 62, p.377 et seq.

<sup>89</sup> *Patrick Mitchell v. Congo*, Decision on the Application for the Annulment of the Award issued on November 1, 2006 available at <http://ita.law.uvic.ca/documents/mitchellannulment.pdf>

- manifest excess of powers;
- failure to state reasons.

*Consortium R.F.C.C. v. Kingdom of Morocco:*<sup>90</sup>

- serious departure from the fundamental rule of the procedure
- failure to state reasons.

*CMS Gas Transmission Company v. Argentine Republic:*<sup>91</sup>

- manifest excess of powers;
- failure to state reasons.

*Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador:*<sup>92</sup>

- improper constitution of the Tribunal;
- manifest excess of powers;
- serious departure from the fundamental rule of the procedure.

*Azurix Corp. v. Argentine Republic:*<sup>93</sup>

- improper constitution of the Tribunal;
- manifest excess of powers;
- serious departure from the fundamental rule of the procedure;
- failure to state reasons.

*Malaysian Historical Salvors, SDN, BHD v. Malaysia:*<sup>94</sup>

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<sup>90</sup> Consortium R.F.C.C. v Morocco, Introductory note available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC611&caseId=C193>

<sup>91</sup> CMS v. Argentine, Decision on the Application for the Annulment of the Award issued on September 25, 2007 available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687\\_En&caseId=C4](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4)

<sup>92</sup> Repsol v. Ecuador, Decision on the Application for Annulment issued on January 8, 2007, unofficial English translation available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC619\\_En&caseId=C203](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC619_En&caseId=C203)

<sup>93</sup> Azurix v. Argentine, Decision of the *ad hoc* Committee on the Application for Annulment issued on September 1, 2009, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171\\_En&caseId=C5](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1171_En&caseId=C5), p.24 et seq.

- manifest excess of powers;

*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*:<sup>95</sup>

- manifest excess of powers;
- serious departure from the fundamental rule of the procedure;
- failure to state reasons.

Classification of individual grounds is not clear, since some aspect of award may fall within several grounds, e.g. failure to apply the applicable law could cause serious departure from fundamental rules of procedure and manifest excess of powers as well<sup>96</sup>. For example, in *Amco*, the *ad hoc* Committee was hesitant to decide whether failure of the Tribunal to answer all the questions submitted as a requirement of Art. 48(3) might have amount to manifest excess of powers, cause serious departure from fundamental rule of procedure or failure to state reasons.<sup>97</sup> *Amco* stated that omission of the Tribunal to deal with every question submitted did not constitute a ground for annulment under Art. 52(1) but rather would entitle a party to the dispute to request completion or correction of the award under Art. 49(2). The *Amco ad hoc* Committee made a general statement that Art. 48(3) is applicable to annulment proceedings and went further, that such failure is a ground for annulment under Art. 52(1)(e) amounting to serious departure from fundamental rule of procedure and manifest excess of powers.<sup>98</sup>

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<sup>94</sup> *Malaysian Historical Salvors, SDN, BHD v. Malaysia*, Decision on the Application for Annulment April 16, 2009, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030\\_En&caseId=C247](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1030_En&caseId=C247), p. 24 et seq.

<sup>95</sup> *Vivendi v. Argentine*, Decision on Annulment issued July 3, 2002, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552\\_En&caseId=C159](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552_En&caseId=C159). After resubmission the case is still not concluded.

<sup>96</sup> As the *ad hoc* Committee distinguished in *Amco v. Indonesia* a failure to apply the applicable law is a ground for annulment and a misinterpretation of applicable law (*error in iudicando*) is a ground for appeal, see *Amco v. Indonesia*, supra note 48, p. 515-516

<sup>97</sup> *Ibid.*, at pp. 514, 517-519.

<sup>98</sup> *Ibid.*, at 517-518

Typically, these three grounds blur into each other and even the technique of dealing with every ground separately like in *Klöckner*, the *ad hoc* Committees cannot avoid the meeting and competing of these grounds.<sup>99</sup> Nevertheless, the *ad hoc* Committee is authorized under Art. 52 (3) to annul on any ground and only within the scope of the request<sup>100</sup> and therefore, it suffices to have at least one ground present, and the Committee does not have to overstress the flawed award. As Schreuer states: "The *Klöckner I ad hoc* Committee seems to have expended much time and energy in shooting a horse that it had declared dead."<sup>101</sup> In addition, the Committee in this case chose to interpret Art. 52 in relation with all provisions and standards of the whole ICSID Convention.

The above mentioned issue demonstrates that even though the list of grounds is exhaustive, the *ad hoc* Committees may feel flexible for their interpretation. Albeit the decisions of the *ad hoc* Committees are limited, since they can only verify the existence of the invoked grounds, their task is much difficult than it seems because rendering of some plausible solution did bring already a wave of outrage from the side of commentators, in particular at the dawn of annulment proceedings in *Klöckner* and *Amco* cases and their critical observations led to the evaluation of the whole ICSID system.<sup>102</sup>

In the *MINE* case, however, the *ad hoc* Committee tried to redeem the ICSID's reputation. After having found that the award must be annulled on the basis of the Tribunal's failure to state reasons for calculation of the damages, the *ad hoc* Committee saw no further need to examine the ground of manifest excess of powers submitted by Guinea.<sup>103</sup> Also dealing with the nature of the annulment the *ad hoc* Committee stated, that "annulment is not a remedy against an incorrect decision (...)" and an *ad hoc* Committee may not in fact reverse

<sup>99</sup> Schreuer, Ch., H., supra note 22 at 1033

<sup>100</sup> *MINE v. Guinea*, supra note 51, para.4.8, p.103

<sup>101</sup> Schreuer, Ch., H., supra note 22 at 1035

<sup>102</sup> For example see Feldman, M.B, supra note 24 or Broches, A., supra note 26

<sup>103</sup> *MINE v. Guinea*, supra note 51, p.125-126

an award on the merits under the guise of applying Article 52(1).”<sup>104</sup> The *ad hoc* Committee went further, elaborating the dilemma of restrictive or extensive interpretation of Art. 52(1) and stated that “...the grounds for annulment should be strictly construed or, on the contrary, that they should be given a liberal interpretation since they represent the only remedy against unjust awards (...) Art. 52 should be interpreted in accordance with its object and purpose, which excludes on the one, as already stated, extending its application to the review of an award on the merits, and on the other, an unwarranted refusal to give full effect to it within the limited but important area for which it was intended.”<sup>105</sup>

### 2.2.2.1 Improper constitution of the Tribunal

The principle of a properly composed tribunal under the ICSID Convention is no novelty, since it is a common ground for the setting aside or non-enforcement of an award under many instruments of national or international laws regulating post-award proceedings, e.g. the New York Convention Art. V(d). Under Art. 56(1) there is a necessity of the Tribunal remain unchanged after it has been constituted and under Art. 57 a party may raise an objection against the arbitrators having found out exclusion under the principles of nationality as stated in Arts. 38 and 39. Following Arbitration Rule 53<sup>106</sup> it may be implied that Rule 27 requiring objections to be raised promptly, otherwise deemed as a waiver, applies to the annulment proceedings as well. This means that if a party knows about a defect concerning the Tribunal, he should exhaust all the remedies available already during the original proceeding. However, it is not in the power of the Secretary-General to refuse an application for annulment on the

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<sup>104</sup> Ibid., para.4.04 at.102

<sup>105</sup> Ibid., para. 4.05, in accordance with the Vienna Convention on the Law of Treaties adopted May 23, 1969 , Art.31(1)

<sup>106</sup> “The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee.”

ground that the party did not object during the arbitration, the applicant will be asked to clarify why he did not raise any objection before.<sup>107</sup>

### 2.2.2.2 Manifest excess of powers

The language of Art. 52(1) seems to be *prima facie* plain, but the “manifest excess of powers” presents a lot of problems being at risk of different interpretation. This ground for annulment is an equivalent of the New York Convention’s Art. V(c), under which recognition and enforcement of an award may be refused if it deals with a difference not contemplated by or not falling within the terms of submission to arbitration. This ground was not projected to allow annulment for any error of law.<sup>108</sup>

To stress the restrictive nature of the annulment, the excess must be manifest<sup>109</sup>; it logically follows that the *ad hoc* Committees should “*primo* decide whether the Tribunal has indeed exceeded its jurisdiction in any way whatsoever; and *secundo*, if it has, determine the extent to which such an excess might be characterized as a manifest excess of powers.”<sup>110</sup> In the case of ICSID the excess of power includes in particular jurisdiction matters, going *ultra petita* and violation of Art. 42 on applicable law.

The most serious and obvious excess of powers could be the lack or of failure to comply with the requirements of Art. 25 – e.g. if the dispute does not arise directly out of the investment or is of no legal nature. In *Klöckner*, the Claimant based his allegations of violation of Art. 52(1)(b) on several grounds. One of them, a claim of lack of jurisdiction was raised, when the Tribunal exceeded its powers holding Klöckner – the investor - responsible for failure of performance of its management duties even though the Management Agreement contained an ICC arbitration clause. The Tribunal based its decision on the ground that the

<sup>107</sup> Schreuer, Ch., H., supra note 22 at p.931

<sup>108</sup> Feldman, M.B, supra note 24 at p.100

<sup>109</sup> Under the Art.46 (2) of the Vienna Convention on the Law of Treaties “a violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith”.

<sup>110</sup> *Klöckner v. Cameroon*, supra note 29, para.4 at p.93

earlier concluded Protocol of Agreement contained an ICSID arbitration clause and its Art. 9 contained an obligation to conclude a management contract, from which the Tribunal deduced direct connection between these two instruments and Klöckner's implied acceptance of the ICSID arbitration clause.

However, the *ad hoc* Committee refused the Tribunal's arguments and stated they were not implausible and that "such interpretation of the agreements and especially of the two arbitration clauses, whether correct or not, is tenable and does not in any event constitute a manifest excess of powers"<sup>111</sup> and "since the answers are tenable and not arbitrary (...), in any case, the doubt or uncertainty that may have persisted in this regard throughout the long preceding analysis should be resolved in *favorem validitatis sententiae*".<sup>112</sup> After the "*in favorem validitatis sententiae*" decision, Klöckner contested the award on the basis that the Tribunal erred in the application of the proper law (because the Tribunal took for granted that the duty of full disclosure to a partner is a basic principle of French law<sup>113</sup>), which would have resulted in rededuction on merits by the Committee.

The award based on applicable law other than that of parties' agreement is deemed as a manifest excess of powers.<sup>114</sup> In *Klöckner* the Tribunal had failed to make any attempt to point out the "duty of full disclosure to a partner" under the French law (which the Cameroonian law is based on) in terms that it had alleged, but had never proved, the existence of such principle, but rather made a reference to equity and thus had acted as *amiable compositeur*. Consequently, the *ad hoc* Committee stated, "that in its reasoning, limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form, the Tribunal has not applied the law of the Contracting State.

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<sup>111</sup> Ibid., para.52 at 107

<sup>112</sup> Ibid., para.52 at 108

<sup>113</sup> *Klöckner v. Cameroon*, supra note 32, para.66, at p.111

<sup>114</sup> Art.42(1) states: "(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(...); however justified its award may be the Tribunal thus "manifestly exceeded its powers" within the meaning of Article 52(1)(b)".<sup>115</sup>

The excess of jurisdiction would also comprise cases when the Tribunal possesses jurisdiction, but goes beyond it, e.g. deciding aspects not included in the dispute or not covered by the consent of the parties and even non-exercise of jurisdiction although given such as in *Vivendi*, when the *ad hoc* Committee concluded that the Tribunal had exceeded its powers by having jurisdiction to decide and failing to do so.<sup>116</sup>

In *Amco*, even though the proper law had been applied by the Tribunal, while calculating damages it had omitted an essential provision of the Indonesian law, which had been not a matter of misinterpretation, but rather of ignorance. Nonetheless, the *ad hoc* Committee ventured into a *de novo* review of facts, reviewed the case for flaws and used these errors to state that the Tribunal had exceeded its powers - it calculated the damages on its own and annulled the relevant portion of the award.<sup>117</sup> Mark Feldman criticized this approach as follows: "Very likely the members of the Committee would insist that the award was annulled not for mistakes of law and fact, but for failure to apply the rules of Indonesian law applicable to the dispute."<sup>118</sup> Very shortly after the *Amco* annulment, which was actually the second annulment in ICSID's history and also highly controversial, raised doubts about the future of ICSID arbitrations.<sup>119</sup>

<sup>115</sup> Klöckner v. Cameroon, Decision on Annulment, supra note 32, para.79 at p.115

<sup>116</sup> Vivendi v. Argentine, supra note 35 available at

[http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552\\_En&caseId=C159](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC552_En&caseId=C159), para.115 at p.136

<sup>117</sup> Amco v.Indonesia, supra note 52, pp. 533-534,537

<sup>118</sup> Feldman, M.B, supra note 24 at p.96

<sup>119</sup> Craig, W.L., *Uses and Abuses of Appeal from Awards*, Arbitration International, (Kluwer Law International 1988, Volume 4 Issue 3), p.212



### 2.2.2.3 Serious departure from a fundamental rule of procedure

This ground, however, mostly invoked, has a very small possibility to access, since the aggrieved party always seems to have a feeling of unequal treatment, injustice and partiality. To narrow the application of this ground of violation of a rule of procedure, the departure must be “serious” and the violated rule of a “fundamental” nature in the sense of *de minimis non curat praetor*. The language of Art. 52(1)(d) *prima facie* reveals that these conditions must be met cumulatively. The *ad hoc* Committee in *MINE* stated that “...this establishes both quantitative and qualitative criteria: the departure must be substantial and be such as to deprive a party of the benefit or protection which the rule was intended to provide.”<sup>120</sup> *Prima facie* two separate concepts were encountered in *Klöckner*, when the *ad hoc* Committee suggested that any slightest shortcoming of impartiality as one of the essential requirements of process should constitute a serious departure.<sup>121</sup> It follows, that the departure must be of such kind to notably affect one of the parties, and in particular, it is a matter of lack of impartiality, violation of the right to be heard and rules of evidence and absence or abuse of deliberation among the arbitrators.<sup>122</sup>

In *Klöckner*, the Claimant alleged absence of deliberation since comparing the Award and the Dissenting opinion supposed, that “a confrontation between the arbitrators did not take place.”<sup>123</sup> This allegation was rejected by the *ad hoc* Committee as not sustainable. Further the Claimant stated that there were irregularities in the process, since Tribunal based its decision on arguments not presented by the parties to arbitration. This contention was also rejected by the *ad hoc* Committee stating that “arbitrators must be free to rely on arguments which strike them as the best ones (...) and basing their decision on an argument that has not been discussed by the parties, it obviously does not follow that they therefore commit a

<sup>120</sup> *MINE v. Guinea*, Decision on Annulment, *supra* note 51, para.5.05 at p.104

<sup>121</sup> *Klöckner v. Cameroon*, *supra* note 32, p.119

<sup>122</sup> Schreuer, Ch., H., *supra* note 22 at p.972

<sup>123</sup> *Klöckner v. Cameroon*, *supra* note 32, para.85 at p.116

"serious departure from a fundamental rule of procedure."<sup>124</sup> Additionally, the Claimant alleged obvious lack of impartiality on the basis of failure of the Tribunal to examine his arguments during the oral pleadings, thus showing the Award being systematically hostile to him.<sup>125</sup> Though, the *ad hoc* Committee admitted the harsh wording of the Award, it stated that these shortcomings were not enough for accusation for lack of impartiality.<sup>126</sup> Through these statements the blurring of respective grounds for annulment is apparent.

In *Amco*, the argument of impartiality was put forward by Indonesia claiming among others unequal treatment since it had not been allowed to present arguments against its unlawful revocation of Amco's investment licence. The *ad hoc* Committee accepted Indonesia's claim stating it would rather fit for Art. 52(1)(e), but still there was no evidence of unequal treatment and thus rejected it.<sup>127</sup> Violation of *audiatur et altera pars* was claimed also in *MINE* by Guinea contending the Tribunal's measure for calculating damages not discussed by the parties, but since the award was annulled on the ground of failure to state reasons, the *ad hoc* Committee stopped to shoot the dead award and didn't make any point for this ground.

Although the ICSID Convention does not contain any formal rules of evidence and under the Rule 34(1) "the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value", the claimants usually allege wrong allocation of burden of proof. In *Amco*, Indonesia submitted incomplete documents that should have been originally submitted by the other party, afterwards stating unequal treatment and later rejected by the *ad hoc* Committee.<sup>128</sup> In *Wena*, the Applicant contended a breach of fundamental rule of procedure by the Tribunal when it did not summon a decisive witness without the parties'

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<sup>124</sup> Ibid., para.91 at 118

<sup>125</sup> Ibid. at 120

<sup>126</sup> Ibid. at 123

<sup>127</sup> *Amco v.Indonesia*, supra note 52, pp.518-519, 541

<sup>128</sup> Ibid., at 533

proposal while having the power to order further evidence under Arbitration Rule 34(2).<sup>129</sup> The *ad hoc* Committee concluded that the Claimant tried to turn the contradictory nature of this provision to its contrary and thus failed to demonstrate the fundamental nature of this provision.<sup>130</sup>

#### 2.2.2.4 Failure to state reasons

The statement of reasons is an inherent element of every decision of adjudicative bodies explaining why and how the tribunal has come to a particular conclusion. It is composed of legal arguments, statements of fact and of equitable considerations if the tribunal has been given discretion to decide *ex aequo et bono*. This ground comprises two aspects: first one is its own problematic interpretation and the second one is its connection with Art. 48 (3). The problem of Art. 52(1)(e) is that it “invites scrutiny of tribunal decisions not only in terms of the legitimacy of the process of decision but also in terms of substantive correctness.”<sup>131</sup> Under Art. 48(3) “the award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based“, hence this provision is mandatory obligation for the Tribunal and any failure to comply with this provision creates a basis for annulment under Art. 52(1)(e).

However, the purpose of the statement of reasons is to “enable the reader to follow the reasoning of the Tribunal on points of fact and law (...); the adequacy of the reasoning is not an appropriate standard of review under paragraph (1) (e), because it almost inevitably draws an *ad hoc* Committee into an examination of the substance of the tribunal's decision.”<sup>132</sup> Nevertheless, the issue of reasons sufficiently supporting the results lingers on, since there is no competent method or formula in judicial ruling.

<sup>129</sup> Wena Hotels v. Egypt, supra note 62, para.71, p.391; Arbitration Rule 34(2) states : “The Tribunal may, if it deems it necessary at any stage of the proceeding:(a) call upon the parties to produce documents, witnesses and experts; and (b) visit any place connected with the dispute or conduct inquiries there.”

<sup>130</sup> Ibid., para.73 at p.391

<sup>131</sup> Caron, D.,D., supra note 23 at p.34

<sup>132</sup> MINE v. Guinea, supra note 51, para.5.08 at p.105

Failure to state reasons embraces first of all any absence of reasons, which is very unlikely, since Art. 48(3) *expressis verbis* states that the award “shall state the reasons upon which it is based.” A case when the reasons are absent, but are without difficulty identifiable in the award, does not require annulment.<sup>133</sup> However, absence of reasons for a particular part of the award is likely (which is in close connection with first sentence of Art. 48 (3)) and the *ad hoc* Committee may be tempted to reconstruct the Tribunal’s reasoning. In *Klöckner* the *ad hoc* Committee rejected the notion of filling the gaps in Tribunal’s reasoning<sup>134</sup>, but in *MINE* made it clear why the Tribunal had awarded the Respondent with interest prior to ICSID arbitration and why it had done in US dollars.<sup>135</sup> The same reconstruction of reasoning happened in *Wena* as well, when the *ad hoc* Committee added the date since when the interest should have been calculated.<sup>136</sup> The decisions of the *ad hoc* Committees in this respect seem inconsistent.

In *Klöckner*, after the “*in favorem validitatis sententiae*” decision, Klöckner challenged the award on the basis that the Tribunal erred in the application of the proper law (because the Tribunal took it for granted that the duty of full disclosure to a partner is a basic principle of French law<sup>137</sup>), which would have resulted in redecision on merits. The Committee, however, did not stay idle by applying its own “rule”, but rather troubled by the Tribunal’s insufficient distinction between “rule” and “principle” went against its own “*in favorem validitatis sententiae*” ruling. Even if the holding of the Committee was based *prima facie* on an inadequacy of reasons and not on an *error in iudicando* as a ground for appeal, it made a disguised substantive ruling which resulted to a sufficient ground for annulment and to total invalidation of the award.<sup>138</sup> Another aspect of annulment of the award under Art. 52(1)(e)

<sup>133</sup> Schreuer, Ch., H., *supra* note 22 at p.989

<sup>134</sup> *Klöckner v. Cameroon*, *supra* note 32, p.134

<sup>135</sup> *MINE v. Guinea*, *supra* note 51, para.6.104 at p.125

<sup>136</sup> *Wena Hotels v. Egypt*, *supra* note 62, para.98 at p.50

<sup>137</sup> *Klöckner v. Cameroon*, *supra* note 32, para.66 at p.111

<sup>138</sup> Reisman, W., M., *supra* note 2, p.768-769

was the abovementioned negative response of the Committee to reconstruct the reasoning of the Tribunal that simply assumed instead of making a reasoning.

Moreover, the *Klöckner* Committee was troubled by the strict connection between the Arts.52(1)(e) and 48(3). Although, the wordings of these two provisions are at variance, sanction of annulment when the Tribunal failed to deal with every question before it seems uncertain, since it imposes a higher standard on the Tribunal and the rocks balance between finality and justice towards justice.<sup>139</sup>

There is no test what are insufficient and inadequate reasons, since any statement on this matter is a subjective matter, which could slide into substantive test of correctness, hence endangering the finality of the award and smudging the line between annulment and appeal. The *ad hoc* Committees have been tending to attribute to “*statement of reasons*” different meanings. In *Klöckner* and *Amco* the *ad hoc* Committees aware of this adopted that since Art. 52(1)(e) requires statement of reasons, these reasons must have “some substance, allowing the reader to follow the arbitral tribunal's reasoning, on facts and on law”<sup>140</sup> and “there must be a reasonable connection between the bases invoked by the tribunal and the conclusions reached”<sup>141</sup> while these statement of reasons shall justify the result as well. While it seems reasonable, the *Klöckner* Committee posed the question: “in order to rule out annulment under Article 52(l) (e) is it enough that there be “*apparently relevant*” reasons, or is it necessary that there be “*relevant reasons*?”<sup>142</sup> At last the Committee concluded that failure to answer any question raised by the parties means a failure to state reasons as whole, which turned this *prima facie* narrow ground for annulment to a device for overturning the awards.<sup>143</sup>

<sup>139</sup> Buckley, R.P., supra note 77, p.364-365

<sup>140</sup> *Klöckner v. Cameroon*, supra note 32, para.119 at p.126

<sup>141</sup> *Amco v.Indonesia*, supra note 52, p.520

<sup>142</sup> *Klöckner v. Cameroon*, supra note 32, para. 119 p.126

<sup>143</sup> Craig, W.L., supra note 119, p.210

Besides, in *Klöckner* the *ad hoc* Committee adopted the alibistic and formalistic approach “*in favorem validatis sententiae*”<sup>144</sup> to test the adequacy of reasons, “which seemed to have been designed to help sustain challenged awards, actually reduced the effect of the presumption in favor of validity by leading to a curious passivity and unwillingness to try to penetrate the thinking of the tribunal whose award was under attack.”<sup>145</sup> This formal methodology, however, could have been the only possible way, because to have chosen a substantive test would have led the *ad hoc* Committee into appeal.

In *Amco*, having learnt the lesson of hair-splitting technical discrepancy approach, the *ad hoc* Committee inclined to the material approach, however making other mistakes mentioned before in connection with other grounds. The Committee found that the shortfall to be invested by Amco had been understated by the Tribunal, which had promulgated it as not material, and thus the whole case could have been decided otherwise. Consequently, the Committee partially annulled the award pursuant also to inadequate justification of damages awarded to Amco.

In *MINE* the *ad hoc* Committee adopted a narrower image of limits of failure to state reasons that “the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law.”<sup>146</sup> So the task of the Tribunal is simply “to explain the way by which it reached its result and not to supply reasoning that offers incontrovertible grounds on every argument put forward by the parties.”<sup>147</sup>

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<sup>144</sup> *Klöckner v. Cameroon*, supra note 32, para. 52, p.108

<sup>145</sup> Reisman, W., M., supra note 2, p.764

<sup>146</sup> *MINE v. Guinea*, supra note 51, para.5.09, p. 105

<sup>147</sup> Schreuer, Ch. H., *ICSID Annulment Revisited*, Legal Issues of Economic Integration , (Kluwer Law International 2003 Volume 30, Issue 2), p.11

## 2.2.3 Post-annulment issues

### 2.2.3.1 Resubmission

If the request for annulment is successful, the original award is not replaced, but rather invalidated. Seeing the ICSID mechanism as double-leveled system, the parties are in the case of annulment sent back to the first level to commence new arbitration proceedings. The resubmission is embodied in Art. 52(6) under which “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,” which means a brand new Tribunal constituted in the same manner as the original one. Just like the request for arbitration is discretionary, so is the request for resubmission- the initiative must come from the parties to arbitration and it is not the ICSID’s *ex officio* matter. In addition, the request is not subject of any time limit.

In first annulment cases like *Amco* and *Klöckner*, after rendering the second award, new annulment proceedings were requested, but these applications were rejected on unknown grounds, because the conclusions of the *ad hoc* Committees have never been published. The *Amco* case lasted since the registration of the request of the first arbitration in 1981 till the decision rejecting the parties' applications for annulment in 1992. Likewise, the *Klöckner* case - saga lasted nine years as well till the *ad hoc* Committee refused the application for annulment. The *Vivendi* case started in 1997 and is still pending. Long-lasting proceedings have always been a detriment to both parties because of waste of time and money and therefore resubmission may discourage the parties and make them satisfied with the result of annulment.

The resubmission is governed by Arbitration Rule 55, according to which the Secretary-General does not have any discretion upon registration; if the request meets the formal requirements of Arbitration Rule 55, he must register the request. In the fresh process, the

parties may choose a sole or uneven number of arbitrators, but a person who had acted as an arbitrator in previous process cannot be appointed again.

As far as the link between the respective tribunals is concerned, it is not clear whether the second Tribunal should act just like the *ad hoc* Committee, but what could be taken for granted, is that the subsequent Tribunal cannot invalidate the Committee's findings. After all, the Tribunal's holding, that the Committee had exceeded its powers would lead the ICSID system to absolute weakening.<sup>148</sup>

### 2.2.3.2 *Res iudicata*

*Res iudicata* means a thing has been adjudged and stands for estoppel with regard to the same dispute, same parties and same cause of action, whereas the doctrine applies if the prior dispute has been resolved on the merits by a valid and final decision. In connection with ICSID annulment, the issue of *res iudicata* arises with the problem of partial annulment, because dispute involves a complex of problems between the parties. Rule 55(3) states that "if the original award had only been annulled in part, the new Tribunal shall not reconsider any portion of the award not so annulled", it follows that the part of the award that has not been annulled has *res iudicata* effect and is binding upon the parties.

First of all, the subsequent Tribunal should determine which parts of the *ad hoc* Committee's decision in connection with the first award have *res iudicata* effect; even if the *ad hoc* Committee does not have the authority to confirm an award, it should use instruments such as language of plain confirmation to explicitly reject a claim for annulment, thus it would be a signal for the subsequent Tribunal to distinct *res iudicata* matters.<sup>149</sup>

<sup>148</sup> Reisman, W., M., supra note 2, p.797-798

<sup>149</sup> Ibid, at pp.797-798



When the *Amco* case was resubmitted, the new Tribunal issued a Provisional Indication with two lists as to what had been annulled and what remained as *res iudicata*.<sup>150</sup> Although, the award was annulled as whole, it was obvious, that the points that had been annulled had to be relitigated and the matters confirmed (or rather not annulled) were *res iudicata* (in the *Amco* case for the purposes of the resubmitted proceedings the findings of the first Tribunal such as the illegality of acts of the police or the inadequacy of the hearings given to Amco remained *res iudicata*).<sup>151</sup> The second Tribunal went further adopting a general approach for holdings not challenged in annulment procedure that “matters decided by the first Tribunal but never put forward for annulment are binding on the parties and cannot be relitigated.”<sup>152</sup>

Since in *Klöckner* the *ad hoc* Committee annulled the whole award, there were no questions raised in connection with the *res iudicata* effect.

In *Amco* the *ad hoc* Committee provided extensive examination of invoked grounds for annulment, thus not avoiding analysis of merits which raised the question of legal nature of this reasoning and whether these findings on the substance shall guide the new Tribunal as *res iudicata*. The acceptance of the binding nature of the *ad hoc* Committee’s reasoning would have led to the recognition of the review mechanism as appeal. The *Amco*’s second Tribunal agreed to a very reasonable principle that “the authority given to the *ad hoc* Committee is clearly that of nullity and not of substantive revision”<sup>153</sup> and “if the present Tribunal were bound by “*integral reasoning*” of the *ad hoc* Committee, then the present Tribunal would have bestowed upon the *ad Hoc* Committee the role of an appeal court. The underlying reasoning of an *ad hoc* Committee could be so extensive that the tasks of a subsequent Tribunal could be rendered mechanical, and not consistent with its authority - as indicated in

<sup>150</sup> This Provisional Indication indicated and cited in *Amco v. Indonesia*, Decision on Jurisdiction (May 10, 1988), 3 *ICSID Review—Foreign Investment Law Journal* 166 (1988), p.120 para. 14 et seq.

<sup>151</sup> *Ibid.*, para. 15 at p.120

<sup>152</sup> *Ibid.*, para. 73 at p.179

<sup>153</sup> *Ibid.*, para. 43 at p.175

Article 52(6), which speaks of "*the dispute*" being submitted to a new Tribunal."<sup>154</sup> These findings helped to vindicate the view that the function of *ad hoc* Committees should be firmly restricted.<sup>155</sup>

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<sup>154</sup> Ibid. para. 44at p.175

<sup>155</sup> Trooboff, P.D., International investment disputes – res iudicata effect of partially annulled ICSID award 83Am. J. Int'l L. (1989), p.111

### Chapter 3 : Quo vadis ICSID?

*“No ICSID award can be assumed to be final.”*<sup>156</sup>

No doubt that the very first annulments case, the *Klöckner* one, casted shadows on the ICSID review system. With confusingly long analysis full of constitutive and substantive rulings and contradictory opinions the *ad hoc* Committee swept aside all bright perspectives of the ICSID’s annulment machinery. Moreover, the wrongly designed decision based on hair-trigger automatic discrepancy annulment could have encouraged the losing parties to file applications for annulment over and over again. At that time, Michael W. Reisman expressed his opinion that the ICSID review system does not work and “the function of a control system is neither to undermine the operation of a dispute mechanism by extending disputes ad infinitum nor to deter potential litigants from incorporating this mode of dispute resolution in their agreements.”<sup>157</sup> Even though, there were some who despite of the controversy of the *Klöckner* case predicted a bright future for the ICSID. For example, Sylvia Schatz assumed that all-embracing interpretations would allow applying the provisions of ICSID Convention in more circumstances and cases like *Klöckner* would just support the ICSID arbitration.<sup>158</sup>

Nevertheless, *Klöckner* encouraged the losing party in the very next case – *Amco*. The ICSID’s Secretary-General, Ibrahim Shinata, said that “the danger thus exists that if parties, dissatisfied with an award, make it a practice to seek annulment, the effectiveness of the ICSID machinery might become questionable and both investors and Contracting States might be deterred from making use of the ICSID arbitration.”<sup>159</sup>

The issues have been not only the number of annulments requested, but the issue of “promised” finality of the awards. As Ross P. Buckley states: “Many of the approaches taken

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<sup>156</sup> Reisman, W., M., supra note 2, p.785

<sup>157</sup> Ibid.

<sup>158</sup> Schatz, S., supra note 65, p. 515

<sup>159</sup> Report of the Secretary General to the Administrative Council of ICSID, 1986, Annex A, at 2 as quoted in *Finality at What Cost? The Decision of the Ad Hoc Committee in Wena Hotels v. Egypt*, published in Gailard E., Banifatemi Y., Gailard E., Banifatemi Y., IAI International Arbitration Series No.1, Annulment of ICSID Awards (2004), p.50

by the *Klöckner* Committee served to replace the original mosquito bite of a request for annulment with a potential fracture to the foundations of arbitration at ICSID.”<sup>160</sup> Even if the ICSID’s credit seems to have been damaged because of the problem with the finality, these issues may have a very small practical impact. Private investors and Contracting-States have recourse and will recourse to the ICSID’s help in dispute resolution because of its pros – which is still the one-way review system, its neutrality and the easiness of the enforceability of its awards. Besides, the financial crisis, which has barred the developing countries the access to foreign funds or has made them fail to perform their contractual obligations, would just increase ICSID arbitrations.

Just after the *Amco* annulment, Mr. Craig expressed the hope that the ICSID arbitrations will remain attractive for potential parties provided the narrowly tailored grounds for annulment will be respected, the *ad hoc* Committees will not believe in the indefiniteness of their mission and will not follow the cases of *Klöckner* and *Amco* – “a story about *ad hoc* Committees of legal scholars deftly getting out of their straightjacket limits written into the Washington Convention.”<sup>161</sup>

However, the principal question whether the investment arbitration needs an appellate system remains. As disputes before three arbitrators involve claims for damages up to several billion dollars, who in addition examine governmental decisions, the answer could be positive. Michael W. Reisman pointed out a possible natural evolution of the first tribunal into a trial court of first instance and of the *ad hoc* Committee into “something between a court of cassation and a court of appeals.”<sup>162</sup> Mark Feldman expressed its view that parties to arbitration appreciate “informality, expedition and economy.”<sup>163</sup> If this is true, Prof. Caron answers that “the substantive correctness of an award for a dispute regarding multimillion

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<sup>160</sup> Buckley, R.P., supra note 77, p.363

<sup>161</sup> Craig, W.L., supra note 119, p.212-213

<sup>162</sup> Reisman, W., M., supra note 2, p.785

<sup>163</sup> Feldman, M.B, supra note 24, p.87

turn-key contract is of little concern to the parties or the international community.”<sup>164</sup> The truth is, certainly, different because the annulment proceedings would have not been used the way they have been. As Noemi Gal-Or pointed out, “drafters of international law must ask themselves the three following questions: appeal for what purpose?; appeal from what?; appeal under what conditions?”<sup>165</sup>

Since the very first request for annulment was submitted in 1984, so nearly twenty years after the ICSID Convention had entered into force in 1966, the ICSID *ad hoc* Committees have been insisting that they have never been a device of appeal. However, they have been at pains to avoid any sign of appeal, they have been swinging towards correctness of the award while weakening its finality, which should refer to notion that the parties have been using the annulment mechanism as an ineffective appellate body.<sup>166</sup> ICSID could not ignore these signals and in October 2004 issued a Discussion Paper called “Possible Improvements of the Framework for ICSID Arbitration.”<sup>167</sup>

In an Annex the ICSID Secretariat admitted that appeal mechanism is necessary. To be specific it stated: “If ICSID undertakes the creation of a single Appeals Facility, as an alternative to multiple mechanisms under treaties providing for appeal of awards made in investor-State arbitrations, the Facility might be established under a set of ICSID Appeals Facility Rules adopted by the Administrative Council.”<sup>168</sup> Under the Discussion Paper, an Appeals Panel composed of 15 members elected would be established to which challenges of awards could be referred to for a clear error of law or fact or any other ground for annulment, while the appeal tribunal would be constituted of three persons unless otherwise agreed by the

<sup>164</sup> Caron, D., D., *supra* note 23, p.50

<sup>165</sup> Gal-Or., N., *The concept of appeal in International Dispute Settlement*, European Journal of International Law, February, 2008, p.48

<sup>166</sup> Kalb, J., *Creating an ICSID Appellate Body*, 10 *UCLA Journal of International Law & Foreign Affairs* 179 (2005), p.205

<sup>167</sup> The paper was released by the ICSID Secretariat and discussed possible improvements and changes to ICSID Arbitration Rules with respect to transparency and expedition.

<sup>168</sup> Possible Improvements of the Framework for ICSID Arbitration, available at [http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14\\_1.pdf](http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf), Annex, p.1

parties.<sup>169</sup> The authority of such panel would be to uphold, modify or reverse the award; if the award concerned was not annulled and resubmitted to a new tribunal, then it would be binding and final.<sup>170</sup>

A two-tiered system of dispute settlement would for sure prolong the duration of proceedings and consequently discourage the investors and depress the economic development. Of course, the time-periods always depend on scope of review and the rules governing the appellate proceedings, nevertheless, a two-tiered system could bring uncertainties into legal relationships. An appellate mechanism would also increase the costs of procedures and go against the ICSID's priority to solve the disputes quickly. And last but not least, it would definitely undermine the authority of the first Tribunal rendering the award and consequently the whole ICSID. Besides, if Appeals Facility would work in the future, the ICSID will have to deal with the question of hierarchy altogether with the issue of *stare decisis* which is inherent to appeal-control mechanisms. Nevertheless, the creation of an appellate body would help to keep the ICSID jurisprudence consistent.<sup>171</sup> Currently, the doctrine of *stare decisis* is not applicable to the decisions of *ad hoc* Committees or tribunals, but nevertheless, the members of respective panels are not restricted from relying on previous decisions.

Certainly, an appellate system would foster consistency and predictability not only with the ICSID, but in international investment law as well. In order to provide for such values, this appellate body should be a steady and permanent body, so situations of contradictory interpretations just like in *Klöckner*, *Amco* or *MINE* would not happen again.<sup>172</sup>

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<sup>169</sup> Ibid., pp.3-4

<sup>170</sup> Ibid., p.5

<sup>171</sup> Kalb, J., *supra* note 166, p.201

<sup>172</sup> Tams, Christian J., *Is There a Need for an ICSID Appellate Structure?* (February 11, 2009). *The International Convention for the Settlement of Investment Disputes: Taking Stock after 40 Years*, Hofmann, Tams, eds., Nomos, Baden-Baden, 2007. Available at SSRN: <http://ssrn.com/abstract=1341268>, p.238-239

However, it seems that the solution envisaged in the Discussion Paper may be a straightforward road to solution of the ICSID's finality problems. It is a rocky road, because it also requires a political consensus, which could only hardly be achieved. The problem is that under Art. 66<sup>173</sup> amendments to ICSID Convention require ratification of each of the 155 Contracting States what is fairly unrealistic. The possible solution that would circumvent Art. 53 of the ICSID Convention and at the same time would not be so burdensome could be an appeal system without comprehensive competence established on the ground of bilateral treaties.<sup>174</sup> This is allowed by Art. 41 of the 1969 Vienna Convention of the Law of Treaties, provided, that such a adjustment is not itself prohibited by the ICSID Convention and does not affect the enjoyment by the other parties of their rights under the ICSID Convention or performance of their obligations and it is not against the whole purpose of the ICSID Convention.<sup>175</sup> But this may put pressure on Contracting States in concluding bilateral treaties to include such facility.<sup>176</sup>

Assuming that the Appeals Facility would be approved once and could work effectively, however, would be a Pyrrhic victory for ICSID. It would solve the finality and correctness problem, but as previous analysis has showed, it would undermine the confidence in the whole institution. And losing the confidence in ICSID would corrode its primal principle – the flow of investments in developing countries.

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<sup>173</sup> First sentence of Art. 66(1) of the ICSID Convention states :“ If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval.“

<sup>174</sup> Tams, Ch., J., *An Appealing Option? The Debate about an ICSID Appellate Structure*, Essays in Transnational Economic Law, No. 57/June 2006, p.13, available at <http://ssrn.com/abstract=1413694>

<sup>175</sup> Art.41(b) of 1969 Vienna Convention of the Law of Treaties, see [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>176</sup> Gantz. D.A., *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, Vanderbilt Journal of Transnational Law, January 2006, p.74

## CONCLUSION

Irrespective of the fact that the finality in investment arbitration is important to the parties, the decisions of *ad hoc* Committees lead to a conclusion that the correctness and justice is equally relevant and these two values should be balanced. The ICSID annulment system is not a sophisticated appeal system. Simply, even if controversial, it may be concluded that the se decisions have been no more but calls for justice to be done.

The former Secretary-General of ICSID, Ibrahim F.I. Shihata once stated that the aims of the ICSID Convention are to “(i) assure the finality of ICSID awards; (ii) distinguish carefully an annulment proceeding from an appeal, and (iii) construe narrowly the grounds for annulment, so that procedure remained exceptional.”<sup>177</sup> Indeed, a fair award may be valued more than a final award, but it depends on the point of view of the parties to arbitration. But when parties choose ICSID arbitration, they do it because they believe the aforementioned aims will be achieved.

Even though evolution and modification are natural features of international organizations, from the previous analysis it follows, that the way towards an ICSID appellate structure remains plausible, but highly fantastical. Till some real solution will come up, the annulment procedure will remain ICSID’s most unique feature but the weakest point as well, since arbitrators as servants of justice will be always tempted to do justice.

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<sup>177</sup> Report of the Secretary-General to the Administrative Council, ICSID Doc.No. AC 86/4 Oct.2, 1986, Annex A at 2, In Broches, A., *Observations on the Finality of ICSID Awards*, 6 ICSID Review – Foreign Investment Law Journal (1991), p.109-110



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