



ANNULMENT OF ICSID AWARDS

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ABSTRACT

Focusing on annulment of ICSID awards – a unique internal, self-contained, but international mechanism of arbitral awards’ review – this paper will firstly talk about control of arbitral awards exercised by state courts covering, *inter alia*, the cases when this control is unavoidable towards ICSID awards. Then it will proceed to comparison of annulment and appeal. Chapter II will be dedicated to a detailed and complex analysis of the provisions on annulment contained in the ICSID Convention and in the ICSID Arbitration Rules. The undertaken approach shall facilitate a better comprehension of the procedure along with the issues consequential to and accompanying annulment. It shall also fill up the gap in understanding of the elements of annulment procedure which might not be exactly obvious by simply reading Article 52 of the ICSID Convention. Later, on the basis of available decisions on annulment it will be examined what is the current statistics of annulment procedures and what grounds for annulment are invoked by the parties more often. Finally, interpretation of the grounds for annulment foreseen by the Article 52(1) of the ICSID Convention that has been established and upheld by the *ad hoc* committees will be demonstrated.

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INTRODUCTION

The International Centre for Settlement of Investment Disputes (ICSID or “the Centre”) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”)¹ with the purpose “to facilitate the settlement of disputes between States and foreign investors” taking into consideration “the special characteristics of the disputes covered.”² A mere membership to the ICSID Convention does not constitute compulsory jurisdiction of the Centre; instead, it is consent of the parties that establishes the jurisdiction.³ As it will be discussed later such consent not only provides the arbitrators with the powers but also places restrictions on them.

Being a system of “restricted delegation of power” ICSID arbitration shall have a system of control over the awards rendered.⁴ It has been repeatedly stated that the ICSID mechanism for reviewing arbitral awards, annulment, is one of the strength and most characteristic features of this arbitral institution.⁵

The following properties of annulment are mostly known since they directly follow from the text of Articles 52 and 53(1) of the ICSID Convention: (i) an ICSID award may not be subject to any review except an annulment procedure; (ii) annulment is a drastic measure that leads to a complete invalidation of an award or leaves it intact, and (iii) a challenge may be brought before an *ad hoc* committee only on the basis of five grounds for annulment foreseen by Article 52(1).

The present thesis will address all three of the above properties of annulment. With regard to the first feature of annulment, this research will focus on control of arbitral awards

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter *ICSID Convention*]

² Michael W. Tupman, *Case Studies in the Jurisdiction of the International Centre for Settlement of Investment Disputes*, Int’l & Comp. L.Q., Oct. 1986, 813, 813

³ *Id.* at 813

⁴ See Michael W. Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, Duke L.J., Sep. 1989, 739, 740

⁵ Emmanuel Gaillard, *Introduction, to Annulment of ICSID Awards* 5, 5 (Emmanuel Gaillard et al. eds., 2004)

exercised by state courts in order to find out whether it is an absolute maxim that national courts do not deal with ICSID awards, or there might be instances when parties to a dispute shall expect an intervention from the side of the courts. Secondly, to develop a broad picture regarding annulment it will be compared to appeal, a well known method of re-examination of court decision, which may be set as a benchmark to draw conclusions about the features of annulment. In addition to that, there will be an integrated approach to interpretation of the text of the ICSID Convention regarding annulment by correlating certain provisions of the Convention among themselves as well as with the Rules of Procedure for Arbitration Proceedings (Arbitration Rules),⁶ annulment decisions and opinions of pillar scholars. Setting the limits of this research it is worth noting that “while there is no principle of binding precedents in the world of arbitration . . . the solution given to . . . [the] issues raised will conceivably provide indications, trends, and guidelines for future arbitrations.”⁷ Therefore, evaluation of the grounds for annulment set by Article 52(1) of the ICSID Convention will be done by means of assessing the interpretation given to them by the *ad hoc* committees. State-of-the-art understanding will be furnished taking a look at the decisions on annulment dated 2010. Finally, this paper will present a lay-out of the grounds invoked by the parties in all annulment proceedings that have been currently decided except for those that are not available publicly. The latter analysis shall facilitate the author when making conclusions regarding the mostly relied grounds for annulment in the history of ICSID.

⁶ Rules of Procedure for Arbitration Proceedings, Jan. 2003, *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain> [hereinafter *Arbitration Rules*]

⁷ C.F. Amerasinghe, *Interpretation of Article 25(2)(b) of the ICSID Convention*, in *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity?* 223, 230 (R. Lillich et al. eds., 1994)

CHAPTER I. Review of Arbitral Awards

Arbitration is a private adjudication system where parties to a dispute choose to settle arising discrepancies outside of any judicial system by appointing one or several arbitrators and endowing them with the power to decide the dispute.⁸ Such consent of the parties not only delegates but also limits the arbitrator's powers. An arbitrator or a tribunal can only rule upon issues within the scope of the parties' agreement in a certain way established by the parties.⁹

Being a system of "restricted delegation of power" arbitration shall have a system of control.¹⁰ What is well-known as a control system is the system of national courts. It is hierarchical. Upper level courts "appraise and reappraise the general workings of the system as well as the accuracy, consistency, and justice . . . of particular applications . . . make adjustments in particular lower decisions"¹¹ However, existence of financial and time nature costs¹² leads to a tension between justice and finality. State courts' control systems are forced to balance "the interest in justice," which shall be achieved disregarding the cost and time-consumption, and "the interest in finality," which asks for an arbitrary limit for control.¹³

Contrary to aforesaid is international commercial arbitration. It lacks an escalator of "bureaucratic institutions comparable to the levels of domestic adjudication"¹⁴ and has an entirely different approach to the problem. As it has been stated arbitrator's powers are derived from a contract, therefore, an award "rendered within the framework of the . . . agreement . . . is itself part of the contract."¹⁵ If the award is issued in a way not approved by

⁸ Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration*, 1 (2008)

⁹ *Id.* at 2

¹⁰ Reisman, *supra* note 4, at 740

¹¹ *Id.* at 743

¹² *Id.* at 744 (talking about expenditures that are required to establish and maintain courts of all levels, as well as about additional layers of control which increase the time lap between claim and final adjudication)

¹³ *Id.* at 744-745

¹⁴ *Id.* at 745

¹⁵ *Id.* at 745

the parties it shall be considered as something to which the parties had not agreed, and the arbitrators shall be considered as having exceeded their powers. If an excess is proved “the putative award is null, and may be ignored by the ‘losing’ party.”¹⁶

This doctrine functions as a conceptual foundation of arbitration’s control mechanism¹⁷ and serves to achieve one of the objectives of arbitration, i.e. to stay dispute resolution out of the national courts of the parties and protect from the costs and the red tape associated with the possibility to appeal. However, it has been proved impossible to exclude involvement of state courts completely. This chapter is intended to address cases when the courts exercise control over arbitral awards, including ICSID awards, as well as to identify the difference between annulment, the form of self-control mechanism adopted by ICSID, and appeal.

I.1 Control of Arbitral Awards Exercised by State Courts

In 1915 an American lawyer, Thomas Willing Balch, conducted research on the meaning of the word “arbitration” and of others of the same root. He analyzed works of earlier English lexicographers in order to find out what sense had been given to the same words starting from the 17th century. As it was found out by the author, the well known dictionary of that time, *The New Word of Words*, published in 1678, provided with the following definitions: (i) “Arbitration, the Act of Arbitrating, the Putting an End to a Difference by the Means of Arbitrators,” and (ii) “To arbitrate, to award, give Sentence, adjudge, or act as an Arbitrator.”¹⁸ Progressing with the study Mr. Balch examined dictionaries of the 18th and 19th centuries and pointed out the next definitions accordingly:

¹⁶ *Id.* at 745

¹⁷ *Id.* at 746

¹⁸ Thomas Willing Balch, “*Arbitration*” as a Term of International Law, Colum. L. Rev., Nov. 1915, 590, 591

(i) “To arbitrate . . . To decide; to determine; [t]o judge of,”¹⁹ and (ii) “Arbitrate . . . To decide; to judge of . . . [t]o give judgment.”²⁰

The above excursus serves to prove that historically the main idea of arbitration has been to decide, to settle a dispute by giving judgment. In the nowadays terminology instead of using “judgment” one would say “award” in order to name the final product of the act of arbitrating. Indeed, arbitration is expected to lead to settlement of a dispute by means of an award.

Scholarly works provide with various definitions explaining the meaning of “award”. Certain characteristics that are common for all these papers can be collected in order to describe an arbitral award. Thus, award is a final decision on the merits issued by the arbitrators that the parties to a dispute have chosen themselves and to whose decision they have mutually agreed to abide.²¹

One of the definition’s core words of the definition is the adjective “final”. On the one hand, it is supposed to indicate that the award “finally settle[s] all of the claims submitted to the arbitrators and by which the mission of the tribunal is completed.”²² On the other hand, when the award is final it “may be judicially confirmed, vacated, modified, corrected, or clarified; the finality rule makes an award ripe for judicial review.”²³ Even though the latter statement might seem as an exaggeration, since the idea of state courts’ systematic control of arbitration has been vastly rejected, the connection between arbitration and state courts cannot be denied completely.²⁴

¹⁹ *Id.* at 593 (numeration omitted) (punctuation altered)

²⁰ *Id.* at 594

²¹ *E.g.*, Jay E. Grenig, *Alternative Dispute Resolution* § 9:1 (Westlaw); Moses, *supra* note 8, at 179-181

²² Tibor Várady et al., *International Commercial Arbitration a Transnational Perspective* 582 (3rd ed. 2006)

²³ Thomas H. Oehmke, *Commercial Arbitration* § 128:15 (Westlaw)

²⁴ *See*, Michael J. Mustill et al., *Law and Practice of Commercial Arbitration in England* 3 (2nd sub ed. 1989) (stressing the close connection of arbitration and the courts by saying that “the law on private arbitration is concerned with the relationship between the courts and the arbitral process”)

Assistance of national courts is often wanted when enforcing an award. If there was a losing party refusing to pay voluntarily then there would be a successful party seeking enforcement of the award through a national court located in the jurisdiction where the losing party is expected to have assets.²⁵ The parties' interests are conflicting at the enforcement stage just as they are from the beginning of the dispute resolution process. It is clear that in the above case the winning party would desire to limit the legal relationship with the courts to an almost automatic process of recognition and enforcement of the award, whereas, the losing party would hope for avoidance of enforcement.

It is one of the consequences of the award's finality that the award is challengeable by the losing party through national courts. The logic behind suggests necessity of the measure. There might be special circumstances that could bring the value of the award to ought: "after the completion of the process [arbitration], some limits must obviously be imposed on the enforceability of awards: otherwise arbitrators could subject the parties to legal consequences as the result of dishonesty, bias, incompetence, or the arbitrary capricious use of power."²⁶ Nevertheless, international arbitral awards are not subject to appeal like court judgments.

Unification and harmonization of legislation on international commercial arbitration²⁷ lead to the fact that most countries of the world treat judicial control of awards similarly. As a general rule, awards cannot be reviewed on the merits, whether by a court or another arbitral tribunal, but the power of judicial control by means of setting aside or refusing to enforce awards is retained by state courts.²⁸ The function may be exercised by the courts of the country in which (i) the tribunal had its seat or that considers the award to be domestic, or (ii)

²⁵ Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, N.Y.U. J. Int'l L. & Pol., 1995-1996, 175, 175

²⁶ Michael Kerr, *Arbitration and the Courts: The Uncitral Model Law*, Int'l & Comp. L.Q., Jan. 1985, 1, 2

²⁷ See, e.g., Choi, *supra* note 25, at 175 (referring to the Convention on the ICSID Convention and the New York Convention which are aimed to set uniform standards for the enforcement of arbitral awards through national courts)

²⁸ Lucy Reed et al., *Guide to ICSID Arbitration* 95-96 (2004)

in which the winner chooses to rely on the award.²⁹ The commonly accepted list of grounds for attacking arbitral awards in front of national courts is provided for in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).³⁰ The list is specific and narrow, and the grounds for refusal of recognition and enforcement may be grouped as follows: (i) invalidity of the arbitral agreement; (ii) violation of due process; (iii) excess of powers; (iv) improper constitution of the tribunal; (v) failure of the award to become binding, or its setting aside or suspension in the country in which, or under the law of which, the award was made; (vi) nonarbitrability of the dispute, and (vii) violation of public policy.³¹

Parties to the New York Convention shall not refuse recognition and enforcement on grounds other than listed above.³² If a country is party to the Convention there shall be no room for reference to the law of the forum on enforcement of the awards.³³ In fact, the New York Convention has influenced the UNCITRAL Model Law on International Commercial Arbitration (Model Law)³⁴, another document widely accepted and used internationally as a model when enacting domestic legislation on international commercial arbitration.³⁵ Grounds

²⁹ Várady et al., *supra* note 22, at 706

³⁰ The fact that, at the time of this writing, there are 145 parties to the Convention evidences success of this treaty and allows saying that provisions of Article V have in fact become world law. See, status of the Convention, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

³¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, Jun. 10, 1958, 330 U.N.T.S. 38 [hereinafter *New York Convention*]

³² *Contra* Albert Jan van den Berg, *The New York Convention of 1958 Towards a Uniform Judicial Interpretation* 274 (1981) (stating that there are might be courts neglecting the above Convention's principle and applying grounds for refusal contained in domestic law on enforcement of foreign awards even if the enforcement was sought under the Convention)

³³ *Id.* at 268

³⁴ UNCITRAL Model Law on International Commercial Arbitration, Jun. 21, 1985, U.N. Doc. A/40/17 [hereinafter *Model Law*] (legislation based on the Model Law has been enacted in more than 60 jurisdictions. See, status of the document, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985_Model_arbitration_status.html)

³⁵ See, e.g., Várady et al., *supra* note 22, at 705 (discussing a very strong harmonization trend toward convergence established in the Model Law)

for setting aside or non-recognition of the awards by state courts contained in the Model Law are closely modeled on Article V of the New York Convention.³⁶

Predictability and stability of international and national legislation on international commercial arbitration is highly important. When businessmen go into foreign trade the possibility of future disputes is seen as one of the risks that is increased when there is uncertainty about existence of reliable procedures allowing to resolve any such disputes promptly and fairly.³⁷ In two ways the business reacts in such case: either there is a refusal to enter into the transaction or the price is raised to compensate additional danger, but in any of the developments the trade flow is hindered.³⁸ Consequently, it is predictable that when the process of dispute resolution and award enforcement is known beforehand and trusted then the currents of trade and investment are facilitated. Knowing that the New York Convention and the Model Law, influencing national legislation of the most countries, provide for control of the arbitral awards by state courts, parties to an arbitration agreement can evaluate and reserve for the risks connected to the court's review and oppositions that might be raised by the losing party.

It is, then, equally important to know that in the case of ICSID arbitration “[t]he award . . . shall not be subject to any appeal or to any other remedy except those provided for in this Convention [on the Settlement of Investment Disputes between States and Nationals of Other States].”³⁹ The ICSID awards are not subject to any form of scrutiny exercised by state courts, and Article 52 of the ICSID Convention establishes a self-contained system of review named “annulment”. Nevertheless, state courts’ involvement does also occur when either a contracting state or an investor seeks to enforce an ICSID award.

³⁶ *Model Law*, supra note 34, arts. 34 & 36; Christoph H. Schreuer, *The ICSID Convention: A Commentary* 890 (2001)

³⁷ Howard M. Holtzmann et al., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 3 (1989)

³⁸ *Id.* at 3

³⁹ *ICSID Convention*, supra note 1, art. 53(1)

Enforcement of the ICSID awards consists of two separate stages: recognition and execution.⁴⁰ “Typically, a prevailing party . . . will petition a national court to recognize and enforce the award and then, in a separate procedure, seek an execution order against the losing party’s assets in that jurisdiction.”⁴¹ Being presented with a copy of the award certified by the Secretary-General of ICSID, each contracting state shall with no scrutiny recognize the award as binding and equal to a final judgment of a court in that state.⁴²

There shall be no refusal to recognize the award because of the state’s own law governing arbitral awards, public policy, non-arbitrability of the dispute, or any other reason.⁴³ However, there were precedents when courts attempted to check compliance of the ICSID awards with their national legislation instead of automatic recognition pursuant to the provisions of the ICSID Convention. Scholarly works refer to the following examples: (i) French lower court examined whether the ICSID award complied with French public policy instead of simply enforcing the award against Congo in favor of Benvenuti and Bonfant; (ii) in the process of recognition in France of the award in favor of SOABI against Senegal there was enforcement granted by the lower court and vacated by the Court of Appeal since the latter ignored the requirement of the automatic recognition and imported French notions of public policy into the recognition process.⁴⁴ In the SOABI case it seems that the Court of Appeal mistreated the recognition and applied provisions that are more appropriate to the ICSID awards’ execution stage. Eventually the mistake was cured by the French Supreme Court’s holding that the ICSID Convention excludes recourse to French rules on recognition of foreign arbitral awards.⁴⁵

⁴⁰ Choi, *supra* note 25, at 179

⁴¹ Reed et al., *supra* note 28, at 106

⁴² *ICSID Convention*, *supra* note 1, arts. 54(1) & 54(2)

⁴³ Choi, *supra* note 25, at 180

⁴⁴ *Id.* at 181-184

⁴⁵ *Id.* at 184

Indeed, Article 54(3) of the ICSID Convention provides with the rule that execution of the ICSID awards “shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.” Further in the Convention it is emphasized that nothing of the aforesaid shall be interpreted as derogating the existing law of the contracting state relating to immunity of that state or of any state from execution.⁴⁶ Therefore, national courts shall recognize and enforce ICSID awards automatically pursuant to the ICSID Convention; any intervention of the courts shall be considered as erroneous and shall be cured by higher courts if necessary. At the same time, contracting state courts are in position to execute awards subject to their own law and, therefore, exercise control over ICSID awards at this stage.

State courts may also exercise control over the ICSID awards rendered pursuant to the ICSID Additional Facility Rules⁴⁷ since these awards do not fall within ICSID autonomous system of annulment. Additional Facility was initially established for a short term, but later continued indefinitely,⁴⁸ endowing the Secretariat of ICSID with the power to administer certain categories of proceedings⁴⁹ between States and nationals of other States that fall outside the jurisdiction of the Centre. Article 3 of the Rules provides with the rule that none of the provisions of the ICSID Convention shall be applicable to the awards that might be rendered pursuant to the Additional Facility Rules.⁵⁰ This means that the Additional Facility arbitration may not be disconnected from national law. Therefore, the recognition and

⁴⁶ *ICSID Convention*, *supra* note 1, art. 55

⁴⁷ Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes, April 2006, *available at* <http://icsid.worldbank.org/ICSID/ICSID/AdditionalFacilityRules.jsp> [hereinafter *Additional Facility Rules*]

⁴⁸ Christoph H. Schreuer, *The ICSID Convention: A Commentary* 92 (2001) [hereinafter *Commentary to the ICSID Convention*]

⁴⁹ *Additional Facility Rules*, *supra* note 47, introduction (naming the proceedings: (i) fact finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not an ICSID contracting state or a national of a contracting state; and (iii) conciliation and arbitration proceedings between parties at least one of which is a contracting state or a national of a contracting state for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction)

⁵⁰ *Additional Facility Rules*, *supra* note 47, art. 3

enforcement of awards is governed by the law of the forum and any applicable treaties⁵¹ and control by state courts shall be expected.

I.2 Annulment v. Appeal

As it has been discussed above, for international commercial arbitration it is desirable to lessen exposure of the awards to any form of control performed by state courts, and “the optimum control institution . . . would be self-contained at the international level.”⁵² Annulment of ICSID awards appears to be an example of such mechanism.

The primary purpose of the ICSID Convention was to promote foreign investment by creating an independent and neutral dispute resolution forum which would “facilitate the settlement of disputes between States and foreign investors . . . promot[e] an atmosphere of mutual confidence and thus stimulat[e] a larger flow of private international capital into those countries which wish to attract it.”⁵³ Contributing to this idea and taking into account that the cases processed by the Centre are politically sensitive, ICSID reduced the role of the courts during the enforcement stage more than in other available systems of private international arbitration by eliminating the possibility to challenge an award in national courts of the country where enforcement is being sought.⁵⁴ However, in order to police the requirements and standards proposed by the ICSID Convention its designers came up with an idea of a unique self-contained, internal, international review instance named “annulment”.⁵⁵ Pursuant to the *ad hoc* Committee in Vivendi II annulment is focused on the efficient operation of the Centre: it is “meant to uphold and strengthen the integrity of the ICSID process.”⁵⁶

⁵¹ *Commentary to the ICSID Convention*, *supra* note 48, at 92-93

⁵² Reisman, *supra* note 4, at 749

⁵³ Reed et al., *supra* note 28, at 2-3

⁵⁴ Reisman, *supra* note 4, at 751

⁵⁵ *Id.* at 754

⁵⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 247(i) (Aug. 10, 2010), available at http://ita.law.uvic.ca/annulment_judicialreview.htm [hereinafter *Vivendi II*]

Functionally annulment is different from appeal, form of control exercised by state courts. One may argue that these systems of control have similar features such as: (i) procedure may be invoked by any of the parties to a dispute, and (ii) both annulment and appeal represent a process of “reviewing to some degree a judicial or arbitral decision.”⁵⁷ However, annulment is rather “concerned with maintenance of the minimum conditions necessary for the continuation of the process of decision itself”, whereas “[a]ppeal is concerned with what is right for the parties.”⁵⁸

Without getting into substantiation of the difference between annulment and appeal, its existence has been regularly noted by the ICSID *ad hoc* committees. Thus, in *Klöckner I*, the first *ad hoc* Committee in the history of ICSID made the following observation: “the remedy [annulment] . . . is in no sense an appeal against arbitral awards.”⁵⁹ The same conclusion is suggested by Article 53 of the ICSID Convention stating that “[t]he award . . . shall not be subject to any appeal or to any other remedy except those provided for in this Convention”. The most recent *ad hoc* committees underline the same idea that “[a]nnulment is distinct from an appeal”⁶⁰ and that “the annulment mechanism does not permit an appeal.”⁶¹

Professor Caron made comparison of annulment and appeal which is considered to be the “most cogently”⁶² describing the difference between these two institutions. He suggests

⁵⁷ David D. Caron, *Reputation and Realty in the ICSID Annulment Process: Understanding the Distinction Between Annulment and Appeal*, ICSID Rev.-Foreign Inv. L.J., Spring 1992, 21, 23

⁵⁸ Reisman, *supra* note 4, at 748

⁵⁹ *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment, ¶ 3 (May 03, 1985), available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Klöckner I*]

⁶⁰ *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, ¶ 73 (Jun. 29, 2010), available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Sempra*]

⁶¹ *Republic of Kazakhstan v. Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S.*, ICSID Case No. ARB/05/16, Decision on Annulment, ¶ 40 (March 25, 2010), available at <http://ita.law.uvic.ca/> [hereinafter *Rumeli Telekom*]

⁶² *Commentary to the ICSID Convention*, *supra* note 48, at 891

that the processes of appeal and annulment are different in two ways: (i) in relation to “the result of the process”; (ii) “aspects of the decision that are subject to review.”⁶³

As to the first, in the process of appeal reviewed decision may be confirmed or modified, i.e. appellate body may alter the decision on the merits by introducing the one it finds more appropriate.⁶⁴ Whereas, in the process of annulment reviewed decision may be recognized as null and void in whole or in part, or be left as it is if the application for annulment is rejected: the choice of a decision maker is reduced to leaving the original decision intact or invalidating it.⁶⁵ The latter conclusion is derived from the wording of Article 52(3) of the ICSID Convention providing for the right of the *ad hoc* committees to annul the award or any part of it.⁶⁶ The case law also suggests that “[a]n *ad hoc* committee cannot substitute its own judgement on the merits for the decision of the Tribunal.”⁶⁷ The only option open to the parties upon annulment of the award is the resubmission of the same dispute to a new tribunal.⁶⁸

Talking about the second difference, Professor Caron draws a line between “the framework that yields the decision – . . . ‘legitimacy’ of the process of decision – and the content of the decision – . . . ‘correctness’ [of the decision].”⁶⁹ According to the author, correctness is concerned with whether the decision reflects correct determination of the facts and application of the law to those facts, but legitimacy covers proper constitution of the deciding body, non-corruption of its members, observance of the fundamental rules of procedure and other issues of this nature.⁷⁰ Appeal generally reviews both; whereas, annulment is focused on the legitimacy of the process only. Article 52(1) the ICSID

⁶³ Caron, *supra* note 57, at 23

⁶⁴ *Id.* at 23; Christoph Schreuer, *ICSID Annulment Revisited*, Legal Issues of Econ. Integration, 30 (2), 2003, 103, 104

⁶⁵ Caron, *supra* note 57, at 24; *Commentary to the ICSID Convention*, *supra* note 48, at 891

⁶⁶ *ICSID Convention*, *supra* note 1, art. 52(3)

⁶⁷ *Sempra*, *supra* note 60, ¶ 73

⁶⁸ *ICSID Convention*, *supra* note 1, art. 52(6)

⁶⁹ Caron, *supra* note 57, at 24

⁷⁰ *Id.* at 24

Convention provides with an exhaustive list of grounds for annulment: each representing a breach of due process standards.⁷¹

Coming back to the frequently repeated by the *ad hoc* committees idea of distinction between annulment and appeal, it's worth mentioning that these committees have also underlined that their functions are limited and that they do not have the powers of a court of appeal.⁷² The Commentary to the ICSID Convention mentions the following passage from the *ad hoc* Committee' decision in MINE as an example of the limited function of annulment:

4.04. Article 52(1) makes it clear that annulment is a limited remedy. This is further by the exclusion of review of merits of awards by Article 53. Annulment is not a remedy against an incorrect decision. Accordingly, an *ad hoc* Committee may not in fact reverse an award on the merits under the guise of applying Article 52.⁷³

The aforementioned case is considered to be the “second generation” case pursuant to the well known categorization of ICSID annulment mechanism's development stages proposed by Professor Schreuer.⁷⁴ This case is considered to be mitigating results of the first group of annulments (Klöckner I⁷⁵, Amco I⁷⁶) that have been severely criticized by the international commercial arbitration community for improperly crossing the line between annulment and appeal.⁷⁷

⁷¹ *ICSID Convention*, *supra* note 1, art. 52(1)

⁷² E.g., *Rumeli Telekom*, *supra* note 61, ¶ 96; *Industria Nacional de Alimentos, S.A. & Indalsa Perú, S.A. v the Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, ¶ 101 (Sep. 5, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, ¶¶ 52-54 (March 21, 2007), *available at* http://ita.law.uvic.ca/annulment_judicialreview.htm; *Klöckner I*, *supra* note 59, ¶ 61; *Hussein Nuaman Soufraki v. the United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, ¶ 20 (Jun. 5, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>

⁷³ *Maritime International Nominees Establishment v. Government of Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 4.04 (Dec. 22, 1989), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *MINE*], *quoted in Commentary to the ICSID Convention*, *supra* note 48, at 892;

⁷⁴ Christoph Schreuer, *Three Generations of ICSID Annulment Proceedings*, in *Annulment of ICSID Awards* 17, 18 (Emmanuel Gaillard et al. eds., 2004)

⁷⁵ *Klöckner I*, *supra* note 59

⁷⁶ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986) [hereinafter *Amco I*]

⁷⁷ Schreuer, *supra* note 74, at 17-18

Since MINE the *ad hoc* committees started to apply the grounds for annulment more strictly paying much intention object and purpose of annulment procedure in line with the following excerpt:

4.05. The fact that *annulment is a limited, and in that sense extraordinary, remedy* might suggest either that the terms of Article 52(1), i.e., 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. The Committee has no difficulty in rejecting either suggestion. In its view, *Article 52(1) should be interpreted in accordance with its object and purpose, which excludes*, on the one hand, 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.⁷⁸

⁷⁸ MINE, *supra* note 73, ¶ 4.05

CHAPTER II. ICSID Annulment Mechanism

The focus of this chapter is the elements of the ICSID annulment mechanism. Essentials of the procedure will be revealed by way of interpreting the text of Article 52. Therefore, the elements of the procedure will appear in order suggested by this Article of the ICSID Convention; however, skipping the grounds for annulment since the latter will be closely examined in Chapter III below. Stay of enforcement, which usually accompanies annulment and which is introduced by Article 52(5), as well as post-annulment opportunities discussed in Article 52(6) will be covered separately in Subchapter II.2.

II.1 Elements of the Procedure

The first paragraph of Article 52 reads as follows:

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

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.”⁷⁹

Initiative. Analyzing the text of this provision one shall make several conclusions with regard to launching of annulment procedure. Firstly, the wording “*either party* may request”⁸⁰ suggests that initiative to start annulment has to come from one of the parties to the original arbitration: either a contracting state⁸¹ or a national of another contracting state.⁸² However, historically it has been accepted that parties to a dispute may request annulment jointly.⁸³ The power to initiate annulment procedure is exclusive and can be exercised neither

⁷⁹ *ICSID Convention*, *supra* note 1, art. 52(1)

⁸⁰ *Id.* art. 52(1) (emphasis added)

⁸¹ The notion of “Contracting State” includes any constituent subdivision or agency of a contracting state designated to ICSID by that state, *see, ICSID Convention*, *supra* note 1, art. 25(1)

⁸² For the precise meaning of the notion “national of another contracting state”, *see, ICSID Convention*, *supra* note 1, art. 25(2). It includes, subject to reservations of Article 25(2), both natural and juridical persons

⁸³ *Commentary to the ICSID Convention*, *supra* note 48, at 903-904

by the Centre itself nor by any third parties even if such third parties claim that the award affects them directly.⁸⁴

Discretion to apply for annulment. From the same wording “either party *may* request”⁸⁵ it is clear that application for annulment is an option, a discretionary power. However, there are cases when the party must have felt obliged to take chances and to apply for annulment hoping for the new decision to be more favorable. One of the examples is Argentina. This state has faced the most amount of claims arising from bilateral investment treaties, and there has been no other state that would show more resistance to the outcomes of the arbitral process by continuously seeking annulment of all awards rendered against it.⁸⁶

Annulment Waiver. As noted by Professor Schreuer, the discretionary nature of the request for annulment advises that this right may be waived. Three different waiver situations were discussed by the author: (i) when the right for annulment is waived after rendition of an award but prior to expiry of the time limit for the application for annulment, (ii) when a waiver agreed by the parties before an award has been handed down, and (iii) when an implied waiver occurs through a failure to make timely objection to a serious procedural irregularity.⁸⁷

The post-award waiver covers explicitly expressed waivers of certain claims in the course of annulment proceedings. Available precedents suggest likelihood of this waiver type applying to the claims asserted by a party but later withdrawn while continuing to force other claims.⁸⁸

As to the advance waiver, it has been expected that, following some national trends when parties to the arbitration agree to limit the review function of state courts, parties to

⁸⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 903

⁸⁵ *ICSID Convention*, *supra* note 1, art. 52(1) (emphasis added)

⁸⁶ Maria Vicien-Milburn et al., *There Is Nothing More Permanent Than Temporary -- a Critical Look at ICSID Article 52(5) on Stay of Enforcement in Cases Against Argentina*, in IBA Arbitration News, March 2010 (Westlaw)

⁸⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 906-911

⁸⁸ *Id.* at 906

ICSID arbitration might try to reduce Article 52(1) grounds for annulment by inserting a corresponding provision in their submission agreement.⁸⁹ Within this assumption there is a divergence of views. Some authors suggest that parties may opt out of all grounds for annulment, when others talk about exclusion of the grounds that could be controlled by the parties, i.e. applicable law, some questions of jurisdiction and obligation to provide reasons.⁹⁰ However, there are also opinions declining possibility of advance waivers as such due to (i) the systematic interpretation of the ICSID Convention which does not advance agreements establishing a rule out of the possibility to annul,⁹¹ and (ii) the object and purpose of Article 52.⁹² Concluding the comparison of these views, Professor Schreuer discourages the parties to enter an advance-waiver agreement because, overall, it is unpredictable what interpretation of such agreement would be upheld by an *ad hoc* committee, but it is foreseeable that a party might regret the given up remedy against an unfavorable decision.⁹³

The third type of waiver is different from the advance waiver, which is given prior an appearance of a ground for annulment, in the way that it represents a failure to promptly object to procedural shortcomings arising in the course of arbitration and deprives a party to use this defect as a ground for annulment. Logic suggests potential willingness of a party that is aware of the defect constituting a ground for annulment to wait until an award is rendered in order to evaluate how favorable the award is and attack it later if found dissatisfactory. This type of intentional waiver to promptly challenge defects has been found unacceptable.⁹⁴

⁸⁹ Reisman, *supra* note 4, at 805

⁹⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 907

⁹¹ *Id.* at 908 (referring to certain articles of the ICSID Convention that contain the formula “except as the parties otherwise agree” or a similar one and, therefore, foresee modification of the provision by the parties; whereas, Article 52 lacks it)

⁹² *Id.* at 908-909 (asserting that review process provided by the Convention is intended not only to protect interest of the parties but is designed to enhance the integrity and quality of the ICSID arbitration. Thus, exclusion of annulment seems problematic)

⁹³ *Id.* at 910

⁹⁴ *Id.* at 911

Subject of Annulment. The first paragraph of Article 52 also leads to the conclusion that not all decisions made by an arbitral tribunal may be annulled.⁹⁵ What the parties may request to annul is awards. Pursuant to Article 48 of the Convention, a final award may be described as a written document signed by the tribunal's members, who voted for it, dealing with every question submitted to the tribunal and stating the reasons upon which its is based.⁹⁶ However, an award does not necessarily need to be a decision on the merits. A tribunal's judgment that a dispute falls outside the jurisdiction of the Centre or of the tribunal's competence is also an award since it is final in the sense that it stops any further proceedings, whereas, preliminary decisions upholding jurisdiction are not awards but lead to a one and are subsequently incorporated into final awards.⁹⁷ Other decisions of the tribunal preceding a final award, such as procedural orders⁹⁸ and decisions on provisional measures,⁹⁹ are not subject to annulment unless they get incorporated into a final award and become subject to annulment this way.¹⁰⁰

If prior to rendition of an award the parties agree on a settlement they may request the tribunal to embody such settlement into the award.¹⁰¹ This way the settlement might become a part of the award and, therefore, subject to annulment. However, as it has been noted by Professor Schreuer applicability of the grounds for annulment would be very limited since the practical role of the tribunal is reduced to an almost automatic transformation of a settlement into an award, and any procedural mistakes on behalf of the tribunal are hardly imaginable.¹⁰² However, simplicity of the process shall not affect the right available to the parties under the Convention that suggests the possibility of annulment.

⁹⁵ *ICSID Convention*, *supra* note 1, art. 52(1) (stating that "[e]ither party may request annulment of *the award*") (emphasis added)

⁹⁶ *Id.* arts. 48(1) & 48(2)

⁹⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 792, 912-913

⁹⁸ *ICSID Convention*, *supra* note 1, art. 44

⁹⁹ *Id.* art. 47

¹⁰⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 912

¹⁰¹ *Arbitration Rules*, *supra* note 6, rule 43

¹⁰² *Commentary to the ICSID Convention*, *supra* note 48, at 915

Partial Annulment. Availability of partial annulment has been deeply examined by Professor Caron: he points out that the *ad hoc* committee's power to annul an award in part is foreseen by Article 52(3) of the ICSID Convention and also refers to the wording of the Klöckner I decision:

In concrete terms, the question is whether, applying the principle of *favor validitatis* or “partial annulment of legal acts,” *only a part* of the contested award should be annulled, or whether it should be annulled in its *entirety*.

Generally speaking, partial annulment would seem appropriate if the part of the Award affected by the excess of powers is identifiable and detachable from the rest, and if so, the remaining part of the Award has independent basis.¹⁰³

The MINE Committee came across situation when annulled part of the award could not be detached from the rest of the award and the latter had to be completely annulled.¹⁰⁴

Aforementioned precedents confirm the language of Article 52(3) of the ICSID Convention. However, because of some contradicting language of the MINE decision¹⁰⁵ it was unclear whether the right to annul an award or any part thereof is in sole discretion of the *ad hoc* committee or the parties may also limit the scope of review by requesting partial annulment. The Vivendi I *ad hoc* Committee addressed and clarified the issue:

68. . . . [I]n the opinion of the Committee, a party to annulment proceedings which successfully pleads and sustains a ground for annulment set out in Article 52(1) of the ICSID Convention *cannot limit the extent to which an ad hoc committee may decide to annul the impugned award as a consequence*. Certain grounds for annulment will effect the award as a whole – for example, where it is demonstrated that the tribunal which rendered the award was not properly constituted (Article 52(1)(a)). Others may only affect part of the award. An *ad hoc* committee is expressly authorized by the Convention to annul an award “in whole or in part” (Article 52(3)).

69. *Thus where a ground for annulment is established, it is for the ad hoc committee, and not the requesting party, to determine the extent of the annulment.* In making this determination, the committee is not bound by the applicant's characterization of its request, whether in the original application or otherwise, as requiring either complete or partial annulment of the award.¹⁰⁶

¹⁰³ *Klöckner I*, *supra* note 59, ¶ 80 (emphasis in original), *quoted in* Caron, *supra* note 57, at 35

¹⁰⁴ *MINE*, *supra* note 73, ¶ 6.112

¹⁰⁵ *Id.* ¶¶ 4.07-4.08 (firstly recognizing that Guinea has requested partial annulment, but later saying that annulment of the requested part might entail the annulment of other portions outside the scope of the request for annulment)

¹⁰⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 68-69 (Jul. 03, 2002) (emphasis in original), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Vivendi I*]

It is obvious that allowing the parties to request partial annulment may lead to carefully planned protractions and multi-fillings on the side of the party unwilling to execute the award voluntarily.

Application. If a document rendered by ICSID tribunal meets above criteria of the document subject to annulment then the party willing to exercise its right to annul this act shall file “an application in writing addressed to the Secretary-General.”¹⁰⁷ Application procedure is regulated by Arbitration Rule 50.¹⁰⁸ An application shall be addressed to the Secretary-General of ICSID who upon receiving the application and the lodging fee¹⁰⁹ shall register the application, notify the parties of the registration and forward the other party a copy of the application and of any accompanying documentation.¹¹⁰ If the Secretary-General refuses to register the application for annulment he shall notify the requesting party regarding the refusal.¹¹¹

Application period is specifically stated by Article 52(2) of the ICSID Convention and is limited to 120 days after the date of the award’s rendition. The only exception is when annulment is applied for on the ground of corruption; in such case the application shall be made within 120 days after discovery of corruption but in any event no later than three years from the date on which the award was rendered.¹¹² Timely filing is crucial since it is interconnected with the obligation of the Secretary-General to refuse registration of the application if it is outside the time frame foreseen by Article 52(2) of the Convention.¹¹³

¹⁰⁷ *ICSID Convention*, *supra* note 1, art. 52(1)

¹⁰⁸ *Arbitration Rules*, *supra* note 6, rule 50

¹⁰⁹ Administrative and Financial Regulations reg. 16, Jan. 2003, *available at* <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=RulesMain> (establishing that the party requesting annulment of an arbitral award shall pay to the Centre a non-refundable fee determined from time to time by the Secretary-General)

¹¹⁰ *Arbitration Rules*, *supra* note 6, rule 50(2)

¹¹¹ *Id.* rule 50(4)

¹¹² *ICSID Convention*, *supra* note 1, art. 52(2)

¹¹³ *Arbitration Rules*, *supra* note 6, rule 50(3)(b)

However, a pure timely filing of a document called “Application for Annulment” does not suffice. Pursuant to Arbitration Rule 50(1), the application shall contain information regarding ICSID award to which it relates, indicate the date and state in detail the grounds on which the application it is based.¹¹⁴ The Commentary to the ICSID Convention suggests that an assertion of one or more of the grounds for annulment must be accompanied by indication of the award’s features demonstrating defects that constitute these grounds for annulment.¹¹⁵

Appointment of an *Ad Hoc* Committee. Upon receipt of the request for annulment the Chairman of the Administrative Council shall without delay appoint an *ad hoc* committee of three persons from the Panel of Arbitrators.¹¹⁶ The choice is limited in the way that none of the members of the committee may (i) have been a member of the tribunal which rendered the award in question; (ii) be of the same nationality as any of the tribunal’s members; (iii) be a national of the state party to the dispute or be of the investor’s nationality; (iv) have been designated to the Panel of Arbitrators by either the state party to the dispute or by the state the investor is a national of, or (v) have acted as a conciliator in the same dispute.¹¹⁷ It is notable that, in practice, there is an informal, non-binding on the Secretary General, procedure when the Secretary General consults the parties regarding composition of the *ad hoc* committee.¹¹⁸ With regard to the *ad hoc* committee’s chairman neither the ICSID Convention nor the Arbitration Rules provide with the guidance for appointment, however, the adopted solution appears to be that the three members of the *ad hoc* committee decide on the president amongst themselves.¹¹⁹

¹¹⁴ *Arbitration Rules*, *supra* note 6, rule 50(1) (inter alia limiting the grounds for annulment to those listed in Article 52(1) of the ICSID Convention)

¹¹⁵ *Commentary to the ICSID Convention*, *supra* note 48, at 919-920

¹¹⁶ *ICSID Convention*, *supra* note 1, art. 52(3)

¹¹⁷ *Id.* art. 52(3)

¹¹⁸ Reisman, *supra* note 4, at 807

¹¹⁹ *Commentary to the ICSID Convention*, *supra* note 48, at 1014

Since provisions of the Arbitration Rules apply to the annulment procedure *mutatis mutandis*¹²⁰ it is also expected that, as part of the appointment procedure, each arbitrator shall sign a declaration confirming that there is no reason that would question arbitrator's reliability for independent judgment and, therefore, would be a barrier to the appointment, *e.g.*, existence of past or present business relationships or family ties and etc.¹²¹

Discretion to Annul. After the *ad hoc* committee is formed it “shall have the authority to annul the award or any part thereof.”¹²² The first ICSID annulment cases established a somewhat contradicting law-enforcement practice with regard to interpretation of the aforementioned provision.

Thus, the Klöckner I *ad hoc* Committee adopted the “hair trigger” formalistic approach that has been heavily criticized by the scholars.¹²³ Pursuant to the Committee's conclusion, the review process shall be technical and mechanical, and the Committee is imposed with an automatic requirement of nullification upon establishment of any procedural defect notwithstanding its gravity or significance.¹²⁴ The Committee specifically rejected the idea that it had any discretion: “[T]he Committee is inclined to consider that the finding that there is one of the grounds for annulment in Article 52(1) *must* in principle lead to a total or partial annulment of the award, without the Committee having any discretion.”¹²⁵

In Amco I the *ad hoc* Committee employed a more flexible approach: it refused to nullify the award where the Tribunal had reached the correct decision though on the basis of the wrong legal system.¹²⁶

¹²⁰ *Arbitration Rules*, *supra* note 6, rule 53

¹²¹ *Id.* rule 6

¹²² *ICSID Convention*, *supra* note 1, art. 52(3)

¹²³ *Commentary to the ICSID Convention*, *supra* note 48, at 1014; Michael W. Reisman et al., *International Commercial Arbitration Cases, Materials and Notes on the Resolution of International Business Disputes* 994 (1997); Caron, *supra* note 57, at 45

¹²⁴ Michael W. Reisman et al., *International Commercial Arbitration Cases, Materials and Notes on the Resolution of International Business Disputes* 994 (1997) [hereinafter *ICA Cases, Materials and Notes*]

¹²⁵ *Klöckner I*, *supra* note 59, ¶ 179

¹²⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 1020

The MINE *ad hoc* Committee was even clearer on the discretionary nature of the process: “The Convention *does not require automatic exercise of that authority* to annul an award whenever a timely application for its annulment has been made and the applicant has established one of the grounds for annulment. *Nor does the Committee consider that the language of Article 52(3) implies such automatic exercise.*”¹²⁷ It continued pronouncing that “[a]n *ad hoc* Committee *retains a measure of discretion* in ruling on applications for annulment”¹²⁸ as long as the discretion is exercised in compliance with the object and purpose of the remedy of annulment.¹²⁹

Later cases seem to adopt MINE approach. Therefore, it is predictable that an *ad hoc* committee would proceed in two steps: (i) firstly, an award would be examined for the presence of a ground for annulment; (ii) then, when the ground is found, the committee would move to evaluate whether this ground has lead to any practical consequences for the parties.¹³⁰ Since complexity of arbitral proceedings raises possibility of a procedural error the usefulness of ICSID arbitration would be undermined if annulment was available for any inconsequential flaw, and, for this reason, only a positive answer received going through each of the steps above shall lead to annulment.¹³¹

As to the language of the third paragraph of Article 52 of the ICSID Convention, it suggests that an *ad hoc* committee has discretionary power to annul on any of the grounds set forth in the first paragraph of the same Article.¹³² The list of grounds is restricted, and committees are prohibited from annulling on other grounds. However, there is an established expansive reading of each of the grounds that might be found in the text of the existing

¹²⁷ MINE, *supra* note 73, ¶ 4.09 (emphasis added)

¹²⁸ *Id.* ¶ 4.10 (emphasis added)

¹²⁹ *Id.* ¶ 4.10

¹³⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 1021

¹³¹ *Id.* at 1021-1022

¹³² *ICSID Convention*, *supra* note 1, art. 52(3)

decisions on the application for annulment, and it will be discussed in detail in Chapter III of the present work along with the academic interpretation of the grounds for annulment.

Provisions Applicable *Mutatis Mutandis*. Article 52(4) makes certain provisions of the ICSID Convention regulating procedural questions applicable to annulment proceedings *mutatis mutandis*.¹³³ A similar provision contains in Article 53 of the Arbitration Rules making provisions of the Rules applicable *mutatis mutandis* to any procedure relating to annulment of an award.¹³⁴ *Mutatis mutandis* is a Latin expression meaning that the named provisions shall apply having made all necessary changes.¹³⁵ Therefore, for example, references to “the Tribunal” and to “the award” shall be read as “the *ad hoc* Committee” and “the decision on annulment” respectively.¹³⁶

Thus, Article 41 of the ICSID Convention guides an *ad hoc* committee to be the judge of its own competence,¹³⁷ i.e. it shall make decisions on whether the application was timely, in compliance with other procedural requirements, sufficiently substantiated, and also decide on the validity of an “exclusion agreement” aiming to waive the right of annulment.¹³⁸

Article 42 decides the question of applicable law governing annulment by combining flexibility with certainty.¹³⁹ They appear in the following way: flexibility by granting maximum autonomy to the parties in choosing applicable rules of law and certainty by ensuring that the *ad hoc* committee will find appropriate rules even in the absence of such choice.¹⁴⁰

¹³³ *ICSID Convention*, *supra* note 1, art. 52(4) (limiting the number of applicable provision to those of Articles 41-45, 48, 49, 53, 54 and of Chapters VI and VII)

¹³⁴ *Arbitration Rules*, *supra* note 6, rule 53

¹³⁵ Black’s Law Dictionary (Westlaw)

¹³⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 1042

¹³⁷ *ICSID Convention*, *supra* note 1, art. 41(1)

¹³⁸ *Commentary to the ICSID Convention*, *supra* note 48, at 1042

¹³⁹ *ICSID Convention*, *supra* note 1, art. 42

¹⁴⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 553

Article 43 allows an *ad hoc* committee to request evidence, visit the scene connected with the dispute, and conduct inquiries it deems appropriate.¹⁴¹ Since most of the evidence relates to the procedure before the original tribunals, in the past, the *ad hoc* committees have sought and have obtained files and transcripts of proceedings before these tribunals, as well as various other documents both from the parties and the ICSID tribunals.¹⁴²

The reference to Article 44 means that an *ad hoc* Committee has a right to decide any question of procedure if the latter is not covered by the ICSID Convention's provisions on powers and functions of the tribunal, the Arbitration Rules, or any other rules agreed by the parties.¹⁴³

Pursuant to Article 45 of the ICSID Convention, failure of a party to appear or to present its case during annulment proceedings shall not be deemed as an admission of the other party's assertions.¹⁴⁴ The *ad hoc* committee cannot just rely on the assertions of one of the parties but must be fully satisfied that there is a ground for annulment before making a decision¹⁴⁵, therefore, the committee shall notify, and grant a period of grace to, the party failing to appear or to present its case unless it is satisfied that this party does not intend to do so.¹⁴⁶

Application of Article 48 is also extended to the decisions on annulment. This article of the ICSID Convention deals with a number of issues: majority decisions, the form of the decision, the requirements that the decision shall be exhaustive and reasoned, the possibility of individual opinions and restrictions on the decision's publication.

Odd number of an *ad hoc* committee's members makes determination of majority voting simple. Any member of the committee may express his individual or dissenting

¹⁴¹ *ICSID Convention*, *supra* note 1, art. 43

¹⁴² *Commentary to the ICSID Convention*, *supra* note 48, at 1043

¹⁴³ *ICSID Convention*, *supra* note 1, art. 44

¹⁴⁴ *Id.* art. 45(1)

¹⁴⁵ *Commentary to the ICSID Convention*, *supra* note 48, at 1045

¹⁴⁶ *ICSID Convention*, *supra* note 1, art. 45(2)

opinion to the decision and it shall be attached to the latter.¹⁴⁷ In the history of the published ICSID decisions on annulment there were a few annulment proceedings ending with a dissent. The last dissent was in the case against Malaysia in 2009.¹⁴⁸ However, overall majority of the decisions was adopted unanimously.

Pursuant to Article 48(2) of the ICSID Convention the decision on annulment shall be in writing and shall be signed by the members of the committee who voted for it.¹⁴⁹ Article 48(3) requires that the decision deals with every question submitted to the committee, and states the reasons upon which it is based.¹⁵⁰ The second part of this condition was never questioned; however, there was a discussion whether it would be superfluous to continue looking into the reasons for annulment if one of the grounds, out of several submitted to the *ad hoc* committee, was already established. The Klöckner I and Amco I *ad hoc* Committees concluded that it was necessary to deal with all of the grounds, whereas, in MINE, the Committee found no need to do so.¹⁵¹

Article 48(5) prohibits the Centre from publishing the decisions on annulment without the consent of the parties.¹⁵²

By referring to Article 49, the Convention stretches the rule on prompt dispatch and on supplementation and rectification to the decisions on annulment. A decision must be deemed as rendered on the date on which the certified copies were dispatched.¹⁵³ The Committee may decide any question omitted to decide in the decision and shall rectify any clerical, arithmetical or similar error in the decision upon a proper request made by the party

¹⁴⁷ *ICSID Convention*, *supra* note 1, art. 48(4)

¹⁴⁸ *Malaysian Historical Salvors SDN BHD v. the Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment (Apr 16, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Malaysian Historical Salvors*]

¹⁴⁹ *ICSID Convention*, *supra* note 1, art. 48(2) (containing more detailed requirements to the decision, such as a precise designation of each party, a description of the method of the tribunal's constitution and so on); *Arbitration Rules*, *supra* note 6, rules 47 (1) & 47 (2)

¹⁵⁰ *ICSID Convention*, *supra* note 1, art. 48(3)

¹⁵¹ *Commentary to the ICSID Convention*, *supra* note 48, at 1046

¹⁵² *ICSID Convention*, *supra* note 1, art. 48(5)

¹⁵³ *Id.* art. 49(1)

within 45 days after the date the certified copies were sent out.¹⁵⁴ Notification of the other party is a must and shall precede any proceedings undertaken pursuant to such request.¹⁵⁵

When an award gets annulled a party may not seek its enforcement. Moreover, the reference to Article 53, besides making the decision on annulment binding on the parties, bars any appeal or any other remedy except those provided for in the Convention. There are two further options open to the parties within the ICSID mechanism. They may either request for supplementation or rectification pursuant to Article 49(2) or resubmit the dispute in accordance with Article 52(6).¹⁵⁶

Usually, compliance with the decision on annulment is a passive action meaning that the party refrains from enforcing the annulled award; however, it might require an active action in the part connected to the duty to pay charges awarded by an *ad hoc* committee in accordance with Chapter VI of the Convention, which applies *mutatis mutandis* as well. With regard to involvement of state courts: pursuant to Article 54 all the states, parties to the Convention, must recognize a decision on annulment as it was a final judgment of a court in that state¹⁵⁷ meaning that there shall be no control from the side of state courts over the decision. The courts are not allowed to examine the substance of the decision on annulment and refuse to give effect to it. The role of courts shall simply amount to refusal to recognize and enforce awards to the extent they have been annulled pursuant to Article 52.¹⁵⁸

Finally, the reference to Chapter VII leads to the rule that annulment proceedings shall be held at the seat of the Centre in Washington DC.¹⁵⁹ However, the parties may agree that the proceedings will take place at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make

¹⁵⁴ *ICSID Convention*, *supra* note 1, art. 49(2)

¹⁵⁵ *Id.* art. 49(2)

¹⁵⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 1046

¹⁵⁷ *ICSID Convention*, *supra* note 1, art. 54(1)

¹⁵⁸ *Commentary to the ICSID Convention*, *supra* note 48, at 1047

¹⁵⁹ *ICSID Convention*, *supra* note 1, art. 62

arrangements for that purpose, or at any other place approved by the *ad hoc* Committee after consultation with the Secretary-General.¹⁶⁰

II.2 Stay of Enforcement and Post-Annulment Issues

Granting Stay of Enforcement. Existence of annulment proceedings does not automatically lead to suspension of enforcement of the award in question. However, imposition of a provisional stay of the award's enforcement¹⁶¹ does not appear to be a difficult process. The party submitting an application for annulment is entitled to request the provisional stay in the same application. For instance, Argentina is an absolute champion in this game so far: in all ICSID annulment proceedings it requested enforcement of the awards undergoing review to be stayed pursuant to Article 52(5) of the Convention.¹⁶² Such request shall be granted automatically, and the Secretary-General has to notify the parties about the stay together with the notice of the application's registration.¹⁶³ Consequently, if the application for annulment is refused registration there will be no stay of enforcement.¹⁶⁴

The situation changes once an *ad hoc* committee is constituted. Since then the party seeking to stay the enforcement must direct its request to the committee that is not obliged to grant it automatically but has discretionary power over the matter.¹⁶⁵ The *ad hoc* committee shall also be addressed if the party having obtained the provisional stay wishes to continue it because, otherwise, the stay will be terminated automatically.¹⁶⁶ At this stage, in accordance with Arbitration Rule 54(1), either party to the dispute may request a stay in the enforcement of part or the entire award.¹⁶⁷ However, the *ad hoc* committee has no power to stay

¹⁶⁰ *ICSID Convention*, *supra* note 1, art. 63

¹⁶¹ Until an *ad hoc* committee is constituted, the party is in position to apply for the stay of enforcement of the entire award only

¹⁶² Maria Vicien-Milburn et al., *supra* note 86, at 1

¹⁶³ *Arbitration Rules*, *supra* note 6, rule 54(2)

¹⁶⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 1051-1052

¹⁶⁵ *Id.* at 1052

¹⁶⁶ *Arbitration Rules*, *supra* note 6, rule 54(2)

¹⁶⁷ *Id.* rule 54(1)

enforcement on its own motion. It is also due to the request of either party when the *ad hoc* committee decides on modification of the stay of enforcement that has been granted or continued earlier.¹⁶⁸

The *ad hoc* committee shall give priority to the consideration of a request for stay of enforcement.¹⁶⁹ The Commentary to the ICSID Convention explains this provision in the way that the committee shall deal with the question prior going into the merits of the application for annulment¹⁷⁰ or, if the request relates to the continuation of a provisional stay, the committee shall rule within thirty days from the date of its constitution.¹⁷¹

The other procedural rule requires that a stay of enforcement shall only be granted after an *ad hoc* committee has given each party the opportunity of presenting its observations.¹⁷² This is a basic principle of fairness; furthermore, an infringement of this procedure would amount to violation of the right to be heard and, therefore, would constitute a serious departure from a fundamental rule of procedure.¹⁷³

The ICSID Convention gives an *ad hoc* committee considering a request for annulment discretionary power with regard to granting or extending a stay of enforcement, and pursuant to Article 52(5) the committee may invoke its power “if it considers that the circumstances so require”.¹⁷⁴ Pursuant to Arbitration Rule 54(4) the parties to the dispute are obliged to specify the circumstances that require the stay or its modification or termination.¹⁷⁵ However, the aforementioned provisions do not provide with the list of circumstances that

¹⁶⁸ *Arbitration Rules*, *supra* note 6, rule 54(3)

¹⁶⁹ *Id.* rule 54(1)

¹⁷⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 1054

¹⁷¹ *Arbitration Rules*, *supra* note 6, rule 54(2)

¹⁷² *Id.* rule 54(3)

¹⁷³ *Commentary to the ICSID Convention*, *supra* note 48, at 1055

¹⁷⁴ *ICSID Convention*, *supra* note 1, art. 52(5)

¹⁷⁵ *Arbitration Rules*, *supra* note 6, rule 54(4)

might require a stay. Existing ICSID practice suggests that each *ad hoc* committee looks into the facts of the case for the grounds proving the stay of enforcement.¹⁷⁶

Imposing Conditions on the Stay. In order to balance the interests of the party opposing a stay of enforcement with the interests of the one requesting it, the latter is usually asked to provide some security for subsequent payment pursuant to the ICSID award, should it be upheld. The classical example of the security would be a bank guarantee that may be drawn upon when the award becomes final and enforceable.¹⁷⁷ In *Amco I* the *ad hoc* Committee granted the stay subject to an irrevocable and unconditional bank guarantee for payment of the award if it was supported by the final decision of the *ad hoc* Committee.¹⁷⁸ In the cases where Argentina was involved, several *ad hoc* committees maintained the stay of enforcement until the annulment has run its course, here are the examples of the imposed conditions: (i) the CMS Committee¹⁷⁹ based its decision partially on a written declaration of Argentina expressing its commitment to recognize and comply with the award if upheld annulment; (ii) in the *Azurix* case¹⁸⁰ the stay was granted without any formal assurances of compliance; (iii) the Continental Casualty Committee¹⁸¹ continued the provisional stay unconditionally due to “the relatively small amount of the Award and the presence of cross application for annulment,” (iv) the *Vivendi II ad hoc* Committee¹⁸² agreed to maintain the

¹⁷⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 1056-1057 (by way of example referring to *Amco I* and *MINE* cases. Thus, in *Amco I* the *ad hoc* Committee considered the following circumstances: (i) problems with the payment made pursuant to the award should it be annulled; (ii) a possible intention to suppress behind the application for annulment; (iii) a timely enforcement of the award if it is upheld, and (iv) provision of a security by the party requesting the stay. Whereas, the *MINE ad hoc* Committee looked at: (i) a possible irreparable injury in case of immediate enforcement; (ii) problems with the payment made pursuant to the award should it be annulled; (iii) a *prima facie* case for the party seeking annulment, and (iv) a possible intention to suppress behind the application for annulment)

¹⁷⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 1058

¹⁷⁸ *Id.* at 1059

¹⁷⁹ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment (Sept. 25, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *CMS*]

¹⁸⁰ *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment (Sept. 01, 2009), available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Azurix*]

¹⁸¹ *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Continental Casualty Company*]

¹⁸² *Vivendi II*, *supra* note 56

stay subject to a formal assurance of compliance with the award provided within thirty days or, failing that, endowing with a USD 196 million bank guarantee within sixty days thereafter.¹⁸³

The Argentine stay decisions are also notable for the unanimity of interpretation of the committee's power to impose conditions on a continued stay of enforcement.¹⁸⁴ Although the ICSID Convention is silent on the matter, before 2008, the *ad hoc* committees' authority to order the conditional stay has never been at issue.¹⁸⁵ However, in *Enron*¹⁸⁶, *Vivendi II*¹⁸⁷ and *Sempra*¹⁸⁸ cases Argentina questioned the committee's power stating that the ICSID Convention does not expressly provide with the authority to impose conditions on the stay.¹⁸⁹ Response of the committees in the mentioned cases was unanimous: it was established that the power of the *ad hoc* committees to grant the provisional stay should be set in stone even though the literal reading of Article 52(5) of the ICSID Convention provides for the options either to continue the stay or to allow immediate enforcement.¹⁹⁰ The *ad hoc* committees added a missing middle ground, the conditional stay, that has become a general rule.¹⁹¹

The fate of the security attached to the stay of enforcement depends on the outcome of the annulment proceedings: (i) if the award is upheld, the winner shall be in position to draw upon the security in accordance with its terms; (ii) if the award is annulled, the security will lapse.¹⁹² The situation becomes more complex in case of a partial annulment when part of the award remains existent and may be enforced.¹⁹³ It is expected that that a new tribunal

¹⁸³ Maria Vicien-Milburn et al., *supra* note 86, at 1-2

¹⁸⁴ *Id.* at 3

¹⁸⁵ *Id.* at 3

¹⁸⁶ *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. the Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment (Jul. 30, 2010), available at http://ita.law.uvic.ca/annulment_judicialreview.htm [hereinafter *Enron*]

¹⁸⁷ *Vivendi II*, *supra* note 56

¹⁸⁸ *Sempra*, *supra* note 60

¹⁸⁹ Maria Vicien-Milburn et al., *supra* note 86, at 3

¹⁹⁰ *Id.* at 4

¹⁹¹ *Id.* at 4

¹⁹² *Commentary to the ICSID Convention*, *supra* note 48, at 1061

¹⁹³ *Id.* at 1061

constituted under Article 52(6) of the ICSID Convention will have to decide on the stay of enforcement of the unannulled portion of the original award since it is endowed with such power by Arbitration Rule 55(3).¹⁹⁴ Committee granting partial annulment of the award may order the temporary stay of enforcement of the unannulled portion in order to cover the period of time existing between the decision on partial annulment and constitution of the new tribunal.

Resubmission. An *ad hoc* committee's decision on annulment invalidates the original award, but it does not replace the latter with a new decision on the merits.¹⁹⁵ The sixth paragraph of Article 52 of the ICSID Convention provides that the dispute shall, at the request of either party, be submitted to a new tribunal constituted in accordance with proceedings foreseen by the ICSID Convention and Arbitration Rules.¹⁹⁶

Resubmission is a matter of discretion of one or both parties. Professor Schreuer has noted that "[t]he existence of claims and counter-claims as well as a situation of partial annulment may contribute to a situation in which both parties have an interest in relitigating the case. In *Klöckner II* as well as in *Amco II*, requests for resubmission came from both parties."¹⁹⁷

There is no time limitation for applying with a request for resubmission of the dispute to a new tribunal. The Secretary-General has no discretion and shall register the request upon its receipt.¹⁹⁸ Moreover, the Secretary-General's involvement is limited to the role of an intermediary notifying the parties about registration of the request, transmitting the request

¹⁹⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 1061

¹⁹⁵ E.g., *CMS*, *supra* note 179, ¶ 44 (stating that "[a]ll it [*ad hoc* Committee] can do is annul the decision of the tribunal . . . but on a question of merits it cannot create a new one")

¹⁹⁶ *ICSID Convention*, *supra* note 1, art. 52(6)

¹⁹⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 1063-1064

¹⁹⁸ *Arbitration Rules*, *supra* note 6, rule 55(2)

and accompanying documentation to the second party, and inviting the parties to proceed to constitute a new tribunal.¹⁹⁹

Second Tribunal's Role and *res judicata*. From the text of Article 52(6) stating “[i]f the award is annulled *the dispute* shall . . . be submitted to a new tribunal”²⁰⁰ it follows that it is the original dispute that gets relitigated. However, in case of a partial annulment the new tribunal shall not reconsider any portion of the award not so annulled.²⁰¹ Put it otherwise, the annulled portion of the original award remains *res judicata*²⁰² and, therefore, is binding on the new tribunal.²⁰³

The relationship between the *ad hoc* committees and the second tribunals was analyzed by Professor Reisman. Pursuant to the author, the second tribunal might consider itself allowed to review, in terms of Article 52(1), the *ad hoc* committee's procedures and findings while recognizing only those that are not “null”.²⁰⁴ However, under the ICSID Convention and general international law, such behavior is not authorized, and the subsequent tribunal shall not be in position to nullify findings of the *ad hoc* committee.²⁰⁵ If the second tribunal was allowed to “review the reviewer” it would lead to an infinite regression of nullification action and, as a result, would violate the purpose of the ICSID Convention by frustrating its control function.²⁰⁶ On the contrary, the second tribunal shall accept the decision of the *ad hoc* Committee as a binding and valid result of the Committee's duty to interpret the ICSID Convention, international law, and the award as it sees fit.²⁰⁷

¹⁹⁹ *Arbitration Rules*, *supra* note 6, rule 55(2)

²⁰⁰ *ICSID Convention*, *supra* note 1, art. 52(6) (emphasis added)

²⁰¹ *Arbitration Rules*, *supra* note 6, rule 55(3)

²⁰² Black's Law Dictionary (Westlaw) (providing with the following definition if the term: an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit)

²⁰³ *Commentary to the ICSID Convention*, *supra* note 48, at 1067

²⁰⁴ Reisman, *supra* note 4, at 797

²⁰⁵ *Id.* at 797

²⁰⁶ *Id.* at 798

²⁰⁷ *Id.* at 798

As to *res judicata*, differing points of view with regard to the problem have been pronounced. On the one hand, a broad conception of *res judicata* might limit presumable outcome for a plaintiff at the same time posing many dangers in the form of counterclaims to the plaintiff that the latter might completely stay away reinitiating the arbitration.²⁰⁸ On the other hand, a narrow interpretation excluding reasoning and its premises as well as implied confirmations would lead to widening of the margin of relitigation.²⁰⁹

The first tribunal in the history of ICSID dealing with *res judicata* was the Amco II tribunal.²¹⁰ One of the first issues discussed by the arbitrators was how much of the dispute before the first tribunal need to be heard again, moreover, they expected that their resolution would have major impacts on the parties to the dispute as well as on the future arbitrations.²¹¹ It was noted that international law does not provide with the answer whether the reasoning attributive to a tribunal's holdings bears *res judicata* effect in addition to the holdings themselves.²¹² The second tribunal held the issue should be decided on the basis of the structure of ICSID rather than on the basis of general international law: the ICSID Convention does not provide for appellate review, or "substantive revision", of ICSID awards but allows annulment on certain narrow grounds set forth in Article 52(1).²¹³ No *res judicata* was established with regard to the *ad hoc* committee's reasoning as well as to the decision on annulment itself due to the fact that a contrary solution would be against of the ICSID Convention's concept that an *ad hoc* committee is not an appellate tribunal.²¹⁴

Referring to the same case, Professor Schreuer laid out the actions of the Tribunal leading to the above finding as well as some additional conclusions:

²⁰⁸ ICA Cases, *Materials and Notes*, *supra* note 124, at 1014

²⁰⁹ *Id.* at 1014

²¹⁰ See, *id.* at 1002 (the first dispute leading to annulment and resubmission was Klöckner. However, the *ad hoc* Committee nullified the entire award, and the second tribunal was obliged to relitigate everything again. There was no *res judicata* involved)

²¹¹ *Id.* at 1013

²¹² Peter D. Trooboff, *International Investment Disputes – Res Judicata Effect of Partially Annulled ICSID Award*, Am. J. Int'l L., Jan. 1989, 1, 2-3 (LexisNexis)

²¹³ *Id.* at 3

²¹⁴ *Id.* at 3

It [Tribunal] identified a list of points on which the *ad hoc* Committee had explicitly refused to annul the first Tribunal's findings or had specifically confirmed the holdings in the original Award. These points were held, by the new Tribunal, to be pertinent to an understanding of the "qualifications" made by the *ad hoc* Committee to its annulment of "the Award as a whole." In addition, the new Tribunal gave a list of specific annulment findings of the *ad hoc* Committee. It was clear that points on which the Award was annulled fell to be relitigated. It was equally clear that matters sought by a party to be annulled but which has expressly not been annulled or had been expressly confirmed were *res judicata*.

Less obvious was the fate of holdings by the first Tribunal that had not been challenged in the annulment proceedings and on which the *ad hoc* Committee, consequently had not made a pronouncement The new Tribunal found that these matters were *res judicata*.²¹⁵

The latter approach regarding unchallenged holdings was further employed by the second Tribunal in Vivendi case. The Tribunal held that "because the first Tribunal found that CAA was a French company under the ICSID Convention and the BIT and the *ad hoc* Committee did not annul this finding, the finding remains in force and is *res judicata*."²¹⁶

Professor Reisman, summarizing the concept of *res judicata* in the light of a basic trend in international law, quoted Pious Fund case before the Permanent Court of Arbitration, when the tribunal said:

[A]ll the parts of the judgement or the decree concerning the points debated in the litigation enlighten and mutually supplement each other and . . . the all serve to render precise the meaning and the bearing of the *dispositif* . . . and to determine the points upon which there is *res judicata* and which thereafter cannot put in question [T]his rule applies not only to the judgements of tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the *compromis*; [T]he same principle should for a still stronger reason be applied in international arbitration.²¹⁷

Furthermore, scholars have rightly suggested that ICSID tribunals shall warrant implementation of a broad approach to *res judicata*. Adoption of this approach by subsequent *ad hoc* committees and second arbitral tribunals would substantially reduce the amount of re-arbitrations and would limit the parties' initiative to abuse the control procedure.²¹⁸

²¹⁵ *Commentary to the ICSID Convention*, *supra* note 48, at 1067-1068

²¹⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, ¶ 7.2.5 (Aug. 20, 2007), available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²¹⁷ Reisman, *supra* note 4, at 800

²¹⁸ *Id.* at 803

CHAPTER III. Grounds for Annulment

Pursuant to Article 52(1) of the ICSID Convention, either party may request annulment of the award on one or more of the grounds that:

- (a) the Tribunal was not properly constituted;
- (b) the Tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the Tribunal;
- (d) there has been a serious departure from a fundamental rule of procedure; or
- (e) the award has failed to state the reasons on which it is based.²¹⁹

“These grounds for annulment are enumerated exhaustively The power for review is limited to the grounds of annulment as defined in this provision.”²²⁰

The above grounds for annulment do not vary significantly from respective provisions under most national and international arbitral rules.²²¹ There has been a disputable argument that the ability to seek annulment under the ICSID Convention is more expansive in comparison with other arbitral statutes; however, it is difficult to agree with such postulate since Article 52 excludes certain grounds for challenging an award that are available to the parties under these arbitral statutes.²²² For example, annulment based on domestic public policy is not offered under the ICSID Convention but constitutes one of the most popular grounds for vacating arbitral awards under the New York Convention.²²³

This discussion remains theoretical because grounds listed in Article 52(1) are exhaustive and, moreover, as it has been noted in Chapter I, ICSID awards shall not be subject to any control exercised by state courts. Article 52(1) does not permit a revision of an award on the grounds of legal or factual errors available to a limited extent under some national arbitration statutes.²²⁴ The lack of opportunity to subject ICSID awards to review of

²¹⁹ *ICSID Convention*, *supra* note 1, art. 52(1)

²²⁰ *Wena Hotels LTD. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶¶ 17-18 (Jan 28, 2002), available at http://ita.law.uvic.ca/annulment_judicialreview.htm [hereinafter *Wena*]

²²¹ Ieva Kalnina & Domenico Di Pietro, *The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decisions*, in *International Investment Law for the 21st Century* 221, 226 (Christina Binder et al. eds., 2009)

²²² *Id.* at 226

²²³ *Id.* at 226

²²⁴ *Id.* at 226

national courts or international conventions providing for broader annulment grounds have led some scholars to propose a broad interpretation of Article 52 of the ICSID Convention while there are some firmly opposing authors arguing that such reading would contradict the intention of the drafters of the Convention.²²⁵ Established practice of the *ad hoc* committees with regard to the matter will be analyzed below in order to define the widely accepted interpretation of Article 52(1) of the ICSID Convention.

Overall in the history of ICSID, not counting the currently pending proceedings, there have been 32 annulment cases, more than half taking place in the past decade. Annulment requests were successful 11 times and unsuccessful 15 times, while 6 annulment proceedings were either discontinued or settled.²²⁶ The table below lists annulment proceedings showing the practice of invocation of Article 52(1) grounds by the parties. Several decisions on annulment are not publicly available; therefore, there will be a special note to that regard. Symbol “●” indicates that the ground has been brought up by the parties but did not lead to annulment; whereas, “◆” indicates the grounds on which an award was annulled.

	Annulment Proceedings	Year	Invoked Grounds for Annulment				
			1. Improper constitution of the tribunal (Art.52(1)(a))	2. Manifest excess of powers (Art.52(1)(b))	3. Corruption on the part of a member of the tribunal (Art.52(1)(c))	4. Serious departure from a fundamental rule of procedure (Art.52(1)(d))	5. Failure to state reasons (Art.52(1)(e))
1	Klöckner I ²²⁷	1985		◆		●	◆
2	Amco I ²²⁸	1986		◆		●	◆
3	MINE ²²⁹	1989		●		●	◆
4	Klöckner II ²³⁰	1990	Text of the decision is not publicly available				
5	Amco II ²³¹	1992	Text of the decision is not publicly available				
6	SPP v. Egypt ²³²	1993	Settlement by the parties				

²²⁵ *Id.* at 226-227

²²⁶ *Annulment Proceedings under the ICSID Convention – Outcomes*, The ICSID Caseload – Statistics 15 (Issue 2011-1), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>

²²⁷ *Klöckner I*, *supra* note 59

²²⁸ *Amco I*, *supra* note 76, partially quoted in *ICA Cases, Materials and Notes*, *supra* note 124, at 1010-1011

²²⁹ *MINE*, *supra* note 73

²³⁰ *Klöckner v. Republic of Cameroon*, ICSID Case No. ARB/81/2, Decision on Annulment (May 17, 1990)

²³¹ *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment (Dec. 17, 1992)

²³² *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3

7	Vivendi I ²³³	2002		◆		●	●
8	Wena v. Egypt ²³⁴	2002		●		●	●
9	Gruslin v. Malaysia ²³⁵	2002	Settlement by the parties				
10	Joy Mining v. Egypt ²³⁶	2005	Settlement by the parties				
11	CDC Group v. Seychelles ²³⁷	2005	Text of the decision is not publicly available				
12	Mitchell v. Congo ²³⁸	2006		◆			◆
13	R.F.C.C. v. Morocco ²³⁹	2006	Text of the decision is not publicly available				
14	CMS v. Argentine ²⁴⁰	2007		●			●
15	MTD v. Chile ²⁴¹	2007		●		●	●
16	Repsol v. Empresa Estatal Petróleos del Ecuador ²⁴²	2007		●			
17	Lucchetti v. Peru ²⁴³	2007		●		●	●
18	Soufraki v. UAE ²⁴⁴	2007		●			●
19	Siemens v. Argentine ²⁴⁵	2009	Settlement by the parties				
20	Azurix v. Argentine ²⁴⁶	2009	●	●		●	●
21	M.C.I. v. Ecuador ²⁴⁷	2009		●			●
22	Malaysian Historical Salvors v. Malaysia ²⁴⁸	2009		◆			
23	Enron v. Argentine ²⁴⁹	2010		◆		●	●
24	Sempra v. Argentine ²⁵⁰	2010	●	◆		●	●
25	Vivendi II ²⁵¹	2010	●	●		●	●
26	Vieira v. Chile ²⁵²	2010		●		●	●
27	Ahmonseto v. Egypt ²⁵³	2010	Discontinued for lack of payment				
28	Siag v. Egypt ²⁵⁴	2010	Discontinued for failure to act				

²³³ *Vivendi I*, *supra* note 106

²³⁴ *Wena*, *supra* note 220

²³⁵ Philippe Gruslin v. Malaysia, ICSID Case No. ARB/94/1

²³⁶ Joy Mining Machinery Limited v. Arab Republic of Egypt, ICSID Case No. ARB/03/11

²³⁷ CDC Group plc v. Republic of Seychelles, ICSID Case No. ARB/02/14

²³⁸ Mr. Patrick Mitchell v. the Democratic Republic of Congo, ICSID Case No. ARB/99/7, Decision on Annulment (Nov. 01, 2006), *available at* http://ita.law.uvic.ca/annulment_judicialreview.htm [hereinafter *Patrick Mitchell*]

²³⁹ Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6

²⁴⁰ *CMS*, *supra* note 179

²⁴¹ MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment (March 21, 2007), *available at* http://ita.law.uvic.ca/annulment_judicialreview.htm

²⁴² Repsol YPF Ecuador, S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/01/10, Decision on Annulment (Jan. 08, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Repsol*]

²⁴³ Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. the Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment (Sept. 05, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Lucchetti*]

²⁴⁴ Hussein Nuaman Soufraki v. the United Arab Emirates, ICSID Case No. ARB/02/7, Decision on Annulment (Jun. 5, 2007), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet> [hereinafter *Nuaman Soufraki*]

²⁴⁵ Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8

²⁴⁶ *Azurix*, *supra* note 180

²⁴⁷ M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Decision on Annulment (Oct. 19, 2009), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁴⁸ *Malaysian Historical Salvors*, *supra* note 148

²⁴⁹ *Enron*, *supra* note 186

²⁵⁰ *Sempra*, *supra* note 60

²⁵¹ *Vivendi II*, *supra* note 56

²⁵² Sociedad Anónima Eduardo Vieira, ICSID Case No. ARB/04/7, Decision on Annulment (Dec. 10, 2010), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁵³ Ahmonseto, Inc. and others v. Arab Republic of Egypt, ICSID Case No. ARB/02/15

29	Helnan v. Egypt ²⁵⁵	2010		◆		●	●
30	Transgabonais v. Gabon ²⁵⁶	2010	Text of the decision is not publicly available				
31	Rumeli Telekom v. Kazakhstan ²⁵⁷	2010		●		●	●
32	Fraport v. Philippines ²⁵⁸	2010	Text of the decision is not publicly available				
33	Continental Casualty v. Argentine ²⁵⁹	2011	Pending				
34	Duke v. Peru ²⁶⁰	2011	Pending				
35	LG&E v. Argentina ²⁶¹	2011	Pending				
36	Casado v. Chile ²⁶²	2011	Pending				
37	Kardassopoulos v. Georgia ²⁶³	2011	Pending				
38	Fuchs v. Georgia ²⁶⁴	2011	Pending				
39	RSM v. Grenada ²⁶⁵	2011	Pending				
40	ATA Construction v. Jordan ²⁶⁶	2011	Pending				

At least six decisions on annulment are not public and, therefore, the referred to reasons for annulment are unknown. Analyzing the rest of the cases one should easily conclude that the mainly invoked grounds are that the tribunal has exceeded its powers, has departed from a fundamental rule of procedure, or has failed to state reasons for the award. The last two are the most accepted by the *ad hoc* committees grounds for annulment. Whereas, improper constitution of the tribunal has been invoked three times only, and there has been no case alleging corruption on the part of a member of the tribunal.

²⁵⁴ Waguil Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15

²⁵⁵ Helnan International Hotels A/S v. Arab Republic of Egypt, ICSID Case No. ARB/05/19, Decision on Annulment (June 14, 2010), *available at* <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁵⁶ Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic, ICSID Case No. ARB/04/5

²⁵⁷ *Rumeli Telekom*, *supra* note 61

²⁵⁸ Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines, ICSID Case No. ARB/03/25

²⁵⁹ *Continental Casualty Company*, *supra* note 181

²⁶⁰ Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶¹ LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶² Víctor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶³ Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶⁴ Ron Fuchs v. Georgia, ICSID Case No. ARB/07/15, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶⁵ RSM Production Corporation v. Grenada, ICSID Case No. ARB/05/14, Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

²⁶⁶ ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan, (ICSID Case No. ARB/08/2), Pending Case, information on the status is available at <http://icsid.worldbank.org/ICSID/FrontServlet>

During the ICSID Convention's drafting it was recognized that the different grounds for annulment are not easily distinguishable categories, and, later, the practice has also proven that the same set of facts often constitutes more than one ground for annulment.²⁶⁷ The recognized by most *ad hoc* committees classification of the defects being apparent to a certain ground for annulment will be discussed below together with the theoretical interpretation of these grounds.

III.1 Improper Constitution of the Tribunal

Improper constitution of the tribunal was invoked as a ground for annulment three times.²⁶⁸ However, none of the attempts was successful. Moreover, prior 2009 it was doubtful that this ground would be ever invoked due to the fact that the ICSID Secretariat carefully monitors constitution of the tribunal, and any procedural irregularities are unlikely.²⁶⁹

The ICSID Convention itself does not specify when a tribunal is not properly constituted for the purposes of Article 52(1)(a). The Azurix *ad hoc* Committee established, in the light of the object and purpose of the Convention, that the expression "properly constituted" shall be construed as proper compliance with the provisions of the ICSID Convention and ICSID Arbitration Rules dealing with the constitution of the tribunal.²⁷⁰ Pursuant to the Committee these provisions include Section 2 of Chapter IV (Articles 37-40) of the ICSID Convention ("Construction of the Tribunal") as well as Chapter V (Articles 56-58) of the ICSID Convention ("Replacement and Disqualification of Conciliators and Arbitrators").²⁷¹

Analyzing this ground for annulment Professor Schreuer outlined the following exemplary problems that might accompany the tribunal's constitution. Articles 38 and 39 bar

²⁶⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 926

²⁶⁸ *Azurix*, *supra* note 180, ¶ 2; *Sempra*, *supra* note 60, ¶ 2; *Vivendi II*, *supra* note 56, ¶ 17

²⁶⁹ *Commentary to the ICSID Convention*, *supra* note 48, at 929

²⁷⁰ *Azurix*, *supra* note 180, ¶ 276

²⁷¹ *Azurix*, *supra* note 180, ¶ 276

nationals of the host state and co-nationals of the investor to serve as arbitrators under certain circumstances.²⁷² Therefore, concerns could arise if an arbitrator has more than one nationality: a non-dominant nationality may be overlooked at the time the tribunal's constitution but invoked as the basis for annulment later.²⁷³ Equally, there might be doubts regarding the nationality of a corporate investor which cannot be positively clarified at the time of the tribunal's constitution.²⁷⁴

Article 14(1) provides with qualifications applicable to persons who may be selected as arbitrators,²⁷⁵ and it has been predicted that appointment of an arbitrator manifestly not possessing these qualities may be put forward as a ground for annulment.²⁷⁶ At the same time, if a party is aware of circumstances affecting the tribunal's proper constitution it shall as early as possible raise the question of disqualification that would be handled pursuant to the procedure foreseen by Article 58 of the ICSID Convention. Arbitration Rule 27 obliges the parties to state objections to violations of rules and regulations promptly,²⁷⁷ and failure to do so shall be deemed as a waiver of the right to object.²⁷⁸ However, in principle parties are not prohibited to raise objections at any stage. It was done in the *Azurix* case, and addressing the argument the Committee commented as follows:

280. The Committee considers that Article 52(1)(a) cannot be interpreted as providing the parties with a *de novo* opportunity to challenge members of the tribunal after the tribunal has already given its award. *A Committee would only be able to annul an award under Article 52(1)(a) if there had been a failure to comply properly with the procedure for challenging members of the tribunal set out in other provisions of the ICSID Convention.*

281. This means that *if a party never proposed the disqualification of a member of a tribunal under Article 57 of the ICSID Convention (with the consequence that there was never any decision under Article 58), there would be no basis for seeking annulment on the ground that the provisions of Article 57 and 58 were not properly*

²⁷² *ICSID Convention*, *supra* note 1, arts. 38 & 39

²⁷³ *Commentary to the ICSID Convention*, *supra* note 48, at 929

²⁷⁴ *Id.* at 929

²⁷⁵ *ICSID Convention*, *supra* note 1, art. 14(1) (listing the following characteristics: high moral character; competence in the fields of law, commerce, industry or finance; ability to exercise an independent judgment)

²⁷⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 930

²⁷⁷ *Id.* at 930

²⁷⁸ *Arbitration Rules*, *supra* note 6, rule 27

*complied with. In the event that the party only became aware of the grounds for disqualification of the arbitrator after the award was rendered, this newly discovered fact may provide a basis for revision of the award under Article 51 of the ICSID Convention but, in the Committee's view, such a newly discovered fact would not provide a ground of annulment under Article 52(1)(a).*²⁷⁹

Therefore, for the purposes of Article 52(1)(a) this means that the remedies available during the primary proceedings must be exhausted prior requesting annulment; however, this ground for annulment remains available if relevant facts come to the requesting party's knowledge at a stage when it is late to challenge the tribunal's constitution in the primary proceedings.²⁸⁰ For example, the Vivendi II Committee was addressed with a claim that the situation giving rise to the conflict of interest was not disclosed timely stopping the proper application of the procedure for selection and challenge of arbitrators.²⁸¹

In the same case the *ad hoc* Committee went beyond a prima facie examination and undertook a fairly extensive analysis of compatibility of a duty of an arbitrator with a fiduciary duty vis-à-vis the shareholders of a major international bank:

219. As a minimum, the *ad hoc* Committee sees here reason for extreme caution, especially in ICSID cases where the public interest is often strongly engaged.

220. It means foremost that anyone aspiring to a position as director in a major international bank should understand the likely extent of such a bank's interests, and the possibility of conflict should be clear in particular to all senior and experienced international arbitrators accepting such a position.

221. Any arbitrator who still seeks to combine both functions must therefore make a special effort that the conflicts that may so arise are managed properly and handled with the greatest care.

222. In the view of the *ad hoc* Committee, this does not only require any arbitrator becoming or having become a member of the board of a major international bank first to specifically investigate whether the bank has any connection with or interest in any of the parties in its pending arbitrations but, if such an arbitrator decides in principle to continue, also to notify the parties in each arbitration of such a connection or interest. This imposes a continuous duty of investigation.²⁸²

Finishing the discussion, the *ad hoc* Committee expressly pronounced that an arbitrator willing to become a board member of a major international bank shall understand

²⁷⁹ *Azurix*, *supra* note 180, ¶¶ 280-281 (emphasis added)

²⁸⁰ *Commentary to the ICSID Convention*, *supra* note 48, at 930-931

²⁸¹ *Vivendi II*, *supra* note 56, ¶ 19

²⁸² *Vivendi II*, *supra* note 56, ¶¶ 219-222

and handle the risk of possible necessity to step down even in case of an illfounded challenge.²⁸³

The final conclusion is that the party aware of errors in the tribunal's constitution is not allowed to withhold the argument until an award is rendered. However, if the objection raised during the primary proceedings is unsuccessful the right to invoke Article 52(1)(a) ground for annulment stays in force. It is also acceptable to ask for annulment without opposing to the improper constitution during the primary proceedings as long as the party has a sufficient explanation for not raising this objection earlier. In neither case Secretary-General has a right refuse registration of the application: the question always remains to be the *ad hoc* committee's discretion.

III.2 Manifest Excess of Powers

Given that (i) a tribunal gets its powers from the parties' agreement that, at the same time, imposes limits on this power, and (ii) since the agreement to arbitrate incorporates by reference the Convention, containing certain restrictions as well, in ICSID arbitration jurisdiction is determined by the parties' agreement and Article 25 of the ICSID Convention.²⁸⁴ The most obvious example of an excess of powers would be a decision rendered notwithstanding an absence of jurisdiction or a decision going outside an existing jurisdiction.²⁸⁵

Another example would be a violation of Article 42 of the ICSID Convention. Non-application of the law agreed by the parties or of the law determined by the Article 42(1) breaches the parties' agreement to arbitrate and may constitute an excess of powers.²⁸⁶

²⁸³ *Vivendi II*, *supra* note 56, ¶¶ 226-227

²⁸⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 932

²⁸⁵ Schreuer, *supra* note 74, at 25

²⁸⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 932

The above range of cases when the tribunal may be found to manifestly exceed its powers together with the interpretation of the word “manifest” were of the *ad hoc* committees’ main focus when examining this ground for annulment.²⁸⁷ The outcome of the committees’ work is represented below.

“Manifestly.” In the history of the Convention’s drafting there was a successful German proposal to insert the word “manifestly” in order to minimize the risk of frustration of awards.²⁸⁸ The proposal was challenged but defeated.²⁸⁹ “Thus, Article 52(1)(b) does not provide a sanction for every excess of its powers by a tribunal but requires that *the excess be manifest which necessarily limits an ad hoc Committee’s freedom of appreciation* as to whether the tribunal has exceeded its powers.”²⁹⁰

In a more recent case of Repsol, the Committee says, “It is generally understood that exceeding one’s powers is ‘*manifest*’ when it is ‘*obvious by itself*’ simply by reading the Award, that is, even prior to a detailed examination of its contents.”²⁹¹ The Committee makes its reasoning on the already set standard for this annulment ground by citing Professor’s Schreuer’s Commentary:

The word relates not to the seriousness of the excess of the fundamental nature of the rule that has been violated but rather to the cognitive process that makes it apparent. An excess of powers is manifest if it can be discerned with little effort and without deeper analysis.²⁹²

A similar approach is elaborated by the Mitchell v. Congo Committee: “If an excess of powers is to be the cause of an annulment, the *ad hoc* Committee must find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.”²⁹³

²⁸⁷ Caron, *supra* note 57, at 38

²⁸⁸ *Commentary to the ICSID Convention*, *supra* note 48, at 932

²⁸⁹ *Id.* at 932

²⁹⁰ *MINE*, *supra* note 73, ¶ 4.06 (emphasis added)

²⁹¹ *Repsol*, *supra* note 242, ¶ 36 (emphasis in original)

²⁹² *Id.* ¶ 36 (emphasis omitted), quoting *Commentary to the ICSID Convention*, *supra* note 48, at 938

²⁹³ *Patrick Mitchell*, *supra* note 238, ¶ 20 (emphasis in original)

It is also notable that this concept is applicable to all the cases of excess of power. Thus, “[a]rticle 52(1)(b) of the Convention does not distinguish between findings on jurisdiction and findings on the merits It follows that the requirement that an excess of power must be “*manifest*” applies equally if the question is one of jurisdiction. A jurisdictional error is not a separate category of excess of power.”²⁹⁴ Continuing this idea the *Lucchetti v. Peru ad hoc* Committee states, “One general purpose of Article 52, including its sub-paragraph (1)(b), must be that an annulment should not occur easily. From this perspective, the Committee considers that the word “manifest” should be given considerable weight also when matters of jurisdiction are concerned.”²⁹⁵

Actions Composing Manifest Excess of Powers. Above it is mentioned that excess of powers is composed of problems with jurisdiction and failure to apply proper law. In order to understand the details one should examine the claims raised by the parties earlier and approaches undertaken by the *ad hoc* committees.

In *Klöckner I*, the *ad hoc* Committee said,

Clearly, an arbitral tribunal’s lack of jurisdiction, whether said to be partial or total, necessarily comes within the scope of an “excess of powers” under Article 52(1)(b). Consequently, an applicant for annulment may not only invoke lack of jurisdiction *ratione materiae* or *ratione personae* under Article 25 and 26 of the Convention, but may also contend that the award exceeded the Tribunal’s jurisdiction as it existed under the appropriate interpretation of the ICSID arbitration clause.²⁹⁶

Therefore, there is no need for lack of jurisdiction to be absolute. A competent principle tribunal may go beyond the limits of its competence: it may, for example, include aspects of the dispute that are too indirectly related to the investment to be covered by the Centre’s jurisdiction, or matters that are outside the scope of the parties’ consent.²⁹⁷

²⁹⁴ *Nuaman Soufraki*, *supra* note 244, ¶¶ 118-119

²⁹⁵ *Lucchetti*, *supra* note 243, ¶ 101

²⁹⁶ *Klöckner I*, *supra* note 59, ¶ 4

²⁹⁷ *Commentary to the ICSID Convention*, *supra* note 48, at 937

In *Vivendi I*, the *ad hoc* Committee had to deal with contention that a failure to decide the Tucumán claims, having jurisdiction over them, amounts to the manifest excess of powers as well:

86. It is settled . . . that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments [T]he failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts . . . to a manifest excess of powers within the meaning of Article 52(1)(b).²⁹⁸

In the same manner, as it was discussed with regard to raising objections against improper constitution of a tribunal, a party being aware of a lack of jurisdiction shall make its objections during preliminary proceedings as early as possible;²⁹⁹ otherwise, it could be considered that the party has waived its right to object.³⁰⁰ Therefore, it is not advisable to await the outcome of the proceedings on the merits without making an objection to jurisdiction in order to request annulment due to excess of powers if the award turns out to be unfavorable.³⁰¹

Besides problems with jurisdiction, pursuant to the CMS Committee, “[i]t is well established that the ground of manifest excess of powers is not limited to jurisdictional error. A complete failure to apply the law to which a Tribunal is directed by Article 42(1) of the ICSID Convention can also constitute a manifest excess of powers.”³⁰² In *Amco I*, the *ad hoc* Committee took for granted that failure to apply the proper law amounts to a manifest excess of powers and is a ground for annulment without any deeper analysis of the theoretical foundation.³⁰³

²⁹⁸ *Vivendi I*, *supra* note 106, ¶ 86

²⁹⁹ *Arbitration Rules*, *supra* note 6, rule 41(1)

³⁰⁰ *Arbitration Rules*, *supra* note 6, rule 27

³⁰¹ *Commentary to the ICSID Convention*, *supra* note 48, at 939

³⁰² *CMS*, *supra* note 179, ¶ 49

³⁰³ *Commentary to the ICSID Convention*, *supra* note 48, at 945

A detailed reasoning was provided by the MINE Committee. Following citing an excerpt from Article 42(1) it stated:

The Committee is of the view that the provision is significant in two ways. It grants the parties to the dispute unlimited freedom to agree on the rules of law applicable to the substance of their dispute and requires the tribunal to respect the parties' autonomy and to apply those rules. From another perspective, the parties' agreement on applicable law forms part of their arbitration agreement. Thus, a tribunal's disregard of the agreed rules of law would constitute a derogation from the terms of reference within which the tribunal has been authorized to function. Examples of such a derogation include the application of rules of law other than the ones agreed by parties, or a decision not based on any law unless the parties had agreed on a decision *ex aequo et bono*. If the derogation is manifest, it entails a manifest excess of power.³⁰⁴

This approach has been confirmed by a more recent case. The CMS Committee quoted the above paragraph, however, also reproducing the following part of the MINE decision: "[d]isregard of the applicable rules of law must be distinguished from erroneous application of those rules which, even if manifestly unwarranted, furnishes no ground for annulment."³⁰⁵ Therefore, a non application of applicable law constitutes a valid reason for annulment; whereas, a mere error in application does not.³⁰⁶ This opinion was shared by the *ad hoc* Committee in Repsol by quoting previous committees in Klöckner I and Amco I:

39. In the *Klöckner* . . . to "the fine distinction between the 'non-application' of the applicable law and mistaken application of this same law" [the Committee] stated (in paragraph 61): "It is clear that the 'error in judicando' could not be admitted as is as cause for annulment"³⁰⁷

40. The Committee's Annulment Decision in the *Amco v. Indonesia* case was equally categorical:

"23. The law applied by the Tribunal will be examined by the *ad hoc* Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law Such scrutiny is properly the task of a court of appeals, which the *ad hoc* Committee is not. The *ad hoc* Committee will limit itself to determining whether the Tribunal did in fact apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from mere misconstruction of that law, would constitute a manifest excess of power. . . . misinterpretation of the applicable law [shall be treated] as a ground for appeal."³⁰⁸

³⁰⁴ *MINE*, *supra* note 73, ¶ 5.03 (emphasis in original)

³⁰⁵ *CMS*, *supra* note 179, ¶ 50; *MINE*, *supra* note 73, ¶ 5.04

³⁰⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 947

³⁰⁷ *Repsol*, *supra* note 242, ¶ 39 (quoting *Klöckner I*, *supra* note 59) (emphasis in original)

³⁰⁸ *Repsol*, *supra* note 242, ¶ 40 (quoting *Amco I*, *supra* note 76) (emphasis in original)

III.3 Corruption on the Part of a Member of the Tribunal

Corruption among arbitral tribunals' members is so unusual that this ground is hardly ever contemplated.³⁰⁹ The Convention's wording and drafting history are evidentiary that the fact of corruption must be established, not simply supposed, in order to become a reason for annulment.³¹⁰ Therefore, mere bias of improper "compensation" of a member of the ICSID tribunal would not amount to corruption unless there has been an improper payment in connection with ICSID proceedings.³¹¹ Above that, it is unlikely that an unauthorized communication between an arbitrator and a party taking place outside the official proceedings, giving an untruthful statement of any past or present professional business and other relationship with the parties and similar actions would possibly amount to corruption; more likely, they would constitute a serious departure from a fundamental rule of procedure with all that it implies.³¹²

Taking into account that the fact of corruption is usually well concealed and might become known to the betrayed party at a much later date, Article 52(2) of the ICSID Convention provides with a special time limit for invoking this annulment ground. Thus, a corresponding application shall be made within 120 days after discovery of corruption but no later than three years from the date on which the award was rendered.³¹³

III.4 Serious Departure from a Fundamental Rule of Procedure

Pursuant to major international treaties violation of procedural rules is a common ground for setting aside or refusing enforcement of arbitral awards.³¹⁴ Under the ICSID

³⁰⁹ *Commentary to the ICSID Convention*, *supra* note 48, at 967 (providing the New York Convention as an example since it does not list corruption as one of the reasons for setting aside or non-enforcement of awards)

³¹⁰ *Id.* at 967

³¹¹ *Id.* at 967

³¹² *Id.* at 967-968

³¹³ *ICSID Convention*, *supra* note 1, art. 52(1)

³¹⁴ New York Convention, *supra* note 31, art. V 1(d); Model Law, *supra* note 34, arts. 34(2)(a)(iv) & 36(1)(a)(iv)

Convention departure from a rule of procedure becomes a ground for annulment only if two requirements are met: the violation must be “serious” and the rule in question must be “fundamental”.³¹⁵

Professor Caron found that the meaning of the words “fundamental” and “serious” was correctly interpreted by the MINE Committee.³¹⁶ Thus, the term “fundamental” was interpreted in such a way that not all ICSID rules are to be seen equal and unless the rule is fundamental the departure would not result in annulment.³¹⁷ This is in line with the consensus established during drafting of the ICSID Convention that not all rules of procedure contained in the Arbitration Rules shall fall under the concept of “fundamental rules”, and the fundamental rules shall be restricted to the principles of natural justice.³¹⁸ The term “serious” was held by the MINE Committee as establishing “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.”³¹⁹

Additionally, the following interpretation is worse noting. Dealing with this ground and the term “serious” the Azurix Committee referred to the Wena decision by quoting the latter: “In order to be a ‘serious’ departure from a fundamental rule of procedure, the violation of such a rule must have caused the Tribunal to reach a result substantially different from what it would have awarded had such a rule been observed.”³²⁰ This consideration played the crucial role when the Azurix *ad hoc* Committee was evaluating Argentina’s assertions. It stated that “[o]n the basis of the material before it, the Committee is therefore not satisfied that there is any basis for concluding that it was reasonably likely that the

³¹⁵ *Azurix*, *supra* note 180, ¶ 50; *Commentary to the ICSID Convention*, *supra* note 48, at 970

³¹⁶ Caron, *supra* note 57, at 41

³¹⁷ *MINE*, *supra* note 73, ¶ 5.06; Caron, *supra* note 57, at 41-42

³¹⁸ *Commentary to the ICSID Convention*, *supra* note 48, at 969

³¹⁹ *MINE*, *supra* note 73, ¶ 5.05; Caron, *supra* note 57, at 41

³²⁰ *Azurix*, *supra* note 180, ¶ 51 (quoting *Wena*, *supra* note 220, ¶ 48)

documents requested by Argentina, had they been available in the proceedings, would have caused the Tribunal to reach a substantially different result.”³²¹

The allegations that there had been a serious departure from a fundamental rule of procedure were made in most of the annulment proceedings analyzed by the author of this thesis. However, they never became the ground for annulment besides annulment of rectification in *Amco II* case. These allegations were of the following types: absence of impartiality, violation of the right to be heard, shortcomings of deliberation, and violation of the rules of evidence and prove. The only exception from this categorization is the *Lucchetti v. Peru*³²² annulment proceeding where violation of presumption of being innocent from a criminal offense was claimed jointly with violation of the rules of evidence and prove.

Impartiality. Lack of impartiality was alleged in *Klöckner I* because of the Award’s style and general structure.³²³ In order to address this claim the Committee proceeded into a detailed analysis of the award and found certain shortcomings in its text,³²⁴ nevertheless, it concluded that there was no breach of impartiality and instructed up-coming tribunals as follows:

While the *ad hoc* Committee was able without hesitation to respond negatively, it had to note that certain appearances due to the Award’s wording and structure may rightly or wrongly have aroused the Claimant’s emotions and suspicions. This is to be regretted if we recall the English adage, from which every international arbitration could usefully take inspiration: “It is not enough that justice be done, it must be seen manifestly to be done.”³²⁵

Therefore, in order to lessen the allegations of impartiality the arbitrators shall do their best reaching the balance when none of the parties have a feeling of unequal treatment and injustice.

³²¹ *Azurix*, *supra* note 180, ¶ 238

³²² *Lucchetti*, *supra* note 243

³²³ *Klöckner I*, *supra* note 59, ¶¶ 129-136; Schreuer, *supra* note 74, at 29

³²⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 973-974 (naming the following defects: (1) the absence of a reference to a precise legal basis for the Award’s reliance on “the duty of full disclosure”; (2) devoting more space to the Claimant’s duties and shortcomings than to Claimant’s arguments; (3) brief examination of the Government’s obligations creating the impression of a little importance to the Government’s responsibility)

³²⁵ *Klöckner I*, *supra* note 59, ¶ 111

Right to be heard. One of the essentials of a fair trial is that each of the parties must be heard on all issues affecting its legal position, and it can be easily traced thought the ICSID Arbitration Rules.³²⁶

So far, the only successful assertion of a serious departure from a fundamental rule of procedure concerned the rectification of the award rendered by the Amco II Tribunal.³²⁷ It was a clear case when annulment was rendered because of the Tribunal's failure to give one party the opportunity to file its observations prior to granting the request of the other.³²⁸

Violation of the right to be heard was invoked in several other cases before *ad hoc* committees; however, these complaints were of a different nature not that obvious as in example above. In *Klöckner I*, it was claimed that arbitrators did not have the "power to base their decision on an argument other than that made by either party."³²⁹ The *ad hoc* Committee answered that, in principle, a tribunal is not prohibited from choosing its own argument as a basis for its decision as long as this argument lies within "the dispute's 'legal framework'".³³⁰

In *Vivendi I*, the Claimants argued that the Tribunal had departed from the fundamental rule of procedure dismissing the Tucumán claims on a point "not adequately canvassed in argument."³³¹ It was also asserted that the Tribunal's decision came unannounced depriving the Claimants of the opportunity to present arguments.³³² The Committee recognized that the approach adopted by the Tribunal might have come as a surprise to the parties, however, stating that it would not be the first time in the history of judicial decision-making, it concluded that the situation had nothing to do with the Article 52(1)(d) ground for annulment.³³³ The *ad hoc* Committee checked whether the parties had

³²⁶ *Commentary to the ICSID Convention*, *supra* note 48, at 976 (be way of example listing the following Rules 20, 21, 27, 31, 32, 37, 39, 40, 41, 42, 44, 49, 50, 54, 55)

³²⁷ Schreuer, *supra* note 74, at 29

³²⁸ *Id.* at 29

³²⁹ *Klöckner I*, *supra* note 59, ¶ 87

³³⁰ *Id.* ¶ 91

³³¹ *Vivendi I*, *supra* note 106, ¶ 82

³³² *Id.* ¶ 84

³³³ *Id.* ¶ 84

had full and fair opportunity to be heard at every stage of the proceedings, and that the Tribunal's analysis had been grounded on the materials presented by the parties and "was in no sense *ultra petita*."³³⁴ Due to these reasons, the Committee established no departure from any fundamental rule of procedure not to mention a serious departure.³³⁵

In *Wena* the Tribunal allocated compound interest on the damages. Egypt argued that it had been deprived of the right to be heard when not allowed an opportunity to express its view on the issue of the appropriate rule of interest.³³⁶ The Committee rejected the complaint due to the existing practice of assigning compound interest by international tribunals the parties must have been aware of.³³⁷

The *Azurix ad hoc* Committee analyzed a number of unsuccessful Argentina requests for the Tribunal to exercise its power granted by the ICSID Convention and Arbitration Rules to call upon *Azurix* for the production of certain documents.³³⁸ At the time of annulment proceedings Argentina claimed that Tribunal's refusal amounted to violation of "the right of defense".³³⁹ Responding to this assertion the *ad hoc* Committee firstly quoted the *Wena* Decision on Annulment:

[Article 57(1)(d) of the ICSID Convention] refers to a set of minimal standards of procedure to be respected as a matter of international law. It is fundamental, as a matter of procedure, that each party is given the right to be heard before an independent and impartial tribunal. This includes the right to stake its claim more its defence and to produce all arguments and evidence in support of it. This fundamental right has to be ensured on an equal level, in a way that allows each party to respond adequately to the arguments and evidence presented by the other.³⁴⁰

Then the Committee moved to independent examination of the circumstances saying that "none of the fundamental rules of procedure imply a right of a party to obtain evidence in

³³⁴ *Id.* ¶ 85 (emphasis in original)

³³⁵ *Id.* ¶ 85

³³⁶ *Wena*, *supra* note 220, ¶ 66

³³⁷ *Id.* ¶ 69

³³⁸ *Azurix*, *supra* note 180, ¶ 207

³³⁹ *Id.* ¶ 211

³⁴⁰ *Id.* ¶ 212; *Wena*, *supra* note 220, ¶ 57

the hands of another party”.³⁴¹ It affirmed the general principle of ICSID proceedings that “who asserts must prove” as well as that accomplishing this task the arguing party must itself collect and present the necessary evidence proving its assertions.³⁴²

The above practice shows that the right to be heard is applied carefully by the *ad hoc* committees. Each party must be given the opportunity to present its case, however, with no possibility to shift the burden of prove to the other party even if the latter is in better position. It is the arbitrators’ task neither to call attention of parties to an aspect of a legal question that they may have failed to address nor to bar themselves from elaborating legal reasoning that was not put forward by one of the parties without first seeking the parties’ opinion on the matter.³⁴³

Deliberation. Majority decision implies analysis, weighting of evidence and discussion. There is no detailed regulation of deliberations contained in Arbitration Rules besides Rule 15 providing for private deliberations which are to be kept secret and held among the members of a tribunal only, unless the tribunal decides to admit another person.³⁴⁴

In Klöckner I the Claimant alleged that it was “impossible that there was serious deliberation among the arbitrators.”³⁴⁵ Addressing this claim the *ad hoc* Committee noted that while superficial deliberation was not expressly foreseen by Article 52 of the Convention it was possible to hold that the requirement of deliberation among the arbitrators was a “basic rule of procedure.”³⁴⁶ It was also stated by the Committee that the deliberation must be real and not merely apparent.³⁴⁷ However, in the discussed case, assertion of Klöckner was not found convincing but being a personal view regarding deliberation. To the contrary, the existence of deliberation was proved by the availability of the ICSID Secretariat’s minutes

³⁴¹ *Azurix*, *supra* note 180, ¶ 215

³⁴² *Id.* ¶ 215

³⁴³ *Commentary to the ICSID Convention*, *supra* note 48, at 979-980

³⁴⁴ *Arbitration Rules*, *supra* note 6, rule 15

³⁴⁵ *Klöckner I*, *supra* note 59, ¶ 84

³⁴⁶ *Id.* ¶ 84

³⁴⁷ *Id.* ¶ 84

and the references within the Award “to a minority opinion which was advanced ‘within the Tribunal’.”³⁴⁸

In Klöckner II there was an issue regarding the privacy of the deliberation due to the fact that Klöckner was represented by counsel who had served as an arbitrator in primary proceeding.³⁴⁹ Neither the Convention nor the Arbitration Rules restricts such representation, and the *ad hoc* Committee rejected the argument.³⁵⁰

The aforementioned cases allow to conclude that a divergence between an award and a dissenting opinion, even a total one, as well as party’s representation by an arbitrator in a resubmitted case are likely not to be considered as absence or violation of deliberation by the *ad hoc* committees.

Evidence and Proof of Facts. The tribunal shall be the judge of the acceptability as well as of the probative value of any evidence.³⁵¹ “Neither the ICSID Convention nor the ICSID Arbitration Rules contains specific rules on the admissibility of evidence.”³⁵² However, there are examples of the awards being attacked for the way they dealt with evidence and the burden of proof alleging a serious departure from a fundamental rule of procedure.³⁵³

On several occasions it was highlighted by the *ad hoc* committees that the tribunal’s power to call upon parties to produce further evidence, to accept a piece of evidence after the deadline fixed and similar issues is discretionary.

The Wena Committee stated that it was the parties’ obligation to produce evidence and that the tribunal’s power to call for evidence was discretionary:

³⁴⁸ *Id.* ¶ 85

³⁴⁹ *Commentary to the ICSID Convention*, *supra* note 48, at 980-981

³⁵⁰ *Id.* at 981

³⁵¹ *Arbitration Rules*, *supra* note 6, rule 34(1)

³⁵² *Enron*, *supra* note 186, ¶ 170

³⁵³ *Commentary to the ICSID Convention*, *supra* note 48, at 981

The Applicant fails to demonstrate the existence of a fundamental rule of procedure which would have put the Tribunal under an obligation to call for further evidence concerning Mr.Kandil.³⁵⁴

In addition to the above, the Enron Committee recognized that tribunals might reach different conclusions on whether or not a particular evidence shall be admitted in a given circumstances.³⁵⁵ Nevertheless, regardless of the view elaborated by a tribunal, its decision will not amount to an annulable error unless an *ad hoc* Committee finds that such decision constitutes one of the grounds listed in Article 52(1) of the Convention.³⁵⁶

As a final remark, it is appropriate to refer to an excerpt from the Azurix Annulment Decision:

A decision by a tribunal whether or not to exercise a discretionary power that it has under a rule of procedure is an *exercise* of that rule of procedure, and not a departure *from that rule of procedure*. It is only where the exercise of that discretion, in all of the circumstances of the case, amounts to a serious departure from another rule of procedure of a fundamental nature that there will be grounds for annulment under Article 52(1)(e) of the ICSID Convention.³⁵⁷

III.5 Failure to State Reasons

A total absence of reasons is very unlikely due to the mandatory requirement of Article 48(3) of the ICSID Convention to state reasons for the decision. At the same time there have been repeated applications for annulment on the ground of Article 52(1)(e). What is frequently alleged is “absence of reasons for a particular aspect of an award, or otherwise insufficient, inadequate or possibly contradictory reasons.”³⁵⁸

It has been noted that this ground for annulment is the most difficult one to apply and to analyze.³⁵⁹ Examination of the failure to state reasons is seen as it can easily shift into an examination of the substantive correctness of an award. Therefore, this ground for annulment

³⁵⁴ *Wena*, *supra* note 220, ¶ 73

³⁵⁵ *Enron*, *supra* note 186, ¶ 178

³⁵⁶ *Id.* ¶ 178

³⁵⁷ *Azurix*, *supra* note 180, ¶ 210

³⁵⁸ *Sempra*, *supra* note 60, ¶ 167

³⁵⁹ Schreuer, *supra* note 74, at 33

is the hardest for the *ad hoc* Committee “to avoid being drawn into an appeal-like, rather than annulment-like, review.”³⁶⁰

As it was correctly stated in the *Vivendi I*, the ground of “failure to state reasons” is a greater source of concern among other grounds since it is not qualified by any such phrase as “manifestly” or “serious.”³⁶¹ Having analyzed both the case law and the treatises the Committee concludes that “Article 52(1)(e) concerns a failure to state *any* reasons with regard to all or part of an award, not the failure to state correct or convincing reasons.”³⁶² Correctness of the reasoning is not covered by Article 52(1)(e), moreover, it is established that reasons may be stated succinctly or at length due to different legal traditions’ modes of expressing reasons.³⁶³

It is notable that during the drafting of the Convention there was an attempt to include a possibility for the parties to waive the statement of reasons by agreement.³⁶⁴ However this attempted failed. The *ad hoc* Committee in *MINE* observed:

5.10 A statement of reasons is a valuable element of the arbitration process. The Committee has noted that the Committee of Legal Experts, which was to advise the Executive Directors of the World Bank on the draft Convention, by vote of 28 to 3 rejected a proposal which would allow the parties to dispense with the requirement of a reasoned award (History of the Convention, Vol. II, p. 816). A waiver of the requirement in an arbitration agreement would therefore not bar a party from seeking an annulment for failure of an award to state reasons.³⁶⁵

Analyzing this ground for annulment professor Caron says that “failure to state reasons” has centered on two issues: “(1) how is the Committee to decide if there has been a failure to state reasons, and (2) is the failure to answer a question raised by a party also a failure to state reasons?”³⁶⁶

³⁶⁰ Caron, *supra* note 57, at 41

³⁶¹ *Vivendi I*, *supra* note 106, ¶ 64

³⁶² *Id.* ¶ 64 (emphasis in original)

³⁶³ *Id.* ¶ 64; Enron, *supra* note 186, ¶ 178 (providing with a similar statement that “[t]here are no rigid or formulaic requirements as to the form or method by which a tribunal must state its reasons”)

³⁶⁴ *Commentary to the ICSID Convention*, *supra* note 48, at 984-985

³⁶⁵ *MINE*, *supra* note 73, ¶ 5.10

³⁶⁶ Caron, *supra* note 57, at 42

Regarding the first question the MINE Committee connects Article 52(1)(e) with Article 48(3) of the Convention providing that “[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based,”³⁶⁷ and says that “[f]ailure to comply with the last part of the above sentence is made an explicit ground for annulment by paragraph (1) (e) of Article 52.”³⁶⁸ Later it sets the standard for an award to be motivated meaning that it shall allow the reader to follow the reasoning of the Tribunal on points of fact and law.³⁶⁹ However, the adequacy of the reasoning is not an appropriate standard of review since it might easily bring an *ad hoc* Committee into an examination of the substance of the award.³⁷⁰ This idea is summed up by the Committee in the following way:

5.09 In the Committee’s view, 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. This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons.³⁷¹

The Wena Committee added that neither Article 48(3) nor Article 52(1)(e) specify the manner in which the tribunal’s reasons shall be stated because the object of both provisions was simply to guarantee that the parties are in position to understand the tribunal’s reasoning, and this goal does not make it necessary for each reason to be stated expressly.³⁷² Moreover, the *ad hoc* Committee says that unconformity of an award with the minimum requirement to state reasons shall not necessarily lead to resubmission to a new tribunal as long as an *ad hoc* committee can itself explain the reasons supporting the tribunal’s conclusions on the basis of the knowledge it has received upon the dispute.³⁷³

³⁶⁷ *MINE*, *supra* note 73, ¶ 5.07, *ICSID Convention*, *supra* note 1, art. 48(3)

³⁶⁸ *MINE*, *supra* note 73, ¶ 5.07

³⁶⁹ *Id.* ¶ 5.08

³⁷⁰ *Id.* ¶ 5.08

³⁷¹ *Id.* ¶ 5.09

³⁷² *Wena*, *supra* note 220, ¶ 81

³⁷³ *Id.* ¶ 83

A similar idea was brought by the Vivendi I Committee. It said that “annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, the point must itself be necessary to the tribunal’s decision.”³⁷⁴

Subsequent committees adopted the same approach. Thus, CMS Committee was quoting MINE decision regarding traceability of reasoning, how “the tribunal proceeded from Point A. to point B.”³⁷⁵ It was also added by the Committee that “although the motivation of the Award could certainly have been clearer, a careful reader can follow the implicit reasoning of the Tribunal.”³⁷⁶ In *MTD v. Chile* the *ad hoc* Committee refers to Vivendi I above and says that “Committees in other cases have expresses similar views.”³⁷⁷

Along with absence of reasons it is established that “outright or unexplained contradictions can involve a failure to state reasons.”³⁷⁸ However, it is unclear whether “contradictory reasons constitute a failure to state reasons unless they completely cancel each other out and therefore amount to a total absence of reasons.”³⁷⁹ It was expected by the *ad hoc* Committee in Kazakhstani case that such situations would be extremely rare. As noted by the Vivendi I Committee, “tribunals must often struggle to balance conflicting considerations, and an *ad hoc* committee should be careful not to discern contradiction when what is actually expresses in a tribunal’s reasons could more truly be said to be but a reflection of such conflicting considerations.”³⁸⁰

³⁷⁴ *Vivendi I*, *supra* note 106, ¶ 65

³⁷⁵ *CMS*, *supra* note 179, ¶ 55

³⁷⁶ *Id.* ¶ 127

³⁷⁷ *MTD*, *supra* note 241, ¶ 50 (referring to *Amco I*, *supra* note 76, ¶¶ 38–44; *MINE*, *supra* note 73, ¶¶ 5.07–5.13; *Wena*, *supra* note 220, ¶¶ 77–82; *Patrick Mitchell*, *supra* note 238, ¶ 21)

³⁷⁸ *Id.* ¶ 78

³⁷⁹ *Rumeli Telekom*, *supra* note 61, ¶ 82

³⁸⁰ *Vivendi I*, *supra* note 106, ¶ 65

As to the second question whether the failure to answer a question might amount to a failure to state reasons, the committees gave affirmative answer. However, commentators have noted that the committees disagreed when annulment on this basis shall be found.³⁸¹ There were attempts to clarify the relationship between Article 52(1)(e) and Article 49(2) of the ICSID Convention providing for the right of a tribunal to decide any question omitted to decide in the award as well as to rectify any clerical, arithmetical or similar error in the award.³⁸²

The Amco I Committee provided with a sound interpretation of Article 52(1)(e) as a penalty for breach of Article 48(3), whereas, in the eyes of the Committee Article 49(2) provided a more limited remedy used to correct minor errors:

“It may be safely assumed that arbitrators will strive in their award to express clearly at least the main reasons on which the award rests. Any omissions of relatively minor points may be repaired pursuant to Article 49(2) by simply inserting the Tribunal’s conclusions thereon in the award, the main reasoning of the award remaining unaffected by such insertion.”³⁸³

³⁸¹ Caron, *supra* note 57, at 44

³⁸² *ICSID Convention*, *supra* note 1, art. 49(2)

³⁸³ Amco I, *supra* note 76, ¶¶ 32 & 34, *quoted in* Caron, *supra* note 57, at 44-45

CONCLUSION

What the ICSID Convention has created is the investor-state dispute settlement Centre with an independent system of review of the awards rendered. Popularity of the ICSID arbitration is partially due to the fact that it has the self-contained mechanism of annulment established with the purpose to eliminate any potential control over the ICSID awards from the side of state courts.

The present research has shown that the exclusion of national courts' involvement is not absolute. Firstly, one shall reasonably expect the possibility of an erroneous attempt of state courts to check compliance of the ICSID awards with their national legislation instead of the automatic recognition. Even though the existing case law shows willingness of the upper courts to cure such mistakes, it is important to remember about the prospect of the state courts' control and, therefore, the possibility of additional time and money costs. Secondly, if there is an award rendered pursuant to the ICSID Additional Facility Rules it does not fall within ICSID annulment mechanism and is open to scrutiny of state courts. Recognition and enforcement of this type of ICSID awards is governed by national law and by any applicable treaties.

Nevertheless, as a general rule, annulment is the only option available for a party willing to void an ICSID award. Annulment is different from appeal in the sense that it allows to review the decision making process but not the correctness of the award. The *ad hoc* committees are prohibited from reviewing merits of the awards. Existing case law demonstrates that annulment is treated as an extraordinary remedy which shall be applied in line with the object and purpose of the ICSID Convention. It does not entail an automatic cancellation of an award when a ground of annulment is found unless the *ad hoc* committee finds annulment necessary after a careful evaluation of the impact the established procedural error has had on the parties.

Most of the elements of annulment procedure are obvious from the text of Article 52 of the ICSID Convention. However, the integrated interpretation of the text of the ICSID Convention undertaken in Chapter II allowed determination of certain specific features of the procedure established by the case law. Thus, for example, a party applying for annulment shall expect the *ad hoc* committee to exercise its discretionary power and annul the award in full even if the partial annulment has been requested. It shall be also taken into account that there is neither established interpretation nor practice with regard to annulment waivers. Therefore, an annulment waiver agreement might become a game of chance leading to a situation when a party might greatly regret the given up remedy against unfavorable decision. It is worth noting that *ad hoc* committees have added a conditional stay to the options available pursuant to Article 52(5) of the ICSID Convention and, therefore, when asking for a stay of enforcement one shall anticipate certain conditions being imposed.

Overall, not counting the currently pending proceedings, there have been 32 annulment cases, more than half taking place in the past decade. Annulment requests were successful 11 times and unsuccessful 15 times, while 6 annulment proceedings were either discontinued or settled. Analysis of the available decisions on annulment shows that the mainly invoked reasons for annulment are that the tribunal has exceeded its powers, has departed from a fundamental rule of procedure, or has failed to state reasons for the award. The last two are the most accepted by the *ad hoc* committees grounds leading to annulment. Whereas, improper constitution of the tribunal has been unsuccessfully invoked three times only, and there has been no case alleging corruption on the part of a member of the tribunal.

Having seen the statistics and almost uniform interpretation of the grounds for annulment, when more recent *ad hoc* committees are quoting decisions rendered yet in twentieth century, it is logical to conclude that there will be no drastic changes in the distribution of invocation of the grounds for annulment. Most likely, the grounds foreseen by

subparagraphs (b), (d) and (e) of the first paragraph of Article 52 of the ICSID Convention will stay the most invoked ones. Along with that, it is also unlikely that there will be major shifts in the interpretation of these grounds by the *ad hoc* committees, and the reading of Article 52 (1) will stay close to the one established in Chapter III of this thesis.

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